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

RICHARD DUNCAN,)
)
Appellant,)
)
v.)
) **Case Number: 02-AC-59**
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

Appellant Richard Duncan filed a claim against the Architect of the Capitol, alleging three counts of retaliation in violation of Section 207(a) of the Congressional Accountability Act ("CAA"), 2 U.S.C. §1317. The hearing officer dismissed two of the claims for failure to exhaust administrative remedies. The hearing officer also decided all claims on the merits, and determined that the evidence presented by Appellant did not support any of the three claims of retaliation. For the reasons set forth below, the majority opinion affirms the decision of the hearing officer. Member Camens joins the majority opinion in part, and dissents in part.

I. Background

FACTUAL BACKGROUND

Richard Duncan ("Appellant" or "Duncan") has been employed by the Architect of the Capitol ("AOC" or "Architect") as a mechanic in its Maintenance Division since 1986. In September 2002, Duncan was repairing motor units in an area of the Capitol where hard hats were worn. On September 4, 2002, Duncan assisted in lifting a motor, and in the process, he bore a large portion of the weight of a replacement motor, which weighed approximately 550 pounds.

The next day at work, Duncan complained to a co-worker that he had hurt his neck the night before. Duncan's job on September 5, 2002 was to install a fan motor, along with his supervisor Robert Perry and a team of employees. As they rose to lift the fan motor, Duncan's hard hat hit the head of Perry, who was not wearing a hard hat. Perry requested that Duncan remove his hard hat, but Duncan said nothing and did not remove his hard hat. No one else in the area was wearing a hard hat. After having been hit one or more times by Duncan's hard hat, Perry removed Duncan's hat from Duncan's head. At the end of his shift, Duncan went home, without requesting medical attention.

The next day, Friday, September 6, 2002, Duncan reported the September 5 hard hat incident to his second line supervisor, stating that he wanted to file a worker's compensation claim. After the paperwork was filled out, AOC staff transported Duncan to the hospital for medical treatment. The treating physician indicated on medical forms that Duncan reported that he "twisted neck while moving." That following Monday, September 9, 2002, Duncan saw his private physician, to whom he stated that he "hurt his neck at work while lifting a heavy motor on 9/05/02 - he twisted his neck."[1]

Duncan remained absent from work pursuant to his injury and returned on September 16, 2002. On September 19, 2002, Duncan initiated the following: counseling with the Office of Compliance ("Office"), citing the incident from September 5, 2002; a request for Safety Inspection with the Office of Compliance; and a grievance through the AOC's grievance procedure. Duncan left work on September 20, 2002, after having become physically ill, and did not return until November 4, 2002. Upon his return, he worked on a different shift with a different supervisor.

AOC Safety Officer Joan Nagel conducted an investigation into Appellant's safety claims and determined that the area in which Duncan worked on September 4 and 5, 2002 did not require a hard had, and that the applicable regulations allowed removal of the hard hat while installing the fan motors. Nagel also determined that Duncan's injury more than likely occurred on September 4, 2002, when he bore the weight of the replacement motor. The Office of Compliance did not issue a citation in this matter.

On November 5, 2002, the Director of Human Resources denied Duncan's grievance, and on February 12, 2003, the Architect upheld the Director of Human Resources' denial.[2]

Duncan filed a worker's compensation claim with the Department of Labor, claiming two injuries: 1) a neck and back injury; and 2) emotional injury. The first claim was granted, and five days of absence was approved by the Department of Labor. The second claim

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[1] "Appellee's Exhibit No. 4" includes Appellant's physician's report, dated September 13, 2002, which gives an injury date of September 5, 2002, describing the injury as above.

[2] Duncan's initial grievance was filed with Dave Angier, one of Duncan's lower level supervisors. Because Angier did not have the authority to grant the relief requested, Angier directed Duncan to file his grievance with the Director of Human Resources.

was denied by the Department of Labor, as there was insufficient documentation to support the emotional injury claim. Duncan did not appeal the denial.

PROCEDURAL BACKGROUND

As mentioned earlier, on September 19, 2002, Duncan filed a request for counseling with the Office. His request for counseling included a copy of his grievance filed with the AOC on that same date, alleging physical/emotional injury and hostile work environment in retaliation for his opposition to allegedly unsafe working conditions. Specifically, Appellant described the hard hat incident between himself and his supervisor, and alleged injuries therefrom.[3] Appellant did not mention the denial of worker's compensation in his AOC grievance or in the request for counseling.

On March 3, 2003, after having used the Respondent's internal grievance procedure, Duncan reinstated his request for counseling with the Office, and subsequently participated in mediation. On December 8, 2003, Duncan filed his formal complaint with the Office, alleging 3 counts of retaliation resulting from his refusal to remove his hard hat: Count 1 alleged that the removal of his hard hat by his supervisor was conducted in retaliation for Duncan's failure to remove the hard hat; Count 2 alleged that the denial of Duncan's worker's compensation claim for emotional injury was decided in retaliation for Duncan's failure to remove his hard hat; and Count 3 alleged that the denial of Duncan's grievance was decided in retaliation for Duncan's failure to remove his hard hat.[4]

In response to the complaint, the AOC filed a motion to dismiss the complaint, arguing that the Office of Compliance lacked subject matter jurisdiction over the issues because 1) sovereign immunity had not been waived, and 2) the Appellant failed to state a claim since there is no private right of action in OSHA claims. Hearing Officer Sylvia Bacon granted the motion to dismiss on all counts, noting that the CAA did not grant an individual right of action over OSHA matters. Duncan subsequently filed a Notice of Petition for Review, with supporting memorandum. On August 5, 2004, the Board of Directors reversed Hearing Officer Bacon, holding that OSHA retaliation claims may be brought under Section 207 of the CAA, and remanded the case for further proceedings.

Subsequent to the remand, a hearing was held on all three counts on January 24, 26, and 28, 2005. Hearing Officer Bacon issued a judgment for the AOC on all counts on June 27, 2005. Her Findings of Fact and Conclusions of Law followed on July 21, 2005. Duncan filed a Notice of Petition for Review on August 19, 2005. His supporting memorandum followed on October 11, 2005. The AOC's response was filed on November 21, 2005.

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[3] The copy of the grievance gives a date for the incident of September 5, 2001. The error in the date was neither made an issue during the hearing, nor has it been raised as an issue on appeal.

[4] The third claim in Appellant's formal complaint arose subsequent to the request for counseling and was first alleged by Appellant in his complaint.

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 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

Jurisdictional Prerequisites were not Met on Counts II and III

In his complaint, Appellant alleged two counts which were never a part of the counseling phase of the process: Count 2, involving the denial of worker's compensation; and Count 3, involving the denial of his grievance. Appellant introduced his Request for Counseling Form as Exhibit No. 12 during the hearing on these issues[5], and the Architect argued that since these counts were not included in counseling, they did not satisfy the jurisdictional prerequisites of the CAA. In her decision, the hearing officer determined that the Appellant failed to meet the jurisdictional pre-requisites to bring these two claims because he did not seek counseling and mediation on the matters, thereby failing to exhaust his administrative remedies.

The Board agrees with the hearing officer's July 7, 2005 Memorandum of Decision and Order, and her July 21, 2005 Findings of Fact, Conclusions of Law and Judgment. In her decision and findings, the hearing officer carefully considered the record evidence and correctly relied on relevant case law to support her determination. The Board finds that the hearing officer's decision is consistent with law and required procedures, and supported by substantial evidence. Accordingly, the Board affirms the hearing officer's dismissal of Counts 2 and 3.

Record Evidence is Insufficient to Support the Remaining Claims of Retaliation

The hearing officer also determined that Count 1 failed on the merits, as there was insufficient evidence to support the claim of retaliation. We agree.

To establish evidence of retaliation, Duncan was required, under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), to demonstrate: (1)

[5] The Appellant introduced his counseling form into evidence in this case. The CAA does not require the submission of the counseling form as evidence during the hearing.

that he engaged in activity protected by Section 207(a); (2) that the employing office took action against him that is "reasonably likely to deter" protected activity; and (3) that a causal connection existed between the two. *See Britton v. Architect of the Capitol* 02-AC-20 (CV, RP)(May 23, 2005). The employing office, thereafter, would be required to rebut the presumption of retaliation by articulating a legitimate non-discriminatory reason for its actions. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981), *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1817. Appellant retained the ultimate burden of persuasion and could have proved intentional retaliation by demonstrating that the AOC's proffered legitimate reason was false and that retaliation was the "true reason" for the AOC's actions. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1089; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 516-517, 113 S.Ct. 2742, 2752, 125 L.Ed.2d 407 (1993)(clarifying that a plaintiff must show that the employer's proffer is a pretext for unlawful discrimination, not that it is merely false in some way). *See Also Robert Solomon v. Architect of the Capitol,* 02-AC-62 (RP)(December 7, 2005).

In Count 1, Duncan claimed that the removal of his hard hat by his supervisor was conducted in retaliation for Duncan's failure to remove the hard hat. This claim fails on the third element of the *Britton* standard, as there is no nexus between the alleged protected activity and the action of removing the hard hat. Courts have addressed the issue of causation and determined that an intervening cause can defeat the nexus between the protected activity and the adverse action. To break the chain of causation, the intervening cause must provide a non-retaliatory reason for the adverse action. *See Caver v. City of Trenton*, 420 F.3d 243, 256-7 (3rd Cir. 2005)("proximate cause" of adverse action was psychiatric report that officer was unfit for duty, not resentment for protected activity); *Yarde v. Good Samaritan Hospital*, 360 F.Supp.2d 552, 562 (S.D.N.Y. 2005)(Sec.1981 claim)(an inference of causation is defeated (1) if the allegedly retaliatory discharge took place at a time removed from the protected activity; or (2) if there was an intervening causal event that occurred between the protected activity and the allegedly retaliatory discharge); *Smith v. American Airlines, Inc.*, 2001 WL 710108 (N.D. Ill. 2001)(" ... in its causation analysis, temporal sequence is not all the Court considers. The Court must look to any intervening cause that breaks the causal chain.")

In the case before us, there is such an intervening cause between the alleged protected activity of refusing to remove the hard hat and the alleged adverse action of the removal of the hard hat by Perry. The intervening cause is the collision between Duncan's hard hat and Perry's head. On September 5, 2002, when Duncan and Perry (who was not wearing a hard hat) tried to install a motor fan, Duncan's hard hat hit the supervisor's head, and the supervisor requested that Duncan remove his hard hat. Duncan refused, and he and his supervisor resumed their efforts. Duncan's hat and his supervisor's head collided at least twice while trying to install the equipment. Duncan's supervisor then removed Duncan's hat. Between the initial request to remove the hard hat and the removal of the hard hat was the intervening causal event of the supervisor being hit in the head a second time by Duncan's hard hat.

Indeed, Duncan has not established that the supervisor's removal of Duncan's hard hat was motivated by Duncan's refusal to remove his hat, as opposed to the supervisor just not wanting to be hit in the head again. Section 207 of the Congressional Accountability Act makes it unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against a covered employee because of an employee's prior protected activity. The Board interprets the term "because" as requiring a connection between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action. It is insufficient for Duncan to show that Perry's removal of Duncan's hard hat resulted in Duncan feeling intimidated. As Section 207 requires causation, Duncan would have to establish, by direct or indirect evidence, that Perry's action was motivated by Duncan's refusal to remove his hat. As the facts are presented, Duncan did not meet this burden. The facts establish that Perry removed the hard hat, not after Duncan refused to remove it (which is the alleged protected activity), but only after Perry had been hit a second time in the head with it (the intervening cause). The removal of the hat by Perry was a response to being hit in the head a second time, rather than a response to Duncan's alleged protected activity. Without additional evidence, Duncan fails to establish a nexus between his refusal to remove his hat, and his supervisor's removal of same.

The Board recognizes that the supervisor's action of removing Duncan's hat was inappropriate for the workplace. However, a distinction must be made between conduct which is inappropriate, and conduct which amounts to retaliation. The facts suggest that the supervisor lost his temper and reacted poorly. The retaliation provision of the CAA protects against intimidation, retaliation, and discrimination for opposing a practice made unlawful by the CAA.[6] The conduct exhibited by the supervisor, although inappropriate, did not amount to retaliation.

The Board agrees with the hearing officer's determination that Appellant failed to establish a *prima facie* case of retaliation. Because the Board determines that Appellant has failed to prove causation, it need not address the remaining elements of the *prima facie* case of retaliation. Specifically, the Board need not determine whether Duncan engaged in protected activity or whether he was subjected to an adverse action.[7] *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 F3d 718, 722 (2nd Cir. 1994)(plaintiff bears the burden of establishing each element to prove a *prima facie* case of discrimination).

ORDER

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[6] The other forms of protected activity mentioned in Section 207(a) are not present in this case.

[7] Because the Board does not address whether the adverse action requirement has been established, it need not determine the impact of *Burlington Northern & Sante Fe Railway Co.*, 126 S. Ct. 2405 (June 22, 2006) upon the Board's adopted standard in *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (May 23, 2005).

Pursuant to §406(e) of the Congressional Accountability Act and §801(d) of the Office of Compliance Procedural Rules, the Board affirms the hearing officer's decision in this matter, dismissing Counts 2 and 3 for failure to exhaust administrative remedies, and agrees that the evidence presented was insufficient to support a claim of retaliation on Count 1.

It is so ORDERED.

Issued, Washington, DC
September 19, 2006

Member Camens, concurring in the judgment in part, and dissenting in part:

I concur with the majority's dismissal of Counts 2 and 3 based on Duncan's failure to exhaust his administrative remedies. I respectfully dissent, however, from the majority's dismissal of Count 1 on the merits of that claim. In my view, Duncan has demonstrated by substantial record evidence that the Architect engaged in unlawful retaliatory conduct in violation of Section 207(a) of the Act.

Indeed, I believe that the majority opinion communicates a powerfully chilling message to employees that they proceed at their own peril in insisting upon workplace safety practices that their own supervisors do not embrace. Because Duncan's Count 1 claim of retaliation raises important issues as to the scope of Section 207 and the underlying OSH guarantees which are incorporated into the CAA pursuant to Section 215(a), I examine that Count at length below.

I. Background Facts

On September 4 and 5, 2002, Duncan, along with two fellow maintenance mechanics and a supervisor, Robert Perry, were involved in the replacement of an electric fan motor located in the East Attic of the U.S. Capitol Building. The motor in question was extremely heavy – approximately 550 pounds. The AOC did not have an established "lifting program," and had not issued any guidance on lifting limits for employees. The Architect also did not have any lifting devices to assist in the lifting and transporting of heavy pieces of equipment. As a consequence, the lifting of the heavy replacement motor proved to be difficult and perilous work.

The motor replacement took place in a posted hard hat area which posed numerous bumping hazards. As described in the written report of a certified safety and health inspector from the Office of the General Counsel of the Office of Compliance, who was later dispatched to inspect the area:

> The attic work space is typical of older large buildings where ventilation ducts, heat exchangers and piping occupy much of the space. In order to get to the area of the failing motor, one must crawl on all fours under some large ducts for 6 to 8

> feet. In addition one must traverse stairs and elevated work areas. The area is a hard hat area because there are many low pipes and metal projections that workers could easily knock their heads against.

December 2, 2002 Memorandum of Stephen Mallinger.[8] Duncan was well aware that the attic area was a designated hard hat zone, as he had personally posted the hard hat signs on a previous occasion, pursuant to a supervisor's order.

The record establishes that Duncan was diligent in his observance of safety practices – far more so than other team members, including supervisor Perry. On both September 4 and 5 while engaged in the motor replacement work in the hard hat area in question, Duncan was the only employee who actually wore his hard hat (in addition to his back brace, gloves and safety shoes). His two colleagues – and supervisor Perry – did not.

On September 5, the four employees assembled in the attic space to complete the lifting and installation of the new fan motor. At some point, the heavy motor slipped from the four employees' collective grasp, causing Duncan and Perry's heads to collide, with the brim of Duncan's hard hat hitting Perry's bare head. Duncan apologized, and Perry responded: "Why don't you get rid of that stupid f—ing hard hat?" Duncan silently refused. Duncan testified that he refused to remove the hard hat because its removal would have placed him in physical danger.

When the employees made another attempt to lift the motor just moments later, the motor again slipped out of their hands, causing the brim of Duncan's hard hat to once again bump Perry's head. As Perry came up from his bent-over position, he grabbed Duncan's hard hat off his head and threw it to the ground, saying, "Get rid of that stupid f—ing hard hat." Duncan responded by asking Perry: "Now, what are you going to do if I lay my head open here?" Perry replied: "Don't do it."

Perry then ordered Duncan and one of his colleagues to retrieve longer pipes from the basement, which would be used in the lifting efforts. The trip to the basement required Duncan to navigate through the attic's numerous low hanging ducts, metal protrusions and various other bumping hazards. Despite these hazards, Duncan did not retrieve his hard hat from the ground where it had been thrown by Perry, either upon exiting or upon returning to the attic area.

On the way down to the basement, Duncan discussed with his co-worker the incident with Perry that had just occurred. The co-worker commented to Duncan that he didn't understand why Duncan hadn't "laid him [Perry] out. If that was me I would have– I would have hit him."

II. Count I

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[8] Indeed, Mallinger testified at length that he wore a hard hat for "good reason" when he visited the area in question, as it posed numerous hazards including protrusions, low-hanging fixtures, pipes, valves and brackets, and offered very limited available space to move your head safely.

The record evidence establishes that the Architect retaliated against Duncan, in violation of Section 207, with regard to the hard hat incident. Duncan easily satisfies each of the required elements of unlawful retaliation regarding Count 1: 1) that Duncan engaged in protected activity; 2) that the AOC's adverse treatment is based on a retaliatory motive and is reasonably likely to deter future protected activity; and 3) that a causal connection exists between the protected activity and the subsequent adverse treatment. *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (May 23, 2005).[9]

Duncan's refusal to remove his hard hat constitutes protected activity under Section 207(a) because Duncan had a *reasonable, good faith belief* that his supervisor's order to remove the hard hat constituted an unlawful employer practice. Duncan does not have to prove that the request to remove the hard hat was actually unlawful. He need only prove that he possessed a reasonable, good faith belief that the practice was unlawful. See *George v. Leavitt*, 407 F.3d 405, 417 (D.C. Cir. 2005); *Little v. United Tech*, 103 F.3d 956 (11th Cir. 1997); *Grant v. Hazelett Strip Casting Corp.*, 880 F.2d 1564, 1569 (2d Cir. 1989); *Moore v. California Institute of Technology*, 275 F.3d 838 (9th Cir. 2002); *Payne v. McLemore's Wholesale Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981) cert. denied, 455 U.S. 1000 (1982).

Duncan testified that he refused to remove the hard hat because he feared it would expose him to physical harm in a work area riddled with bumping hazards. OSHA regulation, incorporated under the CAA pursuant to Section 215(d) of the CAA, clearly protects an employee's right to wear protective head gear in work areas containing head hazards. See 29 CFR 1926.28; 29 CFR 1926.100; 29 CFR 1910.132; 29 CFR 1910.135.[10] The attic area in which the incident occurred was a clearly posted hard hat area, which presented numerous significant bumping hazards. Indeed, Duncan himself had posted the hard hat area signs in the vicinity. When Perry forcibly removed the hat from Duncan's

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[9] In *Britton*, the Board decided that "Title VII based frameworks should be applied when analyzing retaliation claims brought under Section 207". While this appeal was pending, the Supreme Court rendered a decision regarding Title VII based frameworks in the context of a retaliation claim. See *Burlington Northern & Sante Fe Railway Co.*, 126 S. Ct. 2405 (June 22, 2006). In *Burlington*, the Court adopted a legal standard for the "adverse action" prong of the retaliation standard which at least arguably differs from the standard adopted by this Board in *Britton*. *Burlington*, at 2415 ("In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which 'in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination'") *citing Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006).

The majority declines to consider the legal impact of the *Burlington* opinion on the *Britton* standard, which was adopted in light of the unique statutory language of Section 207 of the CAA. Because I believe that Duncan's Count I claim would prevail under either the *Britton* or the *Burlington* articulation of an "adverse action, " I similarly decline to address that issue.

[10] In addition to possessing a right to wear the hard hat, Mr. Duncan – and his co-workers – arguably had an obligation to do so. See 29 USC §654(b), which is incorporated into the CAA at Section 215(a)(1), and which states that "[e]ach employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct."

head, Duncan asked Perry what he would do if he (Duncan) split open his now-exposed head. Duncan testified that he felt fearful and unsafe in the wake of Perry's actions. Based on this substantial record evidence, I conclude that Duncan reasonably believed, in good faith, that Perry's order to remove his hard hat deprived him of the safe and healthful workplace that OSHA and the CAA guarantee.[11]

Direct but silent disobedience of an employer order may constitute the requisite protected "oppositional activity" to support a retaliation claim. E.g., *Holden v. General Motors Corp.*, 1998 WL 990997 (D. Kan. 1998). "An employer should not escape liability for taking such adverse action simply because the employee to whom the unlawful directive is given remains silent in the face of the directive yet refuses in his or her actions to comply with the directive." *Id.* at 7. *Accord, Patterson v. PHP Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), cert. denied, 117 S. Ct. 767 (1997); *Aman Cort Furniture Rental Corp.*, 85 F.3d 1074 (3d Cir. 1996)(silent refusal to gather derogatory material on a black co-worker); *EEOC v. St. Anne's Hospital*, 664 F.2d 128 (7th Cir. 1981)(hiring of best qualified candidate without regard to race constitutes requisite opposition to discriminatory directive). See also *EEOC Compliance Manual* at Section 8.

Duncan's defiance of Perry's order to remove his hard hat, played out in the presence of co-workers, constitutes protected oppositional activity within the meaning of Section 207. Indeed, that silent but powerful act was sufficiently oppositional to have drawn the attention of co-worker and supervisor alike. It resulted in Supervisor Perry's angry and rapidly escalating use of expletives and ultimately, his forcible removal of the hat from Duncan's head. It also subjected Duncan to a charge of insubordination – in the form of a written "incident report" filed by higher level supervisor Dave Angier on November 12, 2004, which listed as the relevant "infraction" Duncan's failure on September 5 "to follow reasonable order of supervisor." On this substantial evidence, the hearing officer's conclusion that Duncan's opposition did not constitute protected activity under Section 207 is clearly erroneous.

Duncan also proved by substantial evidence that he was subjected to adverse action within the meaning of Section 207. In *Britton v. Architect of the Capitol*, 02-AC-20 (May 23, 2005), this Board recognized the remarkable breadth of the CAA's retaliation language, which provides:

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[11] Although the AOC Safety Office and the OOC health and safety inspection reports do not find that Perry's removal of the hard hat posed a direct violation of the Act, this fact does not undermine the reasonableness of Duncan's belief. Indeed, it is well established under the OSH statute that the failure of the regulating agency to issue a citation "does not amount to a determination that the condition does not constitute a violation". See *Secretary of Labor v. S&G Packaging Co.*, OSHRC No. 98-1107 (19 BNA OSHC 1503, August 2, 2001); *Secretary of Labor v. Siebel Modern Mfg. & Welding*, 15 BNA OSHC 1218 (1991); *Secretary of Labor v. Native Textiles*,) OSHRC No. 01-1636 (20 BNA OSHC 1111, January 8, 2003). Moreover, each report cited another safety concern posed by the incident of September 5: the Architect's failure to implement a lifting program to prevent employee injuries from excessive or improper lifting. Indeed, the OOC Report indicated that the head bumping incident likely would not have occurred had the Architect maintained a proper lifting program.

> 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.

We therefore adopted a Title VII based standard for the statutorily-proscribed "adverse action" and held that, under the CAA, such action includes any employer conduct which "chills legitimate opposition to unlawful practices." Slip Op. at p. 8.

I earlier noted that the Supreme Court has considered the appropriate legal standard for "adverse action" in the context of a retaliation claim under Title VII in its recently-issued *Burlington* decision. The Court held that a plaintiff must show that "a reasonable employee would have found the challenged action materially adverse, which 'in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Supra*, 126 S. Ct. at 2415.[12] For purposes of this dissenting opinion, I need not decide whether the *Burlington* decision modifies the appropriate legal standard for "adverse action" in the context of a CAA retaliation claim because Supervisor Perry's aggressive words and intimidating physical action constitute "adverse action" under either standard.

As recounted above, Perry used harsh and repeated expletives, uttered at Duncan with obvious anger in front of Duncan's co-workers, in an attempt to get Duncan to remove his hard hat. When Duncan stood firm and refused, Perry angrily grabbed Duncan's hard hat off his head and threw it to the ground, again in front of others. As Duncan testified regarding his reaction to Perry's behavior: "I felt threatened, I felt belittled. I felt fear, and I felt like I was unsafe." Transcript at page 173. Duncan later told coworkers, managers, a union representative and Safety and Health officials that he considered Perry's actions to be a physical assault. Duncan eventually sought psychological counseling for his continued emotional upset.

Any reasonable person, confronted with belittling, verbally aggressive and physically intimidating behavior such as Perry displayed on September 5, would consider such behavior as "materially adverse." *See Burlington*, (finding rescinded disciplinary suspension with full backpay reinstated to be an "adverse action" given "the physical and emotional hardship" suffered by the employee). Any reasonable person in Duncan's shoes would likely reconsider their own future insistence upon workplace safety practices which might somehow rile or personally inconvenience a supervisor. Without question,

[12] As the *Burlington* Court observed: "We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.' A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.....A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination....Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an 'act that would be immaterial in some situations is material in others.'" 126 S. Ct. at 2415-16 (citations omitted).

Supervisor Perry's conduct will likely deter any such protected activity by Duncan and his co-workers in the future.

Indeed, the record evidence proves the actual deterrent effect of Perry's actions. Duncan felt threatened and fearful in the wake of Perry's outburst. Thus, when ordered by Perry immediately after the incident to return to the basement to retrieve pipe, Duncan did not retrieve his hard hart before exiting– despite Duncan's previous diligence and insistence in wearing the hard hat in the hard hat zone at issue. Duncan instead further exposed himself to significant safety risks as he traveled bare-headed throughout an admittedly dangerous "head knocker" area. These are risks that Duncan would not have taken had his normal safety practices not been deterred by his supervisor's intimidating behavior. Given the proven deterrence of Duncan's own protected safety practices by Perry's adverse behavior, the Hearing Officer was clearly erroneous in finding that such behavior did not constitute adverse action within the scope of Section 207.

The majority dismisses Duncan's claim on grounds that Duncan failed to prove a causal connection between his protected activity and the adverse action suffered by him. I strongly
disagree. In my view, the majority reasoning – that the head bumping incident involving Duncan's hard hat constitutes a legitimate and unrelated intervening event – embraces a level of legal hairsplitting that is plainly inconsistent with the strong remedial purposes behind Section 207.

A retaliation claimant need only muster evidence of a causal connection between the protected activity and the subsequent adverse action.[13] And federal courts recognize that temporal proximity between the protected activity and the adverse action provides significant evidence of causal connection. *Jensen v. Potter*, 435 F.3d 444, 450 (3rd Cir. 2006) (observing that temporal proximity raises the requisite inference of retaliation "when it is unusually suggestive of retaliatory motive"); *EEOC v. Kohler Co.*, 335 F.3d 766, 774 (8th Cir. 2003) (finding that short time between protected activity and adverse employment action, plus evidence that the protected activity "upset" the management official that terminated plaintiff, satisfied causal connection element of retaliation test); *O'Neal v. Ferguson Const. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001) (suggesting that "very close" temporal proximity between the protected activity and retaliatory conduct is sufficient evidence alone to establish causation).

Duncan refused to remove his hard hat despite his supervisor's profane demands that he do so. Duncan's stubborn insistence that the hat remain on his head visibly upset his

[13] As noted in our decision in *Britton v. Office of the Architect of the Capitol*, No 02-AC-20 (May 23, 2005), Section 207 is broader than the retaliation provision in the OSH Act, 29 U.S.C. Section 660(c), which provides that "no person shall discharge or in any manner discriminate" against an employee because of their engaging in protected activity. Notably, an OSHA retaliation claimant need only demonstrate "*some evidence of a causal connection* between the protected activity .... and the subsequent adverse action". *Reich v. Hoy Shoe Comp.*, 32 F.3d 361 (8th Cir. 1994). OSHA regulation only requires that the protected activity be a "substantial reason for the action, or ... [that] the adverse action would not have taken place but for engagement in protected activity". See 29 CFR 1977.6.

supervisor. Perry ripped the hat off Duncan's head in a physically coercive manner – with further profanity – just seconds later. The extreme temporal proximity of Duncan's protected activity to the adverse action constitutes compelling evidence that Duncan's refusal caused the retaliation. *EEOC v. Kohler*, *supra*. Indeed, *but for* Duncan's protected activity in refusing to remove his hard hat, the supervisor would not have had occasion to take his punitive action. See 29 CFR 1977.6 (adverse action would not have taken place "but for engagement in protected activity"). On these facts, Perry's conduct constitutes the requisite adverse action.

The majority nonetheless posits that the second knock into Duncan's hard hat - by a supervisor who chose not to wear one in a posted hard hat zone - is an intervening cause that defeats the inference of causation. Yet, in each case the majority cites, the "intervening event" that breaks the chain of causation constitutes a *legitimate*, *unrelated* reason justifying the employer's adverse action. See *Caver v. City of Trenton*, 420 F.3d 243 (3rd Cir. 2005) (intervening psychiatric report rendering plaintiff employee unfit to work provides legitimate grounds for discharge); *Yarde v. Good Samaritan Hospital*, 360 F. Supp. 2d 552 (S.D.N.Y. 2005) (substantial intervening events - including plaintiff's patient confidentiality breach, creating ruckus in office, and failure to cooperate in hospital investigation - provides legitimate grounds for discharge); *Smith v. American Airlines*, Inc., 2001 WL 710108 (N.D. Ill. 2001)(plaintiff's intervening use of abusive profanity and threat to "kill" anyone who touched him provides legitimate grounds for discharge). Perry's behavior here was neither legitimate nor unrelated to Duncan's protected activity.

Knocking into the brim of a hard hat worn by an employee – in a posted hard hat area – whose insistence on wearing the hat constitutes protected activity is not a legitimate reason for a supervisor to forcibly remove it. In my view, the inconvenience posed by Duncan's observance of personal safety practices cannot be used to legitimize the supervisor's impulsive but nonetheless retaliatory action against it. Moreover, the mere notion that the second bump into the hard hat brim somehow "intervened," setting in motion adverse behavior by Perry which is unrelated to Duncan's earlier refusal to remove the hard hat, is logically flawed.[14] Perry's jerking the hard hat off of Duncan's head flows directly and necessarily from Duncan's continuing refusal to remove it, and the physical inconvenience it posed. Under the present circumstances, *Caver*, *Yarde*, and *Smith* are simply inapposite.

Workplace compliance with health and safety standards is an all too often unachieved public goal. Safety policies are meaningless if they are not observed. Employees should

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[14] Again, supervisor Perry was visibly angry with Duncan before he knocked into the brim of Duncan's hard hat a second time. Perry had not simply asked Duncan to remove his hard hat the first time – he had ordered him to remove his "stupid f—ing hard hat." To characterize Perry's forcible removal of Duncan's hard hat a moment later (with a repetition of the same expletive) as legally "unrelated" to Duncan's defiance of his direct order to remove the hat ignores the degree of anger and emotional upset that the supervisor had already displayed with regard to the hard hat. Had Duncan stepped on the supervisor's toes, or engaged in some other completely unrelated gaffe, then the majority's conclusion of an unrelated, intervening event might make sense. But on the current facts, it does not.

wear hard hats in a hard hat zone, and their supervisors should insist upon it. The majority opinion sends a chilling message to workers, such as Duncan, that the Act simply may not protect them if they defy a supervisor who does not adhere to prevailing standards of workplace safety.

In my reading of Section 207, a supervisor's decision to skip the protective head gear in a hard hat zone must yield to another employee's diligent adherence to personal safety standards, and not the other way around. And most certainly, Section 207 must protect against any retaliatory conduct caused by such diligence.

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

RICHARD DUNCAN, Appellant	)	
V.	)	**Case No. 02-AC-59 (RP)**
OFFICE OF THE ARCHITECT OF THE CAPITOL, Appellee.	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing *Decision of the Board of Directors* was served this 19th day of September, 2006, upon the following:

FOR PICK UP ON 9/21/06
Jeffrey Leib, Esq.
5104 34th Street, NW
Washington, DC 20008

BY FACSIMILE AT (202) 789-8634
(ONLY the first page only of the final decision and cover letter) and FOR PICK UP ON 9/20/06
Christine Cooper, Esq.
McGuiness, Norris & Williams
Suite 1200
1015 15th Street, NW
Washington, DC 20005

Respectfully Submitted,

Selviana B. Bates
Hearing Clerk