THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SAUNDRA MCNAIR,	)	
Employee	)	OEA Matter No. 1601-0012-14
	)	
v.	)	Date of Issuance: April 22, 2016
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF EMPLOYMENT	)	
SERVICES,	)	
Agency	)	
	)	Arien Cannon, Esq.
	)	Administrative Judge

Charles Tucker, Jr., Esq. Employee Representative
Rhesha D. Lewis-Plummer, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Saundra McNair ("Employee"), filed a Petition for Appeal on November 1, 2013, with the Office of Employee Appeals ("OEA"), challenging the District of Columbia Department of Employment Services' ("Agency" or "DOES") decision to remove her from her position as an Administrative Law Judge. Employee's termination became effective at the close of business on October 18, 2013. Agency filed its Answer on December 6, 2013.

I was assigned this matter on February 13, 2015. After a number of unsuccessful mediation attempts, a Prehearing/Status Conference was convened on June 5, 2015. Subsequent to another unsuccessful mediation attempt, the parties were ordered to submit written briefs addressing the legal issues in this matter. After both parties were granted an extension of time, the parties' briefs were submitted accordingly. Upon review of the briefs, I determined that Agency needed to address Employee's disparate treatment argument in a sur-reply brief. As such, Agency filed its sur-reply brief on April 18, 2016. Based on the filings in this matter, it was determined that an evidentiary hearing was not warranted. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency had cause to take adverse action against Employee.

2. If so, whether removal was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.[1] "Preponderance of the evidence" shall mean:

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.[2]

Agency's position

On April 16, 2010, Employee filed a request for a reasonable accommodation based on the American with Disabilities Act ("ADA"). Specifically, Employee requested a tour of duty ("TOD") from 7:00 a.m. to 3:30 p.m., Monday through Friday, and the ability to telework every Friday, and on an as-needed basis. Employee's request was alleged to have been a medical necessity and conducive to her disability treatment. In support of this request, Employee submitted medical documentation from her physician dated in 2004 and 2008.[3] After receipt of this documentation, Agency requested more recent medical documents before a reasonable accommodation decision could be made. Employee declined to submit any additional medical documentation.

On April 30, 2012, Employee submitted a request for an Alternative Work Schedule (AWS), which was denied on November 14, 2012.[4] On December 3, 2012, Agency issued Employee a Notice of Change in Tour of Duty. This Notice set Employee's official tour of duty from 8:30 a.m. to 5:00 p.m. On April 18, 2013, Agency issued HR Policy 700.10.1, applicable to all personnel, which established the tour of duty for all employees as 8:30 a.m. to 5:00 p.m., Monday through Friday.

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[1] 59 DCR 2129 (March 16, 2012).
[2] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).
[3] Agency's Brief, Exhibit A (October 15, 2015).
[4] In July of 2010, Employee suffered an injury which required her to be out of work for approximately 22 months; Employee returned to work in April 2012.

Agency maintains that Employee continued to work from 7:00 a.m. to 3:30 p.m. despite instructions and notice to the contrary. As a result, Agency charged Employee with insubordination and absence without official leave ("AWOL") for each day she left work before 5:00 p.m. Employee was charged with a total of 194.5 hours of AWOL from numerous pay periods from November 2012 through August 2013.

Employee's position

On or about April 5, 2009, Employee notified her then-direct supervisor, Chief Administrative Law Judge ("ALJ)" Linda Jory, of her Systemic Lupus diagnosis. Employee asserts that she requested and received a reasonable accommodation from Chief ALJ Jory to work from 7:00 a.m. to 3:30 p.m., Monday through Friday, after providing medical documentation to support her request. Chief ALJ Jory, in consultation with ADA Coordinator, Valerie Kitchens, granted Employee a Modified Work Schedule (MWS) as a reasonable accommodation.[5] Employee maintains that she continued to work this modified schedule until she was removed from her position on October 18, 2013. In December of 2009, Chief Jory stepped down as the Chief ALJ and returned to serving as an ALJ with Agency. In January and February of 2010, Associate Director Mohammad Sheikh ("Sheikh") issued a document which outlined the tour of duty hours for the ALJs working in the Office of Hearings and Adjudication (OHA). Employee responded to the memorandum issued by Sheikh in January 2010, and notified him that the hours listed for her were incorrect.[6] Employee avers that Sheikh acknowledged that Employee was in fact working from 7:00 a.m. to 3:30 p.m. and allowed her to continue working those hours according to her reasonable accommodation request.

In April 2010, after Agency declined to engage in the interactive process required by the ADA, Employee filed an Equal Employment Opportunity complaint. In July of 2010, Employee suffered an on-the-job work-related injury. When Employee returned to work on April 30, 2012, Sheikh asked Employee if she wanted to return to her work hours of 7:00 a.m. to 3:30 p.m; to which Employee responded in the affirmative. Sheikh then provided Employee an Alternative Work Schedule (AWS) form which was signed by Employee and Sheikh.

In October 2012, Employee asserts that her Compensatory Time ("comp. time") had been redistributed to other ALJs within DOES. Employee further maintains that prior to her inquiry regarding her missing comp. time, Agency never charged her with AWOL. After inquiring about her missing comp. time, Employee was informed that she would no longer be able to work a 7:00 a.m. to 3:30 p.m. tour of duty. On November 14, 2012, after Employee made repeated inquiries into her comp. time and her request for reasonable accommodations, Agency informed Employee that her AWS request was denied---nearly seven (7) months after it was requested.[7] Employee maintains that her AWS was denied in retaliation for her union organizing activity, repeated requests for reasonable accommodations, and her inquiries into her missing comp. time.

Employee challenged Agency's decision to repeatedly allow her request for reasonable accommodations to go unanswered. Agency again requested that Employee provide medical

[5] Employee's Brief at 3 (December 17, 2015).
[6] Employee's Brief, Exhibit 4.
[7] Employee's Brief, Exhibit 7.

documentation to support her need for a MWS due to her disability by December 3, 2012. On December 4, 2012, Employee submitted the requested documentation.[8] The supporting documentation included a letter from Employee's physician, dated November 30, 2012, which provided that Employee "needs accommodation so that she can avoid the rush hour traffic." Employee's doctor further recommended that Employee maintain her work schedule of 7:00 a.m. to 3:30 p.m.[9]

Employee maintains that Agency issued her several notifications for change of supervisor.[10] On December 3, 2012, Agency issued Employee a Notice of Change in Tour of Duty, via e-mail. This notice informed Employee that her new tour of duty was Monday through Friday 8:30 a.m. to 5:00 p.m., effective immediately. Employee contends that this notice violates District Personnel Regulations Section 1204.2(a), because a change in TOD should be given in advance of at least one week. At some time during December 2012, the ALJs were directed to report to Mr. Sheikh until an interim or permanent Chief ALJ replaced ALJ Crawford.

Effective June 3, 2013, Malcolm Luis-Harper began serving as Acting Chief ALJ. Shortly thereafter, Employee submitted her medical documentation in support of her reasonable accommodation request to Luis-Harper. Upon information and belief, Luis-Harper presented the documentation to the appropriate personnel within Agency; however, Employee received no response.

Employee further contends that on or about June 20, 2013, the American Federation of Government Employees Local 1000/AFGE 1000 filed an Unfair Labor Practice against Agency on behalf of Employee, regarding AWOL charges, comp. time issues, and an October 31, 2012 scheduled meeting with Agency management.

In June or July 2013, Employee informed Mr. Luis-Harper and Mr. Sheikh that another ALJ was not working the number of hours being reported on the time sheet and that the ALJ was being paid for a greater number of hours than she was actually working.

On or about September 6, 2013, Agency issued a notice to all Agency employees withdrawing all existing AWS and required all employees to resubmit a request if an employee wished to continue or begin to participate in the AWS program. On September 16, 2013, Employee submitted written justification for participation in the AWS program and the MWS program to Mr. Luis-Harper for submission to Agency's Director. Despite the recommendation from Mr. Luis-Harper that Employee's request be approved, Agency's Director denied the request for AWS and MWS without justification.[11]

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The following facts are undisputed:

[8] Employee was absent from work on December 3, 2012, due to illness.
[9] Employee's Brief, Exhibit 2.
[10] Employee's Brief, Exhibit 11.
[11] Employee's Brief, Exhibit 14.

1. Employee began her employment with Agency as an Administrative Law Judge in March 2009, in the Office of Hearings and Adjudication (OHA)—Administrative Hearings Division (AHD).

2. On or about April 5, 2009, Employee notified her then-direct supervisor, Chief ALJ Linda Jory, of her diagnosis of Systemic Lupus. Employee requested and received a reasonable accommodation from Chief ALJ Jory to have her tour of duty begin at 7:00 a.m. and end at 3:30 p.m., Monday through Friday.[12]

3. In December 2009, Chief ALJ Jory stepped down as Chief ALJ and returned serving as an ALJ with Agency. At some point thereafter, Employee again submitted a request for reasonable accommodations. In a letter dated April 22, 2010, Agency acknowledged receipt of Employee's reasonable accommodation request.[13] Agency informed Employee that it needed more recent than 2004 and 2008 medical documentation before a determination was made since reasonable accommodation determinations were based on current medical conditions.

4. In 2010, Agency issued a memorandum which outlined the tours of duty for Administrative Hearing Division employees.[14] This memorandum listed Employee's tour of duty from 8:00 am to 4:30 pm.

5. In July 2010, Employee suffered an injury on the job and was out of work for an extended period of time, returning in April 2012.

6. On April 30, 2012, Employee submitted a request for an Alternative Work Schedule (AWS) to her then-supervisor, Mohammad Sheikh, seeking to change her work schedule to 7:00 a.m. to 3:30 pm.[15] On November 14, 2012, Agency informed Employee, via e-mail, that her request was denied.[16]

7. On December 3, 2012, Agency issued Employee a Notice of Change in Tour of Duty. This Notice established Employee's tour of duty from Monday through Friday, 8:30 am to 5:00 pm.[17]

8. On April 18, 2013, Agency issued HR Policy 700.10-1, establishing the tour of duty for all employees as 8:30 am to 5:00 pm, Monday through Friday. Agency also afforded employees the opportunity to request an alternate work schedule pursuant to the policies and procedures prescribed in DOES policy 700.10-2, *Alternative Work Schedule*.[18]

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[12] *See* Employee's Brief at 16; *See also* Employee's Brief, Exhibit 15 at 2 (December 17, 2015).
[13] Agency's Brief, Exhibit B (October 15, 2015).
[14] *See* Employee's Brief, Exhibit 3.
[15] Agency's Brief, Exhibit C.
[16] *Id*., Exhibit D.
[17] *Id*., Exhibit G.
[18] *Id*., Exhibit H.

9. Agency removed Employee from her position citing Absence without Official Leave and Insubordination, effective October 18, 2013.

Discussion

Employee raises several arguments, including federal issues of law outside the scope of this Office's jurisdiction. Namely, Employee argues that Agency violated Title VII of the Civil Rights Act of 1964, the American's with Disability Act, as amended, Rehabilitation Act of 1973, as amended, federal Fair Labor Standards Act of 1938, the National Labor Relations Act of 1935, as amended. These issues of law are outside the purview of this Office; thus, they will not be addressed in this forum.

Employee does, however, raise several arguments based on District of Columbia law; specifically violation of the District of Columbia Human Rights Act of 1977, as amended, the District of Columbia Family and Medical Leave Act, and the District of Columbia Whistle Blower Protection Amendment Act of 2009.[19] Employee also raises a disparate treatment claim.

Any on-duty on employment related act or omission that interferes with the efficiency and integrity of government operations: Absence without Official Leave.

6-B DCMR § 1268.1, provides that an absence from duty that was not authorized or approved, or for which leave request has been denied, shall be charged on the leave record as "absence without leave (AWOL)."[20] In order for an agency to prove AWOL, the agency must show that the employee was absent, and that his or her absence was not authorized or that his or her request for leave was properly denied.[21] The AWOL action may be taken whether or not the employee has leave to his or her credit. If it is later determined that the absence was excusable, or that the employee was ill, the charge to AWOL may be changed to a charge against annual leave, compensatory time, sick leave, or leave without pay, as appropriate.[22] Here, Agency contends that despite Employee repeatedly being given notice and instructions that her tour of duty was from 8:30 a.m. to 5:00 p.m., Employee continued to work from 7:00 a.m. to 3:30 p.m. Employee was charged with two (2) hours of AWOL each day she left work at 3:30 p.m. and one (1) hour of AWOL for each day she left work at 4:00 p.m.[23] From November 2012 to August 2013, Employee was charged with a total of 194.5 AWOL hours.

A charge of AWOL can be defeated by the submission of medical evidence of incapacitation.[24] Here, it is undisputed that Employee submitted medical documentation in support of her reasonable accommodation request to work from 7:00 a.m. to 3:30 p.m. Employee provided Agency with several medical documents in support of her request throughout

[19] *See* Employee's Brief at 2 (December 17, 2015).
[20] 6-B DCMR § 1268.1.
[21] *Wesley v. U.S. Postal Service*, 94 M.S.P.R. 277 (2003).
[22] 6-B DCMR § 1268.4.
[23] The minimum charge for absence without leave shall be one (1) hour, and additional charges shall be in multiples thereof. *See* DPM § 1229.1.
[24] *See Grubb v. Department of Interior*, 96 M.S.P.R. 377 (2004).

her time with Agency.[25] These documents are dated January 10, 2002, October 15, 2004, May 1, 2008, June 18, 2008, and May 16, 2008. Employee also submitted a more recent medical document from her doctor, dated November 30, 2012, who recommended that Employee "maintain [her] work scheduled of 7 AM to 3:30 PM to avoid the rush hour…"[26] Despite this recommendation, Agency elected to charge Employee with AWOL for various hours she left before 5:00 p.m. from November 2012 to August 2013. Although a tour of duty was recommended for Employee by her physician, Agency apparently decided against adopting this recommendation and required Employee to work a TOD from 8:30 a.m. to 5:00 p.m. The medical documents submitted by Employee illustrate her disability and provided a recommended accommodation; however, the documents did not provide that Employee was incapacitated in any sense. Thus, Agency was within its discretion to charge Employee with AWOL.

Employee additionally raises the argument that she was subject to disparate treatment by Agency when it declined to grant her an AWS or MWS. In *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, Opinion and Order on Petition for Review (September 29, 1995), this Office's Board set forth the law regarding a claim of disparate treatment:

> [An Agency must] apply practical realism to each [disciplinary] situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. It is not sufficient for an employee to simply show that other employees engaged in misconduct and that the agency was aware of it, the employee must also show that the circumstances surrounding the misconduct are substantially similar to [her] own. Normally, in order to show disparate treatment, the employee must demonstrate that he or she worked in the same organizational unit as the comparison employees and that they were subject to [disparate] discipline by the same supervisor [for the same offense] within the same general time period.

An employee who raises an issue of disparate treatment bears the burden of making a *prima facie* showing that he or she was treated differently from other similarly-situated employees.[27] If such a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.[28] "In order to prove a disparate treatment, [Employee] must show that a similarly situated employee received a different penalty."[29]

It is uncontroverted that Employee assumed a tour of duty where she regularly left work before 5:00 p.m. Employee argues that she was subject to disparate treatment when Agency

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[25] Employee's Brief, Exhibit 1 (December 17, 2015).
[26] *Id*., Exhibit 2.
[27] *See Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-01190-90, Opinion and Order on Petition for Review (July 22, 1994).
[28] *Id*.
[29] *Social Sec. Admin. v. Mills*, 73 M.S.P.B. 463 (1991).

denied her AWS and MWS requests; yet, it allowed all other employees within OAH-AHD, particularly other ALJs, to participate in the various alternative work schedule formats.[30] Employee asserts, and Agency does not dispute, that early on in her employment with Agency, beginning in March 2009, that Employee was granted a MWS from then-Chief ALJ Jory, working Monday through Friday, 7:00 a.m. to 3:30 p.m. In early 2010, Agency issued a memorandum to all of the Administrative Hearing Division employees setting forth a "temporary and conditional work schedule" at the recommendation of former Chief ALJ Jory.[31] The memorandum listed Employee's tour of duty from 8:00 am to 4:30 p.m. It is noted that in this memorandum, the tour of duty start and end times for all of the AHD employees, including ALJs, vary.[32] The start times range from 7:00 a.m. to 9:30 a.m.; the end times range from 3:30 p.m. to 6:00 p.m. While the time frame (February 2010) of this memorandum is not pertinent to the time frame in which Employee was charged with AWOL, it does provide context into the varying tours of duty for Agency employees.

Upon consideration of Employee's brief, it was determined that a *prima facie* case for disparate treatment had been made. Accordingly, on March 9, 2016, an order was issued which required Agency to submit a sur-reply brief addressing Employee's disparate treatment argument. This afforded Agency the opportunity to meet its burden of establishing a legitimate reason for imposing a different penalty (or lack thereof) for other Agency employees who did not work the established TOD from 8:30 a.m. to 5:00 p.m. It is noted that Employee embedded her disparate treatment argument in Title VII of the Civil Rights Act of 1964, which is outside of the purview of this Office. However, this Office will address a disparate treatment argument as generally described in *Jordan v. Metropolitan Police Department*.[33] Agency submitted its sur-reply brief on April 18, 2016. Agency offers no legitimate reason for allowing some employees to work an alternative work schedule; rather, Agency only argues that Employee does not assert that she is in a protected class and thus her disparate treatment argument must fail.

Employee offers several time sheets from various employees within her division.[34] Although the employees' names are redacted, they each contain a unique employee ID number. The tours of duty for various Agency employees range from 7:00 a.m. to 9:00 a.m. At all times relevant to Employee's AWOL charge, the other employees who worked outside of the established 8:30 a.m. to 9:00 a.m. TOD were under the same supervisory chain as Employee.[35] Based on the time sheets of other employees, and Agency's failure to offer any legitimate reason why a number of employees were able to establish tours of duty outside the 8:30 a.m. to 5:00 p.m. time frame, but denied Employee the opportunity to do so, amounts to disparate treatment. Agency offers no explanation for denying Employee's AWS request. In doing so, Agency failed to apply practical realism to each employee's situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. As such, Agency's charge of

[30] Employee's Brief, Exhibits 17 & 18.
[31] *Id*., Exhibit 3.
[32] *Id*., Exhibit 3.
[33] OEA Matter No. 1601-0285-94, Opinion and Order on Petition for Review (September 29, 1995).
[34] Employee's Brief, Exhibit 18.
[35] During the time periods Employee was charged with AWOL, employees in the Office of Hearings and Adjudication (OHA)—Administrative Hearings Division (AHD), had three (3) supervisors: George Crawford, Malcolm, Luis-Harper, and Mohammad Sheikh.

AWOL must be reversed.

Any on-duty on employment related act or omission that interferes with the efficiency and integrity of government operations: Insubordination.

Insubordination includes an employee's refusal to comply with direct orders, accept an assignment or detail; or refusal to carry out assigned duties and responsibilities.[36] Furthermore, insubordination is defined as a willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed.[37] Here, Agency's charge against Employee for insubordination stems from Employee's "defiance of the November 14, 2012 AWS denial, the November 19, 2012 supervisory directive [e-mail], the December 3, 2012 Notice of Change in Tour of Duty, and the official agency policy relating to your tour of duty."[38]

Despite Employee submitting a request for AWS on April 30, 2012, nearly seven months later, on November 14, 2012, Agency informed Employee, via e-mail, that her request was denied.[39] The e-mail included the AWS form denying Employee's request as an attachment. Employee's immediate supervisor, Mr. Sheikh recommended that Employee be approved for an AWS, however, Agency's Director ultimately denied Employee's request. In a November 19, 2012 e-mail from Employee's then-supervisor, Chief ALJ Crawford, Employee was warned that failure to report to duty for the Agency's standard TOD, 8:30 a.m. to 5:00 p.m. would result in corrective or adverse action. Employee responded to this e-mail and stated that the denial of her AWS was in retaliation for her other complaints against Agency and that the denial was also disparate treatment.[40] Employee submitted a request for an AWS as late as September 2013, which outlined her justification for her request, and was endorsed by her supervisor at the time, Luis Harper, but was again ultimately denied by Agency's Director.[41]

Here, is it undeniable that Employee continued to work her tour of duty from 7:00 a.m. to 3:30 p.m. at all relevant times, despite Agency's demand that she work from 8:30 a.m. to 5:00 p.m. The inquiry now becomes whether Agency engaged in disparate treatment in allowing other employees to work a modified or alternative work schedule. Employee asserts in her brief that other employees within her division, including other ALJs, deviated from the stated tours of duty stated in Agency Policy No. 700.10-1. In her brief, Employee includes time sheets of other employees within her division which reflect that Agency employees TOD start and end times vary.[42] As stated above, I find that Employee made a *prima facie* showing that her tour of duty expectations was treated differently from other similarly-situated employees. Because Agency does not offer any legitimate reason why some Agency employees were able to deviate from the stated 8:30 a.m. to 5:00 p.m. tour of duty times provided in its policy, I am not persuaded that this policy was consistently enforced. Thus, I must also find that Employee was subject to

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[36] *See* D.C. Mun. Regs. tit. 16 § 1619.1(6)(d). Table of Appropriate Penalties.
[37] *Walker v. Dep't of Army*, 102 M.S.P.B. 474, 477, 2006 MSPB 207 (2006) (citing, *Phillips v. General Services Administration*, 878 F.2d 370, 373 (Fed. Cir. 1989)).
[38] Agency's Answer, Tab "J," Advance Written Notice of Proposed Removal (December 6, 2013).
[39] Agency's Brief, Exhibit D.
[40] *Id.*, Exhibit F.
[41] Employee's Brief, Exhibit 14.
[42] Employee's Brief, Exhibits 18 & 19.

disparate treatment in regards to the charge of insubordination.

Whistleblower claim

Furthermore, Employee asserts that she became a whistleblower under the D.C. Whistleblower Protection Statute (D.C. Code § 1-615.54) when she informed management of the following improprieties: the taking and re-distributing of her earned and accrued Compensatory Time; that another ALJ was not working a full ten (10) hours required under an AWS; and that monies from the worker's compensation program was being improperly used.[43] Employee's argument that she reported another ALJ fudging her time and attendance records, and reported money from the workers' compensation program being improperly used is not supported in the record. Despite this contention in her brief, in an e-mail sent by Employee, she only raises retaliatory actions based on her protected disclosure regarding a meeting with union representatives, the improper documentation of her Compensatory Time, and for the notification of her Unfair Labor Practice claim.[44]

In whistleblower claims involving an otherwise appealable action, the initial burden is on the agency to prove its case by preponderant evidence; if the agency proves its case, the employee's whistleblower claim is treated as an affirmative defense.[45] To prove an affirmative defense of whistleblowing, employee must show by a preponderance of the evidence that she made a protected disclosure under the whistleblower statute and that the disclosure was a contributing factor in the agency's personnel action. A whistleblower may show that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. When an employee establishes a *prima facie* case of reprisal for whistleblowing, the burden of persuasion shifts to the agency to show by clear and convincing evidence that it would have taken the same personnel action absent any protected activity.[46] When determining whether the agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the following factors should be considered: (1) the strength of the agency's evidence in support of its personnel action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated.

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[43] In an e-mail from Employee to Agency's various management officials, in response to her denied AWS, Employee maintains that the denial of her AWS was in retaliation for meeting with union representatives, the improper documentation of her Compensatory Time, and for the notification of her Unfair Labor Practice claim; she does not mention another ALJ misrepresenting hours worked or the misappropriation of money from the workers' compensation program. *See* Employee's Brief, Exhibit 7.

[44] *See* Employee's Brief, Exhibit 7.

[45] *See Grubb v. Department of Interior*, 96 M.S.P.R. 377 (2004).

[46] Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. *Shaw v. Department of the Air Force*, 80 M.S.P.R. 98, 114 (1998).

Under D.C. Code § 1-615.52(6), a protected disclosure is any disclosure of information by an employee to a supervisor or public body that the employee reasonably believes evidences:

(A) Gross mismanagement;

(B) Gross misuse or waste of public resources or funds;

(C) Abuse of authority in connection with the administration of a public program or the execution of a public contract;

(D) A violation of a federal, state, or local law, rule, or regulation, or of a term of a contract between the District government and a District government contractor which is not of a merely technical or minimal nature; or

(E) A substantial and specific danger to the public health and safety.

Employee's assertion that she falls under whistleblower protections arises from her argument that Agency's actions were retaliatory based on a meeting she had with union representatives, the improper documentation of her Compensatory Time, and for filing an Unfair Labor Practice claim.[47] The details of Employee's meeting with union officials are scarce; however, it is not disputed that the meeting occurred. Without more, I do not find that this meeting was protected activity under the Whistleblower Statute. Agency also addresses Employee's argument regarding the improper documentation of her Compensatory Time.[48] In this memorandum, dated October 19, 2012, Employee's then-supervisor, George Crawford, explains to Employee how Agency came to the conclusion it did regarding her comp. time. Employee offers no other argument other than her statements that her accrued comp. time went missing. I find Agency's explanation regarding Employee's comp. time plausible; thus, I do not find Employee's complaint about her comp. time to be protected activity under the Whistleblower Statute. Lastly, Employee asserts that by filing a complaint for Unfair Labor Practice, she engaged in protected activity.[49] The complaint included with Employee's brief does not indicate that the complaint was actually filed with the District of Columbia Public Employee Relations Board ("PERB").[50] There is no time stamp on the complaint, nor does the complaint bear any signature (on the cover letter or at the end of the complaint). It also appears that the complaint was not assigned a docket number; thus, the attachment included with Employee's brief does not establish that the Unfair Labor Practice complaint was actually filed.

Assuming *arguendo*, that one of the complained about activities Employee asserts is deemed protected activity under the statute; the burden of persuasion then shifts to the agency to show by clear and convincing evidence that it would have taken adverse action against Employee absent any protected activity.[51] It is evident that the tour of duty for Employee was an issue for an extended period of time. The issue appears to have first begun in April 2010 when Employee

[47] *See* Employee's Brief, Exhibit 7.
[48] *See* Employee's Brief, Exhibit 13, Enclosure 1.
[49] *Id*. Exhibit 13.
[50] *See Id*., Exhibit 13.
[51] *See Grubb v. Department of Interior*, 96 M.S.P.R. 377 (2004).

filed a request for reasonable accommodation under the ADA, when she sought to have duty hours from 7:00 a.m. to 3:30 p.m. to avoid driving in rush hour traffic due to her medical condition. At this time, Agency requested more recent medical documents before it made a determination regarding Employee's ADA request. Because Employee did not submit more recent medical documents at this time, it appears that Agency never made a determination regarding Employee's ADA request. The issue was reignited when Employee's returned to work in April 2012, after being out with an injury for nearly twenty-two (22) months. Upon Employee's return in April 2012, she requested an AWS, which was denied approximately seven (7) months later. Employee was issued a Notice of Change in Tour of Duty on December 3, 2012. This outlined Employee's TOD from 8:30 a.m. to 5:00 p.m.[52] Agency also issued an Agency-wide policy addressing "Establishment of Schedule and Tour of Duty" on April 18, 2013.[53] Although Employee was first marked AWOL during the pay period of November 5, 2012—November 16, 2012, Agency did not take adverse action against Employee until she was removed from her position on October 18, 2013, nearly a year after first being marked for AWOL. I am persuaded that the on-going issues regarding Employee's scheduled TOD made it inevitable for Agency to take an adverse personnel action against Employee absent any protected activities.

Because I find that Employee successfully asserted an affirmative defense regarding disparate treatment, I will not address the appropriateness of the penalty.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's termination of Employee is **REVERSED**; and
2. Agency shall reinstate Employee and reimburse her all back-pay and benefits lost as a result of her removal; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge

[52] Agency's Brief, Exhibit G.
[53] Agency's Brief, Exhibit H.