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

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| **STEPHEN STEWART,** | ) | |
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| **Appellant,** | ) | |
| | ) | |
| **v.** | ) | **Case No.: 07-AC-25 (DA, FM, RP)** |
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| **OFFICE OF THE ARCHITECT OF THE CAPITOL,** | ) | |
| | ) | |
| **Appellee.** | ) | |
| | ) | |

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

## DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors ("Board") pursuant to a petition for review filed by Stephen Stewart ("Stewart" or "Appellant"). Stewart filed a four-count complaint alleging that the Office of the Architect of the Capitol ("AOC" or "Appellee") interfered with his rights under the Family and Medical Leave Act ("FMLA"), retaliated against him for exercising his rights under the FMLA and Americans with Disabilities Act ("ADA"), and created a retaliatory hostile work environment. Following an evidentiary hearing, the Hearing Officer concluded that the evidence presented by Stewart failed to support any of the alleged claims. For the reasons set forth below, we affirm the decision of the Hearing Officer.

I. Background

Stewart was employed by the AOC from October 1988 until August 21, 2006, on which date he was terminated. From sometime in 2002 until the date of his termination, Stewart served as the general supervisor in the electrical shop of the House Office Buildings.

On a number of occasions during 2004 and 2005, Stewart was absent from work without authorization ("AWOL"), and he was disciplined for two such absences.[1] On March 15,

[1] Specifically, in July 2004, Stewart was reprimanded for being AWOL and for failing to follow leave procedures; in November 2005, he was suspended for four days for not calling in or reporting to work.

2006,[2] Stewart was once again absent from work without authorization. On that date, Stewart called his supervisor at 7:30 a.m. to inform him that he would be reporting to work late, as he needed to attend a meeting at his son's school at 8:30 a.m. However, Stewart failed to report to work at all that day, and he did not call back to explain his absence; accordingly, the AOC charged him with 5 hours of AWOL status. Based on that incident, as well as Stewart's prior leave infractions, on March 28, the AOC presented Stewart with a letter proposing his termination.

Shortly after receiving the March 28 letter, Stewart informed Pete Aitcheson, his direct supervisor/AOC Assistant Superintendent, and Frank Tiscione, AOC Superintendent, that his leave infractions were the result of his alcoholism. At that time, he also requested an accommodation for his alcoholism, i.e., advanced sick leave to participate in an alcohol treatment program. The AOC granted Stewart's request, and he thereafter successfully completed a four-week inpatient treatment program.

Stewart returned to work on May 1. By letter dated May 8, Stewart asked the AOC to reconsider the March 28 proposal to terminate his employment. Pursuant to Stewart's request, the AOC agreed to suspend final determination on the termination proposal in exchange for Stewart's execution of an "abeyance agreement," which required Stewart to adhere to AOC's leave policies for a six-month period beginning on May 15. The agreement further provided, in pertinent part:

> In the event of a failure to follow the AOC's leave policy and guidelines, the proposed removal will be effected immediately without a right to a formal hearing before a Hearing Officer or a Hearing Officer's review, and a permanent record of the disciplinary action shall be placed in my Official Personnel Folder.

Stewart and the AOC executed the abeyance agreement on May 22.

On the morning of August 15, as Stewart was driving to work, he received a telephone call from his ex-wife, who indicated that their younger son was very upset.[3] Accordingly, Stewart drove to his ex-wife's home to care for his son while his ex-wife went to work. At 7:40 a.m., Stewart called supervisor Pete Aitcheson and left him a message indicating that he was running late for work, and that he would be in later. However, Stewart remained at his ex-wife's house with his son all day,[4] and did not report to work. As Stewart concedes, he did not place another call to Aitcheson to advise him that he would

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[2] Unless otherwise specified, all dates referenced herein are in 2006.

[3] Stewart testified that when he arrived at his ex-wife's home on the morning of August 15, his son -- who was distraught about his older brother's anticipated departure for college later in the week -- was lying in bed, and he was crying and hysterical. Through his testimony, Stewart stated that his son had been adversely affected by a number of events that had transpired during the prior several years.

[4] Stewart testified that he did not call a doctor or otherwise seek medical treatment for his son that day. In addition, Stewart confirmed that his son was not under a doctor's continued care, nor was he taking any medication, at that time.

not be coming to work, nor did he request leave for the day. [5] Stewart admits that he did not follow the AOC's leave rules on that day.

The next day, August 16, Stewart again called Aitcheson and left him a message in which he requested leave for the day. As was the case with the August 15 message, Stewart's message to Aitcheson made no reference to the situation with his son. Aitcheson granted Stewart's leave request for August 16, but he designated Stewart as being AWOL on August 15 because he had not complied with the AOC leave regulations.

Stewart previously had requested and had obtained approval to take annual leave on Thursday, August 17 and Friday, August 18. During the period of time from August 16 to August 18,[6] as reflected by the cell phone records admitted into evidence, Stewart made and received numerous phone calls on his mobile phone, including several calls to the AOC's electrical shop. At the same time, however, and as Stewart concedes, he did not call Aitcheson or any other manager to explain his absence on August 15 or to advise them of the difficulties that his son was experiencing.

Stewart returned to work on August 21. Aitcheson called Stewart to his office at about 12:30 p.m. that day, at which time he explained to Stewart that his failure to call in or report for work on August 15 had violated the May 22 abeyance agreement and that, consequently, he was being terminated. Aitcheson also presented to Stewart, and asked that he sign, a termination letter that had been signed by AOC Chief Operating Officer Stephen Ayers. Stewart refused to sign the termination letter and, after asking Aitcheson for "some time," went to the AOC EEO Office.

When Stewart returned to Aitcheson's office, he presented Aitcheson with a letter protesting the termination decision and explaining that his absence on August 15 was "due to medical issues surrounding [his] son."[7] Aitcheson asked Stewart if he was going to sign the termination letter and, when Stewart declined, Aitcheson called Superintendent Robert Gleich to come to his office to serve as a witness for Stewart's official termination.

On November 8, 2007, following the requisite participation in counseling and mediation, Stewart filed with the Office of Compliance ("OOC") a formal complaint, alleging that the AOC interfered with his rights under the FMLA (Count 1), retaliated against him for

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[5] In response to AOC counsel's question as to whether he was able to make telephone calls on August 15, Stewart conceded both that he had been in possession of a phone, and that it would have been possible to call Aitcheson back to advise him that he would not be able to come to work that day.

[6] During this period of time, Stewart and his ex-wife and sons drove Stewart's older son to college in Alabama.

[7] Although there are some minor discrepancies between Aitcheson's and Stewart's testimony regarding the precise timing and substantive detail of Stewart's explanation for his absence on August 15, it is undisputed that it was during his meetings with Aitcheson on August 21 that Stewart first advised the AOC that his absence on August 15 was the result of his son's emotional state.

exercising his rights under the FMLA and the ADA by charging him with AWOL status on August 15 and by terminating him (Counts 2 and 3), and created a retaliatory hostile work environment by virtue of the foregoing actions (Count 4). Both of the parties filed Motions for Summary Judgment, which were denied by Hearing Officer Warren R. King. A hearing was held on all counts of the Complaint on February 4 and 5, 2008. On August 4, 2008, Hearing Officer King issued a Decision and Order concluding that Stewart was not entitled to relief on any of the counts of the complaint. Stewart filed a Notice of Petition for Review on September 4, 2008, and, after receiving two extensions of time, filed a timely supporting brief on October 30, 2008. The AOC filed a timely responsive brief to Stewart's brief on November 20, 2008.

II. Standard of Review

The Board's standard of review for appeals from a hearing officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with the law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1406(c). The Board's review of the legal conclusions that led to the Hearing Officer's determination is *de novo*. *Nebblett v. Office of Personnel Management*, 237 F.3d 1353, 1356 (Fed. Cir. 2001).

III. Analysis

The Board has considered the Hearing Officer's decision, the parties' briefs, and the record in this proceeding. The Board agrees with the Hearing Officer that Stewart has failed to prove that the AOC interfered with his rights under the FMLA, retaliated against him for exercising his rights under the FMLA or ADA, or created a retaliatory hostile work environment. The Board also affirms the Hearing Officer's underlying findings and conclusions, except as modified herein.

<u>The abeyance agreement does not constitute an unlawful waiver of Stewart's substantive or procedural rights</u>

As discussed above, in May 2006, Stewart and the AOC executed an abeyance agreement, pursuant to which the AOC agreed to suspend final determination on its proposal to terminate Stewart's employment, in exchange for Stewart's adherence to the AOC's leave policies and procedures for a six-month period. The AOC considered Stewart's unauthorized absence from work on August 15 to be an infraction of its leave policies and, accordingly, a violation of the abeyance agreement; as a result, the AOC terminated Stewart's employment on August 21.

Stewart contends that the abeyance agreement constitutes an improper waiver of his FMLA rights and, additionally, that the AOC improperly relied on the abeyance agreement in terminating his employment, without affording him the opportunity to contest his purported breach of the agreement at a hearing. Stewart raised the latter argument for the first time in his petition for review to the Board; thus, the Hearing

Officer did not have the opportunity to address that contention. As to the former argument, the Hearing Officer concluded that the abeyance agreement merely indicated that Stewart waived his right to a formal hearing prior to being terminated for a breach of the agreement, and did not constitute a waiver of any FMLA rights.

Section 825.220(d) of the OOC's applicable FMLA regulations[8] provides that "[e]mployees cannot waive, nor may employing offices induce employees to waive, their rights under the FMLA."[9] For the reasons that follow, we conclude that the evidence fails to support a conclusion that the abeyance agreement either explicitly or implicitly waived any of Stewart's FMLA rights, in contravention of the above regulation. As an initial matter, as the Hearing Officer found, the agreement does not explicitly waive any FMLA or other substantive rights; the express language of the agreement merely provides that Stewart could be terminated without a formal hearing in the event that he failed to comply with the AOC's leave policy and guidelines. Thus, we next consider whether the agreement may be construed as an *implicit* waiver of FMLA rights. Although the language of the agreement is not free from ambiguity, we are satisfied that, under the facts of this case, the AOC's enforcement of the agreement has not resulted in any waiver of Stewart's FMLA rights.

First, in our judgment, the language of the agreement is most reasonably construed as a mere waiver of Stewart's right to a hearing or formal review of his termination *by the AOC*, i.e., the right to utilize any designated internal procedure for appeal of an adverse personnel action.[10] Second, even if the language of the agreement could be construed as

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[8] The OOC FMLA regulations essentially track those promulgated by the Department of Labor ("DOL") in 1995. The DOL recently amended its FMLA regulations, effective January 16, 2009. To the extent that there is any question regarding the regulations that properly govern this proceeding, we conclude that the pre-amendment regulations apply to this case, as the applicable facts and events giving rise to this proceeding occurred before the amended regulations were adopted by the DOL. *See Scamihorn v. General Truck Drivers*, 282 F.3d 1078, 1083 (9th Cir. 2002)(holding that case was governed by 1993 interim regulations, which were in effect at the time of the events at issue in the case, rather than the subsequently promulgated final regulations); *Haefling v. United Parcel Service*, 169 F.3d 494, 498 (7th Cir.)(same), *cert. denied*, 528 U.S. 820 (1999); *Victorelli v. Shadyside Hospital*, 128 F.3d 184, 186 (3d Cir. 1997)(same); *Bauer v. Varity Dayton-Walther Corp.*, 118 F.3d 1109, 1111 fn. 1 (6th Cir. 1997)(same). Accordingly, all of the citations to the FMLA regulations that appear in this decision are to the OOC regulations, which reflect the pre-amendment version of the DOL regulations.

[9] As the federal courts of appeals had disagreed as to whether this regulation prohibited only the prospective waiver of FMLA rights, or whether it also prohibited the retrospective waiver of FMLA claims based on past employer conduct (e.g., in releases or settlement agreements), the DOL recently amended the regulation to clarify that only prospective waivers of FMLA rights are prohibited. See The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67934-01, 67987 (Nov. 17, 2008)(codified at 29 C.F.R. pt. 825). It is evident that, in this case, Stewart is asserting that the abeyance agreement constituted an unlawful *prospective* waiver of his FMLA rights.

[10] Indeed, Stewart's citation to Federal Circuit precedent, albeit in the context of his argument that he was improperly denied the opportunity to contest his breach of the abeyance agreement, suggests that Stewart shared this understanding of the agreement's language. Specifically, as discussed in greater detail below, Stewart cites several decisions in which employees of executive branch agencies executed last-chance agreements that waived their rights to appeal adverse personnel actions to the Merit Systems Protection Board ("MSPB"). In contrast to executive branch employees, however, legislative branch employees do

a theoretical waiver of Stewart's right to seek recourse through the OOC, i.e., to challenge his termination as violative of his FMLA or other substantive rights guaranteed by the CAA, the AOC has not in fact asserted that the abeyance agreement constitutes a bar to Stewart's claims under the CAA. Indeed, significantly, Stewart clearly has availed himself of the OOC's processes, and has been afforded a hearing on his FMLA (and ADA) claims before an OOC-designated hearing officer.

Moreover, to the extent that Stewart suggests that the abeyance agreement implicitly waived his FMLA rights because it failed to provide any exception for an unforeseeable FMLA-qualifying absence, we find it unnecessary to address this issue because, as discussed in detail below, we conclude that Stewart was not entitled to FMLA leave for his August 15 absence. *Cf. Waltrip v. Conway Human Development Center,* No. 4:07CV00103 BSM, 2008 WL 4368788, slip op. at * 11 (E.D. Ark. Sept. 22, 2008)(stating that plaintiff could not establish a violation of Section 825.220(d) because she did not demonstrate that she was entitled to FMLA leave)(citing *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 994 (8th Cir. 2005)).

Finally, we find without merit Stewart's assertion that it is inappropriate for the AOC to rely on his alleged breach of the abeyance agreement as a justification for his termination, when he was not afforded the right to contest his alleged breach of the agreement at a hearing, in contravention of Federal Circuit precedent.[11] *See, Gibson v. Dep't of Veterans Affairs,* 160 F.3d 722 (Fed. Cir. 1998); *Briscoe v. Dep't of Veterans Affairs,* 55 F.3d 1571 (Fed. Cir. 1995); *Stewart v. U.S. Postal Service*, 926 F.2d 1146 (Fed. Cir. 1991). As Stewart accurately notes, these decisions indicate that, notwithstanding an employee's waiver of his right to appeal a termination decision in a last-chance agreement, he does not necessarily waive his right to a hearing on the subject of his compliance with the agreement. That is, if an employee raises a non-frivolous factual issue regarding his compliance with the last-chance agreement, he will not be deemed to have waived his right to contest the breach of the agreement itself.

Even assuming *arguendo* that Stewart's argument in this regard is properly addressed to the OOC, however, it is evident in this case that Stewart has not raised a genuine issue of fact regarding his compliance with the abeyance agreement. Indeed, Stewart explicitly conceded that he did not adhere to the AOC's leave rules and policies on August 15, as required by the terms of the agreement. Accordingly, Stewart would not be entitled to a separate hearing on the issue of his breach of the abeyance agreement pursuant to the above-cited precedent in any event.

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not possess the right to appeal adverse personnel actions to the MSPB. Nor do legislative branch employees have a right to appeal adverse personnel actions to the OOC, except to the extent that they may challenge a particular adverse personnel action as violative of a right conferred by the CAA.

[11] As an initial matter, we note that Stewart arguably has waived this argument, as he raises it for the first time in his Petition for Review. *Cf. Laurel Baye Healthcare of Lake Lanier, LLC*, 352 NLRB No. 30, slip op. at 1, fn.2 (2008)(argument not raised to the judge is deemed waived), *vacated on other grounds, Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Nos. 08-1162, 08-1214, 2009 WL 1162574 (D.C. Cir. May 1, 2009); *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989)(same), *enforced, NLRB v. Yorkaire*, 922 F.2d 832 (3d Cir. 1990).

Appellant Failed to Establish a Claim of Interference with FMLA Rights

In the first count of his complaint, Appellant alleged that the AOC interfered with his rights under the FMLA when it denied his request that his August 15 absence be designated as FMLA leave. The Hearing Officer concluded that Appellant failed to establish a claim for interference with FMLA rights, as he did not demonstrate two essential elements of such a claim: that he made a timely request for leave, and that his son had a serious health condition that required his care. For the reasons that follow, we agree that Appellant failed to demonstrate a claim of interference with his FMLA rights.

To establish a claim of interference with FMLA rights, an employee must demonstrate that he was entitled to some right or benefit under the FMLA, and that his employer denied or interfered with that right or benefit.[12] *See, e.g., Martin v. Brevard County Public Schools*, 543 F.3d 1261, 1266-67 (11th Cir. 2008); *Stallings v. Hussman Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006); *Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005), *cert. denied*, 546 U.S. 876 (2005). In this case, Stewart asserts that he was entitled to FMLA leave for his absence on August 15 because his son had a serious health condition that required his care.[13] Section 825.114(a) of the OOC's FMLA regulations defines a "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, etc., or "continuing treatment" by a health care provider.[14] "Continuing treatment," as relevant to this proceeding, is defined as a period of incapacity of more than three consecutive calendar days that also involves either (1) treatment two or more times by a health care provider, or (2) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider. Sec. 825.114(a)(2).[15]

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[12] To prevail on a claim for interference under the FMLA, the employee ultimately must be able to establish that the statutory prerequisites to relief under the FMLA have been satisfied. For example, the employee must show that he is an "eligible employee" as defined by the FMLA (as incorporated into the CAA). See 2 U.S.C. §§ 1312(a)(2)(B).

[13] Section 102 of the FMLA (which is made applicable to certain legislative branch employees by Section 202 of the CAA) grants eligible employees the right to 12 weeks of unpaid leave for the birth or adoption of a child, for the care of an immediate family member who has a serious health condition, for the employee's own serious health condition, or for a "qualifying exigency" arising from an immediate family member's active duty status in the Armed Forces. 29 U.S.C. § 2612.

There is no dispute in this case regarding Stewart's eligibility for FMLA protections or the AOC's status as an employing office subject to the FMLA's mandates.

[14] As discussed above (*see* fn. 8, supra), the OOC FMLA regulations – which govern this proceeding -- mirror the DOL's *pre-amendment* FMLA regulations.

[15] The requisite "continuing treatment" can also be established by evidence of a period of incapacity due to pregnancy or a chronic serious health condition, a permanent or long-term period of incapacity due to a condition for which treatment may not be effective, or a period of absence to receive multiple treatments for restorative surgery or for a condition that would likely result in a longer period of incapacity in the absence of medical treatment (e.g., cancer or kidney disease). 29 C.F.R. 825.114(a)(2). Stewart has not

As it is undisputed that Stewart's son did not receive any inpatient care, Stewart must demonstrate that his son had an illness or condition that involved "continuing treatment" by a healthcare provider.[16] As an initial matter, there is insufficient record evidence demonstrating that Stewart's son was incapacitated for more than three consecutive days. The sum of the evidence on this point consists of Stewart's own testimony that, on August 15, his son was quite upset about his older brother's imminent departure for college (that he was visibly upset, crying, etc.), and that he was a "basket case" on the return trip home from Alabama. This testimony does not establish that Stewart's son was incapacitated – i.e., unable to attend school or perform other regular daily activities – for more than three consecutive days. *See* Sec. 825.114(a)(2)(i).

Moreover, the record evidence also fails to establish that Stewart's son was treated by a health care provider on even a single occasion during the period from August 15-21. Indeed, Stewart conceded that he did not take his son, or even place a phone call, to a doctor in regard to his son's condition on August 15.[17] Similarly, Stewart admitted that his son was not taking any medication or receiving any ongoing medical treatment at that time.

Seemingly recognizing the insufficiency of his evidence, Stewart appears to suggest that his son's subsequent medical treatment beginning in December 2006 can support the existence of a serious health condition as of August 2006. Specifically, Stewart cites *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998) for the proposition that absences due to illnesses that have not yet been diagnosed may be covered under the FMLA. That decision is not supportive of Stewart's position, however. Significantly, the court in *Hodgens* stated: "It would seem that Congress intended to include *visits to a*

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alleged that his son's condition constitutes a serious health condition pursuant to any of these definitions of continuing treatment, nor does the evidence support such a conclusion, as discussed *infra* (*see* fn. 17).

[16] As an initial matter, Stewart contends that the AOC is estopped from denying that his son had a serious health condition because it did not request a medical certification or seek any additional information about his son's condition after he provided notice of his need for FMLA leave on August 21. This argument is unavailing, however, as an employee is required to prove the existence of a serious health condition that entitled him to FMLA leave; an employer does not waive its ability to challenge the seriousness or existence of a health condition by not following the medical certification procedures outlined in the FMLA. *See Rhoads v. F.D.I.C.*, 257 F.3d 373, 386 (4th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002); *Plesha v. United States Steel Corp*., No. 2:05-CV-201 PS, 2007 WL 465447, at *6 (N.D. Ind. Feb. 7, 2007).

[17] In light of the fact that Stewart's son did not receive any treatment by a health care provider for his condition in August 2006, the evidence in this case would be insufficient to establish "continuing treatment" pursuant to any of the various definitions of that term set forth in the FMLA regulations, even if Stewart had alleged as much. With two exceptions – i.e., absences attributable to incapacity due to pregnancy or to a chronic serious health condition – each of the definitions of "continuing treatment" set forth in the FMLA regulations requires treatment (or continuing supervision) by a health care provider in connection with the employee's absence. Sec. 825.114(a)(2), 825.114 (e). Further, with respect to chronic serious health conditions, even though an employee need not demonstrate that treatment was received *during a particular absence*, the definition of a chronic serious health condition itself requires evidence that the condition necessitates periodic visits for treatment by a health care provider. Sec. 825.114(a)( 2)(iii).

*doctor* when the employee has symptoms that are eventually diagnosed as constituting a serious health condition, even if, at the time of the initial medical appointments, the illness has not yet been diagnosed nor its degree of seriousness determined." Id. at 163 (emphasis added). Thus, even assuming that Stewart's son ultimately was diagnosed with a condition that would qualify as a "serious health condition" (as a result of his medical visits beginning in December 2006), Stewart's absence to care for his son on August 15 would not be protected by the FMLA under the rubric of *Hodgens*, as Stewart's son had not *seen a doctor for the purpose of diagnosis or treatment* at that time.

Thus, as Stewart has failed to demonstrate both that his son was incapacitated and that he was treated by a health care provider, he has not established the requisite "continuing treatment" or, accordingly, the existence of a serious health condition. It necessarily follows that Stewart has failed to demonstrate that he was entitled to FMLA leave for his absence on August 15 and, *a fortiori*, that the AOC denied him leave to which he was entitled. For this reason, we need not consider whether Stewart provided the AOC with sufficient notice of his intent to take FMLA leave and, accordingly, we do not rely on the Hearing Officer's discussion of that issue in affirming the conclusion that Stewart failed to prove that the AOC interfered with his rights under the FMLA.

Appellant Failed to Establish that Appellee Retaliated Against Him Based on the Exercise of his Rights Under the ADA and FMLA

In the second and third counts of the complaint, Stewart alleged that the AOC retaliated against him for exercising his rights under the FMLA and ADA[18] when it charged him with AWOL status on August 15 and terminated his employment on August 21. In addition, although he did not so allege in the complaint, Stewart asserts in his brief that the AOC's denial of his August 21 request that his absence on August 15 be designated as unforeseeable FMLA leave constituted retaliation for his having made the request.

To establish a claim for retaliation under the CAA, an employee is required, under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), to demonstrate that: (1) he engaged in activity protected by Section 207(a) of the CAA; (2) the employing office took action against him that is "reasonably likely to deter" protected activity; and (3) a causal connection existed between the two.[19] *See Duncan v. Office of the Architect of the Capitol*, 02-AC-59(RP)(Sept. 16, 2006); *Britton v. Office of*

[18] Specifically, Stewart asserts that each of the following actions constitutes "protected activity" for purposes of his retaliation claims: (1) his request for an accommodation under the ADA to undergo treatment for alcoholism in March 2006; (2) his use of unforeseeable FMLA leave on August 15 and/or his August 21 request that his August 15 absence be designated as FMLA leave; and (3) his August 21 visit to the AOC EEO office to discuss his right to FMLA leave.

[19] Citing the Federal Circuit's decision in *Haddon v. Executive Residence at the White House*, 313 F.3d 1352 (Fed. Cir. 2002), the Hearing Officer included "employer knowledge of the protected activity" as a necessary element of an employee's *prima facie* retaliation claim. Although the Board has not explicitly identified employer knowledge as a required element of a retaliation claim, it is axiomatic that employer knowledge is an implicit requirement, as it would be impossible to establish causation in the absence of such knowledge.

*the Architect of the Capitol*, 02-AC-20(CV, RP)(May 23, 2005). If the employee so demonstrates, the employing office thereafter is required to rebut the presumption of retaliation by articulating a legitimate non-discriminatory reason for its actions. *See Britton*.

The record fully supports the Hearing Officer's conclusion that Stewart failed to establish a *prima facie* case of retaliation based on the exercise of rights under the ADA or FMLA, as there is no evidence of a causal connection between any of the activities that Stewart asserts constitute "protected activity" (see fn. 18, supra) and the alleged "adverse actions" (i.e., placement in AWOL status and termination). As to the FMLA retaliation claims, the AOC did not have knowledge that Stewart was purporting to assert any FMLA rights until *after* it had taken the alleged adverse actions against him. As the Hearing Officer found, Aitcheson testified that he had decided to place Stewart in AWOL status (for his August 15 absence) on August 16; similarly, as the documentary evidence and Stewart's own testimony established, the AOC had prepared Stewart's termination letter prior to August 21, the date on which Stewart first notified the AOC that his absence on August 15 was related to his son's alleged serious health condition. As the AOC lacked knowledge of Stewart's purported attempt to exercise his FMLA rights, there can be no causal connection between any of Stewart's alleged protected activities and the AOC's decisions to place him in AWOL status and terminate him.[20]

Turning to Stewart's ADA retaliation claims, the record fully supports the Hearing Officer's conclusion that Stewart failed to establish the existence of a causal connection between his March 2006 request for an accommodation (i.e., his request for advanced sick leave to attend an alcoholism treatment program) and the AOC's decisions to place him in AWOL status and terminate him in August 2006. Stewart fails to even proffer any argument in support of the existence of a causal connection, and the record is completely devoid of any supporting evidence.

Accordingly, we affirm the Hearing Officer's conclusion that Stewart has failed to establish a *prima facie* case of retaliation based on the AOC's actions in placing him on AWOL status and terminating his employment. As we have concluded that Stewart has failed to demonstrate the requisite causation, we need not address the remaining elements of the *prima facie* case of retaliation. Specifically, we need not determine whether Stewart engaged in protected activity or whether he was subjected to an adverse action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). *See also Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 722 (2d Cir. 1994)(plaintiff bears the burden of establishing each element to prove a *prima facie* case of discrimination).

[20] This analysis is unaffected by the fact that the AOC afforded Stewart several hours to decide whether he would voluntarily sign the termination letter and, thus, did not *officially* terminate Stewart until after he attempted to assert his FMLA rights and visited the AOC EEO Office. It is evident that the AOC had already made the decision to terminate Stewart, and had presented him with the termination letter, prior to those events.

Finally, we conclude that Stewart's claim that the AOC's August 21 denial of his request to designate his August 15 absence as FMLA leave constituted retaliation for his having made the request, which was not addressed by the Hearing Officer, is without merit. In essence, Stewart's claim in this regard is merely a restatement of his unsuccessful FMLA interference claim; as such, it cannot support a retaliation claim. *Cf. Imbody v. C&R Plating Corp.*, No. 1:08-CV-0218, 2009 WL 196251, at *4-5 (N.D. Ind. Jan. 23, 2009)(holding that mere denial of a request for accommodation under the ADA – which is based upon the same conduct that supports a discrimination claim – cannot support a retaliation claim); *Supinski v. United Parcel Service*, No. 3:CV-0600793, 2009 WL 113796, at * 7-8 (M.D. Pa. Jan. 16, 2009)(same).

Appellant Failed to Demonstrate a Claim of Retaliatory Hostile Work Environment

To establish a claim of a hostile work environment, an employee is required to demonstrate, *prima facie*, that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)(citations and internal quotation marks omitted). As the Hearing Officer properly concluded, Stewart has not presented any evidence supporting a *prima facie* case of a hostile work environment. Indeed, to support his claim, Stewart relies solely on the first three counts of the Complaint, i.e., the AOC's alleged interference with his FMLA rights and alleged retaliation against him for exercising his rights under the ADA and FMLA. As Stewart failed to establish any of those claims, the Hearing Officer properly concluded that his hostile environment claim must necessarily fail as well.

**ORDER**

Pursuant to §406(e) of the Congressional Accountability Act and §8.01(d) of the Office of Compliance Procedural Rules, the Board affirms the Hearing Officer's merits determination of no violation in this matter.

It is so ORDERED.

Issued, Washington, DC on July 30, 2009