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

SHERRY M. BRITTON,	)	
	)	
Appellant,	)	
	)	
	)	**Case No. 02-AC-20(CV, RP)**
	)	**Date: May 23, 2005**
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

Complainant, Sherry Britton filed a claim against Respondent, the Office of the Architect of the Capitol, alleging among other things retaliation in violation of Section 207 of the Congressional Accountability Act ("CAA"), 2 U.S.C. 1317. The hearing officer dismissed the retaliation claim for failure to establish a sufficient "adverse action" as required to establish a *prima facie* case in Title VII retaliation cases. For the reasons that follow, we reverse and remand for further proceedings consistent with this opinion.

I. Background

Sherry Britton is a supply technician in the furniture division of the Senate Office Buildings of the Office of the Architect. This is the second case she has brought against her employer under the Congressional Accountability Act. This case alleges retaliation for bringing the first case and is brought under Section 207 of the CAA, 2 U.S.C. 1317.

Britton commenced proceedings in the prior case, Britton v. Office of the Architect of the

Capitol, Case No. 01-AC-346 (CV, FM, RP) ("Britton I"), on May 11, 2001. Britton I alleged a violation of Section 202 of the CAA, which applies the Family and Medical Leave Act ("FMLA") to the Legislative Branch. Britton I arose after Britton was disciplined for leaving work without first providing notice or obtaining permission upon learning that her child had committed a violent act at school and was about to be taken into police custody.

On September 20, 2001, while the proceedings in Britton I were pending, Britton notified the AOC that she would need 3.3 hours of leave without pay that day due to a disability. Rather than approving the time off, the AOC placed Britton by incident report in an AWOL disciplinary status for the 3.3 hours requested. On appeal, Britton also asserts the AOC "thereafter proposed a five-day suspension" and "following a hearing on said five-day suspension proposal, issued an Official Reprimand" to Britton. (Brief, p.3.) These facts were not included in Britton's initial Complaint, her proposed Amended Complaint, other pleadings or the record of proceedings before the Hearing Officer.

Considering this action to be retaliatory, Britton filed a timely request for counseling on March 15, 2002. After completing counseling and mediation, Britton filed a two-count Complaint with the Office of Compliance on February 19, 2003. Both counts of the Complaint are brought under the retaliation provisions in Section 207 of the CAA. Britton's Complaint alleges that her request for counseling also asserted an Americans with Disabilities Act ("ADA") violation under Section 201(a) (3) of the CAA, but her Complaint and Amended Complaint rely exclusively on Section 207.

Count I of the Complaint asserts that the AOC's action violated an agreement the parties entered into on March 8, 1996. The agreement is not part of the record, but Britton alleges that it permits her to "take liberal leave without pay and without adverse action as needed with respect to her disability." Count I also alleges that the AOC's breach of the accommodation agreement and designation of the 3.3 hours as AWOL was retaliation for her previous requests for accommodation under the CAA's ADA/Rehabilitation Act provisions and its FMLA provisions, and retaliation for the proceedings she initiated in Britton I.

Count II of the Complaint alleges that the AOC retaliated against Britton by creating a "supervisory hostile work environment." The factual allegations in Count II are much the same as those in Count I, except that Count II adds the allegation that a "pattern of decisions" by Britton's supervisors resulted in her placement in AWOL status for 3.3 hours on September 20, 2001, and "culminated [in] the creation of an abusive and pervasive hostile work environment which deprived Britton of her statutory entitlements" under the CAA.

On March 6, 2003, the AOC filed a Motion to Dismiss the Complaint with prejudice. The AOC asserted that both Counts I and II of the Complaint failed to articulate a *prima facie* case of retaliation under Section 207 of the CAA. The AOC asserted that Count I should be dismissed because being placed on 3.3 hours of AWOL status was not an "adverse action" as that term has been described by certain courts in Title VII retaliation cases, and Count II should be dismissed because Britton failed to "articulate or describe any specific conduct or environment" to support

her hostile environment claim.

On March 19, 2003, Britton filed a Motion for Leave to File an Amended Complaint. A proposed Amended Complaint was submitted with the motion. On March 21, 2003, Britton also filed a response to the AOC's Motion to Dismiss.

On March 25, 2003, after oral argument on the motions, the hearing officer dismissed the initial Complaint and denied Britton's Motion to Amend. The hearing officer determined that the retaliation claim in Count I should be dismissed because the 3.3 hours AWOL was not an "adverse action" as that term has been defined in Title VII-type retaliation cases. The hearing officer dismissed the hostile environment retaliation claim in Count II on the basis that the conduct alleged did not rise to the level of conduct required under the law developed under Title VII. The hearing officer denied Britton's Motion to Amend as being futile. Leave to file a further amended complaint was not requested, and the hearing officer's decision became the final order.

On appeal, Britton raises two issues: (1) whether the hearing officer erred in determining that the AOC's classification of the 3.3 hours as being AWOL and its issuance of an incident report that subjected her to progressive discipline were not "legally cognizable" under Section 207; and (2) whether the hearing officer erred in denying her Motion to Amend.

The Board published a request for *amici* briefs regarding certain issues presented on appeal, and received several briefs from representatives of employees and employing offices, and other interested parties.

II. Analysis

A. Standard of Review.

The Board's standard of review for appeals from a hearing officer 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 law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. §1406©). This appeal implicates the first standard of review above, as the appeal challenges the hearing officer's conclusions that: (1) Britton's retaliation claim was not legally cognizable, and (2) her request to amend should be denied as being futile. The Board's review of the legal conclusions that led to these determinations is *de novo*. *Nebblett v. Office of Personnel Management*, 237 F.3d 1353, 1356 (Fed. Cir. 2001).

B. The Framework for Analyzing Section 207 Retaliation Claims.

The Board generally applies the law as developed by the courts under the various laws made applicable to the Legislative Branch by the CAA. This is consistent with the language of the CAA itself, Section 225(f)(1), 2 U.S.C. §1361(f)(1), and with the legislative history of the CAA, which establishes that the CAA was designed to make existing employment and labor laws

applicable to the Legislative Branch.

This approach cannot be applied so easily to Section 207 of the Act. In drafting the CAA, Congress chose *not* to incorporate each of the retaliation provisions that exist in the labor and employment laws made applicable by the Act. Instead, Congress adopted Section 207(a), which provides:

> It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed *any practice made unlawful by this Chapter*, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in *a hearing or other proceeding under this Chapter*.[1] (Emphasis added.)

Section 207(a) unambiguously extends its protections to retaliation claims based on activities protected by the Title VII provisions in Section 201 of the CAA, 2 U.S.C. § 1311; retaliation claims based on the Occupational Safety and Health Act (the "OSH Act") provisions in the CAA, 2 U.S.C. § 1341; retaliation claims based on the labor-management relations provisions in the Act, 2 U.S.C. § 1351; as well as retaliation claims based on any of the other statutory provisions made applicable to the Legislative Branch by the CAA.

The legislative history of the CAA unequivocally supports this conclusion. While the CAA was unaccompanied by any committee reports, two major Senate proponents of the CAA, Senators Charles Grassley and Joseph Lieberman, introduced into the Congressional Record their section-by-section analysis of the CAA. Addressing section 207, the document states, in pertinent part, "This section provides one uniform remedy for intimidation or reprisal taken against covered employees for exercising rights and pursuing remedies of violations for the violation of rights conferred by this act." *Congressional Record,* p. S624, January 9, 1995.

That Congress adopted "one uniform remedy" for retaliation under the CAA is significant because the courts and administrative agencies responsible for applying the underlying labor and employment laws in the Executive branch and the private sector have developed several different frameworks for analyzing retaliation claims under those laws. These include the frameworks developed in cases construing Title VII and other discrimination statutes, e.g., *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)[2]; the framework

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[1]The reference to "this Chapter" in Section 207 originally read "this Act", meaning the Congressional Accountability Act of 1995, in Public Law 104-1, Jan. 23, 1995, 109 stat. 3, which enacted the CAA. Accordingly, the "Chapter" referred to is the CAA.

[2]Britton did not allege or argue a mixed-motive theory. Therefore, we need not reach the issue of the impact, if any, of the Supreme Court's decision in Desert Palace, Inc. V. Costa, 539, U.S. 90, 123 S.Ct. 2148, 156 L.Ed. 2d 84 (2003), on mixed-motive retaliation cases.

developed in cases construing retaliation claims brought under the unfair labor practice provisions of the federal labor-management relations laws, see, *Letterkenny Army Depot and International Brotherhood of Police Officers, Local 358*, 35 FLRA 113, 118-22 (1990); the framework developed by the Secretary of Labor for review of retaliation claims brought under the OSH Act, see, 29 CFR §1977.6(b), and the framework developed by Congress in enacting USERRA, see, 38 U.S.C. § 4311©).

Because Section 207 creates one uniform remedy for retaliation for opposing "any practice" made unlawful by the CAA, two questions arise. First, we must determine whether one analytical framework should apply to all claims brought under Section 207 or an *ad hoc* approach should apply. Second, if one approach is adopted for all Section 207 cases, we must determine which of the various approaches should apply.

Adoption of Unified Approach for Section 207 Claims.

An *ad hoc* approach to Section 207 claims would result in the application of the analytical framework used in retaliation cases with respect to the underlying statute protecting the employee's activity. For example, Title VII approaches would apply to claims alleging retaliation for opposing race discrimination, whereas the FLRA's *Letterkenny* approach would apply to claims alleging retaliation for protected union activities and the Secretary of Labor's approach in 29 CFR §1977.6(b) would apply to claims alleging retaliation for opposing health and safety violations, etc.

The Board is aware of several reported decisions that address the nature of retaliation claims brought under Section 207 of the CAA. Each of these cases applied the *McDonnell Douglas* framework used in Title VII and ADA cases, presumably because the underlying claim alleged retaliation for Title VII or ADA activities. See, e.g., *Heamstead v. Office of the Architect*, 38 Fed.Appx. 12, 13, 2002 WL 1359629[3] (D.C. Cir. April 22, 2002)(alleged retaliation for protected Title VII activities); *Timmons v. U.S. Capitol Police Board*, 2005 WL 599978, p. 3 (D.D.C. Mar. 14, 2005)(alleged retaliation for protected ADA/Rehabilitation Act activities); *Brady v. Livingood*, 360 F.Supp.2d 94, 100-101 (D.D.C., 2004)(alleged retaliation for "prior efforts to assert civil rights and oppose discrimination"); *Dean v. Hantman*, 2001 WL 1940434, p.6 (D.D.C. August 8, 2001)(alleged retaliation for protected ADA/Rehabilitation Act activities); *Trawick v. Hantman*, 151 F.Supp.2d 54, 62 (D.D.C. 2001)(alleged retaliation for protected ADA/Rehabilitation Act activities). None of these cases discusses whether Section 207 requires an *ad hoc* or unified approach.

As we are without binding precedent on the issue posed, the starting point for our analysis of the issue must be the statutory text. *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 98, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). Based on the statutory text, we conclude that one analytical framework

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[3]Although *Heamstead* was not selected for publication, D.C. Circuit Rule 28(c)(1)(B) permits citation as precedent of unpublished decisions issued after January 1, 2002.

should apply to all claims brought under Section 207, regardless of the nature of the underlying protected activity. Adopting an *ad hoc* approach by which the analytical framework would be determined by the nature of the underlying protected activity would result in an employee who is retaliated against because of race, sex, age, etc. discrimination, being treated differently than an employee who claims retaliation as a result of bringing an unfair labor practice charge or making a complaint that her working environment is unsafe. Such a distinction is directly contrary to the language of Section 207, which creates *one* integrated provision for retaliation for opposing *any* practice made unlawful by the CAA.

Section 225(f)(1) of the CAA does not require a different result. It provides:

> Except where inconsistent with definitions and exemptions provided in this chapter, the definitions and exemptions in the laws made applicable by this chapter shall apply under this chapter.

2 U.S.C. §1361(f)(1). We find that the use of the varying frameworks developed under the laws made applicable by the CAA would be inconsistent with the unified approach provided in Section 207 of the Act.[4]

Adoption of Title VII-based approach for analyzing Section 207 claims.

The question therefore becomes whether either Section 207 itself or the CAA as a whole suggests any particular approach. We note that in at least one important aspect, Section 207 more closely resembles the statutory construct of Title VII (and other laws to which Title VII-based approaches have been applied) than the federal labor-management relations laws (and other laws to which "but for" approaches have been applied). Like Title VII, the Age Discrimination in Employment Act ("ADEA"), and the ADA, Section 207 allows covered employees to assert retaliation claims directly. The federal labor-management relations law provides for the prosecution of retaliation claims by the FLRA's general counsel and the OSH Act provides for the prosecution of retaliation claims by the Secretary of Labor, thereby affording the regulatory

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[4]Our decision is limited to claims brought under Section 207, and does not address the application of Section 225(f)(1) where existing laws have been made applicable by the CAA. For example, the Board has previously applied a *Letterkenny* framework to unfair labor practice charges brought under the provisions of the federal labor-management law made applicable by Section 220 of the Act, 2 U.S.C. § 1351, and has applied a similar analysis to an interference claim brought under the FMLA provisions made applicable by Section 202 of the Act, 2 U.S.C. § 1312. See, *U.S. Capitol Police Board v. FOP, U.S. Capitol Police Labor Committee,* Case No. LMR-CA-0037 (2002); and *Britton v. Office of the Architect of the Capitol,* Case No. 01-AC-346 (2004). We are not overruling those decisions, and will continue to apply precedent developed under the laws made applicable by the CAA to claims made under the CAA provisions incorporating those laws.

agency discretion in determining whether there is sufficient evidence of retaliation before a claim may proceed to hearing. See, 5 U.S.C. 7118(a)(1) and 29 U.S.C. § 660©)(2). Given this difference, there is good cause for adopting an approach that will provide the Office of Compliance's hearing officers with a framework and extensive precedent for assessing the sufficiency of an employee's *prima facie* case, such as will be provided by adopting a Title VII-based approach.

We also note that only one of the laws made applicable by the CAA has a statutorily-mandated analytical framework, i.e., the "but for" methodology set forth in 38 U.S.C. § 4311©) of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Significantly, Congress chose *not* to make this "but for" framework applicable to the Legislative Branch, in that it did *not* incorporate 38 U.S.C. § 4311©) in Section 206(a) of the CAA. 2 U.S.C. § 1316(a)(1)(A). We consider it inappropriate to adopt a *Letterkenny* or similar "but for " framework for Section 207 retaliation claims when Congress clearly elected not to adopt such a framework for USERRA-based retaliation claims. We therefore conclude that Title VII-based frameworks should be applied when analyzing retaliation claims brought under Section 207.

C. The "Adverse Action " Requirement.

The hearing officer applied a Title VII approach and dismissed Britton's retaliation claim for failure to allege employer conduct rising to the level of a "material adverse action" as defined by the D.C. Circuit in *Heamstead v. Office of the Architect*, 2002 WL 1359629 (D.C. Cir. 2002). On appeal, Britton argues that a broader definition of "adverse action" should apply to retaliation claims brought under Section 207.

Much of the litigation in Title VII-type retaliation cases involves the question of whether the employer's conduct rises to the level of an adverse action. Currently, there is a split among the Circuit Courts of Appeal as to how the adverse action requirement should be defined.

The Fifth and Eighth Circuits limit the type of employer conduct that is prohibited to "ultimate employment decisions" whereby only incidences of hiring, granting leave, discharge, denial of promotion, or decrease in compensation will support a cause of action for retaliation. *Mattern v. Eastman Kodak Co*., 104 F3d 702 (5th Cir. 1997); *Ledergerber v. Sanger*, 122 F. 3d 1142, 1144 (8th Cir. 1997) (transfer involving only minor changes in working conditions and no reduction in pay or benefits is not an adverse employment action); but see, *Manning v. Metropolitan Life Ins. Co*., 127 F.3d 686, 692 (8th Cir. 1997) (defining ultimate employment decision to include a "tangible change in duties or working conditions that constituted a material employment disadvantage").

The D.C., Second, Third and Sixth Circuits have adopted a middle-ground position, by which the employee must show that the employer retaliated by making "a materially adverse change in the terms of [her] employment". *Brown v. Body*, 199 F.3d 446, 457 (D.C. Cir. 1999); *White v. Burlington Northern & Santa Fe Railway,* 364 F.3d 789 (6th Cir. 2004); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir.1997) ("retaliatory conduct must be serious and tangible

enough to alter an employee's compensation, terms, conditions, or privileges of employment" to constitute an adverse employment action); *Torres v. Piano*, 116 F.3d 625, 640 (2nd Cir.1997).

Other Circuits have adopted broader standards, by which many other types of employer conduct are considered sufficiently adverse to support a claim for retaliation. For example, the Ninth Circuit's standard is based on the EEC's interpretation [5] of adverse employment action, which is defined as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity". *Ray v. Henderson*, 217 F.3d 1234, 1240-3 (9th Cir. 2000)(discussing split among the Circuits and citing EEC Compliance Manual §8, "Retaliation," ¶8008 (1998).) See also, *Wyatt v. City of Boston,* 35 F.3d 13, 15-16 (1st Cir.1994) (adverse employment actions include "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees"); *Knox v. Indiana,* 93 F.3d 1327, 1334 (7th Cir.1996) (employer can be liable for retaliation if it permits "actions like moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services ... or cutting off challenging assignments"); *Corneveaux v. CUNA Mutual Ins. Group,* 76 F.3d 1498, 1507 (10th Cir.1996) (employee demonstrated adverse employment action under the ADEA by showing that her employer "required her to go through several hoops in order to obtain her severance benefits"); *Wideman v. Wal-Mart Stores, Inc.,* 141 F.3d 1453, 1456 (11th Cir.1998) (adverse employment actions include an employer requiring plaintiff to work without lunch break, giving her a one-day suspension, soliciting other employees for negative statements about her, changing her schedule without notification, making negative comments about her, and needlessly delaying authorization for medical treatment).

In determining whether a narrow or broader definition of prohibited employer conduct should apply in Section 207 cases, the starting point for our analysis is once again the statutory text. *Desert Palace*, 123 S. Ct. at 2153.

Section 207 provides that it shall be unlawful for an employing office to "intimidate, take reprisal against, or otherwise discriminate against" a covered employee because he or she has opposed any practice made unlawful by the CAA. By the reference to "intimidation", the employer conduct prohibited by Section 207 is broader than the retaliation provisions in Title VII, 42 U.S.C. § 2000e-3, the retaliation provisions in the ADEA, 29 U.S.C. 623(d), and the retaliation provisions in the ADA, 42 U.S.C. 12203(a). These statutory provisions do not refer to intimidation, and only prohibit "discrimination" because an employee has engaged in certain protected activities.

Section 207 is also broader than the retaliation provisions in the Fair Labor Standards Act

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[5] Although EEOC Guidelines are not binding on the courts (or on this Board), they "constitute a body of experience and informed judgement to which the courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed. 2d 49 (1986).

("FLSA"), 29 U.S.C. 215(a)(3), which makes it unlawful for an employer to "discharge or in any other manner discriminate" against any employee who has engaged in protected activities; the Employee Polygraph Protection Act ("EPPA"), 29 U.S.C. §2002(4), which makes it unlawful to "discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action"; USERRA, 38 U.S.C. §4311(b), which provides that an employer may not "discriminate in employment against or take any adverse employment action against any person because such person has engaged in protected activities"; and the OSH Act, 29 U.S.C. §660©), which provides that "no person shall discharge or in any manner discriminate" against an employee because the employee has engaged in protected activities.

We believe that Congress' use of the term "intimidate" in addition to reprisal and discriminate in Section 207 evidences the intent to more broadly define the type of employer conduct proscribed. We note that the interference provisions in Section 503(b) of the ADA contain a reference to "intimidation" as well as references to coercion, threats and interference. 42 U.S.C. 12203 (b). Such interference clauses have generally been construed more broadly than the adverse action cases under Title VII might suggest. See *Brown v. City of Tucson*, 336 F.3d 1181, 1191-92 (9th Cir. 2003).

We therefore decline to adopt a narrow definition of adverse action for Section 207 retaliation cases, and instead adopt the EEOC's definition of adverse action as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity" .

Our adoption of a more flexible definition of adverse action should not be understood as invitation to transform the CAA into a "civility code". The essence of Section 207 is the prevention of employer conduct that chills legitimate opposition to unlawful practices. An adverse action will not be established merely because the employee dislikes the employing office's action or disagrees with it. While our "reasonably likely to deter" test may be more flexible than the "ultimate employment action" and "material adverse action" requirement used by some courts in the Title VII context, it is intended to exclude petty slights, trivial annoyances and anything that is not reasonably likely to deter employees from engaging in protected activity.

D. Application of the Analytical Framework to this Case.

The hearing officer determined that the retaliation claim in Count I of Britton's Complaint should be dismissed because the 3.3 hours AWOL was not an adverse action.

Applying a "reasonably likely to deter" definition as described above, we find that Britton's allegations were sufficient to survive a motion to dismiss at the pleading stage. *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), instructs that the standards for pleading employment claims are no higher than the relaxed notice pleading standard of Federal Rule of Civil Procedure 8(a): all that is required is that the complaining party allege a "short and plain statement of the claim showing that the pleader is entitled to relief."

Swierkiewicz applies with equal force to discrimination and retaliation claims. *Walker v. Thompson,* 288 F.3d 1005, 1011 (7th Cir.2002) (applying *Swierkiewicz* to prisoner retaliation claim); *Castillo v. Norton,* 219 F.R.D. 155, 160-62 (D.Ariz.2003).

Britton alleged that, rather than approving her time off without pay, the AOC placed her in AWOL disciplinary status because she had initiated the proceedings in Britton I. The fact that the time off requested would be without pay whether characterized as approved or unapproved AWOL is not dispositive, as the AOC's action was in the nature of discipline itself and could (and perhaps did) subject Britton to further disciplinary action. We therefore remand Britton's retaliation claim for further proceedings consistent with this decision.

E. The request to amend.

Britton's proposed Amended Complaint included three counts. Count I alleged a retaliatory "breach and nullification" of the 1996 accommodation agreement. Count II alleged that the decision to classify the 3.3 hours as AWOL rather than unpaid leave and issue an incident report was retaliatory. Count III reasserted the hostile environment claim that had been made in Count II of the initial Complaint. The proposed Amended Complaint also would have added a series of factual allegations regarding: (1) events that led to entry into the accommodation agreement in 1996; (2) events in 1999 and 2000 that led to the filing of the FMLA claim in *Britton I* on May 11, 2001; and (3) events in September 2001 that led to the filing of the instant complaint in February 2002. (Amended Complaint, pars. 6-30.)

Britton's Brief on appeal does not assert any basis for reversing the Hearing Officer's decision to dismiss the hostile environment retaliation claim as set forth in Count II of her initial Complaint, or the Hearing Officer's decision to deny amendment of that claim as set forth in Count III of her proposed Amended Complaint. Similarly, Britton's Brief on appeal does not assert any basis for reversing the Hearing Officer's decision to deny amendment to add a breach of contract claim as set forth in Count I of her proposed Amended Complaint. We therefore affirm the Hearing Officer's decisions dismissing Count II of the initial Complaint and denying leave to amend to add the claims as set forth in Counts I and III of her proposed Amended Complaint, because she has failed to preserve or present her claims adequately in her appeal. See, Rule 8.01 of our Procedural Rules.

This leaves us with Britton's request to amend her retaliation claim as set forth in Count II of the proposed Amended Complaint. The proposed Count II added a series of facts occurring before the 180-day period[6] preceding the request for counseling in this case. However, the gist of the claim in the proposed Count II is that the AOC retaliated against Britton by characterizing the September 20, 2001 leave as AWOL. To the extent that Count II alleges facts occurring before the 180-day period, it does so simply to support Britton's claim that she had engaged in activities

[6]The request for counseling was filed on March 15, 2002, such that the 180-day period preceding the filing began on September 15, 2001.

protected the Act.

For the reasons discussed above, we reverse the Hearing Officer's determination that the request to amend the retaliation claim should be dismissed as being futile. The AOC also asserts that amendment was properly denied under Rule 5.01(d) of the Office's Procedural Rules, which states:

Amendments to the Complaint may be permitted by the office or, after assignment by a Hearing Officer, on the following conditions: that all parties to the proceeding have adequate notice to prepare to meet the new allegations; that the amendments, as appropriate, relate to the violations for which the employee has completed counseling and mediation, … ; and that permitting such amendments will not unduly prejudice the rights of the employing office, … unduly delay the completion of the hearing or otherwise interfere with or impede the proceedings.

We reverse the denial on procedural grounds of the request to amend the retaliation claim as set forth in Count II of the proposed Amended Complaint for the following reasons: (1) the Motion to Amend was filed just 13 days after the AOC filed its Motion to Dismiss on March 6, 2003, (2) Count II of the proposed Amended Complaint did not raise any *theories* that were significantly new or surprising, (3) the Hearing Officer did not believe the amendment would prejudice the AOC, and (4) there was more than 30 days (and perhaps more than 60 days) remaining before the hearing had to commence. Under these circumstances, the request to amend the retaliation claim should have been allowed.

ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(d) of the Office's Procedural Rules, the Board reverses dismissal of the Complainant's retaliation claim and the denial of the Motion to Amend the retaliation claim as set forth in Count II of the proposed Amended Complaint. The Board affirms dismissal of Britton's hostile environment retaliation claim, and affirms dismissal of her Motion to Amend that claim and affirms dismissal of her Motion to amend to add a breach of contract claim.

It is so ordered.

Issued, Washington, D.C. May 23, 2005