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

ROBERT SOLOMON,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	**Case Number: 02-AC-62(RP)**
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.

ORDER DENYING REQUEST FOR RECONSIDERATION

On December 7, 2005, the Board of Directors issued a Decision and Order ("Decision") in the above-captioned case, reversing the hearing officer's dismissal of the matter, and remanding the case back to the hearing officer for further proceedings. On December 21, 2005, the Architect of the Capitol filed a Request for Reconsideration of the Board's Decision. After a full review of the Architect's request and supporting memorandum,[1] the Board denies the request.

I. Background

Robert Solomon filed a claim against the Architect of the Capitol, alleging two claims of retaliation, and one claim of retaliatory hostile work environment, in violation of Section 207(a) of the Congressional Accountability Act, 2 U.S.C. 1317. The hearing officer dismissed all three claims, finding that Solomon had failed to prove that he suffered an adverse action, as required to establish a *prima facie* case of retaliation; and that the hostile work environment claim was without merit. In addition, the hearing officer determined that Solomon failed to state a claim

[1] Pursuant to Section 8.02 of the Procedural Rules of the Office of Compliance, the Board of Directors determined that the issues presented by the Architect could be addressed sufficiently without additional pleadings; thus, a response to the request for reconsideration was not requested of Solomon.

upon which relief could be granted.

Solomon filed a petition for review, and the Architect filed a response. Upon consideration of the pleadings and the record evidence, the Board determined that the hearing officer's decision was not consistent with law. The Board determined, among other findings, that the hearing officer's decision did not conform to the Board's ruling in *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP)(May 23, 2005); and that dismissal of the claim of hostile work environment was premature because the hearing officer was not able to determine whether the totality of the circumstances surrounding Solomon's claims would support his allegations of hostile work environment.[2]

II. Standard of Review

Section 8.02 of the Office of Compliance Procedural Rules states that a party may move for reconsideration of a Board decision where the party can establish that the Board has "overlooked or misapprehended points of law or fact."

III. Analysis

In its request for reconsideration, the AOC asks the Board to reconsider its decision in *Britton*, as well as any subsequent decisions relating thereto. The AOC also requests that any pending proceedings in the Office of Compliance involving claims of retaliation be stayed until the Supreme Court renders its decision in *Burlington Northern and Santa Fe Railway Co. v. White*, 127 S.Ct. 797, docket 05-259, (Dec. 5, 2005). The AOC bases its requests on the Supreme Court's grant of a *writ of certiorari* in *Burlington Northern* to determine

> whether an employer may be held liable for retaliatory discrimination under *Title VII* for any '*materially adverse change* in the terms of employment,' . . for any treatment that was 'reasonably likely to deter' the plaintiff from engaging in protected activity, . . . or only for an 'ultimate employment decision . . .'

See Architect's Request to Reconsider, p.4. (*emphasis added*). The AOC states that because *Britton* is the foundation for the Board's analysis of retaliation issues, the Board should reconsider *Britton* and stay proceedings in any pending retaliation cases.

Even the AOC concedes that in *Burlington v. Northern*, *supra*, the Supreme Court is addressing issues involving Title VII retaliation. In both its *Britton* and *Solomon* decisions, the Board has recognized a clear distinction between Title VII claims of retaliation and CAA Section 207 claims of retaliation. In these decisions, the Board notes that by including the language "intimidate, take reprisal against, or otherwise discriminate" in Section 207(a), Congress wrote the CAA more broadly than it wrote Title VII. As the language in Section 207(a) of the CAA is materially different from the anti-retaliation language in Title VII, the Supreme Court's analysis

[2] In its Decision, the Board did not rule on summary judgment issues, but merely determined that the hearing officer prematurely determined whether there was sufficient evidence to support the claim.

of the Title VII language more than likely will not require the reevaluation of the Board's analysis of Section 207(a).
The AOC provides no convincing argument that, given the distinction between Title VII claims of retaliation and CAA Section 207(a) claims of retaliation, the Board should reconsider its evaluation and stay current proceedings. To the contrary, the AOC continues to argue against the Board's *Britton* analysis regarding Section 207(a). Such disagreement does not establish the Board's "misapprehension" of law which might lead us to grant the motion to reconsider.[3]

Inasmuch as the Board has already addressed the employing office's arguments when it deliberated *Britton*, the Board will not entertain those arguments in this matter. Both parties in *Britton* previously were given an opportunity to argue their respective positions, and the Board will not allow these current proceedings to be used as a mechanism to relitigate those issues.

The AOC further argues that the Board's refusal to accept the hearing officer's dismissal of the claims in *Solomon* will "lead to the conclusion that the dismissal by a hearing officer of claims prior to a full hearing will not be permitted no matter how trivial the employment related matters are." The AOC's position is neither supported by the specific language in the Board's Decision, nor by the rationale upon which the Decision rests. Nothing in the Board's Decision in *Solomon* broadly prohibits a hearing officer from dismissing a claim prior to a hearing. Indeed, the Board relied on the Supreme Court's decision in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061 (2002), which differentiates hostile work environment claims from claims involving discrete acts, suggesting that the totality of the circumstances should be considered prior to dismissing an allegation of hostile work environment. *See Howley v. Town of Stratford*, 217 F.3d 141 (2nd Cir. 2000)(grant of summary judgment in hostile work environment claim reversed when totality of circumstances not considered); *Raniola v. Bratton*, 243 F.3d 610 (2nd Cir. 2001)(totality of circumstances must be considered prior to granting summary judgment in hostile work environment claim), relying on *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999), and *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir.1990); *Ramsey v. Henderson*, 286 F.3d 264 (5th Cir. 2002)(dismissal affirmed after review of the totality of the circumstances).

Furthermore, in its Decision, the Board cited *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), wherein the Supreme Court held that notice pleading requirements, not evidentiary requirements such as the prima facie test, are more appropriately applied to motions to dismiss in an employment discrimination case. *See Also Weston v. Commonwealth of Pennsylvania*, 251 F.3d 420 (3rd Cir. 2001)(plaintiff survives motion to

[3] The AOC also argues that *Solomon* and *Britton* are improperly published decisions, in that they are not final decisions by the Board. The Architect suggests that since both of these cases were remanded for further proceedings, the Board's remand does not serve as the final disposition, and the case should not be published. Although the AOC improperly brings this issue before the Board in its motion to reconsider *Solomon*, as such issue does not suggest that the Board has overlooked or misapprehended points of law or fact, the Board directs the Architect to Section 1.04(d) of the Office of Compliance Procedural Rules, as well as §1416(f) of the CAA, wherein the Board is given authority to make public final decisions, as well as "any other decision at its discretion."

dismiss where allegations sufficiently pled). In relying on the holdings and rationales of these cases, the Board stated that the totality of the circumstances should be considered in hostile work environment claims, and notice pleading requirements may be used to analyze motions to dismiss. Nothing in the Board's Decision suggests, as the AOC implies, that trivial matters must be taken to a full hearing before a hearing officer can dismiss them. Again, the AOC's arguments do not establish the Board's "misapprehension" of law or fact which might lead us to grant the motion to reconsider.

ORDER

Pursuant to §8.02 of the Office of Compliance Procedural Rule, the Board DENIES the Architect of the Capitol's request for reconsideration, as the Architect has failed to establish that the Board has "overlooked or misapprehended points of law or fact."

It is so ORDERED.

Issued, Washington, DC
February 21, 2006