OFFICE OF COMPLIANCE
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Washington, DC 20540-1999

EDWARD E. EASTHAM,	)	
	)	
Appellant,	)	
	)	
	)	
	)	**Case Number: 05-CP-55 (DA, RP)**
U.S. CAPITOL POLICE BOARD,	)	
	)	
Appellee.	)	
	)	
	)	

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

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board on the petition of Complainant Edward E. Eastham ("Eastham"), an employee of the U.S. Capitol Police ("USCP"), seeking review of the hearing officer's decision granting USCP's motion for summary judgment, pursuant to Section 5.03(d) of the Procedural Rules of the Office of Compliance.

I. Background

Edward Eastham was hired by USCP in 1999 as an electrician technician in the Maintenance Section, and almost immediately suffered a work-related back injury. In 2001, Eastham suffered another back injury at work, and ultimately underwent back surgery in 2002 and again in 2003 following yet another injury. Throughout this period, Eastham was incapable of performing the essential functions of the position for which he was hired. Because of medical restrictions imposed by his doctors, he was given temporary light-duty assignments to accommodate these restrictions.

In 2000, in a further effort to accommodate his medical restrictions, he was transferred to the Project Planning Section where he was assigned modified or "hybrid" duties. Unlike other Planning Section employees, he primarily performed Computer Aided Drafting and Design ("CAD") work, but he was also responsible for managing a small portfolio of projects, which required him to perform quality assurance, surveys and inspections at various project sites

around Capitol Hill. Because of medical restrictions on crawling, climbing and like activities, USCP accommodated Eastham by providing assistance to him when his project management duties required such activity. He continued to perform these duties during the years that followed.

In late 2004, his doctors determined that he had reached "MMI" – i.e., maximum medical improvement -- and in 2005, he requested various accommodations under the ADA, some of which were granted by USCP. In March 2006, he accepted an offer to transfer to an office position in another USCP administrative unit at the same grade level. Eastham is able to perform this assignment with minimal or no accommodation.

In April 2006, Eastham filed the instant Complaint, in which he alleged that USCP engaged in disability discrimination against him by failing to grant certain requests for accommodation, in violation of the Americans With Disabilities Act ("the ADA") and Section 201(a)(3) of the Congressional Accountability Act, 2 U.S.C. 1311(a)(3) ("the CAA"). The Complaint also alleged that USCP retaliated against Eastham for asserting his rights under the ADA by refusing to grant him a noncompetitive promotion and by failing to engage in the requisite "interactive process" to identify reasonable accommodations, in violation of Section 207 of the CAA. Finally, the Complaint alleged that USCP created a retaliatory and discriminatory hostile work environment.

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).

Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. Id., at 247-248. We review the hearing officer's grant of summary judgment *de novo.* See, e.g., *Medrad, Inc. v. Tyco Healthcare Group LP,* 466 F.3d 1047, 1050 (Fed. Cir. 2006).

III. Analysis

The Board has considered the hearing officer's decision, the parties' briefs, and the record in this proceeding. The Board agrees with the hearing officer that no genuine issue of material fact exists in this case, and that USCP is entitled to summary judgment as a matter of law. The Board also affirms the Hearing Officer's underlying findings and conclusions, except as modified herein.

Reasonable accommodation. The ADA provides that employers "shall not discriminate against a qualified individual with a disability because of the disability of such individual . . .," and defines the term 'discriminate' to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . .." 42

U.S.C. Sec. 12112(a) and (b)(5)(A). See *Office of the Architect of the Capitol v. Office of Compliance,* 361 F.3d 633, 639 (Fed. Cir. 2004). Section 201(a)(3) of the CAA makes this prohibition applicable to most legislative branch agencies of the federal government, including the USCP.

The hearing officer found that USCP reasonably accommodated Eastham's disability, and we agree. Because we affirm her determination of reasonable accommodation, we find it unnecessary to decide whether the hearing officer properly concluded that Eastham was an "otherwise qualified individual" within the meaning of the ADA.[1]

The record shows that USCP has been responsive to Eastham's medical needs beginning with his initial injury in 1999, when he was first given a light duty assignment, and culminating six years later in the creation of a position which Eastham could perform with minimal accommodation – a position which he accepted when it was offered to him in March 2006. In the intervening years, USCP stood by Eastham during his many medical travails, freely granting him time off for recuperation from a number of injuries and surgeries, numerous doctors' appointments, physical

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1 The ADA "protects . . . only *qualified individuals* with disabilities, who are defined [as] . . . 'an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires,'" *D'Angelo v. Conagra Foods, Inc.,* 422 F.3d 1220, 1225 (11th Cir. 2005), quoting 42 U.S.C. 12111(8). Eastham had long been unable to perform the essential functions of the position for which he was hired, and the job to which he was assigned was found by the hearing officer to be a temporary light duty position. Consequently, under ADA law, it is possible that USCP could have refused to keep Eastham in this position when he reached MMI in November 2004. See *Williams v. Eastside Lumberyard,* 190 F.Supp.2d 1104, 1119 (S.D.Ill. 2001), and cases cited ("the ADA does not require employers to convert temporary light-duty assignments into permanent ones"). Instead, it continued to accommodate him for an additional year, and eventually found him a vacant position.

Faulting USCP for failing to make additional accommodations in 2005, at a time when it may have had no obligation to retain him in that position, would only discourage USCP and other employers from voluntarily exceeding ADA requirements. Numerous cases recognize the principle that "good deeds ought not to be punished, and an employer who goes beyond the demands of the law to help a disabled employee incurs no legal obligation to continue to do so." *Lucas v. W.W. Grainger, Inc.,* 257 F.3d 1249, 1257, n.3 (11th Cir. 2001). See also, *Laurin v. The Providence Hospital,* 150 F.3d 52, 60 (1st Cir. 1998).

On the other hand, if an employer allows an employee to "continue doing light-duty assignments *after* knowing that the employee was *permanently*, medically restricted from ever again working in his original position," a finding may be warranted that the light-duty assignment is permanent. *Eastside Lumberyard,* 190 F.Supp. at 1118, citing cases (emphasis the court's). Our review of the record suggests that such a finding could conceivably have been appropriate in the instant case. We need not decide, however, if Eastham was in fact a "qualified individual" entitled to ADA accommodation, because we agree with the hearing officer that USCP reasonably accommodated his disability.

therapy sessions, and the like. It permitted Eastham to return to duty part time on several occasions until he could resume full time duties. It went outside the agency to find a handicap parking place for him, and permitted him to work modified hours. Most importantly, during this entire period, USCP provided significant assistance to Eastham during his visits to project sites. Thus, when his duties required climbing, kneeling, and similar activities that were medically restricted, USCP permitted other employees, even supervisory employees, to perform such tasks. And when Eastham requested specific accommodations under the ADA in 2005, it immediately granted one request (for an ergonomic chair), granted another request (for early release on Friday) as soon as it received medical documentation, and took concrete steps to accommodate a third request (for paid lodging to attend training sessions in the Baltimore area).[2] On the whole, USCP's record of accommodating Eastham during this entire period can best be described as exemplary.

Only two requests for accommodation were denied by USCP. One of these requests – for hydraulic lift training – clearly conflicted with his medical restrictions, since, as the hearing officer observed, his "physician had specifically prohibited [him] from operating a Fork Lift." USCP also did not grant his request for a golf cart to transport him to project sites around Capitol Hill, but USCP had a legitimate reason for denying this request, because Eastham had access to a shuttle service operated by the Office of the Architect of the Capitol that provided frequent transportation around the Hill.[3]

Although Eastham testified that he needed a golf cart "to get around the hill better than just using the shuttle so I didn't have to stand and wait for the shuttle," nowhere does he proffer evidence that using the shuttle violated his medical restrictions, impeded his access to work sites, or amounted to more than a minor inconvenience.[4] Absent a proffer of evidence that he was unable to perform the essential functions of his job without additional accommodation in the form of alternative means of transport, his claim of entitlement to such an accommodation must fail.[5]

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2 USCP was unable to provide paid lodging pursuant to Eastham's request because of agency per diem restrictions and year-end budgetary constraints, but it promptly arranged for a waiver of per diem rules for future CAD training and advised Eastham how to proceed. Eastham subsequently requested funds for a November 2005 CAD-related training seminar, but this request was made just as management began its search for a new position for Eastham – one that presumably would not require such training. It was not unreasonable for USCP to hold this request in abeyance during these deliberations until a position could be found. USCP's response to these paid lodging requests does not, in our view, evidence bad faith or constitute disability discrimination.

3 The hearing officer found that this request remained under discussion, but we assume, for purposes of this decision, that USCP's actions amounted to a denial of the request.

4 Conspicuously absent is any testimony that waiting for the shuttle required him to stand for more than 15 consecutive minutes (one of his medical restrictions), or indeed that he ever had to wait more than a few minutes for the shuttle's arrival.

5 The record also shows that other USCP employees were available to and did transport Eastham to project sites.

Finally, this request must be viewed in the context of USCP's proven history of accommodating Eastham's physical needs during the entire course of his employment, up to and including his being offered an entirely new position which he could readily perform with minimal accommodation. In our view, this history negates any suggestion that, with respect to this one particular request, USCP acted unreasonably or in bad faith. In sum, we conclude that Eastham's proffer of evidence is insufficient to establish, prima facie, that USCP's failure to provide Eastham with a golf cart constituted disability discrimination under the ADA and the CAA.[6]

Retaliatory failure to promote. The Complaint alleged that USCP's failure to grant Eastham a noncompetitive promotion was in retaliation for his requests for accommodation under the ADA. The hearing officer did not address this issue in her decision.[7] Although she did reject Eastham's related claim that USCP failed to engage in an interactive process in retaliation for his accommodation requests, she did not address the Section 207 issue insofar as Eastham alleges a retaliatory failure to promote.

The Board is fully capable of assessing the deposition testimony and other documentary evidence in this summary judgment proceeding. We conclude that Eastham has failed to establish a prima facie case of a retaliatory refusal to promote.

Section 207 of the CAA makes it unlawful to retaliate against a "covered employee because the

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6 The hearing officer determined that the failure to furnish a golf cart did not violate the ADA because the golf cart request triggered a search for an alternative solution that culminated in his transfer to another position, which was itself a reasonable accommodation. She concluded that the transfer effectively mooted the golf cart request, citing cases holding that the employer is not required to provide the disabled employee with the accommodation of his choice. That principle, however, has no application where, as here, the disabled employee seeks an accommodation in his present position (in this instance, the use of a golf cart) and the employer elects instead to transfer the employee to a new position. See, e.g., *Skerski v. Time Warner Cable Co.,* 257 F.3d 273, 285 (3rd Cir. 2001) ("the EEOC's commentary to the regulations [29 C.F.R. pt. 1630, App. 1630.2(o)] makes clear that reassignment 'should be considered only when accommodation *within the individual's current position* would pose an undue hardship.'" (Italics the court's.); *Smith v. Midland Brake, Inc.,* 180 F.3d 1154, 1166 (10th Cir. 1999) ("the message delivered by the quoted sentence is first, the employer must determine that no reasonable accommodation could be made to keep the disabled employee in his present position").

We uphold the hearing officer's summary judgment ruling with respect to the golf cart request, not because he was offered a transfer, but rather because he failed to proffer evidence that because of his disability, he was unable to fully perform his project management duties without the use of a golf cart.

7 Instead, she addressed two issues not alleged in the complaint, but implicitly argued by Eastham in other pleadings – namely, whether Eastham was entitled to a promotion as an accommodation, and whether the denial of a promotion constituted disability discrimination under a "disparate treatment" theory of violation. In his reply brief Eastham unequivocally confirms that his only claim is that the denial of a promotion was retaliatory.

covered employee has opposed any practice made unlawful by [the CAA], or because the covered employee has initiated proceedings . . . or participated in any manner in a hearing or other proceeding under [the CAA]." In order to prove unlawful retaliation under Section 207, Eastham was required to demonstrate (1) 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 *Solomon v. Architect of the Capitol,* 02-AC-62 (RP) (2005). Accord *Thomas v. Corwin,* 483 F.3d 516, (8th Cir. 2007) (retaliation claim under Title VII and the ADA); *Ray v. Henderson,* 217 F.3d 1234, 1240 (9th Cir. 2000) (Title VII). To prove a causal connection between an adverse employment action and protected activity, the employee is required to "proffer evidence 'sufficient to raise the inference that her protected activity was the likely reason for the adverse action.'" *Zanders v. National R.R. Passenger Corp.,* 898 F.2d 1127, 1135 (6th Cir. 1990), quoting *Cohen v. Fred Meyer, Inc.,* 686 F.2d 793, 796 (9th Cir. 1982).

The evidence proffered by Eastham to show that he was denied a promotion because of his ADA requests falls well short of meeting this evidentiary burden. Thus, the record shows, and the hearing officer found, that Eastham's first and second-line supervisors had both told him that in order to be promoted he needed to devote more effort to the project management portion of his hybrid duties, and the hearing officer specifically found that Eastham had failed to "show that [USCP's] reasons for a lack of promotion are a pretext for discrimination" – a finding that applies with equal force to his retaliation claim. Moreover, there is no evidence that USCP harbored resentment or animus toward Eastham because of his ADA requests; as the hearing officer observed, Eastham "has not shown that any of [USCP's] actions or decisions . . . raise an inference of discrimination based on retaliation." Finally, the record fully supports the hearing officer's additional finding that Eastham's supervisor, Eric Goff, did attempt to secure a promotion for him notwithstanding his shortcomings in managing projects – efforts which met with failure because of bureaucratic barriers at higher echelons of USCP that bear no taint of improper motivation.

In his brief to the Board, Eastham argues that in March 2005 he was assigned the duties of a grade 9 in violation of the principle of equal pay for equal work; that the following month he requested a noncompetitive promotion to grade 9; that he was denied a promotion; and that the record supports an inference that the denial was in retaliation for his ADA requests. Other than conclusory allegations in his own Declaration, there is little record support for his assertion that he was performing grade 9 work or that he was entitled to promotion at the time he made his request in April, or at any other time.[8] More importantly, Eastham points to no evidence even remotely suggesting that the USCP's true motive for denying the request was retaliatory. His briefs to the Board offer no legal or evidentiary basis for concluding that an inference of retaliatory motive is warranted. Nor does our review of the record reveal any support for this

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8 Although Goff told Eastham in the summer of 2005 that he was performing grade 9 work, it is clear from the record that Goff was addressing Eastham's performance of CAD duties, not his project management work, which management continued to have problems with. Indeed, Eastham concedes that Goff told him that the only way he could sell a promotion to his superiors was to assign him additional administrative duties – a further indication that Eastham's current performance did not warrant a promotion.

claim.

For all the foregoing reasons, viewing the record in the light most favorable to Eastham, he failed to proffer evidence that would warrant an inference that he was denied a promotion because of his ADA requests. Accordingly, summary judgment is warranted on this allegation of the Complaint.

Retaliatory failure to engage in an interactive process. An employer has "a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement reasonable accommodations." *Humphrey v. Memorial Hospital Ass'n,* 239 F.3d 1128, 1137 (9th Cir. 2001). The hearing officer, after reviewing the extensive efforts of numerous USCP officials to consult with Eastham and to accommodate his needs, concluded that "[t]his communication satisfied the Agency's responsibility to engage in the interactive process," and that Eastham "cannot establish a prima facie case of reprisal or prove that [USCP] discriminated against him by failing to engage in an interactive process." We agree, for the reasons fully set forth in her decision, that summary judgment was warranted on this allegation.

Retaliatory hostile work environment. To sustain this allegation, Eastham was required to establish, prima facie, that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21 (1993) (citations and internal quotation marks omitted). Eastham failed to present any material evidence in support of this allegation. Instead, as the hearing officer observed, "the record contains [Eastham's] statement that he worked in a 'good' atmosphere." Summary judgment was properly granted by the hearing officer on this final allegation.

ORDER

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

It is so ordered.

Issued, Washington, D.C.: May 30, 2007

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EDWARD E. EASTHAM,	)
Petitioner,	)
	)

V.	**)**	**Case No. 05-CP-55 (DA, RP)**
OFFICE OF THE U.S. CAPITOL POLICE BOARD,	**)**	
Respondent.	**)**	
	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing *Decision of the Board of Directors* was served this 30th day of May, 2007, upon the following:

FOR PICK UP ON MAY 30, 2007
Jeffrey Leib, Esq.
5104 34th Street, NW
Washington, D.C. 20008

BY FACSIMILE AT (202) 593-4478 (only cover letter and first page) AND
FOR PICK UP ON MAY 30, 2007
Frederick Herrera, Esq.
Scharon Ball, Esq.
United States Capitol Police
Office of the Employment Counsel
119 D Street, N.E.
Washington, D.C. 20510

Respectfully Submitted,

Selviana B. Bates
Hearing Clerk