OFFICE OF COMPLIANCE
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Washington, D.C. 20540-1999

Blair P. Gormley, Appellant, v. Office of the United States Capitol Police Board, Appellee.	)	Case Number: 07-CP-35 (DA)

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

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors ("Board") through a petition for review filed by Blair P. Gormley ("Gormley" or "Appellant"). Gormley filed a claim of discrimination alleging that the Capitol Police Board ("Capitol Police" or "Appellee"), violated Section 207(a) of the Congressional Accountability Act ("CAA") when it failed to select him for a vacant position for which he applied. The Hearing Officer dismissed the complaint for failure to state a claim upon which relief can be granted and for failure to proceed with the processing of the complaint. For the reasons set forth below, we reverse the decision of the Hearing Officer and remand the claims for further proceedings consistent with this opinion.

I. Background

Appellant applied for a position as police officer with the Capitol Police on November 3, 2006. After receiving a conditional offer of employment dated January 16, 2007, Appellant underwent a physical exam. By letter of February 15, 2007, Appellant was notified that the Office of the Attending Physician had reported to the Capitol Police that he had failed to meet the physical requirements for the position of United States Capitol Police Officer. The letter further notified Appellant that additional processing of his

application had been terminated and that his conditional offer of employment had been withdrawn. Appellant was advised that he could provide additional information and "re-enter the selection process at such time as the Office of the Attending Physician reports that [he met] the minimum physical requirements of the position."

The report from the Office of the Attending Physician, dated January 16, 2007, showed that Appellant had been "temporarily disqualified by reason of: need more info re: DM". Further, there was a note on the report dated February 12, 2007 showing that the information from the Appellant's endocrinologist had been reviewed and that Appellant had been "disqualified by reason of: … DM1 [with] insulin pump and episodes of hypoglycemia."

As a result of the withdrawal of the conditional offer of employment, Appellant sought counseling with the Office of Compliance ("Office" or "OOC") and subsequently requested mediation. He filed a formal complaint with the Office on December 10, 2007, stating that he believed that his "rights to employment" had been violated under the Americans with Disabilities Act ("ADA"). Appellant also stated in the complaint that he had been informed by the Capitol Police that he did not meet the minimum requirements for the position, that additional processing had been terminated and the conditional offer of employment had been withdrawn. Appellant further noted in the complaint that he was told that he did not meet the requirements of the job as a result of Diabetes Mellitus.

On December 21, 2007, the Capitol Police filed a Motion to Dismiss the Complaint ("Motion to Dismiss"), asserting that Appellant failed to state a claim for which relief can be granted and that under Rule 12(b)(6) of the Federal Rules of Civil Procedure and OOC Procedural Rule § 5.03(a), the complaint should be dismissed. Specifically, the Capitol Police argued that Appellant failed to plead that he was disabled or was regarded as disabled as that term is defined by the ADA.

The Hearing Officer granted the Capitol Police's Motion to Dismiss and dismissed the case with prejudice on January 8, 2008, finding that, notwithstanding the allowance of additional time, Appellant failed to file a response to, oppose, or communicate in any way to the Motion to Dismiss.

On January 14, 2008, Appellant filed a Motion to Set Aside the Hearing Officer's Order ("Motion") and an Answer to the Capitol Police's Motion to Dismiss Complaint ("Answer"). In his Motion, Appellant argued that his Answer of January 14, 2008 was timely. Appellant requested that the Hearing Officer's Order of January 8, 2008 be set aside and that his Answer be accepted as timely filed and timely submitted. In his Answer, Appellant contends that he has stated a claim sufficient for relief under the Americans with Disabilities Act because he is an individual who is regarded as being disabled. Appellant further states that it is clear from his Complaint that the Capitol Police regarded him as having a limiting impairment.

On January 17, 2008, the Capitol Police filed an Opposition to the Motion to Set Aside the Hearing Officer's order, arguing that Appellant's Motion should be denied because

under OOC Procedural Rules, Appellant's response to the Motion to Dismiss was untimely by four days.

On January 22, 2008, the Hearing Officer denied the Appellant's Motion and a request for a hearing on the motion. She refused to accept the Answer, finding that: "The Order of Dismissal was rendered in accord with OOC rules as no timely communication was received from Complainant in response to Respondent's Motion To Dismiss and Complainant has not stated a claim upon which relief can be granted." The Hearing Officer also characterized her January 8, 2008 Order of Dismissal as being based on Appellant's failure to proceed with the processing of the complaint.

Although she did review and consider Appellant's January 14, 2008 Answer and attachments, the Hearing Officer ultimately refused to accept them because they were untimely. Noting the Appellant had an impairment of diabetes, the Hearing Officer found that the record did not evidence any limitation of a major life activity nor did it support a conclusion that the Capitol Police's medical officer or personnel officer determined that the Appellant had a substantial limitation of a major life activity or that anyone working for the Capitol Police regarded the Appellant as having a substantial limitation of a major life activity or a record of such limitation.

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 Appellant in this case argues that the Hearing Officer's decision was not in conformity with OOC procedures and was not supported by substantial evidence.[1] 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

By orders of January 8 and January 22, the Hearing Officer dismissed the case with prejudice without holding a hearing on the grounds that Appellant had failed to state a claim for which relief can be granted and that, in not filing a timely response to Appellee's Motion to Dismiss, had failed to proceed with the processing of the complaint. While the Hearing Officer acknowledged that she reviewed Appellant's January 14 Answer, she found it to be untimely and did not accept it.

[1] In its response in opposition to Appellant's Brief in support of the petition for review, Appellee argues that Appellant's brief was untimely and should be rejected. While Appellant's Brief was received in the Office of Compliance on March 3, 2008, the postmark and certificate of service show that it was timely filed on February 22, 2008, as required by the Procedural Rules.

The Hearing Officer's January 8 Order Was Not Consistent With Required Procedures

In his Petition for Review, Appellant argues that the Hearing Officer's January 8, 2008 decision was not in conformity with OOC procedures. He maintains that his Answer to Appellee's Motion to Dismiss was timely because the Procedural Rules provided him with a total of 20 days from the date that he *received* the motion in which to respond. Thus, having received the Motion to Dismiss on December 24, 2007, Appellant reasoned that his Answer was due on Sunday, January 13, 2008[2], and as the next workday for filing was January 14, 2008, the Answer was timely. Thus, according to Appellant's interpretation of the OOC Procedural Rules, he would have been entitled to a total of 20 days after *receipt* of Appellee's Motion to Dismiss, rather than 20 days after the *filing* of the motion. Appellant misconstrues the procedural rules so as to provide him with a total of 24 days from the date of the Motion to Dismiss in which to file a response.

Rejecting this analysis, the Hearing Officer determined that Appellant's answer was due 15 days after *receipt* of the Motion to Dismiss. In making this determination, the Hearing Officer decided that as the Appellant had acknowledged receipt of the Motion to Dismiss on December 24, 2008, the full 5-day mailing period under Rule § 1.03(c) was not needed and therefore ended on that date. The Hearing Officer held that the Answer was due 15 days later, on January 8, 2008. Noting that her Order of Dismissal was issued by close of business on January 8, 2008, after mail and fax communication from the Appellant could have been timely submitted, the Hearing Officer concluded that the Order of Dismissal was issued in accord with OOC Rules. We do not agree and find that the Hearing Officer improperly issued her January 8, 2008 Order prior to the procedurally prescribed time that a response would have been due from the Appellant.

The Office of Compliance Procedural Rules provide:

> Procedural Rule § 9.01 *Filings, Service and Size Limitations of Motions, Briefs, Responses and other Documents:*
> (b) *Service.* The parties shall serve on each other one copy of all motions, briefs, responses and other documents filed with the Office, other than the request for counseling, the request for mediation and complaint. Service shall be made by mailing or by hand delivering a copy of the motion, brief, response or other document to each party, or if represented, the party's representative, on the service list previously provided by the Office. Each of these documents must be accompanied by a certificate of service specifying how, when and on whom service was made.
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> (c) *Time Limitations for Response to Motions or Briefs and Reply.* Unless otherwise specified by the Hearing Officer or these rules, a party shall file a response to a motion or brief within 15 days of the *service* of the motion or brief upon the party. Any reply to such response shall be filed and served within 5 days of the service of the response. (emphasis added)

[2] In his Brief in Support of the Petition for Review, Appellant claims that the Answer was actually due on Saturday, January 12, 2008 and that the next day for filing was Monday January 14, 2008.

> Procedural Rules § 1.03 *Filing and Computation of Time*:
> (c) *Time Allowances for Mailing of Official Notices*. Whenever a person or party has the right or is required to do some act within a prescribed period after the service of a notice or other document upon him or her and the notice or document is served by regular, first-class mail, five (5) days shall be added to the prescribed period.

Under §9.01(c), if Appellant was going to respond to Appellee's Motion to Dismiss, he was required to file a response within 15 days of the *service* of that Motion. As Appellant had the right to file a response to the Motion to Dismiss which had been served by regular, first-class mail, under Rule § 1.03(c), he would have been entitled to five days in addition to the 15 days required for the filing of an answer, for a total of 20 days. Under the OOC Procedural Rules, regardless of when the Appellant actually received Appellee's Motion to Dismiss, the 20 days should have begun to run from the day after the *date of service* which occurred on December 21, 2007 (as evidenced by the Certificate of Service, required under § 9.01(b)). Therefore, Appellant's response to Appellee's Motion to Dismiss was not due until January 10, 2008, two days after the Hearing Officer issued her Order of January 8, 2008. Appellant's Answer was filed on January 14, 2008. While the Board recognizes that Appellant's Answer was four days late, we find that the Hearing Officer's error in issuing her Order prematurely was significant and provides good cause[3] to waive the procedural requirement in this matter. Accordingly, in order to correct the Hearing Officer's error, we hold that Appellant's Answer to Appellee's Motion to Dismiss and its attachments be fully considered as a part of the record in this case.

The Hearing Officer Improperly Dismissed the Complaint For Failure to State a Claim

As indicated above, the Hearing Officer on January 8, 2008, and January 22, 2008 dismissed the complaint on the grounds that the Appellant did not address any limitation

[3] Notwithstanding Appellant's late filing, under section 9.07(b) of the Procedural Rules, "[t]he Board or a Hearing Officer may waive a procedural rule contained in the Part for good cause shown if application of the rule is not required by law." In *American Farm Lines v. Black Ball Freight Service*, 397 US 532, at 539 (1970), the Supreme Court established the principle that "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." *See*, *e.g., Colorado Environmental Coalition v. Wenker*, 353 F.3d 1221 (10th Cir. 2004); and *City of Fremont v. FERC*, 336 F.3d 910 (9th Cir. 2003). As time limits at issue here are not "required" by the "black letter" text of the CAA, and the authority to waive has been set out in the Procedural Rules themselves, the Board clearly has the authority to waive the application of section 9.01(c) of the Procedural Rules. Consequently, the question before the Board is whether "good cause" for a waiver (section 9.07(b)) has been shown. *See Halcomb v. The Association & Executive Board of the Committee of Correspondents Radio and Television Gallery of the U.S. Senate*, Case No. 03-SN-45.

of a major life activity. For the following reasons, we find that the Hearing Officer improperly dismissed the complaint for failure to state a claim.[4]

The Federal Rules of Civil Procedure provide for a liberal system of notice pleading. See Fed. R. Civ. P. 8(a). The Board has held in the past that a complaint may only be dismissed for failure to state a claim "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Solomon v. Office of the Architect of the Capitol*, Case No. 02-AC-62 (RP) (2005); *Duncan v. Office of the Architect of the Capitol*, Case No. 02-AC-59 (RP)(2004)(citing *Hishon v. King & Spaulding,* 467 U.S. 69, 73 (1984) and *H.J. Inc. v. Northwest Bell Telephone Co*., 492 U.S. 229, 249-50 (1989), respectively.) In a motion to dismiss, a court must accept as true all well-pleaded factual allegations contained in the complaint and draw all reasonable inferences in the plaintiff's favor. *Duncan v. Office of the Architect of the Capitol* (citing *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1424-25 (3d Cir. 1997)).

Further, when there is no opportunity to obtain additional evidence, as in this case, and the courts rely only on the pleadings, the circuit courts of appeal have evaluated cases under the "notice pleading" theory to determine whether the allegations in a plaintiff's pleading are sufficient to survive a motion to dismiss. *Solomo*n *v. Office of the Architect of the Capitol* (citing *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)) (employment discrimination pleadings need only give fair notice of the claims and grounds upon which they rest)[5]; *Weston v. Commonwealth of Pennsylvania*, 251 F.3d 420 (3rd Cir. 2001)(claim will survive motion to dismiss when allegations pled

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[4] As we have found Appellant's Answer to be timely and his complaint sufficiently pled, we need not address the hearing officer's determination that Appellant failed to proceed with the processing of the complaint.

[5] In *Swierkiewicz v. Sorema N.A.,* the District Court granted the defendant's motion to dismiss, reasoning that the plaintiff failed to allege sufficient facts to establish a *prima facie* case. *Swierkiewicz*, 534 U.S. at 509. The Second Circuit Court of Appeals affirmed the dismissal, and the U.S. Supreme Court reversed, holding that there is no requirement that all elements of the *prima facie* case test must be pled. In so holding, the Court reasoned that the *prima facie* case is an "evidentiary standard, not a pleading requirement." *Swierkiewicz,* 534 U.S. at 510. The Court determined, based on notice pleading standards, that a plaintiff in an employment discrimination case is only required to plead those facts sufficient to "give respondent fair notice of what petitioner's claims are and the grounds upon which they rest." 534 U.S. at 514. This is not changed by the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), cited by the Capitol Police. In *Bell Atlantic*, the Supreme Court specifically noted, with approval, that it had reversed the Court of Appeals' decision in *Swierkiewicz* because the court had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege "specific facts" beyond those necessary to state his claim and the grounds showing entitlement to relief. 127 S.Ct. at 1973. Therefore, even under *Bell Atlantic*, the Supreme Court does not require "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." 127 S.Ct at 1974. We further note, unlike the requirement articulated in *Bell Atlantic* that under Fed. R. Civ. P. 8(a)(2), a complaint must contain allegations sufficient to show a "plausible" entitlement to relief, there is nothing in the OOC Procedural Rules requiring that an *administrative* complaint filed with the OOC show an entitlement to relief, Thus, § 5.01 (c)(1) of the Procedural Rules requires only that an *administrative* complaint include: "(iv) a description of the conduct being challenged…; (v) a brief description of why the complainant believes the challenged conduct is a violation of the Act and the section(s) of the Act involved; (vi) a statement of the relief or remedy sought…."

provide adequate notice to defense); *Krieger v. Fadley,* 211 F.3d 134 (D.C. Cir. 2000)(pleadings need not contain facts to support each element of a claim); *Brokaw v. Mercer County,* 235 F.3d 1000 (7th Cir. 2000)(notice pleading standards are lenient); *Fouche v. Jekyll Island-State Park Auth.,* 713 F.2d 1518 (11th Cir. 1983)(notice pleading is sufficient at motion to dismiss stage). The Rules of Civil Procedure "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Vector Research, Inc. v. Howard & Howard Attys. P.C.*, 76 F.3d 692, 697 (6th Cir. 1996).

In this case, the Hearing Officer found that the Appellant had not alleged any facts that would allow her to conclude that he was disabled within the meaning of the ADA. The Americans with Disabilities Act defines an individual's disability to be one of three things: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. §12102(2). Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. §1630.2(i).

Appellant's complaint states that: his rights to employment had been violated under the Americans with Disabilities Act; he had been informed by the Capitol Police that he did not meet the minimum requirements for the position; additional processing had been terminated and the conditional offer of employment had been withdrawn; and he was told that he did not meet the requirements of the job as a result of Diabetes Mellitus. Appellant requests that he be allowed a position as a police officer or allowed to continue the employment process. Appellant also states in his complaint that he has been and is able to take the job. The Hearing Officer found that the complaint was insufficient, stating, on page 4 of her Order, that: "[b]ecause the [Appellant] did not address any limitation of a major life activity in his complaint, and has not done so in his answer, it cannot be concluded that he is an individual with a disability or was regarded as such by [Appellee's] medical or personnel offices. Thus, [Appellant] cannot demonstrate that he is protected under the Rehabilitation Act or the ADA. [Appellant] has not stated a claim upon which relief can be granted."

We, therefore, turn to the issue of whether the Hearing Officer inappropriately dismissed the complaint because it failed to address any limitation of a major life activity. This issue of sufficiency has been raised by several courts. The Sixth Circuit's decision in *EEOC v. J.H. Routh Packing Co*., 246 F.3d 850, 852 (6th Cir. 2001) is most instructive on this point. In that case, the employer offered the plaintiff a job as a meat cutter/trimmer, contingent upon his passing a physical examination. As part of this physical examination, the plaintiff disclosed his history of epilepsy. He also disclosed that his epilepsy was controlled by medication and that he had experienced a seizure within the past two months. When the employer learned of this seizure, it terminated the plaintiff's employment, advising him that he must be seizure-free for at least six months before he

would be considered for employment. The Equal Employment Opportunity Commission filed a complaint under the Americans with Disabilities Act against the employer. The employer moved for judgment on the pleadings. The district court granted the motion, finding the plaintiff's claims insufficient because they did not "identify some major life activity…in which [the plaintiff] is substantially limited." On appeal by the EEOC, the Sixth Circuit reversed and remanded. 246 F.3d at 852.

In reaching its decision, the court reviewed several cases, concluding that "[f]ederal jurisprudence is unclear on the necessity of including such a major life activity in a complaint under the Act. Few circuits have addressed the issue, and the district courts that have decided the question have reached inconsistent conclusions." *Id* at 852. *See, e.g*., *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3d Cir. 1998) (court found sufficient, simply alleging that the disability is recognized under the Act, thereby implicitly including a substantially affected major life activity without requiring it to be pleaded expressly); *Homeyer v. Stanley Tulchin Associates, Inc*., 91 F.3d 959, 961 (7th Cir. 1996) (under the liberal federal notice pleading standards, plaintiff sufficiently pled the initial element of an ADA claim, i.e., that she suffers from a 'disability' as defined in the Act.); *Muller v. Costello*, 1996 WL 191977 (N.D.N.Y) (plaintiff's allegation that his disability was a respiratory condition was sufficient to survive defendants' motion to dismiss.); *Compare Dikcis v. Indopco, Inc.,* 1997 WL 211218 (N.D. Ill) (motion to dismiss complaint granted because plaintiff did not plead that his disability substantially limited one of more of his major life activities).

The Sixth Circuit held that as long as the complaint notifies the defendant of the claimed impairment, the substantially limited major life activity need not be specifically identified in the pleading. 246 F. 3d at 854. The Federal Rules require only that the complaint give the defendant fair notice of the claim and its supporting facts. As the court found, "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." *Id*. "An accusation of discrimination on the basis of a particular impairment provides the defendant with sufficient notice to begin its defense against the claim. If the defendant cannot adequately affirm or deny whether the impairment falls under the Act's protection, the defendant 'shall so state and this has the effect of a denial.' *Id*. (citing Fed. R. Civ. P. 8(b)). Just as the Sixth Circuit noted in *Routh*, the Appellant in this case would have been wise to mention his specific limited major life activity, but failing to do so was not fatal to his complaint.

As in *Routh*, the Appellant in this case has pled his allegations with enough specificity to put Appellee on notice as to his claims for relief. Construing the complaint in the light most favorable to the Appellant and accepting all of the Appellant's factual allegations as true, we conclude that the complaint was sufficient to provide the Capitol Police with fair notice of the Appellant's claim, even without stating the particular major life activity his diabetes limits. Similarly, we find that the complaint was sufficient to put the Appellee on notice of Appellant's claim that he was regarded as having a disability. The Appellant has met the requirements of notice pleading at this stage.[6]

[6] The Board would note that, in the context of Appellant's claims, the Board is not ruling on summary judgment issues. Rather, because this case was analyzed by the Hearing Officer on a motion to dismiss the

Moreover, in accord with section 5.01(c)(1) of OOC Procedural Rules, Appellant has alleged: names and dates of those involved in the alleged discrimination; a description of the challenged conduct and how that conduct violated the CAA; and a statement of relief. Therefore, the complaint is sufficient under our procedures. The Board, in following the rationale of the Sixth Circuit in *Routh,* remands Appellant's claims back to the Hearing Officer for further proceedings.

Accordingly, the Board finds that the allegations in Appellant's complaint were pled sufficiently so as to survive a motion to dismiss under federal notice pleading and OOC Procedural Rule requirements.

ORDER

Pursuant to section 406(e) of the Congressional Accountability Act and section 8.01(d) of the Office of Compliance Procedural Rules, the Board sets aside the Hearing Officer's decision in this matter, as it is otherwise not consistent with law. The Board reverses dismissal of Appellant's disability discrimination claims. The case is remanded to a Hearing Officer for further proceedings consistent with this opinion.

It is so ORDERED.

Issued, Washington, DC
August 7, 2008

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complaint, we have addressed only the sufficiency of the complaint without considering Appellant's Answer to Appellee's Motion to Dismiss or its attachments. The allegations in the complaint were adequately pled, and dismissing the complaint on a motion to dismiss is inappropriate at this juncture.