FINDINGS OF FACT AND CONCLUSIONS OF LAW
Case Number: 02-AC-34(CV, RP)

STATEMENT OF THE CASE

Robert Solomon ("complainant" "employee") has been employed in Senate restaurants of the Office of the Architect of the Capitol ("AOC", "employing office", "agency") for sixteen years and he has been the grill cook in the snack bar known as the Baby Gourmet since July, 2001. The hours of operation of the Baby Gourmet are 7:30 a.m. to 3:00 p.m. Monday through Friday.

On December 12, 2001 Solomon submitted a leave request (Comp. Ex 1), for nine day of Christmas vacation from Tuesday, December 18, 2001 to Wednesday, January 2, 2002. The request was submitted through Solomon's first line supervisor Naomi Durant to his second line supervisor, Robert Savidge. At the time the request was submitted, the Senate was still in session, and it was uncertain when it would adjourn. Savidge denied the request and Solomon was told of the denial by Durant.

On December 14, 2001, Solomon submitted a second leave request (Comp. Ex 2), in the form of a hand-written memorandum, requesting annual leave for the same dates. In this request Solomon stated that he was making the request for "religious reasons" and he asked that he be accorded a "reasonable accommodation." In a letter to Solomon dated December 17, 2001 (Comp. Ex 4), Savidge denied the request stating "[r]equests for two or more consecutive days should be submitted at least one week in advance. Due to the fact the Senate is still in session and we are short-handed because of approved absences, I am unable to approve your request. Should Senate recess and circumstances change, I will reconsider any request at that time."

The Senate adjourned the evening of December 19, 2001. When Solomon arrived for work on December 20, 2001, he was informed that his leave was approved. He commenced his leave on December 21, 2001.

As a result of problems Solomon had earlier in 2001 with his use of unscheduled leave, he was placed on "Leave Restriction" on September 19, 2001. Solomon was notified of that action in a letter from Savidge of that date in which the restrictions being imposed were set forth. Solomon was also informed that "[t]hese restrictions will remain in effect for six months, or may be withdrawn after 90 days, at which time I will review your attendance record and make a written determination as to whether leave restriction is continued." (Comp. Ex 5)

In a letter dated December 19, 2001 (Comp. Ex 8), Solomon was informed by Savidge that "I have determined after review of your leave record, taking into consideration your previous restriction and leave record, this current restriction will remain in effect for the entire six month period." In the September 19, 2001 letter placing Solomon on leave restriction, Savidge reminded Solomon that he had previously been on leave restriction from March 31, 2001 through June 30, 2001.

The matter is before this hearing officer on a three count complaint filed by Solomon on October 31, 2002, pursuant to Sections 201 (a)(1) and 207 (a) of the Congressional Accountability Act of 1995. In the first count, Solomon claims a violation of Section 201 (a)(1), alleging that a sincerely held religious belief served as the basis for his annual leave request and the employing office failed to provide a reasonable accommodation. In the second count, Solomon claims that the decision by Savidge to continue Solomon on leave restriction, as reflected in the letter of December 19, 2001

(Comp. Ex 8), was in retaliation for Solomon having requested annual leave based on religious beliefs in violation of Section 207 (a). In the third count, Solomon contends that the allegations set forth in the first two counts amounted to a "supervisory hostile work environment" in violation of Section 207 (a).

The employing office filed two motions for summary judgment and the employee filed a single motion for summary judgment. Arguments on all the motions were heard on the record on January 7, 2003, and the motions were denied. The evidentiary hearing commenced the same date. Further evidence was received on January 8, 13, and 22. Post-hearing memoranda and oppositions thereto were thereafter filed and the record was closed on March 14, 2003.

FINDINGS OF FACT

Virtually all of the facts elicited at the hearing were uncontested and those facts are set forth here. Where testimony is central to the findings and conclusions, an assessment of credibility will be made and expressed herein.

Solomon, who was thirty-seven when the hearing began, credibly testified on a number of issues and his testimony is credited. He related that he has been a member of the Expectation Bible Baptist Church since 1996 and had been a member of other churches before then back to 1980. He related that as a result of his religion he is "devoted and committed to reading the scriptures . . . to help strengthen my relationship with the lord . . . ." He attends church in order to share "in fellowship with other Christian believers." (1/7 Tr 53). In 2000 he was involved in an overseas mission to help rebuild homes destroyed in a hurricane.

On December 12, 2001 Solomon submitted a written request for annual leave from December 18, 2001 to January 2, 2002, giving "Christmas vacation " as a reason. (Comp. Ex 1). When that request was denied he submitted a second written request, in the form of a hand-written memorandum, requesting leave for the same period, stating for the first time that the leave was for "religious reasons" and requesting that a "reasonable accommodation" be made. (Comp Ex 2). Also on December 14, Savidge[1] asked Solomon "what are the religious reasons for your requesting time off?" Solomon replied that the period of time for which he sought leave, is "a very sacred time of the year for me and that I was requesting the time off to celebrate the birth of Christ and to reflect upon what Christ means in my life." (Comp. Ex 3a).

With respect to the religious basis for his leave request, Solomon testified that during the leave period covered by his leave request, he expected to do extra bible readings, be involved in extra prayers beyond what he normally does, be involved in personal out-reach, and to be on-call in case his pastor needed him for some reason. (1/8 Tr 388-89). He admitted that none of those activities were required by his religion—each was a personal desire on Solomon's part. (1/8 Tr 389). Finally, Solomon acknowledged that he had never before requested a reasonable accommodation for his religion (1/8 Tr 312.).

The Senate restaurants have a policy for the granting of annual leave entitled "Senate Restaurant Leave Procedures" a document issued on August 3, 2001. (Comp. Ex 6, page 3). It provides in part that: "Annual Leave requests for two (2) or more

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1. Complainant's Exhibit 3a indicates Solomon's conversation with Savidge occurred on December 13, rather than December 14. Solomon testified, however, on at least two occasions, that the conversation in fact took place on December 14, the same day he submitted the second written request (1/8 Tr 304, 357-

consecutive days must be requested and approved at least one (1) week in advance ." Solomon testified that he was familiar with the document and had received a copy of it shortly after it was issued. (1/7 Tr 121). Solomon also testified that he did not know of any employee receiving annual leave who had not requested the leave at least one week in advance. (1/7 Tr 68).

Robert Savidge credibly testified on several relevant points and his testimony is credited in full. In explaining his reasoning in denying Solomon's leave request (Comp. Ex 4), he related that the policy requiring that leave be requested at least a week in advance allows managers to plan ahead to ensure that an acceptable level of service is provided. He also explained that while the Senate is in session, as it was when Solomon submitted his leave requests, all the restaurants were open and they had an "all hands on deck" policy, meaning they avoided being short-handed. The year 2001 was unusual because of the September 11 tragedies and the anthrax closure, and the Senate was staying in session much later than it ordinarily did. Savidge also testified that it was Senate restaurant policy to try to accommodate the leave requests of those employees in a use-it or lose-it leave circumstance. Employees thus affected had submitted their requests earlier and in a timely fashion, and their requests had been approved. When Solomon submitted his request, he was the last employee to do so. Savidge testified that--because of staffing problems--he had no choice, but to deny the request. (1/22 Tr 146-52).

Savidge explained further that for unskilled positions an employee from a temporary agency can often be substituted. The position of grill cook, however, was more skilled and past experience had shown that a temporary agency employee in that position

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58). I find as fact that the conversation referred to in Complainant's Exhibit 3a took place on December 14, 2001, the first date that Solomon mentioned "religious reasons" as a basis for the annual leave request

was not able to perform satisfactorily. He also testified that when they had used unqualified temporaries in the past, quality had suffered considerably. The preference for a substitute was either a regular employee or a temporary employee then working in one of the restaurants who had experience in the grill cook position. Savidge learned however, that there was no qualified AOC or temporary agency employees available as a substitute. Thus, in order to grant Solomon's request, Savidge testified that it would have been necessary to bring in a substitute from a temporary agency who likely could not provide the level of service necessary and who would be brought in at an added cost to the agency. It was a choice he did not wish to take while the Senate was still in session. (1/8 Tr 146-54).

Solomon was placed on leave restriction by letter dated September 19, 2001. (Comp. Ex 5). The letter stated that it was being issued to Solomon because of "the frequency of unscheduled leave you have used." The letter also stated that Solomon had been placed on leave restriction on March 31, 2001 and had been terminated from that restriction on June 30, 2001. The September 19 leave restriction letter required Solomon: 1.) in the event of unanticipated incapacitation or illness, to personally notify the Time and Attendance Clerk no later than one hour before his tour was scheduled to begin, 2.) upon return to work, to "provide acceptable medical documentation to justify [his] absence, regardless of the length of [his]absence." (underlined in original), 3.) to submit acceptable medical documentation if annual leave was used in lieu of sick leave, and 4.) to submit in advance, requests for annual leave or leave without pay "for reason other than incapacitation or illness ." (underlined in original).

CONCLUSIONS OF LAW

In the first count, Solomon contends that he requested annual leave which he claimed he was entitled to receive based upon a bona fide religious belief and that the employing office wrongly denied his request. The employing office responds that Solomon's religion does not require that he not work during the period when the leave was sought, and that the basis for the requested leave was of a personal nature rather than any requirement of his church. Thus, argues the employing office, Solomon has not shown that a bona fide religious practice conflicts with an employment requirement, an element of the claim that Solomon must establish.[2] Alternatively, the employing office argues that, because compliance with the leave request would impose an undue hardship, it was not required to honor the request. *See Trans World Airlines v. Hardison,* 432 U.S. 63 (1977).

The contention by the employing office that Solomon has failed to show that his request was based on a bona fide religious belief presents a significant constitutional question that need not be decided under the circumstances here. That issue does not need to be decided because Solomon's claim fails for two other reasons.

First, the employing office is correct when it argues that it did not have to comply with Solomon's leave request because to do so would pose an undue hardship. In *Hardison* the Supreme Court considered a case where the employer did not accommodate an employee's request that he not be required to work on Saturdays, the employee's Sabbath. A lower court, in a ruling in favor of the employee, suggested that the employer could either have allowed a short-shift on the day the employee refused to work or have

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[2] Citing *EEOC v. Union Independente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico,* 279 F.3d 49 (1st Cir. 2002).

replaced the employee with another employee through the payment of premium wages. The Supreme Court, however, concluded that "[b]oth of these alternatives would involve costs to [the employer], either in the form of lost efficiency . . . or higher wages." It held that to "require the [employer] to bear more than a de minimus cost in order to give Hardison Saturdays off is an undue hardship" Therefore, the employer was not required to accommodate the employee's request. *Id.* At 84.

The facts in *Hardison* are similar to the facts presented here. There the Court ruled that an accommodation that resulted in *either* a loss of efficiency *or* higher costs amounted to an undue hardship. In this case accommodation would have resulted in *both* loss of efficiency *and* higher costs. Savidge credibly testified that in order to accommodate Solomon's request he would have to bring in an unqualified worker from a temporary agency—loss of efficiency—and he would have to pay the wages of the temporary employee—thus incurring higher costs. Under *Hardison* either circumstance would have created an undue hardship, and the employing office was not obligated to take that course to accommodate Solomon. Therefore, Solomon's claim on the first count fails.

Solomon's claim fails for another reason. His request was not timely made and the employing office could properly deny the request on that ground. The policies of the Senate restaurants is that requests for more than two days of annual leave must be made and approved at least a week in advance.(Comp. Ex 6, page 3). The December 12 request did not mention a religious basis for the request, therefore it did not trigger a requirement

that the employing office make an accommodation.[3] Because the request was untimely, the restaurants were short-handed, and the Senate was still in session, the employing office was free to deny the request without having to take make any accommodation. Thus, denial of the December 12 request was not improper in any way.

Solomon first filed a religion-based leave request, triggering the "reasonable accommodation" requirement, on December 14, 2001. Savidge testified to the efforts he made to accommodate the request which were unsuccessful in large part because the Senate was still in session and Solomon submitted the leave request after every one else had submitted their requests. Solomon's request was denied in a December 17 letter from Savidge to Solomon because, as discussed above, the Senate was still in session and the restaurants were short handed.

In denying the December 14 leave request, Savidge cited the requirement that requests for leave in excess of two days be submitted and approved at least one week in advance. Savidge also informed Solomon that should the "Senate recess and circumstances change" he would reconsider the request. Two days later the Senate did in fact recess and Solomon began his leave on December 21—exactly one week after he requested the leave and invoked religious reasons as a basis for the request. Thus he began his leave on the first day he was entitled to begin it, taking into account the one week advance requirement for requesting leave. Thus, Solomon was never denied any leave that he might have been entitled to. Therefore his claim in the first count fails for this reason as well.

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[3] As noted *supra* at 6, Solomon never asked for a religious accommodation before December 14, 2001. Therefore the employing office could not be expected to be on notice that there was a religious basis underlying the December 12 request.

In the second count, Solomon claims retaliation, contending that the leave restriction imposed on September 19, 2001 were continued on December 19, 2001 because he had requested leave based on religious reasons. In order to establish this claim Solomon must show that: 1.) the employee engaged in statutorily protected activity, 2.) the employer took an adverse employment action, and 3.) a causal connection existed between the first two elements. *Mitchell v. Baldrige,* 759 F.2d 80, 84 (D.C. Cir. 1985). I will assume, for the sake of argument, that a request for annual leave based on religion is statutorily protected activity and that the first element has been established. Nonetheless, Solomon's claim on this count fails because he did not establish either of the other two elements.

For purposes of a retaliation claim, an "adverse action" must result in "materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could conclude that the [employee] has suffered objectively tangible harm." *Brown v. Brody,* 199 F.3d 466, 457 (D.C. Cir. 1999). Solomon has cited no authority for his claim that continuation on leave restriction in general, or the restrictions imposed here, constitute a "materially adverse consequence affecting the terms, conditions, or privileges of employment."

In fact the restrictions imposed here were either restriction applicable to every other employee or were only a relatively minor burden. For example, Solomon was required, in the event of unexpected incapacitation or illness, to provide notice no later than one hour before commencement of the tour of duty. (Comp. Ex 5, page 1, para. 3). That condition, however, is required of all employees. (Comp. Ex 6, page 2). Similarly the leave restriction letter requirement that Solomon submit requests for annual leave in

advance is a requirement imposed on all employees. (Compare Comp. Ex 5, page 2, para. 3 with Comp Ex 6, page 3).

The only condition imposed upon Solomon in the leave restriction letter that is not imposed on all employees is the requirement that he provide medical documentation regardless of the length of the absence. In general employees ordinarily have to provide that documentation only for absences of three consecutive days or more. (Compare Comp. Ex 5, pages 1 and 2 with Comp. Ex 7, page 3). Requiring an employee to provide medical documentation in those circumstances can hardly be considered a "materially adverse consequence." Thus Solomon has failed to show an adverse consequence amounting to an "adverse action" and his claim cannot be sustained for that reason.

In addition, Solomon has failed to show, as he must, that there was a connection between the protected activity and the asserted adverse action. The burden is on Solomon to make that showing and he has failed to do so. In fact there is not a shred of evidence that Savidge's decision to continue Solomon on leave restrictions was motivated by Solomon's religion-based leave request in December 2001. A review of Solomon's leave history demonstrates that Savidge had ample grounds to continue the restrictions on that ground.

In the December 19, 2001 letter informing Solomon that he would be continued on leave restrictions, Savidge stated that he did so "taking into consideration your previous restriction and leave record." (Comp. Ex 8). A previous restriction included that imposed on March 30, 2001 based on Solomon's use of unscheduled leave. (Resp. Ex 1). Although the March 30 restriction was imposed for six months, it was terminated effective June 30, 2001. (Comp Ex 12). However, because of leave problems in July and

September, 2001, Solomon was again placed on the leave restriction on September 19, 2001. (Comp. Ex 5). In light of that history, Savidge was well justified in continuing the leave restrictions in December 2001. Therefore, in the absence of any showing of a connection between the protected activity and the asserted adverse action, and the existence of ample justification, based on the leave record, to continue Solomon on leave restriction in December, 2001, this claim also fails[4].

CONCLUSION

For the reasons stated, Solomon has failed to establish any basis for affording him the relief sought. Therefore, this hearing officer finds for the respondent on all claims.

Respectfully submitted,

Date 5/9/03

Warren R. King
Hearing Officer

[4] The third count claiming a hostile work environment was dismissed at the close of the employee's case for failure to show conduct that was "sufficiently severe or pervasive" to establish the elements of this claim. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).