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

JUANITA JOHNSON,	)	
	)	
Appellee (Employee),	)	
	)	
v.	)	**Case No. 99-AC-326(DA)**
	)	
OFFICE OF THE ARCHITECT OF THE CAPITOL,	)	
	)	
Appellant (Employing Office).	)	
	)	

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

The Office of the Architect of the Capitol ("Appellant"), appeals[1] from the Hearing Officer's initial and supplemental Decisions and remedial order, dated March 19, and June 15, 2001, respectively, which concluded that the Office of the Architect of the Capitol (Appellant) had discriminated against Juanita Johnson ("Appellee") on account of her physical disability. The Hearing Officer directed that the Appellee be reassigned to another position, and that the Appellant award her: back pay, with prejudgment interest; compensatory damages; attorney fees and costs; and post-judgment interest on the foregoing monetary awards.

The Board has considered the decision and record in light of the appeal and briefs, and has decided to affirm and adopt the Hearing Officer's findings and conclusions, and remedial order, except as modified in this decision.[2]

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[1] The Board has considered carefully the parties' initial and response briefs. We deny the Appellant's request for oral argument because we believe that the parties' briefs sufficiently address the factual and legal issues raised in this appeal

[2] Appellee's counsel has moved on appeal to the Board that it issue a protective order as to certain record evidence. The motion is denied because, pursuant to Section 416(C) of the CAA, some confidentiality is accorded by its terms and there is insufficient demonstrated need for additional protection herein. Moreover, the motion is untimely in that such a motion normally

should be made at the hearing level pursuant to Section 7.07(e) of the Board's Procedural Rules which provides: "Any evidentiary objection not timely made before a Hearing Officer shall, in the absence of clear error, be deemed waived on appeal to the Board."

I.

The facts, while fully explicated in the Hearing Officer's initial decision, are summarized below.

Appellee has employed the Appellant for over 19 years as a custodial employee, charged with cleaning offices and restrooms. The Appellee suffers from three medical conditions, but principally asthma and Chronic Obstructive Pulmonary Disease ("COPD"), which affect her ability to breathe. In recent years the Appellee's asthma has worsened and her ability to breathe has been greatly reduced by exposure to such irritants as pollen, dust and cleaning chemicals. Despite extensive reliance upon inhalers, pills and other medical devices, the Appellee is physically challenged when even climbing one flight of stairs, and is unable to go shopping, do yard work, play with her grandchildren, wash dishes, vacuum, or do other housework.

In October 1999, the Appellee experienced shortness of breath and wheezing on the job due to abnormally dusty conditions. She reported this to her supervisor but he was unresponsive. Subsequently, Appellee's physician cautioned her to seek another assignment that did not continue to expose her to environmental irritants. Thereafter, the Appellee, both verbally and with her physician's supporting letter, asked her second and third line supervisors for a reassignment to preserve her health.. They declined by indicating that they had no non-custodial positions for her. They neither suggested alternative assignments nor referred the Appellee to anyone who could explore such assignments with her.

On December 10, 1999, the Appellee became ill on the job from carpet glue fumes and she received treatment at a hospital emergency room. She returned to work a few days later and informed her second line supervisor that she could not work in the environment of carpet glue fumes. Her supervisor declined to reassign the Appellee and sent her home. Based upon her physician's advice, the Appellee did not return to work while she awaited reassignment to a non-custodial position. Subsequently, her union representative took the initiative to propose various reassignment options for the Appellee. In early March 2000, the Appellant offered the Appellee a temporary reassignment to a daytime subway operator[3] position classified at the WG-3 level. The Appellee has been working in that position, at her [lower] WG-2 level salary, since March 15, 2000, with no adverse physical effects. The Appellant permanently reassigned to a WG-3 level subway operator position, in this time range, another WG-2 level employee, but one who had suffered a compensable on-the-job injury. Like the Appellee, however, the Appellant continued to compensate that employee at the WG-2 level.

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[3] Subways trains run between the House and Senate office buildings and the Capitol Building.

II.

The Hearing Officer concluded that the Appellee has a physical impairment that substantially limits her major life activity of *breathing*.[4] The Hearing Officer also found that the Appellee's impairment substantially limited her major life activity of *working* in that it precludes her from performing a class of custodial jobs that exists nationwide. Accordingly, the Hearing Officer found that the Appellee qualified as a person with a disability under the Americans with Disabilities Act of 1990("ADA"), 42 U.S.C. §12101 *et seq*.. The Hearing Officer concluded that the Appellee was qualified for any of the unencumbered nine subway operator positions. He also found that the Appellee qualified for one or more of the 247 vacancy announcements that the Appellant posted during calendar year 2000.

The Hearing Officer concluded that the Appellant failed to reassign the Appellee to a position for which she qualified and did not provide the Appellee with *reasonable accommodation* as prescribed by the ADA. The Hearing Officer found that the Appellant did not engage the Appellee in the *interactive process*, which is a mandatory employer obligation once an employee gives notice of the employee's disability and the desire for a reasonable accommodation. The Hearing Officer held that the employer's special knowledge regarding existing and soon forthcoming vacancies requires the employer to explore reassignment with an employee without requiring the employee to apply and compete as if the disability issue did not exist.

III.

Recently, the United States Supreme Court decided that a protected disability under the ADA must be a physical or mental impairment that substantially limits or restricts an individual from doing activities that are of central importance to most people's daily lives. *Toyota Manufacturing Company, Inc., v. Ella Williams, No. 00-1089, 2002 U.S. LEXIS 400 (S.Ct. 01/08/02) at Slip Opinion, pp. 25-26.* The Court explicitly withheld judgment on whether working, itself, constitutes a *major life activity* for purposes of ADA protection. *Id.,* slip opinion, at p. 29. The Court, focusing on the major life activity of performing manual tasks raised in that case, looked toward representative activities such as tending to personal hygiene, carrying out household chores, bathing and brushing one's teeth in assessing the existence of a protected disability. *Id., Slip Opinion, pp. 32-33.*

The Hearing Officer found that the Appellee had medical impairments that substantially limited her major life activities of breathing and working. In respect to breathing, he specifically concluded that the impairment had the following permanent effects on the Appellee's daily life: Appellee is physically challenged when even climbing one flight of stairs, and is unable to go shopping, do yard work, play with her grandchildren, wash dishes, vacuum, or do other housework. We believe that the Hearing Officer identified the types of activities of

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[4] Appellee's pulmonary function test established that even when enhanced by medication, her forced expiratory volume was only 47% of the normal value.

central importance to people's daily lives that the Supreme Court addressed in *Toyota Manufacturing Company, Inc. v. Ella Williams, supra.* Accordingly, we agree with the Hearing Officer that the Appellee is a person with a disability within the meaning of the ADA.[5]

Under the ADA, an employer may be required to reassign an employee with a disability to a vacant position as a reasonable accommodation, if the employee can no longer perform the essential functions of her current position. 42 U.S.C. §12111(9)(B) (identifying "reassignment" as an example of reasonable accommodation which may have to be provided under the Act); *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1300-1305 (D.C.Cir.1998); *Shiring v. Runyon*, 90 F.3d 827, 832 (3d Cir.1996) (Rehabilitation Act)*; Gile v. United Airlines, Inc*., 95 F.3d 492, 498 (7th Cir. 1996); *Benson v. Northwest Airlines, Inc*., 62 F.3d 1108, 1114 (8th Cir.1995); *White v. York International Corp*., 45 F.3d 357, 362 (10th Cir. 1995).

There are significant limitations upon an employer's duty to reasonably accommodate an employee with a disability through reassignment. For example, the ADA does not require reassignment if no vacant position exists, 42 U.S.C. §12111(a); *Aka v. Washington Hospital Center*, 156 F.3d at 1305, it does not require an employer to "bump" other employees to create a vacancy, *Gile v. United Airlines, Inc*., 95 F.3d at 499, nor does it require an employer to create a new position in order to be able to reassign an employee with a disability, *White v. York International Corp*., 45 F.3d 357, 362 (10th Cir. 1995). An employee need not be reassigned if she is not otherwise qualified for the position, 42 U.S.C. § 12112(b)(5)(A), *Aka v. Washington Hospital Center*, 156 F.3d at 1300, or if reassignment would be an undue hardship on the operation of the business of the employer, 42 U.S.C. §12112(b)(5)(A), *Aka v. Washington Hospital Center*, 156 F.3d at 1300. Finally, an employer is not required to provide an employee the accommodation he or she requests or prefers, the employer need only provide some reasonable accommodation. *Aka v. Washington Hospital Center*, 156 F.3d at 1300. *Gile v. United Airlines, Inc*., 95 F.3d at 499.

We agree with the Hearing Officer that these limitations do not pose a bar to reassignment in this case. The Appellant does not assert that Appellee is not qualified for the subway operator position, nor assert that some other form of reasonable accommodation should be provided. Although the Appellant argues that the position is not vacant and objects to Appellee's request for a permanent reassignment to it because the incumbent has a right to

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[5] The Hearing Officer concluded that the Appellee's medical impairment substantially limited her in working in a broad class of janitorial jobs; however, he premised his finding that the complainant has a protected disability solely upon the complainant's *breathing* impairment because of the legal uncertainty of *working* constituting a major life activity under the ADA. [Decision, p.38]. The Supreme Court's *Toyota* decision left open the question of whether *working* can constitute a major life function for purposes of ADA protection. It is unnecessary for us to decide this point because the Appellee has established her protected status in relation to the major life activity of breathing and its effect upon the tasks of central importance in people's daily lives.

reclaim the position, we agree with the Hearing Officer that the Appellant may be ordered to continue the reassignment without requiring that it be permanent. The evidence indicates that the Appellant has a practice of making long-term "temporary" assignments and perhaps this is the best the Appellant can do for Appellee at the present time. In that event, the Appellant's continuing duty to provide reasonable accommodation would require an inquiry as to whether the Appellee could be reassigned to another position if Appellee's temporary reassignment is terminated.

The Appellant also argues that the reassignment violates its Career Staffing Policy's requirement that employees and other applicants compete for higher graded positions.[6] We recognize that an employer is not required to reassign an employee with a disability in circumstances when such a transfer would violate a legitimate, nondiscriminatory policy of the employer, *Aka v. Washington Hospital Center*, 156 F.3d at 1305, but find that Appellee's reassignment will not have such an effect. The Appellant concedes that it makes exceptions to the Policy, and it does not appear to have used a competitive process to make temporary assignments to its subway operator positions.

However, we are concerned with the Hearing Officer's decision to require the Appellant to reassign Appellee to the subway operator position at the WG-2 pay grade. The Appellant has classified the subway operator position as a WG-3 grade position, and the ADA does not require an employer to promote an employee with a disability to satisfy its duty of reasonable accommodation. *Smith v. Midland Brake, Inc*., 180 F.3d 1154, 1170-78 (10th Cir.1999); *Malabarba v. Chicago Tribune Co*., 149 F.3d 690, 699 (7th Cir. 1998); *Shiring v. Runyon*, 90 F.3d 827, 832 (3d Cir.1996); 29 C.F.R. pt. 1630, App. § 1630.2(o); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship (3/1/99), Question 24. Although Appellee offered to accept the subway operator position at a WG-2 pay grade rather than a WG-3 pay grade, we have serious reservations about the appropriateness of forcing an employer to reclassify a position in order to allow for reassignment.

We are also concerned with that part of the Hearing Officer's order which provides that "so long as she is occupying a position which has been assigned to her by the Appellant as a reasonable accommodation under the ADA, [Appellee] should continue to be paid at her WG-2 pay level, regardless of the wage grade classification of the position." (Decision, p..62.) This inadvertently may intimate that the Appellant may relegate Appellee to a WG-2 grade subway operator position for the remainder of her career with the Appellant, effectively depriving her of the right to seek a transfer or promotion to one of the other subway operator positions at the WG-

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[6] We take official notice of the *Office of the Architect of the Capitol Human Resources Act,* 40 U.S.C. §166b-7 ("AOCHRA"), which requires the Appellant to establish a merit appointment, promotion and assignment personnel- management system. However, no record evidence was adduced regarding the Appellant's implementation of such a program and its effect on the issues herein.

3 compensation level otherwise attributed to that position. Employees with disabilities should not be required to forego future employment opportunities as a condition of continued employment.

We need not decide whether these concerns render Appellee's reassignment inappropriate, however, because of a material change in the circumstances. Although neither party raised the matter,[7] we understand that Appellee is a class member in a lawsuit before Judge Emmet Sullivan that has been settled and is presently at the remedy implementation stage (*Patricia Harris, et. al. v. Office of the Architect of the Capitol*, Civil Action No. 1:97CV01658, D.D.C.). One of the remedial provisions of the settlement requires the Appellant to promote night-shift custodial workers to the WG-3 level, retroactively as of the effective date of the CAA, January 23, 1996.

IV.

Accordingly, we therefore vacate only that part of the Hearing Officer's order that requires the Appellant to reassign the Appellee to the subway operator's position at the WG-2 grade, and remand the case for the Hearing Officer's determination of whether her custodial position of record has been reclassified as a WG-3 grade position. The Hearing Officer, after hearing from the parties, should then fashion a remedy consistent with this opinion, contingent upon the Appellee's grade level and the availability of appropriate permanent or, if necessary, existing temporary assignments for which she qualifies.

It is so ordered.

Issued, Washington, D.C. February 25, 2002

[7] We take this opportunity to emphasize to all parties with appeals before the Board of their obligation to apprise the Board of any changed material circumstances affecting the issues awaiting Board decision. This includes, but is not limited to: new appeal-controlling statutory enactments or case law precedent; case settlements; mootness; and other intervening events, such as may exist in this matter, that remove a remedial impediment that had been contested before a Hearing Officer and raised on appeal.