THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DARLENE REDDING	)	
Employee	)	OEA Matter No. 1601-0112-08
	)	
v.	)	Date of Issuance: August 6, 2009
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF PUBLIC WORKS	)	Rohulamin Quander, Esq.
Agency	)	Senior Administrative Judge
	)	

Pamela Smith, Esq., Agency Representative
Clifford J. Lowery, Employee Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 10, 2008, Employee filed a Petition for Appeal, challenging her termination, effective July 7, 2008, from her position as a Parking Enforcement Officer, due to alleged job abandonment, followed by a subsequent determination that she had become Absent Without Official Leave "(AWOL"). This senior administrative judge (the "AJ") presided over an evidentiary hearing in this matter on December 10, 2008. Employee was present at the hearing and represented by Clifford Lowery, President of AFGE Local 1975. Pamela Smith, Assistant Attorney General, represented the Agency. The record closed on September 5, 2008, upon both parties' belated submission of their respective proposed final orders.

CHARGES AND SPECIFICATIONS

The April 21, 2008, Notice of Proposed Removal letter cited Employee on charges of Inexcusable Absence Without Official Leave. The dates at issue were:

February 14-15, 2008	8 hours
February 17-19, 2008	16 hours

February 20-22, 2008	16 hours
February 24-29, 2008	40 hours
March 2-14, 2008	80 hours
March 16-28, 2008	80 hours
March 31-April 11, 2008	80 hours
April 14-18, 2008	80 hours

On June 26, 2008, Agency issued a Notice of Final Decision, sustaining the removal of Employee based on the evidence of record, the response from Employee, and the recommendation report of Theresa Cusick, Esq., Agency's designated hearing officer.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "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.

OEA Rule 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

Whether Agency's decision to terminate Employee was supported by substantial evidence, whether there was harmful procedural error, or whether Agency's action was done in accordance with applicable laws or regulations

SUMMARY OF WITNESS TESTIMONY AND EVIDENCE

Evidence Considered

The Government called George L. Carr, Pamela McLean, Derric R. Speight and Nancy Harvin to testify as Agency witnesses. Employee testified on her own behalf and called Emmanuel Cummings. Employee also called George L. Carr and Pamela McLean as additional witnesses for her case.

The following documents were admitted into the record as Agency Exhibits:

Exhibit # 1—6/3/08, E-mail from Carr to Harvin;
Exhibit # 2 – 4/21/08, Notification of Personnel Action;
Exhibit # 3 – Employee's Position Description;
Exhibit #4 – AWOL forms;
Exhibit #4a – 5/6/08, February-March 2008 Telephone Log;
Exhibit # 5 – 4/21/08, Proposed Notice of Adverse Action;
Exhibit #6 – 6-26-08, Notice of Final Decision; and
Exhibit # 7 – 10/15/07, FMLA application.

The following documents were admitted into the record as Employee Exhibits:

Exhibit #1 – 5/6/08, Telephone Log (same exhibit as Agency #4a);
Exhibit #2 – 4/19/07, Memo from Khin T. Maw, M.D., psychiatrist;
Exhibit #3 – 4/24/07, Letter from Teri Doke Adams to Employee;
Exhibit #4 – 10/29/08, Memo from Dr. Maw;
Exhibit #5 – 5/12/08, Memo from Dr. Maw; and
Exhibit #6 – Title 42, USC, Public Health and Welfare, Chapter 126.

A/ Agency's Case - Summary of Testimony

Testimony of George Carr

George L. Carr ("Carr") was the Parking Control Division Manager of DMV, whose duties include overseeing operations and enforcement of all parking regulations, He currently supervises approximately 220 individuals. He has an understanding of what is commonly referred to as "AWOL," characterized as "when a person is placed in a status when official leave has not been requested or official leave has not - - - they don't have leave to cover." Carr identified Agency Exhibit #1 as an e-mail that he authored which states the procedure for requesting leave. *Tr. 13-15.* Darlene Redding, Employee herein, was one of his vehicle compliance officers, described as individuals who work in teams of two, driving throughout the city recording tags that are not registered in the District of Columbia. Carr was familiar with the Employee's time and attendance problem, and on one occasion in February 2008, her supervisor, Pamela McLean, forwarded a telephone message from the Employee which stated "I won't be in," and "I think I'll contact you, I'll get in contact with you later." *Tr. 18-19.*

Once he found that Employee was not at work and did not know her status, he detailed another parking control officer into her position so the team could work as normally as possible. *Tr. 20.* On cross examination Carr noted that Agency makes staff adjustments, depending on the length of time an employee is missing, adding that, in Employee's case, "we didn't know the duration because we didn't get any, receive any more messages, so we didn't know the duration, so we had to start thinking about coverage." *Tr. 35.*

Employee was familiar with the process for applying for leave under the Family Medical Leave Act ("FMLA"), as she had applied a year or two before regarding a disability with her heart. *Tr. 22-23.* When subsequently called as Employee's direct witness, Carr denied that he ever directly spoke with Employee during her extended AWOL period, or specifically directed that she could return to work.[1] Rather, he noted that an employee's work status notification is mailed, and an employee might return to duty status, simply because there is nothing written which indicated that they may not return to duty. *Tr. 224-225.*

Testimony of Pamela McLean

Pamela McLean, Employee's former immediate supervisor, is employed by DPW as a Parking Officer Supervisor. She currently supervises eight individual officers who write out-of-state tickets. She described the process as, "they go out in pairs, one person drives, one person works the computer, and they enter out-of-state tags into the computer system." She works from 10:00 p.m. until 6:30 a.m. and usually spends from 2:15 a.m. to 5:00 a.m. out in the field. She characterized Employee's time and attendance from February 14, 2008 to April 18, 2008, by simply stating, "she wasn't coming to work, she stopped coming to work." In response McLean prepared AWOL forms to document Employee's failure to properly request leave. *Tr. 45-47.* McLean recalled that the Employee had left her a single voice mail message while she (Ms. McLean) was out in the field, stating that she (Employee) would not be in, and that McLean could place Employee on whatever leave was available, even AWOL.

Employee did not state that she was ill, nor how long she would be out of the Office. *Tr. 49.* McLean identified Agency's Exhibit #4-A, a partial telephone call log for calls placed to 202-541-6061, McLean's assigned office telephone number, from 202-290-3759, which was established as Employee's home telephone number. McLean testified that in reviewing the call log, it reflects that Employee had called McLean on February 14th 2008, February 15th, February 18th, February 19th, February 22nd, February

[1] This issue is disputed by Employee who testified that it was Carr who directed her to report back to duty, telling her likewise, that she would have to follow the established procedures for returning to work. *Tr. 182.*

25th , February 26th, March 1st, and March 6th, during hours when she (McLean) was ordinarily not in the Office. *Tr. 51-56.*[2]

One time when Employee called, McLean got her supervisor to witness Employee's message. Employee said that she would be in the next night to sit down and talk and bring her paper work. During this conversation, Employee did not state that she was ill, nor how long she would be out. *Tr. 56.* On cross-examination, McLean testified that "the number that I had on file for her, it was disconnected, so I had no way to contact her. I tried to contact her. And she would not leave her phone number on the messages, she didn't leave a number. So I looked through her file and I found her home number, but it was disconnected." *Tr. 63.*

When subsequently called as Employee's direct witness, McLean testified that, only upon Employee's return to duty, after the extended AWOL period (February to April 2008), did she indicate that she had been ill. McLean admitted that during the extended period, Employee left perhaps five to six voice messages, but never claimed illness, requested sick leave, nor stated her intentions in that regard. All of the voice mail messages were forwarded to the witnesses' supervisors, who subsequently directed her to proceed with documenting the AWOL, since no leave had been requested, and no documentation of any illness or other circumstances having been submitted. *Tr. 228–230.*

Testimony of Nancy Harvin

Nancy Harvin, an Employee and Labor Relations Manager for Department of Public Works, Parking Enforcement Management Administration, manages disciplinary actions from investigation to drafting language that's usually signed off by the administrator or director. She prepared the proposed notice of adverse action for Terry Doke Adams' signature after reviewing the Employee's AWOL forms and leave forms. *Tr. 115-116.* Employee did not apply for FMLA assistance while she was AWOL, but was familiar with the process, having done so in the previous year, i.e. 2007. *Tr. 121-123.*

B/ Employee's Case – Summary of Testimony

Testimony of Emmanuel Cummings

Emmanuel Cummings, the union shop steward in the Employee's division, testified on behalf of Employee. One of his primary union-related duties is to work with Agency and any affected employee when there is an attendance problem. When Agency first notices that any employee has an attendance problem, the shop steward's role is to first deal and with both parties, seeking to resolve the problem before it escalates into something more negative, which might result in the imposition of leave restrictions or AWOLs against an employee. Under the union contract, Agency is supposed to notify the

[2] Of the total of 29 telephone calls place, 13 were to McLean's assigned telephone number.

shop steward (this witness) about an attendance problem. While Agency generally adheres to this policy and the union representative is timely notified when there is an attendance problem, in this particular case, there was no such notification given by any Agency representative or contact to this witness. *Tr. 132–135, 146.*

It is the witness's understanding that AWOL-related problems are included in the list of work conditions that Agency is obligated to advise the union about, in order to minimize the adverse impact of excessive employee absences.[3] AWOL pertains to an individual employee's leave and work pattern, and must be included and addressed when there is a problem. Had Agency notified him of Employee's leave situation, he would have followed through with the standard procedure, per the union contract, including contacting the supervisor and Employee, and convening a meeting to determine the exact nature of the problem, seeking to avoid an AWOL, leave restriction, or memorandum of counseling. *Tr. 145-146.*

However, in the matter at hand, because he received no contact from Agency regarding Employee's attendance problem, and the possible severe consequences that she might face as a result, he was unaware that Employee had an attendance problem. He learned after the fact, and then only as a result of Employee stating to the witness, when she happened to see him, that she was having a problem. The matter was then, belatedly, referred to the union. *Tr. 136–139.*

Testimony of Darlene Redding, Employee

Darlene Redding ("Employee" or "Redding"), testified on her own behalf, admitting that she was not at work between February 14, 2008, and April 18, 2008. *Tr. 192.* However, on several occasions, prior to February 14th, but also including the February 14th date, she called Pamela McLean from her working home telephone number (202-290-3759), and left a message and call back telephone number on voice mail. Neither McLean nor anyone else ever returned the call. *Tr. 155-157.* Subsequently, she regularly called, wanting to get things clear, knowing what she needed to do, what type of leave she was eligible to receive, and to let McLean know what was going on with Employee's health, including that she was under sustained doctor's care. Her real objective was to save her job, despite the fact that she was still sick. Only on one occasion in the February-March period, did she spoke to one supervisor, Otis (last name unknown) *Tr. 157-162; E-1 (Same as A-4A*).

Employee admitted that she never personally visited the job site to confront her supervisors about their failure to return calls, and to get her work status situation clarified. She maintained that she was too sick to do so, still tormented by certain circumstances at work, including having been raped earlier by a co-worker(s), and a subsequent nervous breakdown. Certain of these tormentors also made disparaging remarks about her disabled son, which only added to the personal stress of the entire situation. She was under continuing doctor's medical care during the most recent

[3] See CBA, Article 21, § Q.

pendency of this matter, including between the dates of February 14 to April 18, 2008, the AWOL period in question in this record. *Tr. 163–167.*

Agency was on formal notice of Employee's health history over a period of time, as Employee had provided to Agency a medical statement from her psychiatrist, dated April 19, 2007. The doctor diagnosed Employee's medical condition as a "295.7 Schizoaffective Disorder,"[4] and recited the most typical characteristics of the disorder, including depressive episodes and the loss of energy, both of which apparently contributed to Employee failing to report to work. The document also recited that Employee was enrolled in a psychotropic medications program, plus individual therapy, and was making progress towards recovery. Therefore, since at least April 2007, Agency was fully aware that Employee was diagnosed with a documented medical condition of Schizophrenia, but once aware, took no steps to have Employee evaluated for a determination of her capability to perform her job, in light of her medical and psychological condition. *Tr. 168–170, 175 -176; E-2.*

In response to her doctor's report, Agency advised Employee on April 24, 2007, that she was eligible to apply for some relief under the Family and Medical Leave Act ("FMLA"). The letter included the application and the deadline of May 7, 2007, for notification to Agency for the required medical certification to verify her condition. Employee submitted the application in 2007. When she got sick again in 2008, she continued to call her supervisors was to ascertain whether her 2007 FMLA application was still in effect, or whether a new FMLA application was required.[5] *Tr. 172 –173; E-3.*

Employee's doctor submitted follow up medical statements on May 12, 2008, and October 29, 2008, both of which were issued after Employee's proposed and then subsequent termination for AWOL. In the May 12th letter, Dr. Khin Maw stated that Employee remains a patient at the D.C. Department of Mental Health, where she is being treated on an ongoing basis for mental disorders, including diagnosed "worsening symptoms beginning approximately March 15, 2008 through April 2008." The doctor, noting that Employee's condition is being managed with medication,[6] and weekly therapy, concluded that Employee could successfully return to work. *E-5.* This medical statement was issued during the pendency of the Agency-issued Advanced Notice of Proposed Removal, dated April 21, 2008 *(A-5),* but before the Notice of Final Decision, dated June 26, 2008 *(A-6).* Employee filed the letter with Agency. *Tr. 177.* In the less specific October 29th letter, issued after Employee had been terminated, Dr. Maw simply

[4] This is a severe bipolar mental disorder that can create many impressions in the mind of the patient, often brought on by external sources or events. Episodic occurrences of the ailment respond well to appropriate medication.

[5] It was acknowledged during the Evidentiary Hearing that even if Employee had been able to reach someone in her office, no one there could have advised her whether her prior FMLA coverage could be applied to her re-emergent medical situation.

[6] Employee testified that she has been on a two-tablets-a-day of Prozac medication for five years. She was unaware of the milligram dosage. *Tr. 178.*

stated that Employee continued to be a patient of the mental health clinic, and had been so enrolled since 2003. *E-4.*[7]

Although Employee was concerned about keeping her job, she admitted that she was neglectful and not thinking correctly by not responding to the correspondences that Agency sent to her home, including the notice that she was being placed on AWOL. Employee claimed that the nature of her illness, and the job-related stress, connected with certain on-the-job harassments, put her into a frame of mind where she could not cope with anything. In some instances, she did not open Agency-issued letters that came to her home address. *Tr. 178–179.* Employee's condition improved somewhat, and she resumed working in late April 2008, despite the pendency of the April 21, 2008, - issued Advance Notice of Proposed Removal. *A-5.* She continued to work consistently until the effective date of termination, July 7, 2008. *Tr. 182–184.*

The AWOL cycle that began on February 14, 2008, grew from an harassing incident during roll call on the day before, when "they" called both Employee and her son names, which just made her sick, causing her to fall apart. Employee was already devastated because of what "they" had previously done to her on the job, but which resulted in no Agency-imposed discipline for their activities.[8] Nor could she tolerate them making vicious remarks about her disabled child. She described her condition as nauseated, with no life or energy left in her to the point where she just fell to pieces, unable to even go outside of her own house. As she stated, "I just lost sight of everything." At first, the situation was so severe that she would not open up and even talk about what was bothering her. Consideration was given to possibly having to place Employee into a hospital, because of her seriously declined condition, although such event proved unnecessary. *Tr. 185–187.*

She recovered enough, and returned to work in mid April, and had good attendance. Upon her return, no one requested or indicated that she needed a fitness-for-duty evaluation, nor explained to her any possible rights under the Americans with Disabilities Act, codified at 42 USC, Chapter 126, Equal Opportunity for Individuals with Disabilities. *Tr. 187–188, 213; E-6.*

On cross examination, Employee noted that if an employee is out sick, when she is required to bring a doctor's certificate upon returning to work. Compliance with this requirement was always her intention. When she returned to work after her extended absence, she presented Agency with a medical note from her doctor.[9] *Tr. 197–199; E-5.*

---

[7] Employee later testified that this letter, although prepared after she was terminated, was created at Agency's request, and made a part of the administrative review record. *Tr. 189–190.*

[8] Employee is referring to her claim of having been raped by certain co-workers, whose names are not a part of this record.

[9] Although Employee testified that Agency would not allow her to return to work without presenting a medical note, the disparity in the dates in question suggests that Agency allowed Employee to return to duty some time after April 21st, although the medical

She added that another reason for her multiple calls to her office was to get management to address the issue of Employee's being continually harassed on the job.[10] *Tr. 193–194.*

Employee emphasized that a mentally ill person continually remains under the doctor's care, and the need to submit subsequent medical documentation serves to reverify that the person (the Employee herein) remains under treatment. Employee explained this to her supervisors on several occasions, but many people do not understand mental illness, including that once someone is established as mentally ill, they remain under a doctor's care - always. Even when a mentally ill person is at home, he or she is still sick. As reflected in her doctor's medical reports, it is not specific days or weeks, but, "I'm under her care always." Employee stated that even today, while under oath and testifying before this AJ, she remains on daily Prozac medication, including monthly intramuscular injections. The objective is for Employee to avoid a schizophrenic episode, which can be triggered without warning by outside elements. Employee's brother undertook the responsibility of updating Employee's doctor on Employee's condition. *Tr. 205–207; E-5, E-4.*

---

report, dated May 12, 2008, was apparently not provided for some weeks after Employee had returned to full duty.

[10] The legal definition of a "hostile" or "abusive work environment" is when the workplace is permeated with discriminatory intimidation, ridicule, and insult, which is sufficiently severe or pervasive to the point of altering the conditions of the victim's employment. To determine if something is sufficiently severe or pervasive to constitute a hostile work environment both an objective and a subjective test must be met. The conduct must be severe or pervasive enough to create an environment that a "reasonable person" would find hostile, and the victim must also subjectively regard that environment as hostile. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). However, the offensive conduct does not have to be both severe and pervasive, it can be one or the other.

Further, a hostile work environment exists when an employee experiences workplace harassment and fears going to work because of the offensive, intimidating, or oppressive atmosphere generated by the harasser based on race, religion, sex, national origin, age, disability, veteran status, or, in some jurisdictions, sexual orientation, political affiliation, citizenship status, marital status, or personal appearance. *Hostile work environment* is also one of the two legal categories of sexual harassment. The anti-discrimination statutes governing hostile work environment are not a general civility code. Thus, federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not extremely serious. Rather, the conduct must be so objectively offensive as to alter the conditions of the individual's employment. The conditions of employment are altered only if the harassment culminates in a tangible employment action or is sufficiently severe or pervasive to create a hostile work environment. Retrieved from "http://en.wikipedia.org/wiki/Hostile_work_environment"

The AJ queried Employee about how she would manage and interact with the same people, if she prevailed in this case, and Agency placed her back into the same hostile, harassing work environment. She replied, "Well, hopefully, this would teach them a lesson and the supervisor, Mr. Carr, will go back and have a talk with them and try to straighten things out. He's aware of the situation, he knows what's going on. So maybe he'll talk with them and the supervisor, so they'll conduct themselves more professionally. . . . I still need my job and I'll have to just try and be stronger . . . " *Tr. 207-208.*

Of particular concern to Employee was the failure of her supervisors to address her complaints about the continuous mistreatment by three to four co-workers. Employee took great umbrage that her immediate supervisor, Pamela McLean, failed to take action to address or prevent the problem. Employee then elected to file a discrimination complaint with EEOC against McLean and certain harassing co-workers.[11] *Tr. 209–210.*

FINDINGS OF FACT, LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Agency's basic position

Agency asserts that Employee took an unapproved absence of about two months, which amounted to job abandonment and AWOL. She never requested sick or annual leave, never indicated that there was a health emergency, and did not provide a more definitive statement about her situation until after the advance notice of termination was issued. Further, she did not provide a working telephone number for a return call, as the telephone number on file was disconnected.

Employee's basic position

Although Employee was absent for about 60 days, Agency was fully aware of her ongoing medical/mental condition, having been placed on formal notice in 2007. Therefore, Employee was officially established as a "troubled employee," the circumstances of which mandated that she was entitled to certain specific attention, including a written referral by management to the EAP for counseling or treatment designed to help her confront and overcome her problems. Further, management neglected to meet its CBA negotiated obligation to notify the union shop steward, but instead wrongfully terminated Employee. The record reflects that Employee regularly called Agency, in an effort to reach a supervisory staff person, or to leave a voice message that she continued to be unable to report back to work. No one ever returned her calls.

[11] Neither the status of this EEOC complaint or the eventual outcome is a part of this record.

FINDINGS OF FACTS

Undisputed Facts

1. Darlene Redding (Employee) was hired by the D.C. Department of Public Works (the "Agency") on June 11, 2001, and at the time of her termination was serving as a Parking Enforcement Officer. *E-2.* The position required Employee to work in a team with another employee, driving through the District of Columbia recording tags that were not registered in the District.
2. After Employee had been absent from work for a sustained period, on April 21, 2008, Agency issued an Advanced Written Notice of Proposed Removal based upon a charge of Inexcusable Absence Without Official Leave (AWOL) for 400 hours from February 14, 2008, to April 18, 2008. In addition, Employee was charged with job abandonment for being AWOL for 10 consecutive work days or more. *A-5.*
3. Employee was afforded an administrative review by Hearing Officer Theresa Cusick, Esq., who issued a Report, dated June 24, 2008. In her report she made several findings of fact and conclusions of law, and then recommended that the proposed penalty of removal be sustained. *A-5.*
4. On June 26, 2008, Agency issued a notice of final decision for removal, effective July 7, 2008, which terminated Employee's employment. *A-6.*
5. Employee applied for leave under FMLA regarding a disability with her heart on October 15, 2007. Employee then returned to work following her period of disability, but prior to the period that subsequently became the subject of her AWOL. *A-7.*
6. Although Employee's telephone records reflect that she called her job several times during her absence, there is no evidence of any specific message to indicate that she requested sick leave, how long she would be absent from work, or whether she was authorized or approved for leave for the period from February to April of 2008.
7. Employee's immediate supervisor was Pamela McLean, who worked from 10:00 p.m. until 6:30 a.m., and was in the field from approximately 2:15 a.m. to 5:00 a.m. Based upon Employee telephone records, she called the office 29 times. Thirteen of those calls were placed to 202-541-6061, McLean's work telephone number, generally when her supervisor was out in the field. *Tr. 46.*
8. Employee's incomplete 17-page telephone records (missing pages 2, 4, and 10), covering only the period between February 7, to March 7, 2008, reflect that she called from 202-290-3759, her personal telephone, often only a minute apart. Based upon the time reflected per call, generally noted as "0:00," "1:00," and "2:00," minutes, she sometimes left no message or only left a short message. *Tr. 51-56; A-4a and E-1.*
9. Employee's absence from work between February 14, 2008, and April 18, 2008, posed a hardship on the other staff, since the parking officers generally work in teams of two. The prolonged absence of any employee results in certain areas of the assigned territory not being covered as frequently. *Tr. 83, A-4.*

10. Although it remains disputed whether Employee informed Agency that she was ill, she did not indicate when she would return. *Tr. 49.* Upon her return, she provided a medical report which specified certain dates of active medical care by her doctor, i.e., March 15, 2008, through April 2008, but was silent on the period between February 14, 2008, to March 14, 2008. *E-5.*
11. Employee was provided with written notification of the charge of absence without official leave, although her collection from the U.S. Postal Service of the certified mail notifications sent by Agency to her address of record, was sporadic. *Tr. 47; A-4.*

Evidence On Dispute Facts

Agency, which has the burden of proof in this matter, focused its entire case upon the aspects related to Employee's alleged job abandonment, followed by Agency's classification of her extended absence as AWOL. Agency then proceeded in a typical bureaucratic fashion to initiate termination from employment, sending out the standard notifications and subsequently the separation documents. On its face, and were there not more, perhaps this would work, and reflect that Agency followed the standard practice, procedure, and policy, when it took steps to separate Employee from service. Agency also asserts that, in the absence of knowing what was perhaps the true nature of Employee's medical/mental situation, Agency acted properly, following the standard approach for termination of any employee who appears to have abandoned the job. But there is much more.

Agency claimed that it had no idea why Employee was absent for the February-April 2008, period, as she never requested any leave, never indicated that she was in an emergency situation, and likewise gave no indication of her problems. Further, whatever information that might have been available was sparse, at best. I find that the record indicates otherwise. Beginning from at least April 2007, Agency was on official notice of Employee's schizophrenia. Dr. Maw, Employee's psychiatrist and staff member of the D.C. Department of Mental Health, submitted a comprehensive medical report, dated April 19, 2007, which stated at the outset that it was written to explain why Employee had been absent from work, beginning from March 2007. Dr. Maw explained in considerable detail the nature of Employee's illness, diagnosed as a "295.7 Schizoaffective Disorder."

Dr. Maw attributed Employee's absence from work in this March-April 2007 period to mood disorder with some psychosis, including depressive episodes. This condition was referred to as having at least a five year history, but favorably responsive to multi-modality approaches of treatment, including psychotropic medications and individual therapy. Dr. Maw concluded that Employee was in recovery, that her mood was stable, and that employment was a goal and integral component of remaining both psychosis free and stable. The penultimate sentence in the medical report states, "I feel that she can handle her routine responsibility with some support, supervision and understanding from the employer/supervisor."

I find that, at least effective April 19, 2007, Agency was on notice that Employee faced significant medical/mental-related challenges, that her condition was being monitored by qualified medical staff from the D.C. Department of Mental Health, and that she was fully capable of functioning in her job capacity as a Parking Enforcement Officer, provided Agency undertook to at least give her the support, supervision, and a reasonable amount of employer/supervisor understanding. On April 24, 2007, Agency acknowledged receipt of Dr. Maw's report, and extended to Employee the option of applying for medical leave under FMLA. The application documents were enclosed, should Employee elect to pursue the option. Employee returned to work, and did not process the application immediately. Later, when the application was finally completed, the bearing date was "10/19/07," which was several months beyond the initial notification of eligibility. Further, the medical conditions listed in support of the application were cardiopathic and hypertensive, not related to Employee's established mental condition.

Employee credibly testified about being sexually assaulted on the job, about her disabled son being called names, constant harassment by four co-workers, and about the failure of her supervisors to say or do anything to help. No counseling, no interventions, no calling of the alleged perpetrators into the office for the purpose of getting them to stop this adverse conduct. She then filed an EEOC complaint, which she testified is still pending. While this record does not reflect the details and outcome of any of the above-referred harassment problems, and the necessity of filing the EEOC complaint, Agency had ample opportunity to call rebuttal witnesses or to present evidence to counter Employee's testimony regarding what happened and how she was treated. Instead, Agency opted for silence, lending credence to the merit of Employee's harassment claims. She later testified that there was an immediate incident on or about February 13, 2008, which caused her to collapse into a nervous breakdown, and her AWOL period began on the following day.

I find that, having been placed on notice of Employee's mental condition, once Employee incurred a period of connected multi-day absences, Agency had a duty to extend some consideration for her circumstances. I find that, based upon Employee's credible, uncontroverted testimony, that she was subjected to ongoing harassment about herself and her disabled son from three to four co-workers. Agency was aware of the problem, but neglected to provide even the most minimal support to address the problem, to curb the harassment, and assure that her working conditions were as stable as possible. The environment deteriorated to the point that Employee, in addition to sustaining a mental breakdown, also filed an EEOC complaint against her immediate supervisor and the four offending coworkers.[12]

Employee testified that during the entire period of her approximately 60-day absence, she was under the continuing care of her medical doctor and the D.C. Department of Mental Health for a documented case of mental illness, which period –

[12] This record does not reflect the official name of the EEOC complaint, the names of the parties who were cited, and the current status of the complaint.

February 14, to April 18, 2008 - is the same as the job abandonment/AWOL time frame. She readily admitted that she did not reaffirm the basis for her absence with intermediate medical filings, as it was her understanding that Agency was already on official notice of her chronic mental condition (schizophrenia), and that she remained under permanent medical care, monitored by a qualified medical clinic and a staff of medical professionals. She knew that, as a component of being able to return to work, she must present medical documentation to sufficiently verify why she was absent. She secured the medical proof of continued illness upon her return to work, which was accepted without any particular questions or challenges being posed. I find that Agency was on notice that Employee was absent from her job due to a documented mental illness. I further find that, under the circumstances of her extended absence, Employee failed to help herself by not being more forthcoming in periodically advising Agency of the status of her illness and treatment, and its adverse impacted upon her ability to report to work.

Although Employee believed that it was unnecessary to continually reaffirm and justify her absence every few days, still she at least attempted to contact Pamela McLean, her immediate supervisor, and other supervisory personnel by telephone on several occasions. She testified that she left several messages on voice mail, as reflected in the incomplete telephone records, covering the period February 6, to March 7, 2008. Although it is disputed between Agency and Employee whether she ever indicated that she was ill during any of these telephone voice mail messages, I find that, according to the telephone records, at least some of her calls were long enough to reflect that voice mail messages were left on occasion.

It is disputed between Employee and McLean about what efforts, if any, were made to return the calls. McLean claims to have attempted to return some calls, discovering that the telephone number that was on file with Agency had been disconnected. Employee, on the other hand, testified that her home telephone number, 202-290-3759, which she had during the duration of her employment with Agency, was never disconnected, but that no one ever responded to the many messages that she left. The telephone number that McLean allegedly called in her efforts to reach Employee was not recalled, and is not a part of the record. Therefore, I cannot determine whether the number McLean testified that she called, in an effort to reach Employee, was the same telephone number as the one stated by Employee as her sole number of record. I do find that Employee's intention was to establish a good faith contact with her office during the period of her extended absence, but note that she could have done a better job by calling at either the beginning or end of the shift, when there was a greater likelihood that someone would be immediately available to answer the telephone, thus avoiding so many voice mails.

Employee attempted to place reliance upon the Americans with Disabilities Act ("ADA") as justification for entitlement to a reasonable accommodation under Subchapter I, Employment, § 12111(9). An evaluation of the purpose of the Act as relates to the reasonable accommodation provision demonstrates to this AJ that the fact pattern before me does not relate to the implementation of the Act's provisions. Further, Employee testified that she was well able to do her job, which I interpret to mean that

there was no need for any change in her accommodations, including no need to either reduce her work hours or to change her work schedule. I find that ADA is inapplicable to the matter at hand.

I find that, pursuant to the CBA, Article 21, Leave, § Q., when Employee's absence was noticed as excessive, Agency was on notice of a potential work-related problem with Employee, and pursuant to the mandate of the CBA, was obligated to contact AFGE Local 1975, and advise Employee's union steward of her excessive absences from duty, a sure sign that there was some problem. During this same time frame, Employee was sustaining clinically verified depression and emotional meltdown, characterized by her failure to attend work for about two months. Had an intervention been attempted by notifying union representatives, seeking to address the cause for Employee's excessive absence from duty, there was a reasonable chance that the initial charge of job abandonment and subsequently, the charge of AWOL, could have been avoided. As well, another FMLA consideration might have been in order, in an attempt to rescue a troubled, but valued Employee.

Agency was obligated under the CBA to at least notify the union, in an effort to help Employee avoid being terminated, during a period when it was established that Employee was potentially suffering a relapse related to a documented illness. I find that Agency's failure to make even the slightest effort on behalf of Employee constituted a gross procedural error, and that Agency's conduct was not consistent with the law or the negotiated CBA.

In accordance with §1603.2 of the District Personnel Manual (DPM), an Employee may be removed for cause. Pursuant to DPM § 1603.3, the definition of cause includes absence without official leave and job abandonment (unauthorized absence). Pursuant to OEA Rule 629.3, the Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Although Employee was absent from work for the period beginning February 14, 2008, through late April 2008, I find that established circumstances indicate that she neither abandoned her job for 10 consecutive days or more, nor engaged in an absence from duty that was not authorized or approved, or for which a leave request has been denied, pursuant to DPM §§ 1268.1, absence without leave, and § 1619.1.f. (1) and (2), or committed AWOL.

Illness as a Defense

It is a well established legal principle in this jurisdiction that illness is a defense to being AWOL in cases where the illness is incapacitating and evidence of the severity of the illness is established. *Bonnie Murchison v. District of Columbia Department of Public Works*, 813 A.2d 203, 205–206 (2002). The D.C. Court of Appeals remanded the *Murchison* case back to the OEA for the sole purpose of making a factual determination of whether employee in that case was medically incapacitated, unable to work during the time frame she alleged, for which she was charged AWOL. Although the Office found that Murchison was unable to establish her claim of medical incapacity as a justification

for her absence, this AJ revisited some prior decisions, which are applicable to the matter at hand.[13]

I have found that Employee suffered from schizophrenia and was unable to work during the approximately February 14, 2008, to late April, 2008, period. I am satisfied with the documentation that was provided shortly after she returned to work, dated May 12, 2008. The medical report reflected active treatment beginning approximately March 15, 2008, about one month after Employee's relapsed condition has taken hold. *E-5.* Agency has made much of its assertion that Employee, therefore, failed to provide ongoing competent medical evidence for the entire period of her absence, concluding that the scope of her illness, as documented, is not a defense to abandoning her position. When confronted with that issue on prior occasion, the Office has held that, even when not presented with more contemporary (and presumably ongoing) documentation, an employee's legitimate illness, once sufficiently established and justified, is a legitimate excuse. See *Spruiel v. Department of Human Services*, OEA Matter No. 1601-0196-97 (February 1, 2001), __ D.C. Reg. __ ( ).

In the *Spruiel* matter, the AJ noted two defining issues, i.e., whether Employee contacted Agency during the period of her absence to request leave, and whether Employee submitted documentation of her illness covering the period of her absence. In the matter at hand, Employee testified credibly about the many efforts she made to contact Agency staff, to reaffirm why she was not at work, adding that she really needed her job, and wanted to make certain that supervisory staff knew why she was absent and unable to work. She submitted telephone records reflecting dialed telephone calls for the period covering February 6, 2008, to March 7, 2008. *A-4A; E1.* Pages 2, 4, and 10 of the original 17-page document were missing. Although none of the submitted pages included telephone records for the period of March 8, 2008, through April 2008, a time that included some of Employee's extended absence from work, some patterns still emerge.

First, all of the calls were placed from Employee's own home telephone number – (202) 290-3759 – which she testified was never disconnected and had been her contact number during the duration of her employment at this site. Although the records were incomplete, they reflect that Employee called 29 times to (202) 541-6061, 541-6063, 541-6162, 541-6163, and 541-6261, the admitted Agency contact numbers, between 10:00 p.m. and 6:30 a.m., during the working shift's hours of duty. According to Employee, on one occasion she did reach Mr. Carr, who denied having spoken with Employee during the period of her extended absence. Column Two of the Exhibit reflects

[13] In AWOL cases such as the matter at hand, "[t]his Office has consistently held that when an employee offers a legitimate excuse, such as illness, for being absent without leave, the absence is justified and therefore excusable." *Employee v. Agency*, OEA Matter No. 1601-0137-82, 32 D.C. Reg. 240 (1985); *Tolbert v. Department of Public Works*, OEA Matter No. 1601-0317-94 (July 13, 1995), __ D.C. Reg. ___ ( ). Further, when an employee's absence is excusable, the absence "cannot serve as a basis for adverse action." *Richardson v. Department of Corrections*, OEA Matter No. 1601-0249-95 (April 14, 1997), __ D.C. Reg. __ ( ).

that the duration of each call, and varied between "0:00" to "1:00" to "2:00" minutes. It is clear that a good faith effort at making contact and leaving a message was made, although it remains disputed whether any of the messages reflected that Employee was claiming illness as the basis for her continued absence, or stated when she might be able to return to work.

Second, Employee was allowed to return to work in April. The exact date is not reflected in this record. She obtained medical documentation to explain and justify why she had been absent for about two months. Agency concedes that medical documentation was submitted, dated May 12, 2008, but challenges Employee's absence still, noting that the doctor referred to Employee as seen beginning approximately March 15, 2008, through April 2008, which leaves the 30-day period between February 15-March 14, 2008, unaccounted for. The AJ takes exception to such a narrow interpretation of the facts. Employee credibly testified that she sustained a psychological meltdown on or about February 14, 2008, which was triggered by the continued personal harassment and name-calling from four of her co-workers, who disparaged both her and her disabled son.

As a result of this relapse, Employee was essentially confined to her home premises, unresponsive to her brother's efforts to get her to go to the doctor, and only cooperated when it became clear that another possible hospitalization was going to be required. She managed to rally herself, returning to the immediate care of the D.C. Department of Mental Health, where she had been in active treatment for at least five years. I conclude that the medical justification that Employee submitted shortly after she returned to active work status, dated May 12, 2008, was a sufficient medical document, which served to reaffirm what Agency already knew, i.e., that Employee had an ongoing mental condition that could be handled, if monitored properly, and the mere omission of the dates of approximately February to March 15, 2008, on the medical report was an insignificant component of her overall long established health history of record.

Agency's Designated Hearing Officer's Report

As part of my deliberations I read the Report of Hearing Officer, prepared by Theresa Cusick, Esq., Agency's designated hearing officer, who conducted an administrative review of this matter. Cusick found several facts, most or all of which I have likewise found, as a result of my having conducted a separate evidentiary hearing, including that:

- Employee was continually absent from her job from on or about February 14, 2008, through April 18, 2008, and although she lacked sufficient leave to cover her absence, she did not properly request the use of whatever leave she did have.
- Employee failed to indicate the anticipated duration of her anticipated absence, including keeping her supervisors informed of her expected return date.
- Employee did submit a physician's medical note, reflecting that her absence was due to a mental illness, a reaffirmation of what Agency was previously aware of.

- On at least one occasion, Employee spoke with a supervisor by telephone, and indicated that she was still sick. Her promise to come in "shortly" (perhaps as early as the next day) to discuss the matter was not fulfilled.
- There is no evidence that Agency, either verbally or in writing, notified Employee of her option to request family and medical leave under FMLA.
- There is no evidence that Employee was referred to the D.C. government's Employee Assistance Program (the "EAP"), as required by the terms of the CBA.
- Upon her return, Employee provided full medical documentation, but only specifically addressed the period from March 15, to April 18, 2008. The medical report was silent for the period of February 14, through March 14, 2008.

Based upon the above noted facts, Cusick made some additional findings of fact, and then certain conclusions of law, particularly as follows:

- In order to prove a charge of AWOL, Agency must prove that an employee was not present at work, and that the leave was either not authorized or improperly requested. See *Boyle v. Dep't of the Treasury*, 2008 MSPB LEXIS 2479 (May 1, 2008).
- In the event an employee lacks sufficient leave and agency knows or suspects that the employee has a serious mental condition, the agency is obligated to inform the employee of his or her rights under FMLA. If the employee is not eligible for FMLA, or fails to respond with the required documentation, then the employee may be place on AWOL. See *Boileau v. Dep't of Veterans Affairs*, 2007 MSPB 7568 (December 12, 2007).
- Employee's medical documentation reflected that she was under her doctor's care between approximately March 15, to April 18, 2009, but was silent on the period between approximately February 14, to March 14, 2008, a period for which there was no medical documentation.
- Cusick concluded that, at least for that 30-day period of time, there was sufficient proof to justify that this Employee absence constituted AWOL, and that her at least 10 consecutive days of absence from work constituted job abandonment.

Cusick then finalized her Report by reducing certain other elements to the status of "mitigating factors" and "offsets." The mitigating factors were recited as having been given due consideration in accordance with the existing union contract, but not offset by Employee's failure to provide medical documentation for the entire period of her absence.

As mitigating factors, she noted:

- There is no evidence that Employee was referred to the EAP, as required by the contract.
- There is no evidence that Employee was informed of her rights under the Family and Medical Leave Act.
- Management did not officially inform Employee of her AWOL status until after she had been on AWOL for over one month.

Cusick then found and concluded that the mitigating factors were not of a sufficient magnitude to offset Employee's failure to provide medical documentation for the entire period of her absence, despite management's failure to more timely notify Employee of her AWOL status, and failure to provide her with information regarding her options, including entitlement to a referral to EAP and to request FMLA leave. Cusick then concluded that, despite Agency's admitted failures and deficiencies, Employee's lack of medical documentation for the February 14-March 14, 2008, period in question, violated Agency's leave policy and justified a sustaining of the proposed penalty of removal. She recommended said removal to the Deciding Official, who subsequently implemented Employee's separation from Agency's employment.

Conclusions

I have reviewed and evaluated the Hearing Officer's Report, which resulted in a recommendation that Employee should be terminated due to a finding of fact that she was absent from her job for 10 or more days, such to justify a charge of job abandonment, and then the subsequent finding of AWOL. Were there not much more in evidence, that would be the end of it. Employee credibly testified that since at least 2003, she has been mentally ill, a condition which the D.C. Department of Mental Health and her doctor have verified. Employee further testified that mental illness is not like some other illnesses, as there are no visible wounds, and that fact that the person is truly ill, may not be readily or immediately visible. Still, she was ill nonetheless.

Perhaps Employee could have better handled the documentation of the period of her extended absence by providing more expansive information in the medical report to reflect that she remained under the sustained medical care and attention of her psychiatrist. The fact that the report reflected that Employee was under direct medical supervision between March 15, to April 15, 2008, does not belie the fact that she credibly testified that she was under relapse between February 14, and March 14, 2008, a critical period where she was in essence a virtual prisoner in her own home, severely depressed, unable to function. Her brother stepped in, assisted her, and got her back into a doctor's active care. By that time, she had sunk to such a mental state, where immediate hospitalization was contemplated but avoided due to medical intervention on March 15, 2008. The record also reflects numerous calls and apparent voice messages to her office during her extended absence.

The question then becomes, could the adverse impact of this extended AWOL have been avoided, or at least lessened, thus reducing the likelihood of Employee's being terminated? A review of the negotiated CBA is enlightening. Article 3, Employee Rights, at § B, states, "It is understood that employees in the bargaining unit shall have full protection of all articles in this Agreement as long as they remain in the unit." I find that this is the global statement, which sets the tone for all that is to follow.

Three other sections of the CBA then come into play and are further illuminating. First, Article 21, Leave, § Q, provides: "Management will keep Union Stewards informed

of employees suspected of abusing sick leave, or . . . employees [who are] continually late or absent from duty." Second, Article 37, Consultation and Counseling, at § A, provides that, "The parties [to the CBA] recognize that alcoholism, drug abuse, and **emotional disorders** (emphasis added by this AJ) are illnesses that can interfere with job performance. As such Management **shall assist** (emphasis added by this AJ) bargaining unit employees suffering from these illnesses to recover by referring them to the District's Employee Assistance Program (EAP)."

Third, Article 37, at § B, reinforces § A, by providing, "When a bargaining unit employee's excessive absenteeism ... [is] suspected to be or acknowledged by the employee as being the result of . . . an emotional disorder, Management **shall refer** (emphasis added by this AJ) the employee, in writing, to the EAP counseling or treatment program." I find that Agency's failure to act lies at the heart of the matter, is determinative of the final outcome, and was not just a "mitigating factor" or "off set," to be weighed and measured against the significance of the allegations of job abandonment and AWOL.

I reject Agency's efforts to deflect its own failure to act in compliance with the negotiated CBA, by placing the "blame" upon Employee's shoulders for not having produced a medical report that reflected a more expansive statement about the time frame that she was under active medical direction. Had management, consistent with the CBA's directive notified, Emmanuel Cummings, the Union Steward, that a troubled employee was continually absent from duty, Cummings would have been on notice, able to step in and counsel Employee, hopefully minimizing the impact of her absence, and most probably discovering the larger circumstances which contributed to why Employee was so frequently absent. That Employee was "troubled," rather than "just absent" would have been discovered.

I conclude that management's (Agency) failure to act constituted a procedural error, evidence of Agency conduct that was not in accord with applicable law. I further conclude that Agency has not met its burden of proof. *See* OEA Rule 629.3, 46 DCR 9317 (1999). .

Agency, by failing to provide the support as mandated to this Employee, both ignored its obligation and abused its managerial discretion, when it implemented an improper termination. The termination must be vacated and Employee reinstated to her position of record, with all back pay, leave restoration, and relevant benefits.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of removing the Employee from service is **REVERSED**; and

2. Agency shall reinstate the Employee to her last position of record; and

3. Agency shall reimburse the Employee all back-pay and benefits lost as a result of her removal; and

4. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge