This decision may be formally revised before it is published in the District of Columbia Register and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DEBRA JOHNSON	)	OEA Matter No. 1601-0037-13
Employee	)	
	)	Date of Issuance: January 19, 2017
v	)	
	)	Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Administrative Judge
Agency	)	
	)	

Rani Rolston, Esq., Employee Representative
Nicole Dillard, Esq., Agency Representative[1]

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Debra Johnson, Employee, filed a petition with the Office of Employee Appeals (OEA) on December 21, 2012, appealing the determination of the District of Columbia Public Schools, Agency, that Employee voluntarily resigned from or abandoned her teaching position on November 23, 2012.

This matter was assigned to this Administrative Judge (AJ) on February 10, 2014. There were, however, extensive delays throughout this process which the AJ is detailing in part, at this time, to explain why the matter was not completed expeditiously. At the prehearing conference on April 25, 2014, Agency declined mediation, and an evidentiary hearing was scheduled for June 24, 2014. On June 17, 2014, however, the parties informed the AJ that they wanted to proceed with mediation, and asked that the hearing be postpone. The requests was granted, and the parties were directed to file status reports. On January 28, 2015, the AJ notified the party that she had been informed that the matter was resolved, and unless informed to the contrary by the parties, she would dismiss the appeal. Employee responded that the matter was not resolved. The status conference scheduled for March 30, 2015 was continued until April 27, 2015, at the joint request of the parties. On April 25, 2015, the parties asked that the matter be held in abeyance for six months based on Employee's incarceration. The request was granted and Employee, through counsel, was directed to file a status report by June 30, 2015. In her report, counsel stated that Employee was again available to participate. By Order dated July 2, 2015, a status conference and oral argument on the issue of jurisdiction was scheduled for August 1, 2015. The proceeding was continued until August 20, 2015 at the unopposed request of Agency.

[1] Carl Turpin, Esq., represented Agency until early July 2015 when he was replaced by Ms. Dillard.

At the August 20, 2015 status conference, Employee stated that her inability to return to work because of her disability continued without interruption. Agency agreed to consider any medical documentation that Employee submitted in support of this contention, with the goal of resolving the matter. The parties agreed on September 28, 2015 as Employee's deadline for submitting documents to Agency. The parties were directed to file briefs on the issue of jurisdiction, if the matter did not resolve. On or about October 5, 2015, the parties stated that they wanted to renew mediation efforts. The matter was referred to mediation, and deadlines held in abeyance by Order dated October 7, 2015. On December 14, 2015, following notification by Agency that it no longer agreed to mediation, an Order was issued stating that the deadline for filing briefs on jurisdiction was a January 6, 2016,[2] and that the evidentiary hearing, if deemed necessary, would take place on February 10, 2016. The evidentiary hearing was continued until March 9, 2016, at the unopposed request of Employee based on the unavailability of counsel. During this time, the representatives continued to work cooperatively, albeit unsuccessfully, to obtain Employee's medical records for Agency's review. On March 4, 2016, counsel for Employee asked to continue the hearing because she could not reach Employee. Agency agreed, but noted that additional delays could prejudice its case. In the March 7, 2016 Order, the AJ granted the request, but based on the extensive delays, directed Employee counsel to advise her by March 18 if she had reached Employee and was ready to proceed, or if she was unable to reach Employee or could not proceed at that time, to show good cause why the appeal should not be dismissed for failure to prosecute. Counsel submitted a timely response stating she consulted with Employee who was prepared to proceed without delay. Oral argument and the evidentiary hearing were scheduled for April 25, 2016 and June 15, 2016, respectively, by Order issued on March 28, 2016.

Following oral argument on April 25, 2016, the AJ informed the parties that the evidentiary hearing since the jurisdictional issue could not be resolved without additional evidence. There was considerable discussion on the relevant issues and evidence, which the AJ summarized before the proceeding concluded. The parties were directed to submit stipulations, and resolve concerns and challenges related to proposed exhibits by a date certain.

At the evidentiary hearing, which took place on June 15, 2016 and July 7, 2016, the parties were given the opportunity to, and did in fact, present documentary and testimonial evidence.[3] After the submission of closing arguments, the record closed on September 12, 2016.[4]

JURISDICTION

The jurisdiction of this Office was at issue in this matter.

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[2] Additional Orders were issued, other pleadings were filed, and numerous teleconferences and email exchanges took place which are not noted in this Decision...

[3] Witnesses testified under oath. The transcript is cited as "Tr1" for the June 15 hearing and "Tr2" for the July 7 hearing, followed by the page number. Both parties submitted volumes of exhibits with multiple tabs. The volumes are cited as "A-1" (Agency) and "E-1" (Employee) followed by the tab ("t") number. The Stipulated Chronology is cited as "J-1" (Joint) and is located at the front of Agency's binder.

[4] In November 2016, the AJ communicated with the representatives about the possibility of reopening the record if additional information and/or documents related to Employee's unemployment compensation claim could be obtained. The parties agreed, but their efforts were not successful. The AJ informed the parties on November 28, 2016 that the record would not reopen. In January 2017, the parties agreed to the admission of Exhibit E-1, t9. This document was discussed during testimony and referred to in the Stipulations, and its failure to be introduced during the proceeding appears to be an oversight.

ISSUES

Was sufficient evidence presented to determine the jurisdiction of this Office in this matter? If so, what relief, if any, should be awarded to Employee?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Undisputed Findings of Fact[5] (UFF) (Ex J-1)

1. Employee was assigned to teach at Randle Highlands Elementary School (RHES) from 2008 and until on November 23, 2012. Tracy Foster was Principal of RHES and Employee's supervisor, between 2011 and 2013.

2. Erin Pitts was an EEO[6] specialist in April 2011, serving as Interim Director of Labor Management and Employee Relations (LMER), between July and October 2011. In March 2012, she was again appointed LMER Interim Director and was permanently appointed to the position. She was on leave between October 2012 and January 2013.

3. Danielle Reich served as LMER Interim Director while Ms. Pitts was on leave.

4. Erica Smith served as EEO Manager between 2011 and 2013.

5. Crystal Jefferson was Deputy Chief of Agency's Human Resources Office (HRO) and head of LMER between 2011 and 2013.

6. Kaiser-Permanente (Kaiser) was Employee's health care provider while she was employed by Agency. She was treated by Dr. William Burner and Dr. Pamela Cobb of Kaiser's Orthopedic Department, and Dr. Shanda Smith of its Psychiatric Department.

7. On August 20, 2012, a day before the start of the 12/13 SY for students, teachers were required to report to work in order to prepare their classrooms in the morning and participate in staff development in the afternoon. Employee reported to RHES that day. She stated that she injured her back while preparing her classroom in the morning. She attended the afternoon training. She did not return to RHES.

8. The August 21, 2012, Verification of Treatment (VOT) from Dr. Burner stated that Employee had lower back pain and could return to work on August 24, 2012.

9. On August 23, 2012, Employee filed a worker's compensation (WC) claim with the Office of Risk Management (ORM), alleging that she sustained a work-related injury on August 20, 2012. (*See* Tr2, 10).

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[5] The Undisputed Findings of Fact (UFF) includes parts of the Stipulated Chronology, which required corrections and revisions. (Ex J-1). The UFF also includes other uncontested facts.

[6] Equal Employment Opportunity

10. The September 11, 2012 VOT from Dr. Burner states that it was in Employee's "best interest" to remain on leave until there was a formal disability assessment which could determine if Employee could return to her teaching position. The VOT listed Employee's current medical restrictions as sitting, walking or standing a maximum of 20 minutes at a time; no bending, lifting, or pushing and carrying a maximum of ten pounds. (Ex A-1, t11).

11. ORM denied Employee's WC claim denied on September 25, 2012.

12. On October 2, 2012, Ms. Pitts directed Employee[7] to return to work by October 5, 2012. She stated that Agency's decision was based on the denial of the WC claim, and Employee's exhaustion of all leave, including FMLA[8] leave. She advised Employee that Agency could comply with the restrictions stated in the September 11 VOT in Employee's current assignment. She concluded that if Employee failed to report for duty on October 5, she could be separated for "abandonment of position/voluntary resignation." (Ex A-1, t10).

13. Employee responded on October 4, 2012, asking for leave as an accommodation, contending that Dr. Burner and another doctor told her that she could not work until released by her doctor, and that she had upcoming medical appointments. (Ex A-1, t11).

14. On October 5, 2012, Ms. Pitts informed Employee that her request would be evaluated pursuant to the ADA,[9] which could provide leave as an accommodation. She was provided with an ADA packet,[10] and instructed to return the signed release by October 9. Employee was told the release was needed so that Agency could obtain medical information and documentation in order to which, if any, accommodations were available to Employee pursuant to the ADA. (Ex A-1, t12).

15. Employee returned the completed ADA Request Form and release on October 7, 2012. In the form, she identified her disability as "lumbar disc degeneration" and listed Drs. Burner and Cobb as her treating physicians.

16. In her report faxed to Agency from Kaiser on November 14, 2012, Dr. Cobb stated that that she evaluated Employee on October 12, 2012, and determined that Employee could "heel-and-toe walk…[had] no significant pain with forward bending or hyperextension of her spine," and scored "five out of five" on her motor exam. Dr. Cobb recommended physical therapy, weight loss and medication to address Employee's back pain. She did not recommend that Employee be placed on leave.

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[7] Agency and Employee communicated primarily by email. Agency attached letters and documents to emails.
[8] Family Medical Leave Act
[9] Americans With Disabilities Act
[10] The ADA packet included a request form and a medical release for the employee to sign and return. (Tr1, 278). Agency would send the signed release, employee's position description, and Letter to Physician which identified the detailed information, documents and evaluations that Agency needed from the doctor in order to determine if the employee was entitled to ADA accommodations. (Tr1, 282; UFF).

17. On November 14, 2012, Agency directed Employee to return to work on November 16, 2012, having concluded that the medical documentation did not recommend additional leave. (Ex A-1, t18; UFF 16).

18. On November 15, 2012, Erica Smith notified Employee that Agency's decision was unchanged, and that Employee's failure to comply could result in her separation based on "abandonment of position/voluntary resignation. (Ex E-1, t4).

19. Employee responded on November 15, stating that she still needed leave because of the back injury. She also informed Agency that she was currently being treated for "severe depression."

20. On November 15, 2012, Agency received a VOT from Dr. Shanda Smith stating that Employee received medical treatment that day, and that Employee had "been ill and unable to work" since October 15, required "intensive outpatient treatment" and would be evaluated on December 7 to determine if she could return to work. (Ex E-1, t6).

21. On November 16, 2012, Ms. Smith notified Employee that Agency would evaluate her eligibility for ADA accommodations based on depression. She provided Employee with an ADA packet including a letter to Dr. Smith and Employee's position description (PD) which she directed Employee to deliver to Dr. Smith. (Ex A-1, t37). She stated that Agency needed Dr. Smith's responses to determine Employee's eligibility for ADA accommodations. She concluded:

> [I]f you would like to take additional time off from work, the enclosed forms must be completed and returned to our office by close of business Friday, November 23, 2012. Failure to either return to work or to return the enclosed forms by close of business Friday, November 23, 2012, may be treated as your voluntary resignation of your employment with DCPS. (Ex E-1, t8).

22. Agency's letter to Dr. Smith, referenced above, requested responses to the following::

    1. Provide a detailed description of Employee's exact medical condition/impairment.
    2. Describe the nature and severity of the medical condition/impairment.
    3. Is the medical condition/impairment short-term or long-term? If short-term, what is the duration of the impairment? (If unsure how long condition/impairment will last, please give your best medical estimate). If long-term, describe the long-term impact of the medical condition/impairment.
    4. Is Employee substantially limited in a major life activity such as, but not limited to: caring for oneself, performing manual tasks, walking seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, reaching, thinking, concentrating, interacting with others, or sleeping?

5. Provide a copy of any clinical findings from the most recent medical evaluation…and, in the case of psychiatric evaluation/psychological assessment, the findings of a mental status examination and the results of psychological tests if appropriate.
6. Provide a copy of Employee's list of medications that she takes for the medical condition/impairment…
7. Which essential job functions (copy of Job Description attached) would be affected by the medical condition/impairment and to what extent and duration? Please indicate the essential job functions that you believe Employee cannot perform due to his/her medical condition/impairment. If Employee can only perform part of an essential job function, please specify what part the employee cannot perform.

The letter stated that it was "very important" that Dr. Smith provide the information in "a timely manner," because Agency could not process Employee's request for accommodations without it." (Ex A-1, t32).

23. On November 19, 2012, Employee requested an extension of the November 23 explaining that it would take "7-10 business days to receive medical documentation from Kaiser." Agency denied the request.

24. On November 21,[11] 2012, at 3:54 p.m., Employee emailed HRO,[12] complaining that Ms. Smith had denied her request to extend the November 23 deadline, despite Employee's explanation that it would take between seven to ten business days for Kaiser to respond. She asked that someone from HRO contact her. HRO responded by email about 40 minutes later, stating, in relevant part:

> The HR Answers team has been in contact with LMER and shared your concerns. The LMER team will get in contact with you directly after the holiday to follow up and discuss your questions and concerns. (Ex E-1, t9).

25. On November 21, 2012, Employee faxed the signed authorization and ADA Request Form, dated November 19, 2012 to Agency. She stated in the form that she was being treated for "chronic depression" and was unable to work but would be reassessed on December 7, 2012. She sought the following accommodations: transfer to a stress-free environment, shorter work day, and a flexible schedule so she could attend medical treatment. She noted that Dr. Smith might have other recommendations. (Ex E-1, t10).

26. In 2012, Agency schools were closed for Thanksgiving on November 22 and November 23, 2012. Agency administrative offices were open on November 23, 2012. (Tr2, 72).

[11] Although Stipulation 24 lists the date as November 19, the transmittal on the emails is dated November 21. The discrepancy was discussed at the hearing, (Tr2, 61-65). The date is not significant since it is undisputed that these emails were exchanged before November 23. The AJ finds the November 21 date to be more reliable.
[12] These emails were sent to and from "DCPS.hranswers@dc.gov."

27. On November 23, 2012, Ms. Reich notified Employee that because Employee did not report to work or submit the completed ADA packet by the November 23 deadline, Agency considered her to have voluntarily resigned effective that date. (Ex E-1, t11).

28. On November 26, 2012, Employee informed Agency that she did not voluntarily resign, and requested reconsideration and additional time to submit the paperwork.

29. On November 30, 2012, Employee again requested reconsideration, advising Agency that she had faxed Agency a letter from Dr. Smith with medical documents.

30. The November 30 letter from Dr. Smith, referenced above, stated that Employee suffered from "severe depression and has been unable to work since October 15, 2012. Dr. Smith stated that Employee was engaged in "intense outpatient treatment" and recommended that she be granted leave to attend appointments. She advised Agency that Employee would be "reassessed to determine if she could to return to work on December 7, 2012." (*Id*).

31. On December 3, 2012, LMER notified Employee that its decision was unchanged, stating that Dr. Smith's letter did not respond to the requested information. On December 7, 2012, Kaiser faxed Agency a "Letter of Accommodation" from Dr. Smith which stated, in part, that Employee suffered from "severe depression" and had been unable to work since October 15, 2012. The doctor recommended that Employee be given leave to attend appointments. She stated that Employee was unable to work and would be reassessed on December 21, 2012. (Ex E-1, t16). On December 27, 2012, Ms. Reich notified Employee that it had reviewed of this additional information, and had not altered its decision... (Ex E-1, t16).

32. On January 4, 2013, Employee met with Ms. Jefferson, Ms. Reich and Ms. Smith to discuss her requests for accommodations. She did not provide additional documents. On January 7, 2013, Employee informed Ms. Jefferson that Dr. Smith was willing to provide additional information. Ms. Smith advised Employee on January 11, 2013 that Agency's decision was unchanged and that the matter was now closed.

33. In a September 18, 2015 letter, Dr. Danny Mamodesne stated that Employee had been his patient since January 2013, and that during the time she was under his care, "she was not disabled and was able to engage in gainful employment." (Ex E-1, t18).

Positions of the Parties and Summary of Evidence

Agency's position is that, pursuant to 5 DCMR 1020.6, it properly determined Employee voluntarily resigned from her teaching position when she failed to report to work or submit the required information by the stated deadline, after being warned that her failure to comply could result in that decision. It asserts that although Employee did not submit a letter of resignation, "her actions spoke loud and clear." (Tr1, 17). Agency notes that Employee was absent most of the 11/12 SY, and never taught during the 12/13 SY. It states that since Employee had exhausted all other leave, Agency agreed to determine her eligibility for accommodations, including leave, pursuant to the ADA. It contends that

only after Agency directed her to return to work after determining that she did not qualify for leave for the back injury, that Employee "pulled her final hat trick claiming she was suffering from a depressive condition and that she was so depressed that she could not return to work." (Tr1, 22). Agency asserts that Employee's absences during the 11/12 SY and the 12/13 SY based on her back injuries and Agency's continued efforts to consider Employee's claim after the November 23 deadline were relevant and supported Agency's claim that it acted reasonably and fairly, and should be considered.

Tracy Foster, RHES Principal, testified that Employee was absent more than one-half of the 11/12 SY, including about 90% of the second half. (Tr1, 42). She stated that she assigned Employee, who taught preschool in the 11/12 SY, to a second grade class for the 12/13 SY, in part based on Employee's claims of physical limitations, because second graders were less physically demanding than preschoolers. (Tr1, 50-51). She said that Employee did not object to the new assignment. (Tr1, 54). Ms. Foster stated that Employee reported to school on August 20, 2012, and participated in the professional development session that afternoon. She said that no one, including Employee, told her on August 20 that Employee had sustained an injury that morning. (Tr1, 63).

Erin Pitts testified that on August 21, she was told by Ms. Foster that Employee informed her that she would be out for an extended period because of a work-related injury she sustained the previous day. (Tr1, 101). She said that Employee applied for worker's compensation (WC) based on that injury, and that after the claim was denied, Agency directed Employee to return to work on October 5, 2012 advising her that all other leave was exhausted and Agency could to comply with the recommended medical restrictions. (Tr1, 115; Ex A-1, t10). Ms. Pitts stated that based on Employee's October 4 response that she continued to require leave, and since no other leave was available, Agency advised Employee that it would determine her eligibility for accommodations pursuant to the ADA. (Tr1, 122-123). Ms. Pitts stated that her involvement in the matter ended on October 15, 2012, when she went on leave. (Tr1, 127). She agreed that Agency can extend deadlines for submitting medical documents. (Tr1, 128).

Danielle Reich testified that since Employee had exhausted all other leave by the end of the 11/12 SY, the only leave available to her was through the ADA. (Tr1, 146). She said that when Employee first informed Agency that she was suffering from depression after being ordered to return to work on November 16, 2012, Agency informed her it would determine her eligibility for ADA relief for depression and directed her to submit the required documents or return to work on November 23, 2012. (Tr1, 151-156, 205-206, 214). The witness said that Agency directed Employee deliver the letter to Dr. Smith rather than follow its usual practice of mailing the letter directly to the doctor, because it thought it would be more expedient since Employee said that she reported for treatment regularly. She noted that Agency can impose a "turn-around" time of several days, but agreed that Kaiser had not responded to the October 9 request until November 14, 2012. (Tr1, 186-187). She did not recall if she was involved in the decision to deny Employee's request for an extension of the November 23 deadline, but stated that the request was denied, because Employee had received "extra time since the prior school year" and had been absent for the entire 12/13 SY. (Tr1, 180). She stated that although schools were closed on November 23, Employee could have reported to Agency administrative offices which were open. (Tr1, 190-193). She agreed that Employee submitted some of the required documents by the deadline. She stated that Agency "invoked" the voluntary resignation provision "allowable under D.C. regulations for job abandonment" when Employee failed to meet the deadline. (Tr1, 161-164; Ex A-1,

t21). She explained that Agency invoked the provision rather than offering other accommodations, at least in part, because of Employee contended that she was unable to return to work. (Tr1, 237).

Ms. Reich testified that Dr. Smith's November 15, 2012 VOT stating that Employee required intensive outpatient treatment and would be reassessed on December 7, 2012 to determine if she could return to work, was insufficient for Agency determine ADA eligibility. She noted that it was inconsistent for the doctor to state that Employee was unable to work, while also saying that Agency should give Employee leave to attend appointments, which implied Employee would be working. (Tr1, 210). The witness stated that her office continued to review documents submitted even after the deadline because it "is always interested in doing what…is appropriate and right under the law." She said that if Agency determined it had made a "mistake," it "would want to change course." (Tr1, 166). She stated that Agency found that even with the additional documentation, there was not enough information for it to determine Employee's eligibility for ADA relief. She said Agency therefore notified Employee on December 27, 2012, that its decision was unchanged. (Tr1, 181, Ex A-1, t23).

Crystal Jefferson testified that while serving as interim OHR Deputy Chief in January 2013, she attended a meeting with Employee regarding Employee's "[voluntary resignation] case and any additional information that she had to provide to explain her case." She recalled that Employee wanted extended leave, and could not state when she could return to work. (Tr1, 246-247). The witness said that nothing submitted from Dr. Smith or Employee before or after November 23 caused Agency to change its decision. She stated that Agency had "sufficient evidence" to make an "informed decision to ultimately deny" Employee's ADA claim. (Tr1, 250 Ex A-1, t22).

Erica Smith testified that she first became involved with the matter when Employee sought leave because of a back injury during the 12/13 SY. She said Employee's contention that she could not return to work, was not supported by her doctor, and cited Dr. Cobb's statement:

> I have recommended physical therapy, weight loss, and anti-inflammatory medication. [Employee] is very dissatisfied with my recommendations. She is demanding to see a spine specialist. I…told her that I do not believe her back problem is surgical…She is very interested in knowing what disability she has in terms of a rating. (Ex A-1, t28).

Ms. Smith testified that Agency notified Employee that her claim for additional leave was not supported by the medical documentation, and that she was therefore required to report to work by November 16, 2012. (Ex A-1, t18). Ms. Smith stated that Employee responded the following day, disputing Dr. Cobb's report, and asking that Agency contact Dr. Burner, who, she asserted, would support her request. Employee also informed Agency that she was being treated for "severe depression," and would ask her doctor to provide information about her treatment which she would submit to Agency. (Ex A-1, t29). The witness stated that Agency did not contact Dr. Burner again since he had previously not recommended that Employee remain on leave. She testified that since Employee alleged a new disability, Agency determined her eligibility for accommodations, including leave, under the ADA. She said Agency gave Employee the documents that Dr. Smith needed to complete, rather than sending the documents to Kaiser itself as was its usual practice, because it thought it would get a more "timely" response since Employee said that she was seeing Dr. Smith "on a regular basis." (Tr1, 293, 303, 306). She said that Agency thought Employee could comply with the deadline since she had met "a tight turnaround" before on "multiple occasions." She stated that it was also for that reason that

Agency denied Employee's request to extend the deadline. (Tr1, 317-319). Ms. Smith stated that although Employee submitted some documents before the deadline, she did not submit "any medical documentation to support her request to remain off from work." (Tr1, 277).

The witness asserted that Agency reviewed all of Dr. Smith's responses, from the November 15 VOT to those submitted after the deadline, but Agency found them insufficient for it to determine if Employee was eligible for ADA relief. She noted that Dr. Smith never provided answers to questions Agency considered essential to determine ADA eligibility, *i.e.,* if Employee was substantially limited in a major life activity and if any essential job function was affected by her impairment; and also failed to provide information about the extent and duration of Employee's disability. (Tr1, 284; Ex A-1, t32). The witness stated that when Agency contacted Dr. Smith after receiving her responses in order to be sure that the doctor understood that Agency needed complete responses in order to determine Employee's ADA eligibility; Dr. Smith responded that she understood the request and had responded to it, and that was "all that she intended to send." (Tr1, 290-291,323). The witness stated that Agency notified Employee on December 3, 2012 that its decision was unchanged." (Tr1, 284-285; Ex A-1, t34). She testified that at subsequent meetings with Employee, Agency reviewed the reasons for its decision with her, and advised her that it would consider any additional information that she submitted, but that Employee did not submit additional information.

Employee's position is that she did not resign from or abandon her position. She maintains that only evidence related to her claim of depression is relevant, and only evidence of matters that took place regarding her claim between October 2012, when she began treatment, and November 23, 2012, when Agency determined she had voluntarily separated should be considered. Employee maintains that although Agency knew of her depression and how it affected her, it nevertheless "cut her off" when she could not meet the "unreasonable deadline" of November 23, 2012 that it imposed. (Tr1, 24-25).

Employee testified she was on leave because of back problems from February 2012 until the end of the 11/12 SY. She stated that while at school the morning of August 20, 2012, she suffered a work-related back injury. She stated that when she submitted Dr. Burner's September 12 VOT, she did not intend to "return to work under any circumstances." (Tr2, 178, Ex A-1, t18). She said that when she sought additional leave after the October 2, 2012 directive that she report to work, Agency initiated the first ADA process. (Tr2, 18; Ex E-1, t1). She noted that she disagreed with Dr. Cobb's assessment, noting that Dr. Cobb only saw her once. (Tr2, 180). She asserted that she could not provide Agency with a date for returning to work because Dr. Burner recommended that she not return to work until she received the disability evaluation rating, and that she was unable to have the evaluation and therefore could not obtain the rating. (T2, 198; Ex E-1, t5).

Employee stated that she began treatment for depression in October 2012. (Tr2, 192). She said that she was familiar with "severe depression" because she had been treated for it before and had a family history of depression. (T2, 23). Employee said that the medications first prescribed by Dr. Smith had exacerbated her symptoms, but subsequent medicines were effective, and she was then able to attend biweekly group therapy on a fairly regular basis. (T2, 33-37; Ex A-1, t3, t21-22). She testified that she could not return to work, because the depression negatively affected her ability to interact with students and staff, explaining that she stayed in bed most of the time, cried a lot, and that her "mood was just down totally." (T2, 56-57).

Employee testified that after she notified Agency that she suffered from depression, Agency sent her an ADA packet by email at 5:30 p.m. on November 16, 2012, and imposed a November 23 deadline for her to submit the completed documents. (T2, 47-50, 59; Ex E-1, t8). She said that Ms. Smith denied her request for an extension of the deadline. She said that she renewed the request for an extension in an email to HR on November 21, 2012, stating that Ms. Smith had denied her request on November 19, despite her explanation that it would take "at least 7-10 business days" to complete the request. (Tr2, 60-65; Ex E-1, t9). She said that in response, HR stated that LMER would contact her after the holiday to discuss her concerns, but no one did. (Tr2, 70; Ex E-1, t9). Employee stated that due to her depression and the "intense" treatment she was receiving, she could not return to work on November 23, and needed leave until she completed treatment. (Tr2, 79-80). She noted that because she no longer had health insurance after November 23, 2012, she did not continue treatment. (Tr2, 109).

Employee stated that even though she requested accommodations in the response she submitted to Agency before the November 23 deadline, she would not have returned to work even if Agency agreed to her requests, since Agency never provided the accommodations requested for her back injury. She contended that Dr. Burner told her not to return to work because he knew that she was not getting her "accommodations met." (T2, 230-235). She agreed that Dr. Smith did not recommend leave as an accommodation. (T2, 252).

Employee testified that she received unemployment benefits for about a year, beginning in December 2012; and that in her application and while receiving benefits, she attested that she was able to work. (Tr2, 155). She asserted that her early attestations did not contradict statements that she could not work, because she knew that "it takes a while for [the unemployment office] to even consider" her application. (Tr2, 158; Ex E-1, t15). Employee stated that she began applying for jobs, including teaching positions, in December 2012 or January 2013, but was not hired. (Tr2, 109). She said that she was listed on the Charter School Substitute Teacher Network for a year beginning in 2014, but she did not accept "a lot" of the offered assignments. (Tr2, 119-138, 152; Ex E-1, t19-20, t25-26, t29-30). She contended that Dr. Mamodesne's statement that she was not disabled and was able to work during the time that she was his patient beginning in January 2013, did not contradict her position at the January 4, 2013 meeting with Agency that she was unable to work, because she did not become his patient until after the meeting. (Tr2, 260; UFF 36).

Findings of Fact, Analysis and Conclusions of Law

The jurisdiction of this Office is set forth in D.C. Official Code §1-606.03(a), which states in pertinent part:

> An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee … an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more…

Agency argues that this Office does not have jurisdiction of this appeal, because Employee voluntarily resigned from her position. In support of its position Agency relies on 5 DCMR 1020.6, which states:

> Failure to report to work after notice shall be deemed a voluntary resignation due to abandonment of position. This voluntary resignation shall not be considered an adverse action.

Pursuant to OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), employees have the burden of proof on all issues of jurisdiction. The burden must be met by a preponderance of evidence, defined by OEA Rule 628.2 as "[t]hat 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."

There is a rebuttable presumption that a resignation is voluntary. *Christie v. United States*, 518 F.2d 584 (Ct. Cl. 1975). The presumption may be rebutted, in the typical case heard by this Office, with evidence that the employee took the steps needed to effect the resignation as a result of coercion or duress. *See, e.g.*, *Vega v. District of Columbia Public Schools,* OEA Matter No. J-0174-08 (January 23, 2009). Generally, in cases involving the voluntariness of a resignation, the employee will have completed the paperwork needed to effect the resignation, but will argue that this was done due to duress or misinformation by Agency. In this matter, Employee completed no paperwork and took no affirmative action to resign. The resignation in this matter is a result of regulation and not any action by Employee. 5 DCMR 1020.6 allows Agency to consider an employee's failure to meet a stated deadline as a voluntary resignation or abandonment of position. It further states that the "voluntary resignation" is not an adverse action and therefore cannot be appealed to this Office. The presumption remains rebuttable, and the burden of proof remains on the employee.

Several threshold issues required resolution before this dispositive issue could be addressed, *i.e.*, the relevant time period, the disability or disabilities at issue, and the admissibility of evidence. (*infra* at 8, 10). After reviewing the arguments by the parties, the AJ determined that the relevant time period was between October 2012 and November 23, 2012 and that only the relevant disability was depression. In addition, determinations were needed regarding the impact of and admissibility of evidence related to the federal court litigation involving Employee's allegations that Agency violated the ADA and Employee's worker's compensation claim. (UFF 9-11). The parties agreed that this appeal should proceed and kept the AJ informed of the status of these matters. They argued, however, about the relevancy and admissibility of evidence related to ADA requirements and compliance. Agency maintained that such evidence was irrelevant and should be excluded, while Employee argued that this evidence was relevant. The AJ determined that since this Office has no jurisdiction to hear ADA claims, allegations of violations of specific ADA requirements might not be relevant to the limited jurisdictional issue in this matter. The parties were told that evidence related to the ADA, unless independently relevant, would not be admitted. However, despite these determinations, certain evidence was admitted that might not be considered relevant. This was done for several reasons. First and foremost, relevancy could not always be easily determined. The proceedings would have been interrupted, delayed and extended if argument was allowed on each piece of disputed evidence. There was no prejudice to allowing the challenged document into evidence since this AJ is solely responsible for determining the relevance of and the weight accorded to evidence, and she has several decades of experience and expertise in this area. In addition, evidence that was not relevant, could, nevertheless provide context and background information. Some evidence was admitted because it included both relevant and irrelevant information. Since many of the 66 exhibits proposed by the parties and much of the testimony offered by the witnesses during the two day hearing were challenged based on relevancy, the AJ deemed it would be unduly disruptive and unnecessarily extend the proceedings if argument was

permitted on each objection. The AJ also considered that while certain evidence was not relevant to the substantive issue, it could have relevance if other determinations were needed, such as relief.

Agency argues that this matter is governed by 5 DCMR 1020.6, and that it acted in accordance with this provision by deeming that Employee voluntarily resigned when she failed to report to work or submit the documents by the November 23 deadline, despite being warned of the consequences of noncompliance. It maintains that it acted fairly and reasonably at all times. Employee contends that Agency cannot rely on 5 DCMR 1020.6, to establish that she voluntarily resigned, since Agency acted unreasonably and unfairly in imposing the November 23 deadline and in refusing her request for an extension. She also maintains that she communicated to Agency that she did not intend to resign and instead intended to retain her employment.

Credibility assessments were required in this matter, primarily because Agency challenged Employee's credibility and because Employee's evidence was at times contradictory or inconsistent. The District of Columbia Court of Appeals emphasized the importance of credibility evaluations made by the individual who actually sees the witness. *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d at 440 (D.C. 1985). These determinations cannot be made from a transcript, since the transcript captures only the spoken word, and not the tone, inflection, body language, eye contact and other factors used to assess credibility. Thus, the assessments of demeanor can only be made by someone who is present. *See, e.g., Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496 (1951). This AJ has many years of experience making credibility assessments, and her experience and expertise were particularly utilized in this case. The AJ considered the inherent improbability of testimony, prior inconsistent statements and that fact that Employee had a considerable interest in the outcome. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987), *Dell v. Department of Employment Services*, 499 A.2d 102 (D.C. 1985).

Some evidence was not as contradictory as it initially appeared. For example, Employee maintained that she was unable to return to work because of the disabling nature of her depression, however, but also presented evidence that she was able to, and did in fact, work during the same time period. The AJ did not find Employee's explanations convincing. (*infra* at 11). However, at issue was Employee's ability to return to her teaching position. Employee consistently maintained that she could not return to her teaching position because of her depression. She described the disabling nature of the depression, and of some of the medication she took to treat the depression - The AJ determined that Employee's testimony on her ability to return to her teaching position was credible, and not defeated the seemingly contradictory evidence that she presented. This decision in no way establishes that Employes's position on this issue was meritorious or even accurate, only that it was credible.[13]

In addition, Agency challenged Employee's credibility regarding her assertion that she suffered from depression, characterizing it as her "final hat trick" in her effort to remain off from work. (*infra* at 8). The AJ found her testimony on this matter to be credible, and finds that it was supported by the relevant documentary evidence. Agency is correct that Employee did not notify it of this disability until she was ordered to return to work. However, Agency did not challenge, and the AJ finds no reason to challenge, Dr. Smith's credentials, her diagnosis of Employee, or her recommendations that Employee remain on leave until reassessed. In addition, evidence in the record contains information that medication was prescribed for depression, Employee has a family history of depression, and that Employee had

[13] Those determinations were not necessary to reach a decision in this matter...

symptoms consistent with a diagnosis of depression. (Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, pp. 327, 339-344).

Employee argued that the November 16 notice imposing a November 23 deadline was fatally flawed since schools were closed on November 23 so she could not report to work or deliver any documents. Although the November 16 notice did not inform Employee that administrative offices were open on November 23, Employee did not dispute that the offices were in fact open. Further, she knew from the November 16 notice that she was required to report on November 23. If she had a question or concern about what she needed to do since schools were closed that day, she had time to seek clarification. She did not do so, even though she had other contacts with Agency prior to the deadline. In addition, Employee did not assert that she would have reported to the administrative offices if she had known they were open. For these reasons, the AJ did not find the fact that schools were closed on November 23 or Agency's failure to notify her that its administrative offices were open, rendered the November 16 notice or November 23 deadline fatally flawed.

The AJ carefully considered the other arguments raised by Employee to support her position that the deadline was unfair, and Agency's arguments to the contrary. Several arguments can be resolved quickly. Employee argued that it was unreasonable for Agency to deviate from its practice of giving her documents to bring to the doctor rather than following is practice of mailing the documents directly. Agency explained that it did so because it thought that would be quicker, since Employee stated that she went to Kaiser frequently for treatment. There is no need to resolve this dispute, since it appears Kaiser would have received the documents about the same time regardless of the delivery method. Agency provided the ADA packet to Employee at 5:39 p.m. on Friday, November 16, 2012. Since the next business day was Monday, November 19, it is reasonable to assume that this was date that Employee brought them to Kaiser. Even if Agency had sent the documents by overnight mail to Kaiser at that time, it is likely Kaiser would have received them on November 19, the next business day.

Employee contended that the November 23 deadline and denial of requests of an extension were unreasonable based on the short turnaround time, especially during the holiday season. Agency maintained that its decision to adhere to the November 23 deadline was reasonable and fair, noting that Employee had met this short turnaround in the past. However, the record reflects that Employee's doctors did not always respond promptly or timely. Agency sent the October 10, 2012 letter to Drs. Cobb and Burner by overnight mail. (Ex A-1, t26). It notified Kaiser on October 24, 2012 that it was transmitting Employee's release and the October 10, 2012 letter. (Ex A-1, t25).[14] Kaiser faxed Dr. Cobb's response to Agency on November 14, 2012. (Ex A-1, 28). This chronology does not support the claim of a quick turnaround time. Agency also argued, in support of its denial of Employee's request for an extension of the November 23 deadline, that it often granted extensions to Employee in the past, but the evidence indicates that Employee did not seek an extension of the earlier ADA claim, rather she submitted the required documents two days before the stated deadline.

The reasonableness of the deadline is largely dependent on whether compliance could be achieved within the time allowed. Agency gave a deadline of November 23, it did not give Employee a certain number of days so it is not important to determine if business or calendar days should be used to calculate the number of days, although most witnesses used business days. As noted above, Agency

[14] The evidence did not address if the letter was sent by overnight mail on October 10, 2012 and/or the fax transmittal on October 24, 2012 and it is not necessary to make that determination.

provided Employee with the ADA packet at 5:39 p.m. on Friday, November 16, 2012. She was required to complete her portion and submit the completed documentation from Kaiser by "close of business" on November 23, 2012. Employee submitted the part of the ADA packet that she was required to complete on November 21, several days before the deadline. The evidence did not establish when Employee delivered to Kaiser. It is not necessary to determine the time and date because the challenge is to the reasonableness of the deadline and no assertion was made that Employee did not timely deliver the packet. The evidence supports the conclusion that she delivered the documents on November 19, since that was the date that she requested an extension, maintaining Kaiser needed between seven and ten business days to complete and return the information. It is reasonable to assume that someone at Kaiser may have given her that information. Regardless, assuming she delivered the documents on November 19,[15] that would give Dr. Smith about four days to complete and return the responses. The November 16 letter required that Dr. Smith provide comprehensive and detailed information about Employee's disability and a detailed analysis on the impact of the disability on Employee's ability to perform specific job functions. (UFF 22; Ex A-1, t32). The responses could not be completed by checking boxes, they required medical opinion and analysis. In order to answer, Dr. Smith likely would have needed to review Employee's medical records, consult with the therapist conducting the group therapy and analyze the impact of Employee's disability on her ability to perform the duties described in her PD. Even if Dr. Smith was at Kaiser every day during this period, given her other duties and the amount of time she needed to prepare the responses, the AJ finds the November 23, deadline was unreasonable, in that it did not provide sufficient time, particularly given the intervening weekend and legal holiday, and the time needed to prepare the responses. In addition, Agency offered no reason why it was necessary to impose such an abbreviated deadline, and it was not required by law or regulation.

The AJ considered and found it significant that Agency failed to notify Dr. Smith that there was a deadline for submitting her responses, and of the consequences on Employee if the deadline was not met. The AJ has already found, under the circumstances presented, *i.e.*, the holiday week during which many offices were closed and many employees were on leave, the deadline was unduly harsh. The letter stated that it was "very important" that Dr. Smith provide the information in "a timely manner." In this instance, for the reasons already discussed, there was no reason for Dr. Smith to assume that any submission beyond November 23 would be untimely, particularly where detailed information, analysis, and possibly consultation, was needed, Although Employee may have advised, or been expected to advise, Kaiser and/or Dr. Smith of the deadline[16], the record does not establish if she communicated it, or if she did, if Dr. Smith received the information. In any event, notification by Agency would have had a more significant impact. In addition, Kaiser had not submitted Dr. Cobb's response to the earlier ADA letter until about a month after it was received; and no negative consequences resulted. The AJ considers Agency's failure to impose a deadline on its letter to Dr. Smith to be significant because neither Kaiser nor Dr. Smith had reason to know that Employee would be terminated if Dr. Smith's

[15] It is not necessary to determine the time and date that Employee brought the materials to Kaiser, since the challenge is to the reasonableness of the deadline, and no assertion was made that Employee did not timely deliver the packet. Support that November 19 was the date of delivery is based on the fact that Employee asked for an extension on that day, contending that Agency would need between seven and ten business days. This could indicate that Employee was told how much time would be needed when she brought the packet to Kaiser, and sought a request based on Kaiser's statement.

[16] Employee explained that an extension was needed because Kaiser required between seven and ten days to complete the response. It is reasonable to assume that those dates were given to her by Kaiser,

response was not submitted by November 23.

The AJ also considered the fact that Agency imposed the November 23 deadline, despite the VOT faxed on November 15, 2012 to Ms. Smith and Ms. Reich, in which Dr. Smith stated that Employee was ill and had been unable to work since October 15, and that her ability to return to work would not be reassessed until December 7, 2012. (Ex E-1, t6). Since Agency knew on November 15 that Employee's doctor had determined that Employee should remain out of work at least until December 7, 2012 based on her illness, its decision to impose and keep its November 23 deadline is more unreasonable. Agency knew when it imposed the deadline that Employee was not medically cleared to return to work on November 23,[17] therefore imposing that date as the deadline rather than a date nearer to the December 7 reevaluation, appears to be even more unreasonable and harsh.[18]

The reasons offered by Agency for imposing the deadline and refusing to extend the deadline have been addressed. None of the reasons, even if meritorious, establish the necessity of imposing and maintaining the deadline. For example, Agency was concerned with good reason that students in Employee's classroom had not had a permanent teacher that school year, but extending the deadline by a few days would not have made a difference. In fact, it would have been more concerning that a teacher, directed by her doctor to remain off from work, was being order to return to her class. The argument that Employee had been given extensions before and had met short turnaround deadlines before were not supported by the relevant evidence, but even if one or both reasons had been supported by evidence, it still would not establish the reasonableness of this deadline or that a problem would have resulted from extending it.

In determining whether Employee abandoned or voluntarily resigned from her position, the AJ considered the legal definitions of these words. Both, according to Black's Law Dictionary (5th ed.), require intention and action. For example, abandon requires the "intention to forsake or relinquish" and a "visible act of relinquishment." Similarly, "resignation," is defined as a "[f]ormal renouncement or relinquishment [that] must be made with intention of relinquishing the office accompanied by act of relinquishment." An act is "voluntary," according to Black's, if it results from the "free and unrestrained will of the person." Employee established that she did not intend to resign or abandon her position. An employee's failure to report to work or submit documentation by a stated deadline could create a presumption that the employee has abandoned the position, where the employee has failed to communicate with Agency, failed to respond to Agency, and/or failed to explicitly state his or her intention to keep her job. The presumption, at best, was rebutted prior to Agency's November 23 letter confirming the separation by ample evidence that Employee remained in close contact with Agency, that she responded to Agency requests, and that she explicitly stated that she did not intend to abandon or resign from her job. She sought extensions of the November 23 deadline both on November 19 and November 21, explaining that she needed additional time to obtain the documents from Dr. Smith and Kaiser. Further support of Employee's intent, is that she completed and timely submitted her part of the ADA packet, including the signed release and the list of accommodations sought. Thus she submitted

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17 Reports and recommendations from Dr. Smith received by Agency after November 23 are not relevant since they were not considered by Agency in determining the deadline or denying the requests for extension.

18 Agency's argument that it imposed a short deadline and refused the request for an extension because of its concern that students in Employee's class did not have a permanent teacher, while well-founded, also must be called into question since Dr. Smith determined that Employee was not able to return to her teaching duties until at least December 7.

everything that was within her control to submit. (Tr1, 230; Ex E-1, t10). The AJ agrees with Agency that a departure from employment "is voluntary where it appears under the circumstances that the departure based on employee's will and not any action from Agency." (Agency Closing Argument at 5). However, in this matter, the evidence supports the conclusion that Employee's departure was a result of Agency's decision to impose and maintain an unduly harsh deadline without good cause.

It is appropriate for Agency to invoke provisions of 5 DCMR 1020.6 when an employee fails to communicate with Agency, fails to report to work with an accepted excuse, and/or fails to respond to requests from Agency for documentation or information. In those instances, Agency could reasonably assume that the employee demonstrated a lack of interest in retaining his or her employment. However, those are not the facts in this matter. Employee always responded to Agency's communications and was always explicit in stating her intention to keep her position. She met deadlines over which she had control, and sought extensions to meet deadlines that she could not control. She was explicit in her assertions that she did not intend to resign or abandon her position.

In sum, based on the analysis, findings and conclusion contained herein, the AJ determines that the evidence in the record, by more than a preponderance of evidence, supports the conclusion that Agency improperly invoked 5 DCMR 1020.6 5 and therefore that Employee did not abandon or resign from her position. As a result, Employee's separation is considered a constructive removal which is an adverse action. Therefore, the jurisdiction of this Office to hear this appeal has been established by a preponderance of evidence. *Jefferson v. Department of Human Services*, OEA Matter No. J-0043-93, 47 D.C. Reg. 1587 (2000).

The award of relief must be based on the unique facts of the cases. In this matter, the crafting of appropriate relief was complicated. The remedy should return Employee to her status prior to November 23, 2012, since the purpose of status *quo ante* relief is to restore to the employee all that was lost as a result of Agency's action. On November 23, 2012, Employee had exhausted all available leave and was in a non-paid status. There was no evidence that she was entitled to be placed on ADA leave or on any other leave status which would provide pay. Employee consistently maintained that she has not able to return to work since her separation on November 23, 2012, and almost until the beginning of this proceeding, sought to present documentation that she could not return to her teaching position. As a result of her continued representations that she remained unable to work, Agency agreed to review documentation she provided to support that position.[19] In addition, Employee maintained that she remained unable to return to the classroom from October 2012 at least through 2015, possibly longer. It would be speculative at best to award back pay as of any particular day, based on these circumstances.

For these reasons, it is

ORDERED:

[19] In the December 14, 2015 Order, the AJ summarized Employee's position at the August 20 proceeding that from November 23, 2012 and through at least August 20, 2015, she remained unable to perform the required duties of her position. In order to ensure the accuracy of the statement, she directed Employee to notify her if she did not concur with the statement in the Order. Employee did not contest the accuracy of the statement and it is considered an accurate rendition of Employee's statement on that date.

1. This Office has jurisdiction of this appeal since the evidence supports the conclusion that Employee did not voluntarily resign from or abandon her position.

2. Agency is directed to restore any benefits that Employee was receiving at the time she was separated, no later than 45 calendar days from the date of issuance of this Initial Decision.

3. Agency is directed to provide Employee with a list of all documents, certifications and/or clearances, within 30 calendar days from the date of issuance of this Initial Decision. Employee must submit all documentation within 45 calendar days from the date she is provided with the requirements.

4. Agency is directed to notify this Office of its compliance with the two requirements listed above, no later than 50 calendar days of the date of this Decision.

5. Agency must determine if Employee has satisfied all requirements within twenty calendar days from submission and so notify her and this Office. Within ten calendar days thereafter, if Employee has satisfied all requirements, Agency must reinstate Employee. If, on the other hand, Agency determines that Employee has failed to meet all requirements, it must instead notify her of its decision not to provide further relief, detailing its reasons. [20]

FOR THE OFFICE: Lois Hochhauser, Esq.
Administrative Judge

[20] The representatives are commended for the professionalism and cooperation exhibited throughout this process. The AJ is confident that with the continued professionalism and cooperation of the parties, compliance can be achieved.