THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0053-11
GARNETTA HUNT,	)	
Employee	)	
	)	Date of Issuance: February 14, 2014
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
DEPARTMENT OF CORRECTIONS,	)	
Agency	)	Sommer J. Murphy, Esq.
	)	Administrative Judge

Michael Hannon, Esq., Employee Representative
Kevin Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 11, 2012, Garnetta Hunt ("Employee"), filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the D.C. Department of Corrections' ("Agency" or "DOC") action of terminating her employment. Employee was charged with "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: (a) Unauthorized absence: Ten (10) consecutive days or more constitutes abandonment; (e) Incompetence. Prior to being terminated, Employee worked as a Correctional Officer with Agency. Employee's termination was effective on November 23, 2010.

I was assigned this matter in July of 2012. On November 5, 2012, a Prehearing Conference was held for the purpose of assessing the parties' arguments. After several scheduling conflicts were resolved, the undersigned Administrative Judge ("AJ") held a telephonic Status Conference on February 14, 2013. During the SC, the parties agreed that there was a threshold issue regarding reasonable accommodations that should be addressed first. I subsequently ordered the parties to submit written briefs addressing the issues discussed *infra*. Both parties complied with the order. The record is now closed.

JURISDICTION

Jurisdiction in this matter has not been established.

ISSUES

Whether Agency's action of terminating Employee should be upheld.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) 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 628.2 *id.* states:

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

Agency's Position

Agency argues that this Office does not have jurisdiction over Employee's claim that she was not provided with reasonable accommodations when she attempted to return to full duty status after sustaining job-related injuries. Further, Agency contends that OEA does not retain jurisdiction to hear Employee's argument that her termination was in retaliation for filing a complaint with the D.C. Superior Court. Agency states that Employee had more than ten (10) unauthorized absences, which constitutes job abandonment under the applicable regulations. Agency further states that Employee's actions constituted an "on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations.

Employee's Position

In her Petition for Appeal, Employee argues that Agency refused to allow her to return to work in July of 2007, and was escorted off of the DOC premises. Employee further argues that: 1) Agency's allegation that Employee committed unauthorized absences is factually incorrect; 2) Employee's termination was done in retaliation for her refusal to voluntarily leave DOC, and

subsequently filing a complaint for discrimination; and 3) Agency's analysis of the *Douglas Factors* was unjustified because of her unique circumstances.[1]

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Employee began working as a Corrections Officer with Agency in 1988. On March 23, 2004, Employee was attacked by an inmate while working in one of Agency's cell blocks, and sustained serious injuries as a result of the attack. The inmate was subsequently convicted of attempted murder. Employee had to be hospitalized and was diagnosed with Post-Traumatic Stress Disorder ("PTSD") and was required to receive psychological and physical treatment for her injuries. Employee applied for, and was granted Temporary Total Disability benefits ("TTD"). An Independent Medical Examination ("IME") performed on Employee in January of 2006 concluded that Employee could return to work without restrictions. Employee's TTD benefits were terminated by the Office of Risk Management ("ORM") effective March 8, 2006. On April 18, 2006, Employee returned to work after almost two years of being absent on TTD. Employee requested to be placed in a position in which she was not required to interact with inmates.[2] Her request was granted, and Employee was assigned to a post at the staff entrance of the jail, and was not required to attend daily roll call.

Employee; however, suffered three panic attacks after returning to work. On September 26, 2006, Employee suffered a third panic attack after hearing inmates pounding on a secure door to which she controlled access. On September 29, 2006, Employee was placed on administrative leave with pay. Employee was required to submit written medical documentation supporting her position that she could not work in a position that required inmate contact. On November 29, 2006, Employee submitted a letter from Clinical Social Worker, Betty Graves, which stated that Employee suffered from panic attacks and PTSD. The letter further stated that Employee should be assigned to a position with DOC that had no contact with inmates. Employee also submitted a letter from Dr. Tsistos, which stated "[u]pon her request I reluctantly allowed Mrs. G Hunt to return back to work on a trial basis. I will reevaluate her emotional state on December 16, 2006 and advise."[3]

Employee then filed an appeal with the Department of Employment Services' Administrative Hearings Division ("AHD"), claiming that she was unable to work because of the physical injuries she sustained while employed with Agency. An evidentiary hearing was held on September 28, 2008. On May 18, 2009, the Administrative Law Judge issued a Compensation Order ("CO"), denying Employee's appeal. Employee subsequently filed an appeal of the Compensation Order with the Compensation Review Board ("CRB"). The Review Board affirmed the CO on October 20, 2009. Based on the findings of the CRB, ORM concluded that Employee could return to her position as a Corrections Officer with no restrictions. In response, Employee filed an appeal with the District of Columbia Superior Court. The Court affirmed CRB's findings in an opinion issued on April 26, 2011.

[1] Employee Brief (May 24, 2013).
[2] Employee's treating psychiatrist wrote a letter to Agency stating that Employee could return to work on a trial basis.
[3] Proposed Notice of Termination (August 20, 2010).

Employee was placed on leave without pay on June 18, 2009. Agency issued Employee a twenty (20) day notice of proposed termination on August 20, 2010 based on a charge of having more than ten (10) unauthorized absences. On November 19, 2010, Agency issued a Final Notice of Termination to Employee, with an effective date of November 23, 2010. Employee subsequently filed an appeal with this Office. Employee also filed a discrimination complaint, alleging that Agency failed to provide her with a reasonable accommodation as required by the D.C. Human Rights Act. In response, Agency filed a Motion for Summary Judgment, arguing that it was not required to provide Employee with reasonable accommodations. Agency's motion was granted by the Court in an opinion issued on May 2, 2013.[4]

During the February 14, 2013, telephonic Prehearing Conference before the Undersigned, I allowed the parties an opportunity to discuss the issues presented regarding this appeal. Both parties had the opportunity to voice their respective arguments in written and oral form. During the conference, it was agreed that written briefs should be submitted to this Office. In her brief, Employee states that her arguments were misconstrued by Agency during the Prehearing Conference and that 1) she did not have unauthorized absences; 2) her termination was retaliatory; and 3) the Douglas Factors analysis does not support a penalty of termination.[5]

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

Reasonable Accommodation

In accordance with Section 1651 (1) of the Comprehensive Merit Personnel Act ("CMPA") (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. In *Taylor v. Sturgell*, the U.S. Supreme Court stated that claim preclusion and issue preclusion are collectively referred to as "res judicata."[6] Under the doctrine of claim preclusion, a final judgment bars "successive litigation of the very same claim, whether or not re-

[4] *Hunt v. District of Columbia*, CAB-1857-09 (May 2, 2013).
[5] It should be noted that the parties have had several opportunities to clarify the issues to be argued before this Office. Employee did not request to have an additional Prehearing Conference for the purpose of seeking further clarification after receiving the Undersigned's May 2, 2013, Post-Status Conference Order. Accordingly, no further proceedings were held.
[6] 553 U.S. 880, 892, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008).

litigation of the claim raises the same issues as the earlier suit."[7] "Issue preclusion, in contrast, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the issue recurs in the context of a different claim.[8] By precluding the parties from contesting matters that they have had a full and fair opportunity to litigate, these two doctrines protect against "the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions."[9]

In this case, I find that Employee's claims regarding the extent of her injuries, and whether Agency was required to afford Employee reasonable accommodations when she attempted to return to work has been fully litigated in several previous appeals before other tribunals. On May 2, 2013, the D.C. Court of Appeals stated in pertinent part the following:

> [W]e conclude that Hunt failed as a matter of law to show (a) that even with accommodations for her disability, she was able to perform the essential duties of her position at the Jail; (b) that other jobs with DOC existed at the time for which she was qualified and to which she could therefore be transferred; and (c) that DOC breached a duty under the governing statute to engage in an "interactive process" to identify possible alternative jobs.[10]

Although Employee states that her arguments were mischaracterized during the Prehearing Conference before this Office, both the Undersigned and Agency's understanding is that Employee believes that Agency prevented her from returning to work because it was either unable or unwilling to provide her with reasonable accommodations, and because other jobs existed for which Employee was qualified. This issue has been argued and adjudicated by the D.C. Court of Appeals, thus under the doctrine of res judicata, the Undersigned is precluded from addressing the merits of Employee's claims.

Unauthorized Absence

Under District Personnel Manual ("DPM"), Chapter 16, Section 1613, unauthorized absences of ten (10) consecutive days or more constitutes abandonment. In this case, Employee was notified on June 18, 2009, and then again on June 26, 2009 that she was in Unauthorized Leave Status after she had been placed on unpaid leave. Employee did not return to work.

As previously discussed, Employee was unable to return to work and perform the essential functions of her job because of the nature and extent of her injuries; however, Agency was under no duty to provide reasonable accommodations to her. The circumstances in this case placed both parties in a precarious situation: 1) Employee was unable to return to full duty and perform the necessary functions of her job; 2) no other jobs with DOC existed at the time for which she was qualified and to which she could be transferred; and 3) one of Agency's essential

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[7] *New Hampshire v. Maine*, 532 U.S. 742, 748, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).
[8] *Id.*, at 748–749, 121 S.Ct. 1808.
[9] *Taylor* at 893 (citing *Montana v. United States*, 440 U.S. 147, 153–154, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)).
[10] *Hunt*, at 2.

functions is its need to have employees be present and able to perform the duties of their positions. In essence, a stalemate existed between Employee and Agency.

It should be noted; however, that the Compensation Review Board affirmed the Department of Employment Services' Compensation Order on October 20, 2009. Based on the findings of the CRB, ORM concluded that Employee could return to her position as a Corrections Officer with *no restrictions* (emphasis added). This finding was also upheld in D.C. Superior Court on April 26, 2011. Thus, Employee was technically cleared and required to return to her position as a Correctional Officer at that time. Agency warned Employee that she was required to submit proper medical documentation, which certified her ability to safely perform the duties and responsibilities of her job, or her Administrative Leave status would be terminated.[11] At the time of her termination, Employee had not submitted medical documentation clearing her for full duty.

Employee argues that Agency's program statement 3491.7A(8) did not contemplate her specific circumstances. Section 8(a) states that an Unauthorized Absence is "[a]ny absence from duty, which has not been granted or approved in accordance with established policy and procedure."[12] It is Employee's belief that since Agency prohibited her from returning to work, she was not on active duty and could not be cited with Unauthorized Absence. I disagree. Employee was cleared for duty after April 26, 2011, and remained employed by DOC. Employee failed to submit the proper documentation certifying her ability to work with no restrictions, even though she was required to do so. Employee had the burden to comply with Agency's requirement, but did not. While the Undersigned most certainly sympathizes with Employee's unfortunate circumstances, Agency's ability to perform effectively is impeded if its employees cannot perform the functions of their jobs. Accordingly, I find that Employee had more than ten (10) consecutive unauthorized absences after she was placed in Unauthorized Leave Status. I further find that Employee did not submit medical proof that she was able to fully perform her job as a Corrections Officer with no restrictions. Under the DPM, Employee's actions constituted both job abandonment and incompetence. Accordingly, I find that Agency's actions were done for cause as required under D.C. Official Code §1-616.51 (2001).

Douglas Factors

In her brief, Employee argues that Agency's analysis of the *Douglas Factors* was unjustified because of her unique circumstances. In *Douglas v. Veterans Administration,*[13] the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed

[11] Agency Answer to Petition for Appeal, Exhibit 10, 14 (January 21, 2011).
[12] *Id*. at Exhibit 3.
[13] 5 M.S.P.R. 280, 305-306 (1981).

intentionally or maliciously or for gain, or was frequently repeated;

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

3. The employee's past disciplinary record;

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

7. Consistency of the penalty with any applicable agency table of penalties;

8. The notoriety of the offense or its impact upon the reputation of the agency;

9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

10. Potential for the employee's rehabilitation;

11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

In considering the *Douglas Factors*; Agency relied on factors (1), (6), (7), and (9) in making its decision to terminate Employee. Agency stated that "[a]n essential element of employment is to be on the job when expected. Unauthorized absences impose a burden on other employees, increases administrative costs, and decreases productivity….In addition, Agency cited to Program Statement 3490.7A, the Affirmative Attendance policy; Employee had

previously signed for and received notice of Agency's rules regarding work attendance. Agency failed to note any mitigating circumstances surrounding Employee's absences.

In reviewing the record, I find that Agency adequately considered the *Douglas Factors* in choosing the appropriate penalty to levy against Employee in light of the circumstances. At the time of her termination, Employee remained unable to perform the duties necessary of a Correctional Officer, thus she could not be on the job when expected. I further find that Employee has failed to prove that Agency abused its discretion in considering these factors, and there is no *credible* reason to disturb its findings.

In addition, any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[14] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised.[15] When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[16]

Agency has the discretion to impose a penalty, which cannot be reversed unless "OEA finds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceeds the limits of reasonableness."[17] The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for the first offense for "Unauthorized absence: Ten (10) consecutive days or more" is removal. In this case, I find that Employee's failure or inability to return to duty constitutes an employment-related act or omission that interfered with the efficiency and integrity of Agency's operations.

Retaliation

Employee argues that her termination was a result of retaliation by Agency against her for not voluntarily resigning from her position and for filing a civil action in D.C. Superior Court. Employee submits that Agency waited three years after Employee was removed from Administrative Leave to terminate her, and that she was only terminated because "she exercised her rights in civil court in a discrimination claim."[18] This Office's jurisdiction is limited to appeals from final agency decisions affecting a performance rating which results in removal of the employee, adverse actions for cause that result in removal, reductions in force, reductions in

[14] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994).
[15] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).1601-0417-10
[16] *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).
[17] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).
[18] Employee Brief at 7 (May 24, 2013).

grade, placement on enforced leave, and suspensions for 10 days or more. Whether Agency's actions constituted retaliation is a matter outside the purview of this Office's jurisdiction.[19]

Based on the foregoing, I find that this Office may adjudicate the issue of whether Agency terminated Employee for cause, whether her actions constituted job abandonment and incompetence; and whether Agency properly considered the *Douglas Factors* in making the decision to terminate Employee. This Office does not have jurisdiction over the issue of reasonable accommodations or whether Agency discriminated against Employee by failing to provide such accommodations. Employee has yet to submit to Agency or to this Office evidence that she has been medically approved to return to work with no restrictions. Employee has also not provided the Undersigned with a meaningful solution or alternative to rectify the situation, as Agency is under no duty to provide Employee with an alternative position if she were to return to work. Accordingly, I find that Agency's action was taken for cause, and that the penalty of termination is appropriate in this case. For these reasons, Agency's action is upheld.

ORDER

It is hereby **ORDERED** that Agency's action is **UPHELD**.

FOR THE OFFICE:

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SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

[19] Assuming *arguendo*, OEA retains jurisdiction over this issue, it should be noted that in order to establish a *prima facie* case of retaliation under D.C. Code § 1–2525(a) (2001), an employee must by show: (1) that he or she was engaged in a statutorily protected activity, (2) that his or her employer took an adverse action, and (3) that there was a causal relationship between the protected activity and the adverse action. *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 369 (D.C. 1993). Here, Employee states that "it becomes clear after piecing together several layers of circumstantial facts that Sgt. Hunt was wrongfully terminated though retaliatory means."[19] Employee has failed to claim in her submissions that her discrimination claim in D.C. Superior Court was a substantial contributing factor which led to her termination. Agency remained willing to allow Employee to return to work if she submitted the proper medical documentation, clearing her for fully duty status with no restrictions. Employee did not submit such documentation. Thus, even if Employee had not filed a complaint in Superior Court, she remained unable to perform the functions of her job.