OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

SHERRY M. BRITTON	)	
	)	
Complainant,	)	
	)	
v.	)	**Case No. 01-AC-346(CV,FM,RP)**
	)	**Date: June 3, 2003**
OFFICE OF THE ARCHITECT	)	
OF THE CAPITOL	)	
	)	
Respondent.	)	
	)	

Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens, Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION AND REMAND ORDER OF THE BOARD OF DIRECTORS

I. Introduction

This reprisal and Family and Medical Leave Act ("FMLA") case, brought under Section 405 of the Congressional Accountability Act ("CAA") (2 U.S.C. §1405), is before the Board pursuant to the Complainant employee's petition for review of the Hearing Officer's dismissal of the complaint, prior to discovery or a hearing. The issues on appeal essentially deal with the timeliness and merits of the Complainant's FMLA claims and whether her allegedly related discipline by the Employing Office ("the Architect") is encompassed by the CAA's anti-retaliation provision (Section 207 of the CAA, 2 U.S.C.§1317).

We affirm the Hearing Officer's conclusion that the Complainant's denial of FMLA leave by Respondent is time-barred. However, we reverse the Hearing Officer's dismissal of Complainant's alleged reprisal-motivated disciplinary action and remand that issue to the Hearing Officer for further proceedings consistent with the opinion.

II. Statement of the Case

A. Background[1]

On April 13, 2000 the Complainant employee left work abruptly during the afternoon without first providing notice or obtaining employer permission, upon learning telephonically that her child had committed a violent act at school and was about to be taken into police custody.[2] The Complainant did not contact her supervisor until the afternoon of the following day (Friday) when she telephonically asked to be placed on FMLA status from the time of Thursday departure through the following Monday. [3] Her supervisor disapproved her FMLA request for Thursday-Friday but tentatively approved it for the prospective Monday absence. The Architect's management, at its own initiative and with finality, ultimately denied the Complainant's FMLA request covering April 13-14, 2000, on August 18, 2000. The Complainant did not seek counseling from the Office, pursuant to the CAA, until May 11, 2001, which was more than 250 days after August 18, 2000.

The Architect, on June 20, 2000, proposed that the Complainant be suspended without pay for five days: for being on absence-without-leave ("AWOL") on April 13-14, 2000; for using foul language before leaving the office on April 13; and for driving unsafely and failing to identify herself when leaving the employee parking lot on April 13. The Architect afforded the Complainant what the pleadings refer to as a "hearing", and on November 15, 2000, the Architect issued to the Complainant a reduced penalty in the form of a formal reprimand citing the Complainant (1) for uttering a profane expletive at work and (2) leaving work without supervisory permission. The reprimand remained in the Complainant's official personnel file for one year and still may be utilized to enhance penalties should the Architect again consider disciplining the Complainant. The pleadings do not disclose whether the proposed suspension and resultant reprimand otherwise affected the Complainant's working conditions; e.g., regarding assignments, promotability, performance evaluation, etc. The Complainant sought counseling from the Office of Compliance on May 11, 2001, which was within the prescribed 180-day

---

[1]Inasmuch as this appeal arose from a complaint dismissal the Board shall accept as true all well-pleaded factual complaint allegations and draw all reasonable inferences in the Complainant's favor. *H.J. Inc. Northwest Bell Telephone Co.*, 492 U.S. 229, 249-50 (1989); *Conley v. Gibson*, 355 U.S. (1957); and *In re Burlington Coat Fact*ory Sec. *Litig.*, 114 F.3d 1410, 1424-25 (3d Cir. 1997).

[2]In 1999 the Architect permitted (after she grieved the matter) the Complainant to alter her normal working hours to accommodate the medical and other special needs of her child.

[3]Upon returning to work on April 18 the Complainant completed two written leave request slips reasserting her oral FMLA requests for her absences on April 13, 14 and 17, 2000.

period from the imposition of her formal reprimand.

B. Hearing Officer's Decision

The Hearing Officer, on written motion and oral arguments, dismissed the complaint prior to any discovery or an evidentiary hearing. The Hearing Officer stated his reasons on the record and issued a short written dismissal order referencing the hearing transcript of his findings. The dismissal was based upon the following conclusions: (1) the FMLA Claim was time-barred for not having been presented within 180-days from when the Architect disapproved the Complainant's FMLA request for April 13-14, 2000; alternatively, (2) the Complainant failed to establish her entitlement to FMLA Leave; (3) the retaliation allegation did not state a claim because (a) requesting and taking FMLA leave was not a protected activity, (b) formally reprimanding the Complainant for requesting and taking FMLA leave did not rise to an actionable adverse action, and (c) there was no showing of a causal connection between the leave request and the formal reprimand; (4) the hostile working environment claim was redundant to the reprisal claim. In view of his conclusions, the Hearing Officer did not address the Architect's argument that the Complainant's failure to plead that she had worked the statutorily requisite number of hours in the twelve month period preceding her FMLA request was fatal to her claim.[4]

III. Positions of the Parties

A. Appellant/ Complainant

The Complainant contends that subsequent to the Architect's August 2000 determination to deny her FMLA leave for April 13-14, 2000, the Architect, within the 180- day filing period prior to her counseling request, altered the time period of her FMLA eligibility. She also argues that the statute of limitations period should begin to run from November 15, 2000, when the Architect formally reprimanded her, *inter alia,* for being AWOL during the April 2000 period for which she was denied FMLA leave. The Complainant further contends that by giving her a written reprimand the Architect committed an act proscribed by the anti-reprisal clause of the CAA.

B. Appellee/Architect

The Architect argues that its August 18, 2000 denial of the Complainant's FMLA request was a discrete act from which the 180- day filing period commenced. Moreover, the Architect's later re-computation of the Complainant's FMLA eligibility period was unrelated to her denied FMLA request, but instead dealt with computing the twelve month period for measuring the

[4] That contention is without merit. The Office of Compliance FMLA Regulations, at §825.110(c), state:"[A]n employing office must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not 'eligible' for FMLA leave". Accordingly, that showing constitutes an affirmative employing office defense and not a complainant employee's pleading requirement.

Complainant's eligibility to claim up to 12 weeks of FMLA leave. The Architect also submits that the Complainant had not engaged in protected activity by requesting and taking FMLA leave, and that a formal reprimand does not fall within the protection of the CAA anti-reprisal clause.

IV. Analysis and Conclusions

A. Timeliness Issue

The Supreme Court held in *Delaware State College v. Ricks*, 449 U.S.250, 257-58 (1980), that Title VII relief is generally not available with respect to a decision, which is made during the limitations period, not to rescind a discriminatory decision that took place outside the limitation period. In not allowing *Ricks* to challenge his termination, the Supreme Court held: "It is simply insufficient for Ricks to allege that his termination "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Ricks*, 449 U.S. 257-58.

In *National Railroad Passenger Corp. [Amtrak] v. Morgan*, 536 U.S. 101 (2002), the Supreme Court held that when an employee seeks redress for discrete acts of discrimination or retaliation, (s)he may not invoke the doctrine of *continuing violation* to recover for acts that occurred prior to the filing period. The Court did allow employees to use the doctrine, however, when they allege hostile work environment,[5] permitting employees to file within the requisite time period for any act that is part of the hostile work environment. According to the Supreme Court, "discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate 'unlawful employment practice'". *Id.* In contrast, hostile environment claims involve unlawful employment practices that cannot be said to occur on any particular day, but occur over a series of days or years. *Id.* (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)). "Discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at p. 114.

The Complainant has alleged the following discrete events: (1) in 1999 the Architect denied her request to alter her basic working hours to accommodate the medical and special needs of her child until she had successfully grieved the matter; (2) in mid-April and August 2000 the Architect partially disapproved her request for FMLA leave to deal with an emergency connected with her child's diagnosed conditions; and (3) in November 2000 the Architect decided formally to reprimand the Complainant for misconduct, including leaving work without permission during the April period of her disapproved FMLA request.

The Hearing Officer's dismissal on untimeliness grounds would be sustainable only "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the

[5]Count III of the Complaint does allege a hostile work environment.

allegations." *H.J. Inc. v. Northwest Bell Telephone Co.,* 492 U.S. 229, 249-50 (1989). We do find such required clarity in this pleaded record. The Complainant has alleged three individual and discrete acts relating to her alleged exercise of FMLA rights regarding her child, only the last of which occurred within the 180 filing period in which the Complainant timely sought counseling. While the Complainant characterizes these actions as constituting a hostile work environment they are nevertheless discrete acts that do not represent the time-blurred conduct the Supreme Court addressed in *Amtrak* as falling within the narrowed *continuing violation* doctrine. *See, e.g., Gary G. Sharpe, et. al. v. Bruce Cureton, et al.,* 319 F.3d 259 (6th Cir. 2003); and *Florence Deanna Ballard v. Steven A. Kandarian, Executive Director, Pension Benefit Guaranty Corp.,* 2002 U.S. App. LEXIS 26759 (D.C. Cir., 2002).

Accordingly, we affirm the Hearing Officer's conclusion that the Complainant's FMLA claim is time barred regarding the Architect's denial of her requests for FMLA leave for her absences on April 13-14, 2000.

B. The Reprisal Claim

Applying Title VII precedent, the Hearing Officer concluded that the Architect's formal reprimand of the Complainant, did not rise to the level of an actionable personnel event. In addition, the Hearing Officer expressed some sympathy, while not definitively ruling on the Architect's position, for the argument that the Complainant had not engaged in activity protected by the CAA's anti-reprisal clause, which only encompasses the opposition to unlawful practices or participation in the CAA's dispute resolution process. Instead, the Complainant alleged reprisal because she had exercised her rights to request and take leave under the FMLA.

We do not find it necessary to interpret the scope of Section 207 of the CAA to decide this appeal because the FMLA's internal anti-reprisal provision (29 U.S.C. §2615) is applied to this case through section 202(a) of the Congressional Accountability Act (2 U.S.C. § 1312(a)). [6]

The FMLA makes it illegal for an employer "to interfere with, restrain or deny the exercise of or attempt to exercise an [FMLA] right . . . ."[*29 U.S.C. §2615(a)(1)*]. That protection is also reflected in the Office of Compliance's FMLA Regulations at §825.220. The anti-retaliation provision plainly covers Complainant's act of requesting FMLA leave under 29 U.S.C. §2612; and her opposition to the Architect's proposal that she be suspended for five days for alleged misconduct, which included the AWOL period for which the Architect had denied the Complainant's FMLA requests. The prohibition clearly is broader than a non-discrimination anti-retaliation provision. Indeed, the immediately following provisions prohibit discrimination against employees who oppose practices made unlawful by the statute or who participate in the

[6] Although the written complaint did not specifically allege that the Architect retaliated against the Complainant in violation of 29 U.S.C. §2615, it is premised upon the FMLA. Accordingly, the Complainant put the Architect on notice that she was asserting FMLA rights, obligations, and protections, potentially including the FMLA's anti-retaliation provision.

FMLA enforcement process. [*29 U.S.C. §2615(a)(2) & (b)*]. In other words, when Congress intended the FMLA to limit protection to discrimination, it stated so expressly.

The prohibition on interference with FMLA rights appears to be modeled on Section 8(a)(1) of the National Labor Relations Act ("NLRA"), which prohibits employer interference, restraint or coercion of employees' rights to engage or refrain from engaging in union and other concerted activities. [29 U.S.C. §158(a)(1)]. *See Bachelder v. America West Airlines, 259 F.3d 112 (9th Cir. 2001)*. Discriminatory intent is not necessary to establish a violation of Section 8(a)(1). Rather, the National Labor Relations Board ("NLRB") and the courts objectively balance the employees' rights against the employer's property and managerial interests. *See Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945).

There is no requirement under NLRA decisional law that actionable retaliation in the form of coercion or discrimination constitute an "ultimate", "tangible", or "permanent" management decision. Rather, prohibited retaliation under the NLRA turns on whether the action unlawfully coerces an employee under §8(a)(1) or discriminates against an employee under §8(a)(4). The protective emphasis focuses on the foreseeable effects of the employer conduct and not necessarily on whether the employee has suffered an ultimate personnel action such as discharge, suspension, demotion, denied promotion, etc.. See. *e.g., Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983); *Howard Manuf. Co., Inc.* 231 NLRB 731 (1977).

We believe, based upon the foregoing, that the Complainant's allegation of disciplinary retaliation for exercising her FMLA rights was sufficient to have survived a dismissal motion on the pleadings. However, the Hearing Officer may consider, following discovery and/or after a hearing, whether Complainant's alleged mistreatment met "some threshold level of substantiality". *See Tia Graham v. State Farm Mutual Insurance Company, 193 F.3d 1274 (11th Cir. 1999) [* employer placed a non-repercussion memorandum in plaintiff's file stating that she had been AWOL]; *Wideman v. Wal-Mart Stores, Inc.* 141 F.3rd 1453 (11th Cir. 1998); and *Sharon M. Frankel v. U.S. Postal Service,* 96 F. Supp. 2d 19 (D. MA, 2000).
[Court treated as actionable a supervisor's "official discussion" with plaintiff regarding her leave usage, although finding no retaliation because the supervisor was then unaware of her FMLA protected activity].

C. Hearing Officer's Merits Rulings by Summary Judgment

Fed. R. Civ. P. 56(c) provides that summary judgment "shall be rendered forthwith" if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". See *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-328 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-252 (1986). A genuine issue of material fact exists if the evidence in the record would allow a reasonable jury to return a verdict for the non-moving party. See *Anderson,* 477 U.S. at 248. In making this determination, the non-moving party's evidence must be credited, and all justifiable inferences are to be resolved in his/her favor. See *id.* at 255. However, the existence of a mere scintilla of evidence in support of a

position is insufficient; the non-moving party must produce admissible evidence on which a jury could reasonably find in his/her favor. See *id.* at 252.

We do not believe that the pre-discovery record before the Hearing Officer permitted an informed decision on summary judgment on whether a causation nexus existed between the Complainant's protected activities and the Architect disciplining her.[7] The record did not afford the Hearing Officer the benefit of an evidentiary basis to assess causation regarding the Complainant's disciplinary action under the circumstantial proof model for FMLA retaliation cases. *Darby v. Bratch*, 287 F3d 673, 679 (8th Cir. 2002); *Candis v. Allen Health Systems, Inc., et al.*, 302 F3d 827 (8th Cir. 2002); *Graham v. State Farm Mutual Ins. Co.*, 193 F.3d 1274 (11th Cir. 1999); *Maldonado v. U.S. Bank*, 186 F.3d 759 (7th Cir. 1999).

The pleadings allege that the Complainant engaged in FMLA protected activity, that management proposed that she be disciplined in proximate time thereto, *inter alia*, upon allegations against Complainant arguably reflecting her partially disapproved FMLA requests. Based upon this showing, we believe that it was improper to dismiss the complaint or grant summary judgment without affording the Complainant the opportunity to conduct discovery.

[7]In view of our finding that the Complainant is time barred from raising her denial of FMLA leave claim, it is unnecessary for us to address the Hearing Officer's grounds for granting summary judgment on the merits of that claim.

ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(e) of the Office's Procedural Rules, the Board reverses the Hearing Officer's dismissal of the complaint and remands the matter for further proceedings consistent with this decision.

It is so ordered.

_____
Susan S. Robfogel, Chair

_____
Barbara L. Camens, Member

_____
Alan V. Friedman, Member

_____
Roberta L. Holzwarth, Member

_____
Barbara Childs Wallace, Member

Issued, Washington, D.C.: June 3, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2003, I delivered a copy of this Decision of the Board of Directors to the following parties by the identified means:

First-Class Mail Postage-Prepaid

Jeffrey H. Leib, Esquire
5104 34th Street, N.W.
Washington, D.C. 20008

Ms. Sherry M. Britton
8189 Woodland Lane
Chesapeake, MD 20732

First-Class Mail Postage-Prepaid
& Facsimile Mail (202-789-1708)

Christine M. Cooper, Esquire
McGuiness, Norris & Williams, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005

_____
Kisha L. Harley
Office of Compliance