

OFFICE OF COMPLIANCE

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

_____)	
Anthony Katsouros)	
Appellant - Appellee,)	
v.)	
)	
Office of the Architect of the)	Case Numbers: 07-AC-48 (DA, RP)
Capitol,)	09-AC-10 (DA, FM, RP)
Appellee - Appellant. ¹)	
)	
_____)	

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

DECISION OF THE BOARD OF DIRECTORS

These cases are again before the Board of Directors (“Board”) pursuant to petitions for review filed by Anthony Katsouros (“Katsouros”), an employee of the Office of the Architect of the Capitol, and by the Office of the Architect of the Capitol (“AOC”).² In our prior order and decision dated January 21, 2011, we joined the case arising out of Katsouros’ disciplinary suspension (07-AC-48)(“*Katsouros I*”) with the case arising out of his termination (09-AC-10)(“*Katsouros II*”) and remanded the joined case to the Hearing Officer for further proceedings consistent with the order and decision.

The Board has fully considered the Hearing Officer’s Decision and Order issued after the remand, and the parties’ filings. For the reasons stated below, the Board affirms the Hearing Officer’s Decision finding an ADA violation in *Katsouros I*; reverses the Hearing Officer’s Decision finding an ADA violation in *Katsouros II*; and affirms the dismissal of all other claims in *Katsouros II*.

Background

Suspension Case (Katsouros I)

The factual background surrounding Katsouros’ disciplinary suspension is set forth in our prior decision dated January 21, 2011. In that decision, we affirmed the Hearing Officer’s dismissal of

¹ Both parties filed petitions for review in this matter.

² These cases were joined by Order of the Board of Directors on January 21, 2011, and remanded to the Hearing Officer for further proceedings consistent with the Board’s Decision.

the counts in the Complaint alleging retaliation under Section 207 of the Act, creation of a hostile work environment, and interference with FMLA rights, but reversed the Hearing Officer's dismissal of the counts in the Complaint alleging a failure to accommodate claim under the ADA. We remanded the suspension case to the Hearing Officer for further proceedings on whether the AOC's failure to postpone the hearing on the suspension as requested by Katsouros was a failure to accommodate in violation of the ADA.

On November 27, 2007, while Katsouros was on approved leave, his representative, Mr. Reed, submitted a memorandum asking that the hearing on the proposed suspension, then scheduled for November 28, 2007, be postponed because Katsouros "was unable to assist in his own defense." There were a number of documents entitled "FMLA Certification from Health Care Provider" submitted by Katsouros, the last of which was signed by Dr. Pope, a psychiatrist, on November 28, 2007. This document stated that Katsouros "is so disorganized in thought and verbal expression that he could not be at work and useful at this time" and that Katsouros "may be capable in, say, 3 months, episodes of incapacity may recur." The hearing was then postponed until December 13, 2007, with the admonition that no further postponement requests would be honored.

On December 12, 2007, Mr. Reed requested another postponement by submitting a memorandum that was virtually identical to his prior memorandum requesting postponement. The request for the second postponement was denied because the AOC believed that Katsouros' claim that he could not participate in the December 13, 2007 hearing due to his disability was contradicted by the fact that he was participating in the CAA dispute resolution process during this time.

The hearing was conducted on December 13, 2007 without Katsouros being present. However, Mr. Reed did attend. On December 18, 2007, the AOC presiding officer recommended that Katsouros be suspended for 10 days. On January 11, 2008, the Acting Architect of the Capitol issued the final decision suspending Katsouros for ten work days effective January 14, 2008 through January 25, 2008.

Termination Case (Katsouros II)

Much of the factual background surrounding Katsouros' termination complaint is also set forth in our prior decision dated January 21, 2011. In that decision, we reversed the Hearing Officer's decision dismissing the termination complaint, finding that the Hearing Officer erred when he found that Katsouros' request for counseling on the termination was untimely. We remanded the case for further proceedings so that the merits of the allegations contained in the termination complaint would be fully considered.

Katsouros returned to work on January 14, 2008, but he was immediately sent home to serve the 10-day suspension. Katsouros did not return to work as expected at the end of the suspension on January 28, 2008, and did not submit additional medical certifications or otherwise provide notice of the need for additional medical leave. On February 12, 2008, Katsouros' supervisor issued a proposal to terminate him based on his failure to follow leave procedures and his multiple absences without leave. On March 20, 2008, the Superintendent of the Senate Office Building concurred with the February 12 termination proposal. Katsouros appealed the

termination and requested an AOC grievance hearing, which was scheduled for May 15, 2008. The hearing was held as scheduled, without Katsouros, on May 15. On June 5, 2008, the Acting Architect issued a final decision upholding the termination.

In the complaint filed on June 10, 2009, Katsouros alleged that the AOC discriminated and retaliated against him and created a hostile work environment when it terminated him and took various procedural steps that ultimately led to that termination. He also alleged a failure to accommodate under the ADA.

Hearing Officer's Decision

Pursuant to the Board's January 21, 2011 remand, Hearing Officer Michael Doheny conducted a hearing on April 22 and May 5, 2011. In analyzing the claims relating to the suspension, the Hearing Officer determined that Katsouros was a qualified individual with a disability, of which the AOC had notice, and that his requests for accommodation by postponement of the suspension hearing were denied by the AOC in violation of the ADA. In so holding, the Hearing Officer relied on applicable law, reasoning that Katsouros' requests for postponement were the same as a request for ADA reasonable accommodation, and because the AOC had notice of such, it was obligated to engage in an interactive process with Katsouros to determine what, if any, accommodations could be made.

In his analysis of the failure to accommodate claim, the Hearing Officer determined that the FMLA Certification from Health Care Provider forms submitted by Katsouros' physicians coupled with his representative's testimony about his limited cognitive ability, sufficiently established Katsouros as a qualified person with a disability. Although the Hearing Officer acknowledged that the best evidence is medical testimony, he relied on applicable law and regulations to determine that the evidence presented was sufficient.

With respect to his finding that the AOC failed to engage in the interactive process, the Hearing Officer relied on regulations from the EEOC as well as the "Office of Compliance Manual" which suggest that an employer and employee should discuss options for reasonable accommodation once the disability has been made known to the employer and a request for accommodation has been made by the employee. The Hearing Officer determined that the AOC had notice of Katsouros' disability from the August and November 2007 medical certifications. Specifically, the Hearing Officer determined that the November 28, 2007 documentation, indicating Katsouros' potential capability to be at work, in "say 3 months" was a request for an ADA accommodation, and, therefore, the AOC had an obligation to engage in an interactive process to determine a reasonable accommodation. The Hearing Officer also determined that the AOC failed to present evidence sufficient to establish an undue hardship, which would have relieved the AOC of its obligation to provide a reasonable accommodation. The Hearing Officer held that the AOC's concerns about Katsouros' request for postponement - the length of Katsouros' absence and whether he could participate in other administrative proceedings - did not amount to an undue hardship for the AOC. Indeed, the Hearing Officer found that these concerns were of the type to be discussed during an interactive process in which the AOC failed to engage.

In analyzing the allegations relating to the termination, the Hearing Officer held that, while Katsouros failed to present evidence of a reasonable accommodation that would render him qualified to perform the duties of his position, the leave requests submitted in 2007 were sufficient to support his postponement request for the May 2008 termination hearing. Thus, the Hearing Officer held that the AOC was on notice that Katsouros needed a reasonable accommodation, placing the AOC under the obligation to engage in an interactive process.

Finally, the Hearing Officer addressed Katsouros' claims of retaliation, as well as his claims for hostile work environment, such claims having been included in the remand by the Board. The Hearing Officer dismissed the retaliation claim, holding, in part, that there was no discriminatory animus shown by the AOC after having received Katsouros' first medical certification in September 2006 which documented his bipolar disorder. With respect to the hostile work environment claim, the Hearing Officer determined that Katsouros presented no evidence that his workplace become so "permeated with discriminatory intimidation, ridicule and insult that it is sufficiently severe or pervasive to alter" his working conditions or "create an abusive work environment."

In his Decision, Hearing Officer Doheny determined that the AOC violated Section 201(a)(3) of the CAA when it failed to initiate the interactive process with Katsouros to determine whether there existed a reasonable accommodation for his disability and ordered that the AOC either expunge the 10-day suspension from Katsouros' file, or reschedule the disciplinary hearing for a time that reasonably accommodated Katsouros' disability. Finding that the AOC did not engage in the interactive process when it refused to postpone the termination hearing, the Hearing Officer also ordered that Katsouros be reinstated to his former position retroactive to June 5, 2008, with back pay and benefits.

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 it 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).

Analysis

Katsouros I

ADA Claim

The Hearing Officer properly held that the AOC violated the CAA when it denied Katsouros' request for accommodation to postpone the December 2007 disciplinary hearing. Katsouros' request for postponement was tantamount to a request for accommodation.

We find that the Hearing Officer's determination was supported by the evidence and consistent with law. Katsouros was on approved leave due to a medical disability when the AOC denied his request to postpone the suspension hearing. As the Board held in its prior January 2011

Decision, the ADA may require an employer to provide a reasonable accommodation to allow a qualified individual with a disability³ to participate effectively in disciplinary proceedings. *See Mohamed v. Marriott*, 905 F.Supp. 141 (S.D.N.Y. 1995)(request for interpreter at a disciplinary meeting was a request for accommodation under the ADA). Following the Equal Employment Opportunity Commission's framework for analyzing reasonable accommodation claims⁴, we agree with the Hearing Officer, that, under these facts and circumstances⁵, the AOC's denial of Katsouros' request amounted to a violation of the CAA. We therefore rescind the 10-day suspension that was imposed as a result of the 2007 suspension hearing and award Katsouros 10-days of backpay and benefits. In doing so, we do not offer to the AOC, as did the Hearing Officer, the option of holding another suspension hearing as we find the rescission of the 10-day suspension and award of backpay and benefits for that time period to be the appropriate remedy for this ADA violation.

FMLA Claims

Although the Board was clear in its remand that only the ADA failure to accommodate issues should be addressed by the Hearing Officer, in *Katsouros I*, Katsouros continued to argue before the Hearing Officer that his submitted documents amounted to requests for FMLA leave and should be considered prior protected activity. On remand, Hearing Officer Doheny properly addressed these claims by reiterating the Board's prior dismissal of them.

Katsouros II

Retaliation and Hostile Work Environment Claims

In *Katsouros II*, Hearing Officer Doheny properly dismissed Katsouros' claims of retaliation and hostile work environment surrounding his request for medical leave. We agree with the Hearing Officer that there was insufficient evidence of retaliatory and discriminatory animus by the AOC. Further, the Hearing Officer properly applied the law when he determined that there was no

³The Hearing Officer's Decision focused on whether Katsouros sufficiently established that he had a disability as defined by the ADA. In affirming, we note that the term "qualified individual" means a person who, at the time of the employment decision, can perform the essential functions of the employment position that she holds or desires, with or without reasonable accommodation. 42 U.S.C. Sec. 12111(8). The record establishes that Katsouros had served in his position for many years, thereby indicating that he had the requisite skill, experience and education for the position. The record also reflects that Katsouros was on approved leave at the time the second request to postpone the suspension hearing was made, thereby indicating that the AOC considered his leave of absence a reasonable accommodation. *Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 185 (2d Cir. N.Y. 2006)(the EEOC and most circuits have concluded that, in some circumstances, an unpaid leave of absence can be a reasonable accommodation under the ADA, despite the "oxymoronic anomaly it harbors", i.e., the idea that allowing a disabled employee to leave a job allows him to perform that job's functions). On this record, we affirm that for purposes of the request to postpone the suspension hearing, Katsouros was a qualified individual with a disability.

⁴In order to prove that the AOC failed to reasonably accommodate Katsouros, thereby violating the ADA, Katsouros would need to show: (1) that he is a qualified individual with a disability, (2) that he requested a reasonable accommodation of that disability; and (3) that the AOC denied his request for reasons other than undue hardship. 2 U.S.C. Sec. 1311(b); 29 CFR Sec. 1614.203(a)(1); *Prewitt v. United States Postal Service*, 662 F.2d 292, 308 (5th Cir. 19981); *Anderson v. United States Postal Service*, Appeal No. 01970254, 2000 EEOPUB LEXIS 812 (February 23, 2000).

⁵*See Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000)(ADA claims require individual assessment of the facts specific to each claim and whether an accommodation request is reasonable turns on the facts of each claim and each request).

evidence to show that Katsouros' workplace was "permeated with discriminatory intimidation, ridicule and insult that it is sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive work environment." *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75, 78 (1998). In fact, the record supports that in January 2007, the AOC reached out to Katsouros to determine what, if any, accommodation he was seeking.

ADA Violation

With respect to the ADA claim in *Katsouros II*, the Board reverses the Hearing Officer's finding of an ADA violation, as the record does not support this claim. Hearing Officer Doheny reasoned that Katsouros' requests for leave in the medical documentation submitted in August and November 2007 sufficiently served as requests for a reasonable accommodation in the form of postponement of his May 2008 termination hearing. For the reasons that follow, we disagree.

There is no record evidence that Katsouros made a request for leave or followed the AOC's leave procedures during his absence in 2008. The evidence shows that Katsouros returned to the office on January 14, 2008, presumably ready to work after having been out on leave since November 2007. Upon his return to work on January 14, 2008, Katsouros was sent home to serve the 10-day suspension that resulted from the December 2007 disciplinary hearing. Thereafter, Katsouros neither presented himself for work, nor contacted the AOC to alert them of his absence. Katsouros failed to appear for work on January 28, 2008, and failed to contact his employer at any time from that date to February 12, 2008, when the AOC proposed his termination. There is no evidence in the record that Katsouros made any attempt to comply with any procedure, written or oral, to request leave during this absence, or to document any medical disability that would have prevented him from complying with leave procedures, during the period between January 28, 2008 and May 15, 2008⁶.

Generally, an employee must inform his employer that an accommodation is needed in order to obtain relief under the ADA. See *Goodman v. Potter*, 412 F. Supp. 2d 11 (D.D.C. 2005), *aff'd*, No. 06-5071, 2006 U.S. App. LEXIS 28337, 2006 WL 4449339 (D.C. Cir. Nov. 14, 2006); *Flemmings v. Howard University*, 198 F.3d 857, 861 (D.C.Cir.1999). In addition, an employee requesting accommodation under the ADA generally is required to follow his or her employer's written leave procedures. See *Ogawa v. Henderson*, 10 Fed.Appx. 587, 588 (9th Cir.2001) (an employer has the right to terminate employees, even if otherwise disabled, if employees fail to follow written rules, including leave policies and procedures). The record does not contain evidence sufficient to establish that Katsouros was unable to request accommodation in the form of additional leave or modification of the AOC's leave procedures, or that the AOC otherwise knew or had reason to know that a disability prevented him from requesting such accommodation, throughout the 15-week period between January 28, 2008 and May 15, 2008. On these facts, we find that Katsouros may not now claim that the AOC violated the ADA when it terminated his employment in May of 2008.

⁶ Although Katsouros submitted a Certification of Health Care Provider during the 2011 hearing in this matter, the medical form was dated June 24, 2008 and was not provided to his employer during the period he was absent from January 14, 2008 until the May 2008 termination hearing.

ORDER

The Board hereby affirms the finding of an ADA violation under the CAA in *Katsouros I*. The 10-day suspension that was rendered as a result of the suspension hearing in December 2007 is hereby rescinded, and the Board awards 10 days' back pay, with benefits as appropriate. Further, the Board affirms the dismissal of the hostile work environment and retaliation claims, and reverses the finding of an ADA violation in *Katsouros II*.

It is so ORDERED.

Issued, Washington, DC on September 19, 2013