Maria F. Pembrook v. The Library of Congress

LOC-PAB No. 2005-03

Date of Decision: October 26, 2006

Cite as: Pembrook v. LOC, LOC-PAB No. 2005-03 (10/26/03)

Headnotes:

Compensatory Damages

Constructive Discharge

Disability Discrimination

Protected EEO activity

Prima Facie case

Race and Color Discrimination

Retaliation

Sex Discrimination

Stanley Eisenstein and Maria F. Pembrook, *pro se*, for Complainant, Maria F. Pembrook.

Frank J. Mack, Assistant General Counsel, and Jessie James, Jr., Associate General Counsel, for Defendant, The Library of Congress.

DECISION

Introduction

This matter is before the Personnel Appeals Board (PAB or Board)[1] on the Complaint of Maria F. Pembrook (Ms. Pembrook or Complainant) that The Library of Congress (Library or LOC) discriminated against her on the basis of her race, color, sex, and disability and, further, retaliated against her for engaging in prior protected activity.

[1] Pursuant to a March 2005 Memorandum of Understanding between the Library of Congress and the Government Accountability Office (GAO) (with a concurrence on the part of the Personnel Appeals Board, GAO), the Personnel Appeals Board assumed an adjudicatory role for certain categories of Library employees in matters involving grievances and discrimination complaints as well as adverse actions.

Complainant requested a hearing following the July 13, 2004 decision of Ricardo H. Grijalva, Chief of the Library's Equal Employment Opportunity Complaints Office (EEOCO), finding neither discrimination nor reprisal in this case.

Procedural History

After making the procedurally required informal contact with the Library's EEOCO on October 3, 1997, Complainant filed a formal Complaint on September 10, 1999, charging the Library of Congress with discrimination in employment based on race (African-American), color (black), sex (female) and disability; harassment/hostile work environment; and reprisal for Complainant having prevailed in an earlier proceeding against the Library in which an arbitrator overturned the LOC's removal of Complainant. *See* Report of Investigation (ROI),[2] Exhibit (Ex.) 2.

Initially, Complainant claims that she was discriminated against and was the victim of retaliation when she was: charged 5.3 hours of Absence Without Leave (AWOL) for late arrival on September 25, 1997; given a memorandum dated October 2, 1997 entitled "Failure to Observe Time and Attendance Procedures;" and denied promotions and incentive awards. ROI Ex. 13. Further, she asserts that the pattern of assignments after her 1998 reinstatement—consisting of a series of details with no permanent placement—was itself discriminatory and retaliatory. *See* Complainant's Post-Hearing Brief (Comp. Br.) at 1-4. As her representative[3] argued in his opening statement, "the net result was that, while she had some disabilities—some mental and physical disabilities—the processes that the Library took, both before and after her adverse action and during that process—exacerbated, greatly exacerbated, her disabilities and resulted in her having to go on a disability retirement." TR 25-26.

Complainant also contends that upon her reinstatement to the Congressional Research Service (CRS) Division of the Library after the arbitrator's 1998 Decision in her favor, she experienced harassment that constituted discrimination and retaliation. She alleges that she was subjected to a hostile work environment and retaliation by being ridiculed, slandered, and having her reputation ruined by management. Specifically, Complainant believes that CRS encouraged the Library Police to harass her and that employees ridiculed her due to her mental illness. ROI Ex. 2.

Complainant seeks rescission of the 5.3 hours of AWOL imposed in 1997; removal of the AWOL charge from her personnel file; and expungement of the October 2, 1997

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[2] The Report of Investigation is found at Library Exhibit (L.Ex.) 3 and Complainant Exhibit (C.Ex.) 2. For ease of reference, it will be referred to as ROI, followed by the internal exhibit number for the ROI.

[3] At the January 2006 prehearing conference, Stanley Eisenstein, at the request of Complainant (who had been appearing *pro se*), agreed to assist her as a non-attorney representative in this case. Mr. Eisenstein's representational efforts and manner merit special commendation. The Library's lead counsel, Frank J. Mack, also distinguished himself throughout the proceeding.

memorandum of admonishment. The formal Complaint, dated September 10, 1999, also requests an increase in grade, backpay,[4] and "full disclosure of everything that's happened to [her] in CRS since 1988."[5]

The EEOCO conducted an investigation of the Complaint and obtained documentary and testimonial evidence. On May 1, 2003, the EEOCO investigator submitted an analysis of findings and recommendation that concluded that the evidence did not support Complainant's claims of discrimination, hostile work environment or reprisal. On July 13, 2004, the EEOCO Chief's decision was issued, concluding that Complainant was not discriminated against, and that her Complaint had been rendered moot when she retired in 2000, while the case was pending. On July 22, 2004, Complainant requested a hearing on her EEO Complaint.

The Library assigned an Administrative Judge (AJ) to adjudicate the Complaint. LOC subsequently filed a Motion to Dismiss. On August 16, 2005, the AJ denied the motion in part and granted the motion in part. She held that only the claims involving retaliation for prior protected activity and discrimination based on disability would be heard. In addition, she agreed to hear evidence as to the AWOL charge, denial of incentive award, ridicule and harassment to the extent that they related to the charges of discrimination and/or retaliation. Two pre-trial conferences were conducted on the record, and the hearing was scheduled for November 2005. On the eve of trial, the AJ decided to remand the case to the EEOCO for additional investigation regarding Complainant's claims of retaliation and discrimination based on disability. Rather than further delay the proceedings, in December 2005 the Library reassigned the case to the GAO Personnel Appeals Board for full adjudication of the issues.

By Order of January 11, 2006, following a further pre-hearing conference on the record, the undersigned Administrative Judge defined the issues for hearing as follows:

> The parties should be prepared to present evidence at the hearing addressing Complainant's claims of race, color, sex, and disability discrimination and/or retaliation in connection with the following: (1) The Library charging Complainant 5.3 hours of Absence without Leave (AWOL) in September 1997; (2) The Library issuing Complainant a memorandum, dated October 2, 1997, captioned "Failure to Observe Time and Attendance Procedures;" and (3) The Library's work assignments and treatment of the Complainant after she was reinstated in 1998 pursuant to an arbitration award overturning her removal from Library employment.

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[4] Complainant's post-hearing brief requests backpay from mid-June 2000 when Complainant asserts that she was forced to retire on disability. Comp. Br. at 9-10. While Complainant does not explicitly assert it, tacitly she is claiming that she was *constructively discharged*. This claim will be addressed *infra*.

[5] In her post-hearing brief she also requests letters of apology from Congressional Research Service management and the LOC Security Office. Comp. Br. at 10-11.

An evidentiary hearing was held on February 12, 16, and 22, 2006, and extended for a few additional witnesses on March 23 and April 19, 2006. Following the close of the hearing, the parties filed post-hearing briefs on May 30, 2006 and reply briefs on June 16, 2006.

FINDINGS OF FACT

Background

1. Maria F. Pembrook began work at the Library of Congress in July 1988 as a GS-5 editorial assistant in the American Law Division (ALD) of the Congressional Research Service. TR 41, 47.[6] The CRS consists of approximately 700 employees. TR 260.

2. Complainant holds a bachelor's degree, a paralegal certificate[7] from Georgetown University, and possesses some level of German language proficiency. TR 67. Her long-time supervisor was Robin Lancaster, the Research Production Coordinator, who reported in turn to Kent Ronhovde, Assistant Chief of ALD and Richard C. Ehlke, ALD Chief. TR 42. Ms. Lancaster is a black female; Mr. Ronhovde, a white male. TR 198, 216. In March 1989, Complainant's title was changed to production assistant. Her duties included answering the phone, typing papers, formatting documents, delivering messages, inputting changes to CRS reports, obtaining report approval, and physical production of reports; she devoted 80% of her time to typing copy. TR 46-52.

3. Early in her career at the Library, Complainant could take advantage of "flex" time, which provided employees the flexibility of shifting hours within a core period—*e.g.,* by staying an hour later one could attend appointments without using leave. She also would occasionally work until 8 or 9 p.m. to process a rush job. TR 53. Subsequently, "comp flex" became available; this enabled employees to work a compressed schedule to eliminate one workday every two weeks. TR 56-57. These schedules allowed employees to extend the workday to 6:30 or 7:00 p.m. TR 57. Complainant testified that she did not have difficulty maintaining her schedule until 1997. TR 57. She also had performance appraisals that were consistently satisfactory up until that time, and had built a reserve of leave as well. TR 58, TR V/34.

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[6] TR I is the hearing transcript for February 12, 2006; TR II is the transcript for February 16, 2006; TR III covers February 22, 2006; TR IV and TR V cover March 23, 2006 and April 19, 2006 respectively. TR volumes I–IV are paginated consecutively; TR V begins anew with page 1. Therefore, transcript references, other than for Volume V, are referred to simply by page number, *e.g.*, TR 41, while references to the fifth day's testimony include the Volume number, *e.g.*, TR V/41.

[7] Complainant testified that her employment never afforded her the opportunity to utilize her paralegal certificate. TR 48. As seen from her position description, however, paralegal duties were not among the responsibilities outlined for a senior production assistant. *See* Finding of Fact (FOF) #6, *infra*.

4. Complainant began having difficulties with her immediate supervisor—Ms. Lancaster—after a few years on the job. TR 60-62. Complainant testified that this included repeated instances where Ms. Lancaster asked for a loan of money; eventually Complainant informed her that she could no longer help her. TR 63. In January 1993, Complainant was detailed to the Government Division for 30 days. Following that detail, she objected to returning to work for Ms. Lancaster, and sought assistance from the dispute resolution office. As a result, she was placed under the supervision of Tom Durbin, head of the Courts Section in ALD. TR 70-74. While Complainant had some problems with tardiness under Mr. Durbin, she "was getting to work at 10:00 or 10:30" and, once there, stayed the whole day. TR 211. This arrangement continued until Mr. Durbin's death in October 1996. TR 72. Thereafter, for several months, Complainant continued to do work for the section heads and others in ALD. TR 73.

1997 Events

5. In May 1997, Mr. Ehlke, Chief of ALD, informed Complainant that he wanted to return her to the supervision of Ms. Lancaster. She unsuccessfully sought assistance from the dispute resolution office and returned to Ms. Lancaster's supervision on May 31, 1997. TR 70-74. Complainant testified that Ms. Lancaster knew then that she suffered from sarcoidosis and depression, and that she attended the Employee Assistance Program (EAP). TR 353-54.

6. Complainant at that time was a GS-8 senior production assistant.[8] TR 128-29, 194; *see* Library Exhibit (L.Ex.) 11. The position description describes the major duties of a senior production assistant (GS-8) as: 1) creates, formats, and edits documents for review and final production; 2) uses on-line systems to retrieve information to support research production; 3) assists as assigned in performing tasks related to congressional inquiries and CRS responses; 4) may be assigned a lead role in production support; 5) as assigned, performs clerical and administrative support tasks such as receiving telephone calls, referring callers and visitors to individuals or taking accurate messages, maintaining time and attendance records, photocopying materials, and maintaining and ordering division supplies; 6) uses communications technology to transmit documents to congressional or to other destinations as appropriate; and 7) performs related duties as assigned. L.Ex. 11 at 2-4; *see* TR 46-47. The summary statement on the position description states that: "Most products have a congressionally imposed deadline and/or a CRS imposed deadline. The incumbent is an essential participant in the process of meeting CRS and congressional requirements, and must be cognizant of the absolute need to meet both congressional deadlines and CRS standards for editorial accuracy, style, syntax, and clarity of expression in written products." L.Ex. 11 at 2.

7. During this period, ALD maintained an "early list" and a "late list," which identified individuals on sick or annual leave, and whether they would be absent or late. TR 75-78. Complainant testified that any support staff person or "whoever answers the

[8] This was the highest grade on the career ladder for senior production assistant. TR 261.

phone if a support staff person doesn't pick up, they write your name down and they give it to whoever's doing the early list." TR 75.

8. According to Complainant, Ms. Lancaster continued to mistreat her as soon as she returned to her supervision. TR 74. Ms. Lancaster allegedly did "passive/aggressive stuff." TR 74. For example, during July or August 1997, while visiting her elderly father, Complainant called the office to tell someone to put her on the list for annual leave that day when she realized that she would not make it back to town. TR 75. When she returned to work, Ms. Lancaster told her that she should have informed her directly. TR 78. Complainant testified that it was permissible to leave a message with a staff person because it was often difficult to find Ms. Lancaster. TR 74-79.

9. Another example that Complainant provided to illustrate Ms. Lancaster's "mistreatment" of her during this time involved her request to attend the Congressional Black Caucus. TR 83-86. Complainant alleged that a meeting was held deliberately when she was out of the office to discuss who would be attending the Caucus. TR 84-85. She claimed that Ms. Lancaster held onto Complainant's leave request for the Caucus longer than she held onto those of the others. TR 80, 86-87. Moreover, she asserted that while she was attending the Caucus her supervisor withdrew her from a computer class. TR 83. Ms. Lancaster testified that she did not recall a meeting regarding who would attend the Caucus (TR 687) nor did she remember holding onto Complainant's leave request or withdrawing her from a computer class. TR 682.

September 25, 1997 Absence

10. On September 25, 1997, Complainant did not report for work on time. TR 663. As her direct supervisor, Ms. Lancaster inquired of her own supervisors and the other production staff employees about whether Complainant had phoned in that she would be absent or late; no one reported that Complainant had called in. TR 666. She also asked Ingrid Nelson, secretary to the chief of the production unit, if she had heard from Complainant. TR 667. Ms. Lancaster recalled Ms. Nelson responding that she had not spoken to Complainant that day. TR 655-56, 684. Ms. Nelson's EEO affidavit,[9] however, states that initially she mistakenly told Ms. Lancaster that Complainant had not spoken to her, but that later she told her that she had forgotten that Complainant had spoken to her that day "about things in general." ROI Ex. 11. The affidavit states that it was "fairly common for Complainant to call me simply to talk. On September 25, 1997 Complainant called and we spoke about things in general." Ms. Nelson specified that Complainant "did not leave a message with me," and that she herself was not under Ms. Lancaster's supervision. *Id.*

11. Complainant testified that on September 25, 1997: "I wasn't feeling well. I was feeling very weak and tired. I do remember calling Ingrid [Nelson]." TR 90. She further testified: "I remember talking to Ingrid at least two or three times. . . . And I told

[9] Complainant initially listed Ms. Nelson as a witness but subsequently removed her name from her witness list. TR 94-95.

her I was trying to get myself together, but I just didn't feel very good." TR 92. Complainant added, "I called Ingrid—so I did call somebody. I don't remember her not—I don't know why would I tell her not to say that I called. I wouldn't tell her not to say that I called, you know?" TR 92. She further testified that it was common practice to leave such a message with individuals other than production staff employees or one's own supervisor, but admitted that she had never seen Ms. Nelson taking a message about someone's tardiness or absence. TR 91-92, 98. Complainant further added that she called Ms. Nelson because she "trusted her. I used to talk to her and told her I didn't feel well and didn't know what was wrong with me. . . . I told her I was trying to come in." TR 220. When asked specifically what she had said to indicate to Ms. Nelson that she would be late, she replied: "All I remember telling her is that I didn't feel well and that I was trying to come in. And then I was—I remember—I do remember vacillating, you know, should I stay at home or should I come on in?" TR 222.

12. Ms. Nelson's affidavit reflects her understanding of the call-in procedures to be followed at that time:

> It was my understanding at the time that the Support Staff (which I was not considered a part of) should call their Supervisor and inform him/her of their absence or leave a message if necessary, but at the very least should call the main office number 7-6006 which is usually answered by a Support Staff employee and inform them of their absence so that they could be added to the absence/attendance list which is generated by a member of the support staff. In general, division staff members calling in absences would call 7-6006 or their supervisor.
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> I was not accustomed to receive calls from Support Staff informing me of their absence nor was it the practice for anyone to call me on my line to report an absence. I do not recall Complainant asking me to tell someone that she was out. Her call to me was consistent with her routine of just calling to chit chat.

ROI Ex. 11. I give credence to Ms. Nelson's recollection as stated in her affidavit.

13. Under the terms of the collective bargaining agreement (CBA) covering Complainant (Congressional Research Employees Association or CREA), requests for annual leave were required to be made and approved in advance, except for emergencies. In the case of emergency annual leave, supervisors were to be advised of the emergency need by telephone or as expeditiously as possible. L.Ex. 12 at 2. As to sick leave, the CBA required that requests be made to the immediate supervisor or designee unless the Library or CRS had approved another individual for that purpose. *Id.* at 4. Ms. Lancaster testified that she followed the CBA by requiring employees reporting sick leave to call in to the immediate supervisor or designee during the first hour after the beginning of the work shift or core period. If Ms. Lancaster was not available, the employee could call a chief or assistant chief or any member of her unit's production staff. This requirement was communicated to all employees, including

Complainant. TR 670-72.

14. On September 25, 1997, Complainant reported for work at 3:35 p.m. Ms. Lancaster asked how she was feeling and why she had not called to report that she would be late. Complainant replied that she had called in but when asked to supply the name of the individual to whom she spoke, told Ms. Lancaster that it was none of her business. ROI Ex. 15; TR 697. When Ms. Lancaster reminded Complainant that as her supervisor she had a right to know, Complainant persisted in her refusal to answer. Ms. Lancaster noted that Complainant had signed for sick leave on the time and attendance record, and recorded her arrival time as one hour earlier than when she actually arrived. When Ms. Lancaster inquired about the discrepancy, Complainant replied that she was entitled to a one-hour lunch period; Ms. Lancaster responded that a half hour was the allotted period, and suggested that Complainant verify this with the CRS timekeeper and with CREA. Complainant neither reported back to her supervisor nor adjusted her time and attendance submission. Ms. Lancaster reported this incident to her supervisor, Richard Ehlke. TR 664-65, 675-76.

Memorandum Regarding AWOL

15. On October 2, 1997, while Complainant was in the reception area on phone duty, Ms. Lancaster handed her an envelope containing a memorandum captioned "Failure to Observe Time & Attendance Procedures." TR 101, 104. After recounting the events from Ms. Lancaster's perspective, the memorandum advised Complainant that she was being charged with Absence Without Leave for 5.3 hours because Complainant had failed to supply clarification of the reason for the absence of September 25. ROI Ex. 15. Complainant was also cautioned that she had failed to follow flextime regulations and ALD policy requiring that employees sign in at the actual time of arrival, and that the collective bargaining agreement provided that employees could take lunch outside of the 11:30-2:00 period only with prior supervisory approval. Ms. Lancaster testified that before issuing Complainant the AWOL memorandum she had afforded Complainant one week to clarify her September 25 absence but Complainant had failed to do so. TR 673. Complainant testified that this was the first time she had been placed on AWOL. TR 94.

16. Mr. Ehlke, Division Chief of ALD, testified that he could not recall other instances from the 1997 time period when a subordinate supervisor placed an employee in AWOL status. TR V/46.

17. After opening the envelope and reading the memorandum from Ms. Lancaster advising that she was being charged with AWOL, Complainant made repeated comments to a co-worker to the effect that she was going to kill Ms. Lancaster. Arbitration Opinion and Award (Oct. 5, 1998) (L.Ex. 1) at 4.

18. On October 3, 1997, after receiving the AWOL memorandum, Complainant contacted the EEOCO. TR 103-04; *see* ROI Ex. 3. Pursuant to this contact, a period of informal counseling commenced. The informal counseling stage lasted nearly two

years, ending by letter of August 26, 1999 informing Complainant of the right to file a formal complaint since the matter had not been resolved to her satisfaction. ROI Ex. 1. Complainant took that step on September 10, 1999 by filing the formal Complaint that is the basis of this proceeding (EEOCO #98-01). ROI Ex. 2.

Complainant's Removal and Appeal

19. As a result of her October 2, 1997 threatening remarks, on October 8, 1997 Complainant was detailed to the Bill Digest section of CRS, out of proximity to Ms. Lancaster. The alleged threats also led to a disciplinary proposal to remove Complainant; she remained in Bill Digest until she was removed on April 24, 1998. L.Ex. 1 at 5-6.

20. After Complainant's removal, on May 28, 1998, Mr. Ehlke—through CRS Director Daniel Mulhollan—sent a memorandum to Kenneth Lopez, LOC Director of Security, requesting that further action be taken to limit Complainant's access to the Library of Congress because of the threats that she had made against Ms. Lancaster. L.Ex. 16 at 31. In support of the request, the memorandum cited two instances in which Ms. Lancaster "ran into" Complainant and felt threatened. One instance occurred on May 18, 1998, when Complainant was confronted by a police officer and told to leave. The memorandum stated that a similar incident occurred the next day.[10]

21. Mr. Lopez followed up with a letter to Complainant dated May 29, 1998, stating that she was barred from the use of the "Library buildings and its collections" for six months. L.Ex. 16 at 21-22; TR 403 (Joint Stipulation). Complainant received this letter on June 11, 1998. TR 365-66. Mr. Lopez testified regarding the governing process, which is spelled out in a Library regulation. When an organization or office has reason to believe that a person should be barred or limited as to building access, it must send that request to his office with supporting information. TR 389; *see, e.g.,* L.Ex. 16

[10] According to Complainant, this was an example of the harassment to which she was subjected by police. On May 18, 1998, she was legitimately in the building to meet with union officials when she was abruptly ordered out of the building by a police officer. TR 358-61. Complainant also testified regarding an incident in July 1998 when she was prevented from entering the building to deposit money in the credit union. TR 369-72. She had gone to the building to wait for one of her former co-workers, Ingrid Nelson, to make the deposit for her since Complainant was not allowed in the building. When Ms. Nelson arrived, they both were escorted out of the building and Complainant had to give Ms. Nelson the money to deposit while on the street corner.

Complainant also testified regarding incidents of alleged police harassment after she retired on disability. In October 2004, she attempted to enter the Madison building and was questioned about whether she was banned from the building. TR 372-75. In May or June 2005, Complainant attempted to enter the building to conduct business at the credit union; she was questioned regarding her pepper spray canister and prevented from entering the building. TR 376-81.

at 31-32 (memorandum regarding Complainant). If the request meets the requisite criteria, Mr. Lopez then affords the subject an opportunity to respond.[11] TR 390. After a decision is made to restrict or bar an individual, that person and the police commander are notified in writing. At the first opportunity, police officers are informed at roll call. TR 405. Further, when an employee is reinstated after a successful challenge to an adverse action, Mr. Lopez sends an e-mail message or memorandum to police commander—the same receiving the earlier barring notice—notifying him or her that effective on a specified date the person is no longer barred from or restricted in access to the building. This announcement also is read during the police roll call. TR 417-18.

22. Complainant appealed her removal, which was overturned by an arbitrator's Opinion and Award, dated October 5, 1998, following an evidentiary hearing. L.Ex. 1; Complainant Exhibit (C.Ex.) 3. That Opinion found that Complainant had made a threatening remark against Ms. Lancaster. However, the arbitrator reduced the penalty from removal to written reprimand because the Library's post-threat reaction showed that Complainant was not a serious threat and medical testimony established that she was not capable of violence. *Id.* at 21. The arbitrator looked to analogous prior threat cases at the Library in setting the penalty as a written reprimand. He directed that Complainant be "reinstated, with all rights and benefits, but to a different assignment where she will not work for, or to the extent possible, with" Ms. Lancaster.[12] L.Ex. 1 at 23; *see* TR 108. In the Award section of the Opinion, the arbitrator worded this order slightly differently: "Grievant shall be reinstated with all rights and benefits to a position of equal pay and status, but in a unit where she is not supervised by" Ms. Lancaster. L.Ex. 1 at 24. He also ordered a make whole financial remedy. L.Ex. 1 at 23, 24.

23. In his testimony, ALD Chief Richard Ehlke acknowledged that his own reaction to Complainant's prevailing in the adverse action was: "Disappointment. I disagreed with it." TR V/55. He added, "I'm sure top CRS Management was disappointed, but, you know, I don't recall any specific conversations. But I'm sure that feeling was present." TR V/55. He also noted that implementation of the Arbitration Decision posed two difficulties: "One was the bar against being next to Robin Lancaster, and the other bar was the collective bargaining agreement that limited the duration of details." TR V/55-56. He denied hearing or knowing of any actions by CRS managers to punish Complainant for her successful challenge to the removal. TR V/59.

24. On October 27, 1998, Mr. Ehlke wrote to Director of Security Kenneth E. Lopez to advise him that the six-month bar to Complainant's access to LOC buildings

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[11] According to Mr. Lopez, there is precedent for such a proposal being rescinded upon appeal. TR 391.

[12] The arbitrator's Opinion quoted testimony from the Library Health Services Officer to the effect that Complainant's personal psychiatrist had recommended that Complainant "be allowed time for keeping appointments. She recommended her being in detail away from her usual area of work. And she also requested that she be given additional time to complete assignments because of the time management issue." Arbitration Opinion at 9 (L.Ex. 1).

should be lifted, as a consequence of her reinstatement. His memorandum also noted that "we are in the process of determining her placement in the Library." L.Ex. 16 at 4.

November 1998 Reinstatement and Subsequent Details

25. Pursuant to the arbitrator's Opinion, Complainant was reinstated to employment at CRS on November 9, 1998.[13] TR 583; *see* L.Ex. 4 at 1. She was informed of her initial placement by CREA President Dennis Roth and Vice President John Contrubis;[14] CRS management did not meet or discuss her placement with her. TR 127. Mr. Contrubis testified that he worked with Complainant and LOC officials to secure a reasonable accommodation and to "make sure that she was placed in a proper working environment." TR 436. He sensed that CRS management "didn't really want her there." TR 436.

26. Bessie Alkisswani was serving as head of the CRS Administrative Office in November 1998 and thus was tasked with finding a suitable placement for Complainant.[15] TR 453-54, 498-99. Ms. Alkisswani noted that CRS Director Mulhollan signed the official detail papers and therefore likely was advised by her when Complainant was being moved between assignments. TR 473. While acknowledging that she was the primary person responsible for Complainant's reassignment, Ms. Alkisswani could not explain why there had been no permanent reassignment rather than a succession of details, but stated that she believed the eventual goal was "to find a permanent placement for [Complainant] outside of the American Law Division that was comparable to the position that she currently had."[16] TR 498-500. She recalled meeting once with Complainant during the time while looking for a placement; she viewed her task as being "charged with finding a suitable place for her. And so that's essentially what I did." TR 453.

27. Ms. Alkisswani claimed that performance concerns constituted one reason for using details for Complainant, and that such concerns started with the first placement after reinstatement. TR 474-75. She noted that managers brought Complainant's late arrivals and performance difficulties to her attention during the

[13] The EEO affidavits provided by CRS Director Mulhollan and Deputy Director Evans list the dates of Complainant's initial detail as "11/02/98 – 12/31/98." ROI Exs. 9, 10 at ¶2(b). However, both affidavits also state that Complainant "returned to work in CRS on November 9, 1998." ROI Exs. 9, 10 at ¶6.

[14] Mr. Contrubis had represented Complainant in her adverse action appeal. TR 435.

[15] Ms. Alkisswani currently is Associate Director for the CRS Office of Workforce Development and directly reports to CRS Director Daniel Mulhollan. She explained that in her current position she serves as the chief human resources officer for CRS; in 1998 that position was occupied by Susan Vinsen, to whom she reported at that time. TR 452, 496-99.

[16] Ms. Alkisswani explained that Complainant could not be placed in the Library outside of CRS because CRS operates on its own appropriations. TR 506-07.

details. TR 455-56. In Ms. Alkisswani's view, post-reinstatement placement of Complainant proceeded on two tracks: she continued to look for a permanent placement, but respected managers' reluctance to take on an employee with tardiness and performance issues. TR 477. She reiterated that the placement sought was a job of equal pay and status. TR 483. Ms. Alkisswani also recalled "trying to get some answers" from the Health Services Office about what obligations management had to accommodate Complainant. TR 457. She did not recall the outcome of those discussions, *i.e.*, whether she worked to accommodate a disability, but did recall talk of disability retirement being pursued at that time. TR 458-59.

28. Ms. Alkisswani also noted that she worked very closely with the union regarding Complainant, and "probably" secured the requisite waivers from the union for the details over 90 days. TR 491; *see* L.Exs. 5, 9, 10. In addition, she testified that union representative Contrubis believed that disability retirement "might be the best path" for Complainant. TR 474-75. In fact, Library Exhibit 5 (Apr. 6, 1999) is an agreement between CREA President Roth and LOC to waive the limit on duration of detail "to permit the extension of a detail for [Complainant] from her position of Senior Production Assistant in CRS American Law Division to the same position in CRS Government Division in order to allow time for reviewing her ADA related needs and exploring a more permanent accommodation for her." The next waiver, signed on January 6, 2000, no longer references accommodation as a basis. That waiver was entered "to permit the extension of a detail for [Complainant] from her position of Senior Production Assistant in CRS American Law Division to undescribed duties in CRS Office of Information Resources in order to allow her to continue [to] perform the following duties: filing, collating bills, writing short titles for bills, inputting short titles, and some proofing of short titles and amendment digests." L.Ex. 9. A final waiver with similar wording was signed on March 13, 2000, to carry Complainant through to her retirement on disability. L.Ex. 10.

29. In Mr. Contrubis' view, Complainant "bounced around to several different divisions upon her return," which he "didn't think was the best thing for her." TR 436. He testified that he believed Ms. Alkisswani was "genuinely trying to find a home" for Complainant upon her reinstatement but that managers were resistant. TR 436-37. Rather than seeking a comfortable fit for Complainant, he believed that management was "trying to find a location for her where that division chief would basically agree to take her in"—and that that may have been the sole criterion for placement. TR 440. Angela Evans, Deputy Director of CRS, testified that she did not speak with Ms. Alkisswani about Complainant's placements upon her return.[17] TR 429. At that time, Complainant had been diagnosed with sarcoidosis (TR 110) and clinical depression (TR

[17] Mr. Ehlke's testimony was sketchy on the post-reinstatement placement as well. When asked if he would have discussed Complainant with other department chiefs in CRS, he did not recall any such discussions. TR V/31. As to conversations with Ms. Alkisswani, he replied: "It's very possible in that after her reinstatement some effort had to be made to find a place for her." *Id*. He elaborated that because the arbitrator's Opinion specified that Complainant not be placed in proximity to Ms. Lancaster, "that precluded her placement in the American Law

116).[18] Ms. Evans could not recall what accommodation efforts were made for Complainant, although her EEO affidavit states that "extraordinary efforts" were made at that time. TR 431; ROI Ex. 9.

First Detail - Senate Research Center, Congressional Reference Division

30. Initially upon Complainant's reinstatement, CRS detailed her for 60 days to the Senate Research Center (SRC) of the Congressional Reference Division (CRD), under the direct supervision of Vanessa Cieslak, an information research specialist. TR 117, 128, 565-66. Ms. Cieslak was asked to assume the role of supervising the detail; her own supervisor explained that the detail was intended to relieve a tense situation because Complainant had threatened her supervisor. TR 581-82. Ms. Cieslak did not expect Complainant to be permanently reassigned to her. *Id.* Complainant's duties included filing reports and checking in newspapers and magazines—work generally done by GS-5 and GS-7 Library technical specialists. TR 568-70. She also was responsible for loading paper in the copy machine and printer, and distributing mail. TR 129. She did not perform report production duties. TR 130. Complainant testified that she was "having difficulty leaving home," and that it was hard trying to get Ms. Cieslak to understand her situation. TR 132. She complained that she did not have her own computer,[19] and found the work demeaning. TR 131-33. On this detail, Complainant was expected to follow the Division's set schedule of 9:00 a.m. to 5:30 p.m.; no flexible schedule was available. TR 132, 572-73.

31. Complainant's tardiness pattern began to emerge "almost immediately" at the beginning of the detail. TR 583. Ms. Cieslak instructed Complainant to call her or the acting team leader if she would be reporting late on any given day. In just over a month—by December 10, 1998—Complainant had arrived late 16 times and used approximately 30 hours of emergency leave to cover her lateness. L.Ex. 4. On December 11, 1998, Complainant phoned Ms. Cieslak and reported that she would be in between 10:30 and 11:00 a.m. When she arrived at 12:45 p.m., Ms. Cieslak counseled Complainant about her repeated tardiness. *See* Memorandum of Dec. 14, 1998 (L.Ex. 4). She was advised in writing that her tardiness was "disruptive to the work of the SRC" and to her own performance. *Id.* Further, she was encouraged to contact LOC's Employee Assistance Program (EAP) if she believed that medical or personal problems were affecting her ability to report for duty. *Id.* The detail to SRC ended on December 31, 1998. ROI Ex. 9; L.Ex. 2.

Division, so I'm sure that subject came up as to what alternative placements there might be." TR V/32.

[18] LOC disputes that Complainant suffered from any ailments requiring an accommodation in the workplace. TR 110. The record, however, reveals that Complainant's physicians communicated such needs to Dr. Sandra Charles and to others employed at CRS in early 1998, prior to Complainant's removal. *See* C.Exs. 6, 8, 10, 11.

[19] Ms. Cieslak testified that Complainant had no work-based need for an individual computer, but could access her e-mail while in the unit. TR 578.

32. Complainant was advised by a December 30, 1998 memorandum from Bessie Alkisswani that because of new hires expected on board in the near future, CRD could not retain her beyond the end of the year. L.Ex. 2. The memorandum went on to state:

> We are still in the process of determining a permanent placement for you within the Service, however, and hope to have a decision soon. In the meantime, you will be on detail to the position of Senior Production Assistant in the Education and Public Welfare Division (EPW), effective January 1, 1999, not to exceed January 15, 1999. Please report to Karen Spar. . . . I have been informed that your work schedule in EPW will be from 8:30 a.m. to 5:00 p.m."

Id. (emphasis added).

Detail from January 1–15, 1999

33. The record as to Complainant's next assignment is unclear; no conclusion can be drawn as to where Complainant served for the first two weeks of 1999. *See* Library Post Hearing Brief (Lib. Br.) at n.16; Lib. Reply Br. at 5 n.4. Despite the December 30, 1998 memorandum from Ms. Alkisswani, Complainant herself testified that she was detailed to the Domestic Social Policy (DSP) unit from January 1-15, 1999. TR 118, 137. She added that Sharon House was the unit Chief, and that she reported to Angie Smith-Harris. TR 137. Affidavits submitted by the top two executives of CRS—Daniel Mulhollan, Director, and Angela Evans, Deputy Director—indicate that Complainant was detailed during this period to Bill Digest (then part of ALD), under Juanita Campbell's supervision. ROI Exs. 9, 10. Ms. Campbell testified that she does not recall such a detail during the first two weeks of 1999. TR 591. No record of this detail was produced. What is clear is that the Library has presented no evidence that a plan for reassigning Complainant to a permanent and equivalent position in implementation of the arbitrator's Award existed at this point.

Second Documented Detail - Government and Finance Division

34. From January 17, 1999 to July 15, 1999, Complainant was detailed for two consecutive 90-day periods to the Government and Finance Division (G&F), under the supervision of Lillie Thompson, Research Production Coordinator, who in turn reported to Michael Koempel, Assistant Director. ROI Exs. 9, 10; TR 118, 145, 224-26. This detail resulted from a request by CREA official John Contrubis. TR 226. According to Mr. Koempel, union officials regularly discussed details or transfers with assistant directors on behalf of employees with a workplace difficulty or in need of a different opportunity. TR 262. When asked if he had been aware of Complainant's successful adverse action case, Mr. Koempel referenced his June 16, 1999 memorandum (L.Ex. 6) and testified: "That memo mentions an adverse action, so I must have had some awareness of some—that it existed, but I still don't actually recall—I mean, today I don't

recall what it was or what I knew." TR 264. In explaining his memorandum's reference to the adverse action and Complainant's subsequent need for rehabilitation, Mr. Koempel testified:

> [S]he needed a place to essentially put herself back together. She had a very rough time and so rehabilitation is not meant there in some sort of legal sense . . . it was . . . just an act of understanding and trying to—when I had interviewed her the first time, I thought she was a very nice person. . . .

TR 264-65. When asked if he considered any remedial action on Complainant's behalf, or reassignment, Mr. Koempel testified that by midway through the second 90-day detail, it was clear to him that nothing was going to change. TR 266.

35. Ms. Thompson testified that Mr. Koempel told her that CRS needed "a division to take" Complainant on detail, because "she and her supervisor are having problems." TR 340. She recalled: "I made the decision that I would take her. He asked, and I said sure, I'll take her. And he said, are you sure. And I said, yeah, I'll take her. No problem. . . . I believe that Mike [Koempel] said she's having problems with Robin Lancaster. . . . he said something's going on, you know, with her and Robin." TR 341-42. On the G&F assignment, Complainant worked as a senior production assistant—the same title as her position of origin in ALD. TR 231. During the detail to G&F, Complainant formatted documents for printing, did word processing, and created tables and graphs. She also served on a rotating basis with other production assistants at the G&F Communications Center, acting as a receptionist, handling faxes and distribution of Congressional requests, distributing materials, photocopying and preparing presentation folders.[20] L.Ex. 6; TR 146-49, 231-35.

36. At the beginning of the detail, Complainant was assigned work in the same manner as other production assistants. TR 240-41. They numbered approximately 8 to 12 of 80 total G&F employees. TR 260, 324. Like Complainant, the assistants had all reached grade eight—the top of the promotion ladder for their positions. TR 261-62. However, Mr. Koempel observed that Complainant's work "was not getting done in a timely fashion, which was [an] enormous problem for us because all of our work is done on a deadline, and the deadline is based upon what the congressional requester wants." TR 241. Therefore, Complainant was assigned longer-term projects with more flexible deadlines. TR 241-42. According to Ms. Thompson, Complainant's work was satisfactory, and on shorter projects "she did a very good job." TR 325-26. The daily timeframe for performing production work was from 8:00 a.m. to 6:00 p.m. TR 243.

37. During this detail, Complainant repeatedly arrived late for work (TR 327, 335-36); she also left or disappeared without notice during the day for two hours or more. L.Ex. 6 at 2. As Mr. Koempel testified, "certainly tardiness was an issue. The other thing is that she would wander off during the day. She would take extended breaks. She would not tell people when she was leaving the office, she would say she

[20] Complainant complained that she was not listed on a conference room assignment board for support staff. TR 158.

was going for a certain amount of time and return much later than that." TR 242, 250. These attendance problems shifted more work to other production assistants and made it more difficult for G&F to respond to Congressional requests in a timely manner. TR 240-41, 268; L.Ex. 6. According to Ms. Thompson, however, she herself frequently filled in for Complainant in her absence without resentment, and those absences did not negatively affect unit morale. TR 328.

38. Early in this detail—on February 9, 1999—Complainant and Mr. Contrubis, the union official, met with Ms. Thompson and Mr. Koempel to review procedures and to discuss the repeated tardiness. L.Ex. 6; *see* TR 241. Complainant testified that she and the union representative explained that she was ill and waiting for documentation from her physician. TR 153. During February 1999, Mr. Contrubis privately suggested to Complainant that she apply for disability retirement; she informed him that she wanted to continue working at that time. TR 179.

39. Mr. Koempel observed performance issues early in Complainant's detail. After a few days, he found that Complainant was "neither following procedures nor promptly distributing the products." TR 240. On March 2, 1999, he sent Complainant a memorandum detailing procedures and instructing her to go to the Production Development Center twice daily, at 11:00 a.m. and 4:00 p.m., to check for new copies of reports and issue briefs and to distribute them as specified. L.Ex. 6 at 9.

40. A second meeting was held on March 16, 1999 to discuss Complainant's work hours and the importance of following procedures. *See* L.Ex. 6 at 6. In a memorandum memorializing that meeting, Mr. Koempel stated that Complainant needed to provide documentation to the Health Office and obtain a decision from that Office if she had a medical condition that required accommodation as to work hours. *Id.* at 6. In the meantime, he encouraged Complainant to schedule doctor's appointments in advance and, if possible, on her "comp flex" day to minimize workplace disruption. TR 276.

41. At that time, Sandra Charles, M.D., of the Health Service Office sent a memorandum to Mr. Koempel stating that, based upon her review of medical documentation, Complainant "has been determined a person with a disability" under the Americans with Disabilities Act (ADA), and that Complainant was requesting the accommodation of "some flexibility in work schedule and deadlines, as she deals with time management and organization issues." L.Ex. 6 at 7; TR 154. Dr. Charles gave a phone number where she could be contacted for further clarification. Mr. Koempel did not believe the memorandum contained clear instructions; he had only a vague recollection of follow-up with Dr. Charles' Office: "I wanted to understand, you know, what some flexibility in work schedule and deadlines was to mean. . . . How was I to implement something like that?" TR 237. He also testified that the schedule for serving at the Communications Center was changed for Complainant's sake "at least once." TR 239, 254-55.

42. On May 26, 1999, Ms. Thompson, Mr. Koempel, Mr. Contrubis and Complainant met a third time to discuss schedule and attendance issues. At that meeting, Mr. Koempel reiterated that Complainant's bi-weekly official hours were 8:30 a.m. to 6:00 p.m. for eight days, with the ninth day ending at 5:00 p.m.; every other Monday she was off duty. This was a "comp flex" schedule. L.Ex. 6 at 8. He did, however, state that "as a temporary accommodation, I have encouraged you to arrive by 10:30 a.m. and to continue to work toward arriving on time. You will continue to use leave to cover the time that you are late reporting to work." *Id.* Further, the memorandum indicated that the parties had discussed "the disruptiveness" of Complainant's arrival after her scheduled time, noting that her rotation at the Communications Center had already been shifted to the noon hour to allow for late arrival. *Id.* at 8.

43. On June 16, 1999, Mr. Koempel provided Ms. Alkisswani—at her request—with a memorandum elaborating on Complainant's performance in his Division. L.Ex. 6 at 1-5. He noted that the performance of assigned tasks was satisfactory, but the timeliness of such performance was "completely unsatisfactory." *Id.* at 2. He pointed out Complainant's recurring tardiness, her unannounced disappearance for two or more hours during the workday, and generally slow productivity. He explained that he had not been strict in enforcing the 6:00 p.m. signout deadline, "pending guidance on the accommodation." *Id.* at 2-3. He also noted that he and Ms. Thompson had welcomed Complainant in February,

> and offered her the opportunity to rehabilitate and heal herself after her experiences with the adverse action. We told her she would be judged on her performance in the detail, not anything that transpired in the past or outside the division. I do not believe we have had reciprocity, and questions abound on what this legal accommodation is and is for.

Id. at 5. Further, he pointed out that Complainant "needs constant supervision. She needs attention to her use of time, the duration of her breaks, her staying on track in performing assignments and carrying out duties, etc." *Id.* Finally, Mr. Koempel made clear that at the end of the detail on July 15, he wanted Complainant "physically out of the division the same day. She has consumed a disproportionate amount of my time. She has contributed little to the division, and the morale of the production staff is sinking." *Id.* at 5; TR 180-92.

44. Ms. Thompson testified that Complainant followed proper procedures in product distribution and Communications Center work. TR 327. In her view, Complainant "was not alone in taking longer lunches or longer breaks. It was that she was focused on more." TR 329. Ms. Thompson indicated that she advised her staff not to judge Complainant on reputation and to wait and see how she would do. TR 334. She even advised Mr. Koempel not to prejudge:

> I think [Complainant] came with luggage from her old chief and her old supervisor. And I think that sort of colored some thoughts or opinions that

> Mike [Koempel] even may have had. And I know it certainly did for me for a while because I felt that if this is—when Mike asked if I would take [Complainant], I said, well, what's the problem, he said, they're having problems with her downstairs and dadda, dadda. I said I'll take her. He said, are you sure? I said, yeah, I'll take her. And once she came, I found out that there were other circumstances as to maybe why she was this way or that way. . . . I found out that medications was [*sic*] a big part of her not ticking. . . .

TR 336-37.

45. Rather than a morale problem centered on Complainant's absences, in Ms. Thompson's view, the unit's problem was that Complainant "couldn't get to work." TR 335; *see* TR 345. While sympathetic to Complainant's desire to make up time at the end of the day, Ms. Thompson observed that supervision was required and she herself could not stay after 6:00 p.m. TR 336. Finally, Ms. Thompson testified that she would have retained Complainant for further details if the decision had been hers to make. TR 338. Ms. Thompson herself was preparing for retirement towards the end of the detail, and was preoccupied with other matters at that time. TR 343-44.

46. Mr. Koempel testified that the only staff member with whom he discussed Complainant was her direct supervisor, Lillie Thompson. TR 246. He could not recall discussing Complainant with any manager in CRS other than Ms. Alkisswani, in her personnel capacity. TR 257-58. He believed that Complainant provided conflicting information about her health and incapacity, such as complaining about being tired while telling Ms. Thompson that she had been out late.[21] TR 247. He reiterated that Dr. Charles had provided "very little information" in stating that Complainant "needed flexibility in her work schedule and her deadlines." TR 248. As to schedule, the office acted as follows:

> [W]e did accommodate the work schedule, setting a 10:30 arrival time rather than a 8:30 arrival time. . . . And then . . . we didn't charge her, you know, three hours when she came in three hours late, we let her work until 7:00 so that she was only charged for two hours of leave. . . . [W]e took away the . . . deadline and work so that she wouldn't have to do that. So to the extent that we understood something, we tried to accommodate it.

TR 248. Mr. Koempel also testified that Complainant was not disciplined for late arrival or for being away from her work station. TR 276, 278.

[21] Complainant testified that on worknights she sometimes would "take care of grocery shopping and other things" so as not to leave all her errands for Saturdays. TR 183.

Third Documented Detail - Domestic Social Policy Division

47. Effective July 16, 1999, Complainant began a 90-day detail to the Domestic Social Policy Division[22] under the supervision of Flora Adams; Sharon House was the unit Chief. TR 161; L.Ex. 7. The duties included removing staples, affixing box labels, reordering shelf material and making labels. TR 162-64. Complainant was also assigned to assist in "weeding and organizing collections" in preparation for a move. L.Ex. 7. She did not have production work. TR 164. She was instructed in writing to call Ms. Adams to advise her when she would be arriving—if after 8:30 a.m.—and to leave a message on Ms. Adams' voice mail, as well as with the person covering the phones, if Ms. Adams was not available. L.Ex. 7; TR 160-76.

48. At the beginning of this period, Ms. Alkisswani, then CRS management Specialist, sent a memorandum to Dr. Charles seeking guidance as to the nature of Complainant's medical condition and the obligation of CRS to accommodate that condition. L.Ex.13 (Jul. 23, 1999). The memorandum noted that Complainant "had taken steps to apply for disability retirement," with union representative Contrubis' knowledge, but that Ms. Alkisswani was unsure whether Complainant would complete the process.[23] Nevertheless she expressed the view that the 90-day detail "should provide enough time for her [Complainant's] disability retirement to be approved." *Id.* at 1. The memorandum also detailed information from Mr. Koempel's earlier memorandum as to Complainant's performance and tardiness, as well as the resulting "severe impact on morale among the production staff." *Id.* at 5. Finally, the memorandum summarized that Mr. Koempel believed that Complainant needed "constant supervision to monitor her use of time, the duration of her breaks, her staying on track in performing assignments and carrying out duties, etc." *Id.*

49. Dr. Charles responded one month later by memorandum dated August 24, 1999, informing Ms. Alkisswani that it had been totally inappropriate and a threat to confidentiality for her to request an explanation of Complainant's medical condition. L.Ex. 14. She reiterated what she had provided by phone and previous memorandum (Mar. 16, 1999). In her opinion, Complainant was:

> a qualified person with a disability as described in the ADA and Library regulation 2025-8. She is requesting as an accommodation, flexibility with work-schedule and deadlines. With regard to her schedule, she is specifically asking for a flexible arrival time, have her work day start when she arrives and be allowed to stay as late as possible. She is also requesting to be able to make up time on weekends or by staying late. If

[22] Complainant testified that she was "sent back to DSP" from mid-July to mid-October 1999. TR 118. Thus, she reiterated her view that the two-week January 1999 detail had been to that unit.

[23] Complainant testified that she began to seriously consider disability retirement in July or August 1999. TR 180, 213-14.

CRS determines that they cannot provide the accommodation, then they should so state and give justification.

L.Ex. 14 at 1. Dr. Charles testified that her role was to render a medical determination of whether an employee is a person with a disability and to help if management requests advice on what they are able or not able to do to meet the employee's needs. She does not determine whether an employee with a disability is qualified, with or without reasonable accommodation, to perform the essential functions of his or her position. TR 649-56.

50. Ms. Alkisswani replied to Dr. Charles on August 30, 1999, stating that Dr. Charles had misconstrued her request and that she simply sought "clarifying information" as to how CRS could accommodate Complainant within the law's requirements. L.Ex. 15 at 1. She also stated that she still needed guidance on the request. *Id.* at 2.

51. In September 1999, Complainant supplied a physician's letter in support of a more sedentary assignment. TR 165; C.Ex. 12.

52. During this detail Complainant was required to leave by 6:00 p.m., and was escorted out by her supervisor. TR 173. She "began to see a pattern that they were sending me from place to place and [I] never was going to fit anywhere. They were trying to make it look like I didn't belong anywhere." TR 165. She also objected that her computer was an older, refurbished unit, while others in the group had new computers. TR 175-76.

Fourth Documented Detail - Bill Digest Section

53. Beginning October 14, 1999, Complainant was detailed for 90 days to the Bill Digest Section, which by then was part of the Office of Information Resources Management. Her supervisor was Juanita Campbell. TR 176, 590; ROI Ex. 9 (affidavit of Angela Evans). Most of her assignments during this time came from ALD; these included preparing charts, changing document text formats, filing, collating bills, writing short titles, data entry of short titles, and proofreading. ROI Exs. 9, 10 (affidavits of Evans, Mulhollan); TR 176, 607. When tardiness became an issue on this detail, Ms. Campbell began calling Complainant in the morning to awaken her. TR 603. Ms. Campbell also granted Complainant's request to make up time for reporting late by staying beyond the office's closing in the evening. TR 606-07. Mr. Contrubis testified that he did not sense Ms. Campbell being resistant to Complainant's placement under her supervision. TR 450. With the concurrence of union officials, the detail to Bill Digest was extended for an additional 180 days, carrying Complainant through the process of her disability retirement application until her retirement on June 20, 2000. TR 118, 591. Ms. Campbell was not able to evaluate Complainant's work because it was assigned to her by Ellen Lazarus, ALD Assistant Chief.[24] *See* TR 592, 594.

[24] The record contains no testimony or any other evidence from Ms. Lazarus.

54. Mr. Contrubis, the union official, had urged Complainant to pursue disability retirement and testified that he probably had advised her that she would likely be fired if she did not retire; he further explained that it was his opinion "that she was set up to fail not to succeed when she was brought back." TR 446.

55. Complainant retired on disability in June 2000.[25] TR 116.

ANALYSIS

A. The Parties' Arguments

Complainant

Complainant contends that: 1) the Library's action placing her in AWOL status, and the consequent memorandum, were discriminatory; 2) the Library's failure to permanently reassign her to a position of equal pay and status was discriminatory; and 3) the Library's failure to permanently reassign her was retaliatory for her prior protected activity.

The Library of Congress

The Library essentially asserts that Complainant has failed to establish a *prima facie* showing of race, sex, color, or disability discrimination because she has failed to prove that management treated her disparately regarding her placement in AWOL status for 5.3 hours. Moreover, Complainant has no claim based on management's AWOL memorandum because it does not rise to the level of an adverse employment action and, in any event, because management articulated a legitimate and nondiscriminatory reason for issuing that memorandum.

In addition, the Library contends that Complainant's post-reinstatement assignment details did not constitute actionable adverse employment actions because she retained her employment emoluments and job title. Moreover, even assuming an adverse employment action, Complainant did not establish circumstances giving rise to an inference of discrimination. LOC claims that Complainant failed to establish intentional disability discrimination because—by virtue of her time and attendance deficiencies—she was not a person qualified to perform an essential function of her position (*i.e.*, regular attendance). The Library further argues that Complainant's requests for accommodation in the form of flexibility of schedule and assignment deadlines were met.

As to retaliation, the Library argues that the AWOL incident and related memorandum preceded Complainant's EEO activity. With respect to the post-reinstatement details, LOC's arguments are addressed to retaliation in the context of the underlying

[25] The affidavits of Mr. Mulhollan and Ms. Evans indicate that Complainant retired on June 2, 2000, while her detail is listed as ending on June 20, 2000. *See* ROI Exs. 9, 10 at ¶¶2, 6.

discrimination claim that was formalized in 1999 based on the October 1997 initial contact—not on the discrimination issues that formed the subtext of the arbitration proceeding. In the Library's view, because discrimination was not raised in Complainant's arbitration case, that proceeding cannot form the basis of a protected activity retaliation claim. Moreover, there is no evidence establishing causation between the arbitration and Complainant's subsequent detail assignments. The Library argues that it had legitimate and nondiscriminatory justification for the details inasmuch as it was complying with the Arbitration Award.

B. Legal Standard

Discrimination

Complainant's allegations of intentional race, color, sex and disability discrimination are governed by the burden shifting paradigm the Supreme Court established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).[26] Under this scheme, the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination. Once the plaintiff makes such a showing, the burden shifts to the defendant employer to articulate "some legitimate, nondiscriminatory reason" for the adverse employment action. Should the employer do so, the burden shifts to the plaintiff to attack the employer's proffered explanation of its actions and to offer any further evidence of discrimination that may be available. *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1288-89 (D.C. Cir. 1998).

To establish a *prima facie* case of discrimination Complainant must establish that she: 1) is a member of a protected class; 2) has been subjected to an adverse employment action; and 3) the unfavorable action gives rise to an inference of discrimination. *Stella v. Mineta*, 284 F.3d 135, 145 (D.C. Cir. 2002). The ultimate burden of persuading a finder of fact remains at all times with Complainant. *Reeves v. Sanderson Plumbing Products,* 530 U.S. 133, 143 (2000); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

To establish a *prima facie* case of disability discrimination under the Rehabilitation Act[27] Complainant must show that she: 1) is an individual with a disability; 2) who, with or without reasonable accommodation, can perform the essential functions of the position; and 3) who suffered an adverse employment action due to her disability. *Rosell v. Kelliher*, 2006 U.S. Dist. LEXIS 15439 at 11 (D.D.C. Mar. 31, 2006).

[26] Proof of intentional discrimination under the Americans with Disabilities Act and the Rehabilitation Act of 1973, as amended, is also governed by *McDonnell Douglas*. *See Taylor v. Rice,* 451 F.3d 898, 911 (D.C. Cir. 2006).

[27] As LOC's post-hearing brief suggests, the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, and the Rehabilitation Act, 29 U.S.C. §701 *et seq.*, mirror each other and impose identical requirements upon the Library. Lib. Br. at 30.

Retaliation

Employers may not retaliate against employees who file complaints of disability discrimination under the Americans with Disabilities Act. 42 U.S.C. §12203(a). In analyzing a disability retaliation claim the courts employ the burden-shifting framework established by the Supreme Court in *McDonnell Douglas*, *supra*. Under this framework Complainant must establish the three elements of a *prima facie* case of retaliation: 1) that she engaged in protected activity; 2) that she was subjected to adverse action by the employer; and 3) that there existed a causal link between the adverse action and the protected activity. *Smith v. District of Columbia*, 430 F.3d 450, 455 (D.C. Cir. 2005). The Supreme Court recently made clear that in the context of retaliation "adverse action" is interpreted broadly: "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse"—*i.e.*, "'it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination'." *Burlington Northern & Santa Fe Ry. v. White,* 548 U.S. ____, 126 S.Ct. 2405, 2415 (2006) (citations omitted).

C. Discussion

Complainant is a member of four protected groups by virtue of her race (African-American), color (black), sex (female), and disability (mental impairments). Disposition of the allegations in this matter depends upon preliminary resolution of several underlying issues that are addressed immediately below.

Findings as to Animus on the Part of Robin Lancaster against Complainant

Complainant alleges that the Library discriminated against her based on her race, color, sex, and disability when Ms. Lancaster charged her with 5.3 hours of absence without leave and provided her with a consequent counseling memorandum. Both Robin Lancaster and Complainant are African-American females. TR 216. Their mutual race and/or gender does not conclusively establish the absence of discrimination. Moreover, the factual context of this case includes other issues and demands further scrutiny.

Complainant initially worked for Ms. Lancaster from July 1988 until November 1993, and again from May 31, 1997 until October 8, 1997. TR 59, 70-74; L.Ex. 1 at 1, 6. Complainant testified that early in their working relationship Ms. Lancaster took advantage of her by borrowing money for various personal reasons and even to help out Ms. Lancaster's friend who needed $300 to meet her rent payment. She further testified that in 1991, she declined to provide Ms. Lancaster a loan to pay her car insurance. Although Ms. Lancaster responded that she could borrow it from other colleagues, Complainant sensed that Ms. Lancaster had it in for her and Complainant started feeling like an outcast in the Division. TR 62-64.

Ms. Lancaster denies borrowing money from Complainant except for change to use at a vending machine. Ms. Lancaster acknowledged that Complainant loaned $300 to a person she characterized as a mutual friend of theirs. Ms. Lancaster averred that

during the period around 1991 and earlier, she and her husband socialized with Complainant outside the workplace. Ms. Lancaster's spouse also ran errands for Complainant because she did not drive and needed heavy things picked up. TR 678-79.

Complainant submitted a narrative to the Report of Investigation describing her relationship with Ms. Lancaster *circa* 1991 and earlier. *See* ROI Ex. 14. Complainant cited visiting Ms. Lancaster's mother's home in 1989 after Ms. Lancaster failed to call her or to return Complainant's phone calls. Complainant speaks of being forgotten or not wanted. Complainant mentions that she visited Ms. Lancaster's home on Thanksgiving 1989 and in January 1991. She attended a performance of Ms. Lancaster's band at the Shoreham Hotel in October 1990, and went to a play with the Lancasters and Trisha (the woman seeking a loan to pay her rent) in January 1991.

Complainant alludes to Ms. Lancaster being piqued at her after Complainant told another employee that she felt unwanted when she attended Ms. Lancaster's 1989 Thanksgiving dinner. Shortly thereafter Complainant noticed a change in Ms. Lancaster's attitude; she perceived that Ms. Lancaster became dismissive towards her. In September 1990 and at least one other time Ms. Lancaster told Complainant that she did not have time to be friends with her outside of work and that Complainant should get her own friends. Complainant was not invited to Ms. Lancaster's wedding celebration party in April 1990. At some point she realized that Ms. Lancaster did not consider her to be a friend. ROI Ex. 14 at 1-4.

The arbitrator's October 5, 1998 Opinion and Award, following an evidentiary hearing, concluded that Complainant and Ms. Lancaster had a personal relationship around 1990 that Ms. Lancaster terminated. Whereupon, Complainant began criticizing Ms. Lancaster to the rest of the staff. L.Ex.1 (C.Ex. 3) at 2.

As a general matter, I find that the record is devoid of evidence establishing that Ms. Lancaster operated out of an animus against Complainant because of Complainant's race, sex, disability status or any prior protected EEO activity on her part.[28] On the other hand, the evidence plainly discloses that there was *bad blood* between Ms. Lancaster and Complainant in the aftermath of Ms. Lancaster ending their social contacts *circa* 1991.

Findings Regarding Complainant as a Person with a Disability

Complainant testified that Ms. Lancaster was aware that she suffered from sarcoidosis and clinical depression. TR 353. At an unspecified time Ms. Lancaster acknowledged to Complainant that she was aware Complainant was taking medications. TR 353-55. Ms. Lancaster denied knowledge that Complainant had any medical condition as of the September 1997 AWOL incident. TR 694. The Library's Health Officer, Sandra

[28] The record does not establish that supervisor Lancaster possessed sufficient information in September 1997 to be informed that Complainant had a disability within the meaning of the Americans with Disabilities Act.

Charles, M.D., after reviewing Complainant's medical documentation, issued an official memorandum, dated January 12, 1998, concluding that Complainant had "an impairment which substantially limits several major life activities and as such, is a person with a disability" under the Americans with Disabilities Act. C.Ex. 6. In March 1999, Dr. Charles wrote to Mr. Koempel that, based upon a review of documentation, Complainant was a person with a disability and was requesting flexibility in schedule and deadlines as an accommodation. C.Ex. 4; TR 154. Complainant's mental health therapist provided documentation and testimony disclosing that Complainant's impairments substantially affected her daily life activities such as self care, project completion, keeping track of time and managing her financial affairs. C.Ex. 15. Complainant's psychiatrist since August 1995 diagnosed her as suffering from recurrent major depressive episodes, attention deficit hyperactivity disorder, probable bipolar mood disorder, etc., which had impaired her concentration, ability to organize tasks and activities, sustain attention, and time management; and imposed cognitive distortions. C.Ex. 5. Deborah Edge, M.D., in connection with Complainant's disability retirement application, wrote on August 31, 1999 that Complainant's depression very adversely affected her ability to work due to her memory loss and difficulty concentrating. C.Ex. 14 at 4.

Based upon the foregoing I find that Complainant, at the times of the 1997 AWOL incidents and her post-reinstatement detail assignments, was a person with mental impairments substantially limiting one or more of her major life activities. Moreover, management was aware of Complainant's disability status as a consequence of the medical testimony presented at Complainant's arbitration hearing, and the arbitrator's Opinion and Award of October 5, 1998. L.Ex. 1; C.Ex. 3. They also were aware based upon communication from Complainant's physician to Dr. Charles in January 1998, requesting additional time for assignment completion on the basis of time management and organization difficulties related to depression and attention deficit. C.Ex. 10; s*ee* C.Ex. 8. Based upon the Arbitration Opinion, at the time of the reinstatement Complainant was a qualified person with a disability; underlying that Award is the presumption that she could perform her job duties, with or without accommodation to her disability.

Complainant's Protected EEO Activity

Complainant made informal contact with an EEO Counselor on October 3, 1997, soon after she received the AWOL memorandum from Ms. Lancaster. ROI Ex. 13. The ROI indicates that management routinely is advised when individuals file informal complaints and, therefore, should have been aware of Complainant's October 3, 1997 informal contact. As of August 13, 1999, however, Complainant's informal complaint was still pending and the counselor had not yet spoken with or contacted management regarding the particulars of her situation. *Id.* Complainant filed her formal discrimination Complaint on September 10, 1999. ROI Ex. 1. The counselor's report (ROI Ex. 3) is dated September 14, 2001. The EEOCO notified the individuals named in the formal Complaint on September 20, 2001—subsequent to Complainant's June 2000 retirement. *See* ROI Ex. 5. The record thus provides no basis to conclude that

management had more than peripheral knowledge concerning the informal charge prior to formal proceedings in this matter. Based on this record, I find that this protected activity did not inform management's treatment of Complainant.

The October 5, 1998 Arbitration Opinion and Award, reinstating Complainant to employment, arose under a labor-management collective bargaining agreement that did not constitute an EEO proceeding. However, Complainant successfully presented defenses to her removal, including that she suffered from a major depressive disorder and other psychological/psychiatric conditions. *See Bansavage v. Veterans Administration,* EEOC App. No. 01861953, 1986 WL 634158 (Sept. 30, 1986) (raising discrimination issue in non-EEO forum can support allegation of reprisal within purview of EEOC regulations). A Library health officer testified that Complainant had a disability covered by the Americans with Disabilities Act. L.Ex. 1 at 9-10. She further testified as to accommodations recommended by Complainant's psychiatrist. L.Ex. 1 at 9. The arbitrator concluded: "The testimony or report of <u>every</u> mental health professional involved in this matter . . . is that [Complainant] is not capable of violence." L.Ex. 1 at 21 (emphasis in original). This medical evidence, and proof that analogous threats in comparative situations led the Library only to reprimand other offending employees, resulted in Complainant's favorable Arbitration Award. L.Ex. 1 (C.Ex. 3) at 21-22.

<u>The AWOL Charge and Memorandum</u>

The Library subjected Complainant to an adverse employment action by charging her with 5.3 hours AWOL and memorializing that measure in a memorandum.

On September 25, 1997, Complainant arrived at work 5.3 hours late. While she did telephonically contact secretary Ingrid Nelson, the conversation constituted general talk and did not directly convey the message that Complainant would be late for work and that Ms. Nelson should so inform Complainant's supervisor. Moreover, Ms. Nelson was not known to Complainant to convey such messages nor was she the appropriate person to do so pursuant to the controlling collective bargaining agreement and Ms. Lancaster's instructions to staff.[29] After Complainant's late arrival on September 25, she caustically rebuffed Ms. Lancaster's questions regarding the reason for her lateness and to whom she reported that she would be late, while telling Ms. Lancaster that it was "none of her business."

Ms. Lancaster issued Complainant a memorandum on October 2, 1997, captioned "Failure to Observe Time and Attendance Procedures" after Complainant did not respond to the one-week opportunity Ms. Lancaster afforded her to explain her tardiness and how she met her calling-in obligation. ROI Ex. 15. The clear weight of

[29] I do not find the testimony of Mildred Washington to warrant a contrary conclusion. Ms. Washington, an information resources specialist, worked in ALD in 1997. Although she believed that an ALD employee such as Ingrid Nelson could take late arrival call-in messages, Ms. Washington acknowledged that she was never supervised by Ms. Lancaster. TR 508-08, 519-35.

the evidence establishes that the Library imposed those actions for legitimate and nondiscriminatory reasons. Complainant was 5.3 hours late for work on September 25, 1997, and she failed to follow established and controlling procedures to notify her supervisor of her late arrival. When pressed, Complainant refused to respond to her supervisor's proper questions as to why she was late and whom she may have phoned to report her late arrival. Moreover, despite being offered one week to provide that information before an AWOL memorandum was issued, Complainant declined to be forthcoming.

Complainant has presented insufficient evidence to establish that the Library's explanation is pretextual or otherwise unworthy of credence, such as proving that others, not in her protected groupings, were treated more favorably in comparative circumstances. Accordingly, Complainant has failed to establish that the Library discriminated against her in regard to charging her 5.3 hours AWOL and issuing her a consequent memorandum.

Complainant's Post-Reinstatement Assignment Details

Prior to Complainant's disciplinary termination in 1998 she was permanently assigned to a production assistant (GS-8) position within CRS/ALD. She was subsequently reinstated in November of that year pursuant to the Arbitration Opinion and Award. The Award directed, *inter alia*, that Complainant "be reinstated, with all rights and benefits, but to a different assignment where she will not work for, or to the extent possible, with" Ms. Lancaster. L.Ex. 1 at 23.

Post-reinstatement, Complainant was given five temporary details commencing on November 2, 1998 and ending on June 20, 2000, the approximate date of her disability retirement. During those 19+ months Complainant was never afforded the permanent reassignment contemplated by the Arbitration Award. Complainant technically was still assigned to a permanent position—one in which she could no longer serve—in CRS/ALD under Robin Lancaster. TR 483-84, 495. However, that in no manner effectuated the make whole Arbitration Award in Complainant's favor.

Management has not provided a plausible explanation why it did not permanently reassign Complainant. Moreover, it has presented no evidence that permanent positions were unavailable for which Complainant was qualified and eligible for reassignment. The Library's arguments are unavailing, in this regard, that the Complainant was not a **qualified** person with a disability because her attendance was so faulty. LOC presented no evidence that Complainant's attendance was such prior to her reinstatement. While she admitted that time management issues arose in 1997, Complainant did not experience grave attendance problems until after her reinstatement, when she should have been placed swiftly in a permanently assigned position.

Instead of permanently reassigning Complainant, management sent her on trial details where she would have to prove herself before an office would accept her on a

permanent basis. Associate Director for the Office of Workforce Development Bessie Alkisswani testified that she was charged with finding a suitable assignment for Complainant. Then head of the CRS Administrative Office, she was the primary person responsible for Complainant's post-reinstatement assignments. TR 453. Ms. Alkisswani was unaware of any question regarding Complainant's health until post-reinstatement when she received reports from offices to which Complainant had been detailed regarding her attendance and behavior. TR 452-56, 474-79, 498.

Ms. Alkisswani acknowledged that offices accepted Complainant, in essence, because she was a *freebee:* "What I was looking for is a place where they could use additional assistance at the level. Most people don't turn down additional assistance. They usually say sure. . . . Sure, we'll try her out and see how it works. And if it was successful, she would have had a permanent slot." Ms. Alkisswani professed to utilizing the details because there were "problems with [Complainant] getting to work, whether or not she could do the job. . . ." TR 474, 479.

Most telling is Ms. Alkisswani's testimony that she did not know why management did not permanently reassign Complainant immediately upon reinstatement. "I can't answer that right now because I don't know why the decision was made to reassign her because that wasn't my decision. And I don't remember where the decision came from and I don't know the reason." TR 498. Ms. Alkisswani asserts that she was not aware of the terms of the arbitrator's reinstatement order. TR 499. For a person of Ms. Alkisswani's rank and prime responsibility regarding Complainant's reinstatement assignment to assert or be left in such ignorance casts in serious doubt the Library's *bona fides* in its treatment of Complainant. Additionally, Ms. Alkisswani's memorandum to Complainant, dated December 30, 1998, informing Complainant that her first detail (in CRD) was being terminated to make room for new CRD hires suggests that prompt placement of Complainant was not a priority—rather, management was more concerned with *shopping* Complainant on a trial basis to different CRS Divisions for its own convenience. Specifically, Ms. Alkisswani's memorandum stated: "<u>We are still in the process of determining a permanent placement for you within the Service, however, and hope to have a decision soon</u>." L.Ex. 2; *see* TR 477-78 (emphasis added). Eighteen months later, at Complainant's retirement, Ms. Alkisswani's assurance was still uneffectuated.

Michael Koempel, Assistant Director, Government and Finance Division, was approached by CREA official John Contrubis about Complainant coming to his Division on detail, and consented to Complainant's detail to his Division from January 17, 1999 to July 15, 1999. He was aware that Complainant had been the subject of a prior adverse action. Mr. Koempel. Mr. Koempel felt that Complainant "needed a place to essentially put herself back together. She had a very rough time and so rehabilitation is not meant there in some sort of legal sense or response to some other thing, it was really about—just an act of understanding. . . ." TR 224-27, 262-65.

A clear indication of the real barriers to Complainant's permanent reassignment is derived from the testimony of Lillie Thompson, Complainant's immediate supervisor

during her Government and Finance Division detail. The detail came about after Ms. Thompson's Chief (Mr. Koempel) told her that ALD needed a Division to take Complainant because Complainant and her supervisor (Ms. Lancaster) were having problems. Soon thereafter Ms. Thompson encountered Ms. Lancaster who wished her luck and cautioned that Ms. Thompson would need all of the energy she had to deal with Complainant. TR 340-41. Ms. Thompson opined to Mr. Koempel that Complainant seemed to be prejudged by some individuals on her staff because of her reputation. TR 335-37.

John Contrubis, CREA Vice President and formerly an attorney in ALD, who successfully represented Complainant during her arbitration proceeding, testified about his perceptions of management's post-reinstatement attitudes towards Complainant. Mr. Contrubis attempted to obtain assignments for Complainant. He sensed that management really did not want Complainant: "I think it was more trying to find a location for her where that division chief would basically agree to take her in, and I think that might have been the only criteria at that time, you know, who was willing to take her in." TR 440, 435-40. Nevertheless, Mr. Contrubis actively participated on Complainant's behalf in attending meetings with her supervisors regarding the schedule and performance issues, seeking waivers of the limit on the duration of details where the situation warranted, and encouraging and assisting Complainant in moving toward and obtaining disability retirement.

CRS Director Daniel Mulhollan's sworn response, dated February 6, 2003, in the ROI file (Ex. 10), offers the following explanation:

> Our records reflect that Ms. Pembrook was detailed to five offices/divisions in CRS to meet workload requirements while we identified a permanent placement for her. Identifying a permanent placement was made more difficult because of the need to find a suitable placement at her grade level that would accommodate her ADA related requirements. Also during this period, Ms. Pembrook was pursuing disability retirement, which added to the uncertainty of her availability for permanent placement. Throughout this period, we worked closely with representatives from the Congressional Research Employees Association (CREA) who provided assistance to Ms. Pembrook.

Discrimination Allegation

Complainant alleges that the Library discriminated against her based on her race, color, sex, and disability in respect to her post-reinstatement detail assignments between November 1998 and June 2000.

The Library subjected Complainant to an adverse employment action in failing to reinstate her to a permanently assigned position from November 1998 until her disability retirement in June 2000. This is not simply the case of a lateral reassignment from one position to another with equivalent duties and employment emoluments. Instead, the

Library reassigned Complainant from a permanent position to an unanchored floating series of temporary assignments that truly set her adrift. In doing so, LOC imposed materially adverse consequences affecting the terms, conditions or privileges of Complainant's employment. *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998); *Stewart v. Evans*, 275 F.3d 1126, 1134 (D.C. Cir. 2002) (quoting *Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999)); *Armstrong v. Jackson*, 2006 U.S. Dist. LEXIS 48149 at 18-19 (D.D.C., Jul. 17, 2006). The key inquiry is whether the plaintiff is negatively affected, not the type of action taken by the employer. *See Tsehaye v. William C. Smith & Co.,* 402 F.Supp.2d 185, 193-94 (D.D.C. 2005) (quoting *Stewart v. Evans*, 275 F.3d at 1134); *Holcomb v. Powell*, 433 F.3d 889, 902 (D.C. Cir. 2006).

No substantial direct or inferential comparative evidence has been presented to establish that the Library was motivated by Complainant's race, color, or sex in her assignments following her November 1998 reinstatement.

The Library was plainly aware of Complainant's disability status under the Americans with Disabilities Act prior to her November 1998 reinstatement. While Dr. Charles provided this information prior to the removal, it was brought home during the hearing on Complainant's removal through the testimony of her medical experts. Despite its legal obligation under the Arbitration Award—promptly and fully to reinstate Complainant to a suitable permanent assignment—the Library failed to do so for the entire 19-month period preceding Complainant's disability retirement. The Library has not provided any persuasive and nondiscriminatory explanation for its failure to properly reassign Complainant. I do not find compelling their articulations that they were acceding to union requests and thrown off track by Complainant's disability application. LOC's justifications have ranged from ignorance of its obligation to incriminating, incredible and conflicting accounts, as described in the findings, *supra*. One need not look beyond the Library's dueling accounts to sustain this conclusion: informing Complainant at the outset in writing that the detail assignments would be short-lived and that LOC was working actively on her permanent reassignment, while testifying at the hearing that Complainant had to prove herself, during a temporary detail at a host office, to obtain a permanent reassignment.

I conclude that Complainant has made out a *prima facie* case of disability discrimination, in the failure to permanently reassign her, that the Library has not rebutted.

Retaliation Allegation

Complainant alleges that the Library retaliated against her for winning her arbitration case in respect to her post-reinstatement detail assignments between November 1998 and June 2000.

Complainant exercised her rights under the Americans with Disabilities Act at her 1998 removal hearing. A key pillar of her defense was to present pivotal psychiatric testimony from both Library and private mental health practitioners diagnosing her

psychiatric ADA disability and utilizing it to establish that Complainant was not capable of carrying out her physical threat against her supervisor. This defense constructively constituted Complainant's request for a reasonable accommodation for her psychiatric impairment, *i.e.*, that her threat be discounted because of the medical judgments of mental health practitioners concerning her impairment.

There is no question that the Library's temporary detail assignments of Complainant are actionable as retaliation allegations under the Americans with Disabilities Act. *See Burlington Northern v. White*, 126 S.Ct. at 2415; *Gavrilovic v. Worldwide Language Res.*, 441 F.Supp.2d 163, 179 (D.Me. 2006). In applying the operative test, the Library's contested actions would be viewed as materially adverse by a reasonable employee—*i.e.*, harmful to the point that they could well dissuade a reasonable worker from exercising his or her rights under the ADA.

I conclude that Complainant engaged in protected activity and almost immediately thereafter suffered adverse Library employment actions regarding her temporary detail assignments. The Library has failed to rebut Complainant's *prima facie* showing of retaliation.

The Voluntariness of Complainant's June 2000 Disability Retirement

Complainant seeks back pay from the date of her disability retirement forward. Implicit in this claim is the contention that in not permanently reassigning Complainant, management constructively discharged her—*i.e.*, that her disability retirement was not voluntary.

To prove a claim of *constructive discharge*, Complainant must show: 1) a reasonable person in her position would have found the working conditions intolerable; 2) conduct that constituted discrimination against Complainant created the intolerable working conditions; and 3) Complainant's involuntary resignation resulted from the intolerable working conditions. *Blaylock v. Potter,* EEOC App. No. 01A42564 (May 11, 2005), 2005 EEOPUB Lexis 2383 at 5. The working environment must have been so intolerable that the resignation qualified as a fitting response. *Pennsylvania State Police v. Suders,* 542 U.S. 129, 133-34 (2004); *see Hussain v. Nicholson,* 435 F.3d 359, 367 (D.C. Cir., 2006). *See also Carmon-Coleman v. Department of Defense,* EEOC App. No. 07A00003 (Apr. 17, 2002), 2002 EEOPUB Lexis 2344 at 16-17 (constructive discharge found where supervisor, *inter alia*, "continuously and publicly humiliated" employee, refused to provide reasonable accommodation and threatened to transfer employee to another department, and there was testimony that the supervisor said "just apply enough pressure and she'll eventually quit"); *Reynolds v. Department of Navy,* EEOC App. No. 01863210 (Oct. 30, 1987), 1987 WL 769322 (EEOC) (work environment was "charged with antagonism," agency exceeded authority in ordering psychiatric exams and psychiatric records to support sick leave requests, and employee had been labeled as troublemaker).

In reviewing the record, I have not found persuasive evidence that Complainant was severely mistreated in the strict context of her several detail assignments. To the contrary, the record discloses that for the most part management acted compassionately towards Complainant and provided her with many accommodations, albeit it did not afford her the permanent reassignment to which she was entitled. TR 241-42, 247-48, 325-26, 442-43, 449-50, 603-07.

It appears that the progressive decline in Complainant's mental and emotional health, and not her treatment by management during those details, necessitated her disability retirement. Union representative Contrubis believes he probably suggested to Complainant that she retire on disability because he feared that she would be fired if she did not retire. TR 445-46. I infer that his recommendation arose in the context of Complainant being unable to meet the time and attendance requirements by her unremitting several hours-late daily work arrivals.

One of Complainant's physicians, Antoinette Lewis, M.D., in supporting Complainant's disability retirement application, stated as follows: "It is my strong recommendation that [Complainant] be placed on disability retirement. The accommodations recommended [flexible arrival time and working as late as possible and on weekends] were . . . to provide some immediate although temporary reduction in stress. These accommodations will not alleviate [Complainant's] dysfunction." C.Ex. 5 at 7.

Complainant's therapist, Elisabeth LaMotte, LICSW, wrote: "Upon [Complainant's] return to a difficult employment situation in 1998, she describes intense feelings of anxiety, rejection, and ostracism when in her office environment. These feelings overwhelm and inhibit her ability to perform at times. . . . Although she wants very much to remain in her job where she has worked hard for eleven years, this is not in her best physical or emotional interest in my professional opinion." C.Ex. 15 at 1-2.

Thus, the medical testimony uniformly reflects judgments that Complainant's state of health required her retirement on disability grounds. No one management official or supervisor pressured Complainant to retire, although her union representative advised it fearing that she could otherwise be fired. In its context, that counsel probably reflected the jeopardy that inevitably flowed from Complainant's constant tardiness in reporting to work. Complainant even testified that her friends approached her in August 1999 and suggested that she consider disability retirement. TR 180.

Based upon the foregoing, I conclude that a person in Complainant's circumstances would not have felt compelled to resign or retire as a reasonable response to the Library's treatment. Instead, it was Complainant's health that seemingly motivated her retirement.

Accordingly, I hold that no *constructive discharge* occurred.

Complaintant's Other Allegations: LOC Police Harassment and Laptop Access

While neither of these claims are discrete issues before me I shall consider them as context matters.

Complainant testified that in May 1998, after her termination, she entered the Library's Madison Building to meet with her union representatives. Following the meeting, she encountered a Capitol Police officer, whom Complainant recognized as a friend of her antagonist Ms. Lancaster. The officer told her that she did not belong in the building and threatened to arrest her. TR 358-63. Complainant testified to July 1998 and October 2004 incidents when, sequentially: Capitol Police officers escorted her out of the Cannon House building after she untied her shoes to remove money; referred to her as being "crazy;" and itemized things she reputedly had done. TR 369-73. The backdrop was the Library Security formally excluding Complainant from certain areas of LOC facilities for six months, commencing June 11, 1998. TR 365-66, 403. Her exclusion was rescinded immediately prior to Complainant's November 1998 reinstatement. TR 403, 417-18, C.Exs. 32; L.Ex. 15. I find that the record discloses no evidence directly connecting CRS management with the alleged events or that the police were in any way motivated by Complainant's race, color, sex, disability or prior protected activity.

Mandy McGowan, a team leader and computer specialist in the CRS Automation Office in 1994-1998, testified that she was able to observe the Automation Office's function of loaning laptop computers to employees, although laptops were not her responsibility or part of her day-to-day operations. TR 731-32. Ms. McGowan testified that the computer loan procedure was different for Complainant than it was for other employees. According to Ms. McGowan, "it became a big joke actually." TR 733. People "typically gave [Complainant] a harder time. . . . Either they would tell her that the laptop was not ready or would give her some kind of reasons that the last time when she took [one] out, she didn't bring it on time. . . ." TR 734. All of the incidents occurred before Complainant's 1998 removal. TR 758. According to Ms. McGowan, a staffer—whom she could not identify—represented that ALD Assistant Chief Kent Ronhovde had specifically asked Jeff Griffith, Automation supervisor, to monitor Complainant's laptop activities. TR 736, 750. Ms. McGowan never asked Mr. Griffith about that assertion. TR 751.

There is far too insufficient evidence to link the foregoing alleged actions, even if true, to Complainant's race, color, sex or disability. Moreover, Complainant's publicized EEO protected activity, as discussed, *supra*, first occurred during her arbitration proceeding, which was held after these purported events.

JUDGMENT AND REMEDY

The Library has not discriminated against Complainant on the basis of race, color sex, or disability in charging her with 5.3 hours of absence without leave and providing her with a consequent memorandum.

The Library, in its failure to provide a permanent position and instead placing Complainant in temporary detail assignments between November 1998 and June 2000, discriminated against her on the basis of disability and in retaliation for her engaging in protected activity under the Americans with Disabilities Act.

When discrimination is found, the agency must provide the victim with an equitable remedy that constitutes full, make-whole relief to restore him or her as nearly as possible to the position he or she would have been in absent the discrimination. *Carroll v. USPS*, EEOC App. No. 01994040 (2002), 2002 EEOPUB Lexis 3522 at 9 (citing *Franks v. Bowman Transp. Co*., 424 U.S. 747, 764 (1976) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975)). This relief may include, in an appropriate case, compensatory damages in the form of pecuniary (out-of-pocket expenses) and non-pecuniary damages (pain and suffering), backpay, attorney's fees and costs. *See Caguiat v. Gonzales*, EEOC App. No. 01A52651 (Jul. 31, 2006), 2006 EEOPUB Lexis 5047 at 9.

In the instant case, Complainant voluntarily retired on disability. Since there was no constructive discharge, an award of backpay is not appropriate. Moreover, Complainant was not represented by an attorney and thus is not entitled to attorney's fees or costs. As to pecuniary damages,[30] Complainant neither requested any reimbursement of out-of-pocket expenses nor did she submit any receipts; thus, no pecuniary damages will be awarded.

To merit an award of non-pecuniary damages, Complainant must present objective evidence that the Library's discriminatory actions caused her to suffer the complained of harm. No precise formula applies to this situation, but an award should reflect the nature, severity, and duration of the harm. *Carroll v. USPS*, EEOC App. No. 01994040 (May 29, 2002), 2002 EEOPUB Lexis 3522 at 13. In this case, I find that Complainant has provided sufficient evidence to support an award for compensatory damages.

Complainant's mental health therapist testified that Complainant had multiple psychiatric problems, exacerbated by what was happening at the workplace. She was moved around repeatedly when she needed one place to work that would provide her a better structure and routine. TR 618-19. Supervisor Juanita Campbell noted deterioration in Complainant's ability to report to work on time. She sought to retain Complainant because Complainant was comfortable working there and uncomfortable in going to different offices as she awaited approval of her disability retirement. TR 599-600.

Complainant testified to finding her work during the details demeaning and below her grade level, and that her co-workers were unfriendly. TR 131-44, 150-52. Complainant

[30] Pecuniary damages are out-of-pocket expenses incurred as a result of the employer's unlawful actions. They may include such items as moving expenses, medical and psychiatric expenses, physical therapy and other quantifiable out-of-pocket expenses. *Caguiat,* 2006 EEOPUB Lexis 5047 at 10 (citing Enforcement Guidance: "Compensatory and Punitive Damages Available Under Section 102, the Civil Rights Act of 1991," EEOC Notice No. 915.002 (Jul. 14, 1992) at 14).

was shifted around and sensed a pattern of being shuttled from place to place where she would never fit. She sensed hostility and was escorted out of the office each day. TR 160-76. Soon Complainant's concentration skills declined and she professed to being very upset and sick, losing energy, being tired all the time and frustrated. TR 176-79. Complainant resisted her union representative's entreaty that she apply for disability retirement but was struck when her friends iterated how tired she was. TR 179-80.

I am mindful that up to the time of Complainant's adverse action removal in 1998, the record contains no indication that Complainant's work attendance, as a general matter, was a critical problem. Moreover, there was no finding that her performance was less than satisfactory. However, following her November 1998 reinstatement, and the initiation of Complainant's temporary detail assignments, her tardiness became incessant and incompatible with proper on-the-job employee functioning. While it very well could be that Complainant's deterioration would have occurred notwithstanding her discriminatory and retaliatory temporary assignments, I cannot cavalierly eliminate the unrebutted inference that the Library's actions compounded Complainant's stress, pain and decline. While I conclude that no Library official wanted to harm Complainant in any way, grievous damage occurred.

I have reviewed carefully the Equal Employment Opportunity Commission (EEOC) and Government Accountability Office Personnel Appeals Board (GAO PAB) case law on this issue of determining non-pecuniary damages for pain and suffering and have found no neat formula or *Laffey* Matrix[31] for assessing damages. The amounts appear to be calculated on a common law basis by reference to EEOC precedent.

I shall look first to precedent from the GAO Personnel Appeals Board. In the matter of *Gaston v. GAO*, Docket No. 99-02 (Jul. 27, 2004) (*en banc*) (viewable at http://pab.gao.gov), the Board upheld a compliance decision awarding $5,000 in non-pecuniary damages. The Petitioner in that case had testified that work-related stress affected her symptoms of depression, including insomnia and chronic fatigue syndrome. The compliance decisions (of the Board and the Administrative Judge) noted that the Petitioner had not presented extensive evidence on the issue, but there was "sufficient testimony and documentary support for a nominal award to compensate for the Agency's actions that were demeaning, stress-inducing, and damaging to Petitioner's reputation." Final Decision at 12. The initial compliance decision had noted that Petitioner had failed to call medical experts, or to present the testimony of her mother. Initial Decision on Compliance (Mar. 30, 2004) at 15. I do not consider *Gaston* to inform the decision herein because it appears that this Complainant suffered far more from the unlawful conduct and, unlike Ms. Gaston, she presented medical testimony addressing her harm.

[31] The schedule for determining hourly rates for attorneys where fee shifting statutes allow recovery of reasonable attorney fees. It is based on years of practice and prevailing market rate. *See Laffey v. Northwest Airlines,* 572 F.Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985).

The award of non-pecuniary compensatory damages should reflect the extent to which the agency's discriminatory action directly or proximately caused the harm and the extent to which other factors also caused the harm. *Eberly v. USPS*, EEOC App. No. 07A30085 (May 20, 2004), 2004 EEOPUB Lexis 2734 at 15 (citations omitted). The award should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. *Id.* (citations omitted); *see, e.g., Ford v. Secretary of Veterans Affairs*, EEOC App. No. 07A40065 (Aug. 17, 2004), 2004 EEOPUB Lexis 4566 ($15,000 non-pecuniary damages awarded for complainant's 2½ to 3 years of emotional stress where she was falsely accused of performance problems, had personnel records altered, and was passed over four times on the basis of race for a position for which she qualified); *Lam v. Secretary of Agriculture*, EEOC App. No. 01961589 (June 11, 1998), 1998 EEOPUB Lexis 3624 ($18,000 non-pecuniary damages awarded when discrimination spanned a 13-month period and complainant developed high blood pressure and significant psychological trauma as evidenced by testimony of her husband and doctor); *Canino v. Secretary of Navy*, EEOC App. No. 01983857 (Oct. 3, 2000), 2000 EEOPUB Lexis 6347 ($20,000 non-pecuniary damages awarded where emotional distress was "often severe" over 10 months; complainant had feelings of fear, depression, anxiety, fatigue and intermittent panic attacks with brief period of hospitalization); *Hatton v. Postmaster General,* EEOC App. No. 01985377 (June 6, 2000), 2000 EEOPUB Lexis 4005 ($25,000 non-pecuniary damages awarded where complainant suffered from prolonged feelings of frustration, anger, loss of self-esteem and betrayal); *Eberly,* 2004 EEOPUB Lexis 2734 ($10,000 non-pecuniary damages awarded for complainant's nine months of "severe" emotional distress); *Carroll*, 2002 EEOPUB Lexis 3522 ($12,000 non-pecuniary damages for complainant suffering stress and trauma from being portrayed as pariah and outcast by agency officials because of her disability).

Any likelihood, *arguendo*, that Complainant may already have been in precariously fragile mental health at the time she suffered discrimination and retaliation does not insulate the Library from exposure to non-pecuniary damages herein. The EEOC applies the principle that "[a] tortfeasor takes its victims as it finds them." *Carroll,* 2002 EEOPUB Lexis 3522 at 16-17; *Wallis v. USPS*, EEOC App. No. 01950510 (Nov. 13, 1995), 1995 EEOPUB Lexis 2820 at 26-27. There are exceptions to this rule: 1) when a complainant has a pre-existing condition, the agency is liable only for the additional harm or aggravation caused by the discrimination; and 2) if the complainant's pre-existing condition inevitably would have worsened, the agency is entitled to a reduction in damages reflecting the extent to which the condition would have worsened even absent the discrimination. *Carroll,* 2002 EEOPUB Lexis 3522 at 6; *Eberly,* 2004 EEOPUB Lexis 2734 at 16 (citations omitted). The burden of proof on this point is on the employing agency. *Carroll,* 2002 EEOPUB Lexis 3522 at 6.

Having reviewed the precedent, it is my judgment that the palpable degree of Complainant's stress and its effects over an uninterrupted nineteen-month period of discrimination and retaliation, when viewed in the context of her serious and deepening illnesses, warrants a significant award of non-pecuniary damages.

Looking only at Complainant's injuries over the 19-month period of discrimination and retaliation, and considering relevant case law, I have concluded that an award of $20,000 is appropriate.

CONCLUSION

The Library did not discriminate or retaliate against Complainant in respect to the matter of absence without leave or the related memorandum.

The Library did discriminate and retaliate against Complainant, on the basis of disability, in failing to reassign her to a permanent position for the period November 1998 to June 2000. The appropriate remedy is non-pecuniary damages in the amount of $20,000.

SO ORDERED.