

# **Roberta H. Gaston v. U.S. General Accounting Office**

**Docket No. 99-02**

**Date of Decision: April 25, 2002**

**Cite as: Gaston v. GAO (4/25/02)**

**Before: Jeffrey S. Gulin, Chair**

**Discrimination - Disability**

**Disability**

**Americans with Disabilities Act (ADA)**

**Reasonable Accommodation**

**Disparate Treatment**

**Removal**

## **DECISION**

### **I. Introduction**

This matter is before the Personnel Appeals Board (PAB) on a Petition for Review (Petition) filed by Roberta H. Gaston, a former evaluator in the National Security and International Affairs Division (NSIAD) in the Washington office of the U.S. General Accounting Office (GAO or the Agency). Proceeding *pro se*, Petitioner challenged the Agency's decision to remove her from employment on the basis of excessive absence without leave and failure to comply with leave restrictions.

Arguing that her disability adversely impacted her attendance, Petitioner complained that the lack of guidance on disability accommodation interfered with her ability to formally apply for an accommodation. Petition at 2-4. Further, Petitioner alleged that she was treated disparately in response to her request for accommodation because her disability involved mental illness—clinical depression. *See id.* at 1, 6-7. Ultimately, Petitioner's case rests on a theory that the removal decision resulted from the Agency's failure to grant her a reasonable accommodation for disability.<sup>1</sup> Petitioner resigned from employment on September 19, 1997, the day her

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<sup>1</sup> Petitioner introduces at page 11 of her Post-Hearing Brief (P.Br.) an allegation that her performance appraisals in 1996 and 1997 were affected by her having filed a discrimination complaint with the Civil Rights Office. *See also* TR 545. Because this claim was not raised in the Petition for Review, the

removal would have become effective. She applied for and received civil service disability retirement retroactive to that date. She seeks lost salary for time charged as absent without leave, placement on full retirement, and other relief.

## **II. Procedural History**

The Petition for Review was filed on June 7, 1999. Petitioner claimed that she is a qualified individual with a disability who was treated disparately in her efforts to obtain an accommodation. Petitioner detailed a lengthy history of medical complaints and efforts to obtain flexible work arrangements through various supervisors. She complained that the lack of adequate guidance on seeking an accommodation contributed to the discriminatory acts against her and constituted a separate illegal action on the Agency's part. Moreover, she complained about the investigations and conclusions in her case reached by the Civil Rights Office (CRO) and PAB Office of General Counsel (PAB/OGC).

Following the discovery period, the Agency filed a Motion to Dismiss and for Summary Judgment in December 1999. The Agency sought dismissal of the following: Petitioner's claims arising before April 7, 1996; claims not raised in her CRO Complaint or PAB/OGC charge; allegations challenging the investigations conducted separately by those two offices; and allegations concerning the lack of adequate guidance and standards on accommodations for disability. In addition, the Agency sought summary judgment on the allegation that it had violated the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, by failing to permit Petitioner to work at home as an accommodation for her alleged disability.

Petitioner filed a Response to the Agency's Motion on March 1, 2000. She countered by arguing that she was a qualified individual with a disability who was treated disparately in her efforts to obtain an accommodation and was harassed by management in response to her efforts to obtain accommodation. Further, she argued that the lack of adequate guidance on the process of obtaining an accommodation intensified the effect of the Agency's discriminatory actions. On July 11, 2000, after considering the arguments of the parties, I ruled that the Motion to Dismiss be granted in part and denied in part, and that the Motion for Summary Judgment be denied. *See* Order at 7. Specifically, the Order stated that Petitioner's allegation concerning lack of standards and guidance for reasonable accommodation did not constitute a separate claim cognizable under the ADA, but that related evidence might be relevant to other issues in the case. *See id.* at 4-5. Respondent's argument for dismissal of claims arising before April 7, 1996 was rejected as overly narrow in light of Petitioner's claim of failure to accommodate. *See id.* at 3. Finally, the Petition's allegations seeking review of the investigations conducted by the CRO and PAB/OGC were dismissed because PAB review is an independent, *de novo* review, not premised on the earlier conclusions of either of those entities. *See id.* at 3-4.

The Motion for Summary Judgment was denied because sufficient questions remained "as to whether Petitioner was a qualified individual with a disability, whether the Agency's accommodation offer was reasonable under the circumstances, and whether discrimination was a component of Petitioner's employment situation." *Id.* at 6.

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Agency did not have an opportunity to rebut the claim until its Reply Brief (R.Reply Br.). I find that the reprisal issue is not properly in issue in this case.

Thereafter the case was scheduled for evidentiary hearing in September 2000, and at Petitioner's request, it was postponed until October 23-26, 2000. Following the four-day hearing, the parties filed post-hearing briefs on December 26, 2000. On February 13, 2001, Respondent submitted GAO's Reply Brief along with a Motion to File and Supporting Memorandum. Because Petitioner had raised a new issue in her Post-Hearing Brief—reprisal for exercising her lawful rights, the Agency's Reply Brief was accepted for filing. Petitioner's Reply Brief was timely filed on March 12, 2001.

### **III. Factual Background**

Because Petitioner's attendance problems and asserted disability are factually intertwined, a detailed review of the record is appropriate.

#### **A. Relevant GAO Policies**

##### **1. Flexiplace**

Flexiplace is the GAO policy that permits alternative workplace arrangements for employees to work outside the traditional office setting. *See* GAO Order 2300.5, ch. 1 ¶1 (June 15, 1994) (Respondent's Exhibit (R.Ex.) 9). It is defined as "a management option, not an employee benefit." *Id.*, ch. 1 ¶5.a. The Agency requires that the nature of the employee's work be suitable for flexiplace in order for the employee to be eligible to participate. *Id.*, ch. 1 ¶5.d.

Under the Flexiplace Order, Management "will determine whether the tasks, duties, work assignment, and/or product expected are appropriate for an off-site arrangement," and whether the first-line supervisor believes that remote supervision is suitable. *See id.*, ¶6.c.<sup>2</sup>

The Flexiplace Order sets forth the policy that:

All full- and part-time employees are eligible to be considered for flexiplace arrangements if they

- (1) have been rated **at least** Fully Successful on all dimensions for which they received a rating on their most recent performance appraisal;
- (2) have proven themselves to be dependable, independent and highly motivated; and
- (3) have an understanding of the operations of the organization adequate to permit working effectively away from the organization.

*Id.*, ch. 1 ¶6.a (emphasis in original).

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<sup>2</sup> The Agency's Post-Hearing Brief overstates this provision, citing John Luke's letter to Petitioner on accommodation to support the view that flexiplace for evaluators is intended to be "episodic in nature with measurable work results." *See* Respondent's Post-Hearing Brief (R.Br.) at 6; R.Ex. 8.

The Agency's supplemental publication, 2300.5 SUP (June 15, 1994), provides more specific guidance on the flexiplace parameters for different purposes and job duties. *See* R.Ex. 10. The Supplement states that "[a]s a general rule, flexiplace on a regular, recurring basis would not be viable for evaluators since many tasks, such as interviewing agency officials, gathering documents, and team meetings, generally require the employee to report to the office. However, there may be selected tasks for which a short-term flexiplace arrangement may be appropriate, for example, reviewing background materials, writing up job interviews, or drafting a report chapter." 2300.5 SUP at [1-6-b-2]. Moreover, the official guidance also provides that "[s]hort term flexiplace arrangements may be made to accommodate special circumstances in the interest of accomplishing work." SUP at [1-6-b-3].

GAO has on occasion permitted evaluators to use flexiplace. *See* Hearing Transcript (TR) 561-62.

The Flexiplace Order specifically states that "[w]ith the approval of the unit head, exceptions to maxiflex policy may be made when necessary for reasonable accommodation purposes for employees with disabilities." Order. 2300.5, ch. 2 ¶1. The Supplement elaborates on how flexiplace may be of particular use in accommodating employees with disabilities: "Some employees with disabilities cannot regularly commute to work, work an entire day in an office setting, or work for long periods without rest. Special computer technology and telecommunications can enable them to be valuable home workers." SUP at [1-6-b-4].

## **2. GAO Policy on Work Schedule Alternatives**

The GAO Order on work schedule alternatives, in effect during 1996-97,<sup>3</sup> was intended to give employees "the flexibility to establish their biweekly work schedules, subject to supervisory approval, to best meet the needs of their jobs and the demands or desires of their personal life." Order 2620.1 (Jul. 31, 1989), ch. 1 ¶1. Under the terms of that Order, employees were required to submit a biweekly work schedule in advance for supervisory approval; supervisors were authorized to approve "minor deviations" from the approved schedules. *Id.*, ch. 3 ¶2.a. Work hours were required to fit within the core Agency hours of 6 a.m. to 6 p.m., Monday through Friday. *Id.*, ch. 3 ¶2.c. The Order specifically prohibited denying an employee active participation "unless the duties and responsibilities of his/her position clearly warrant a regular (5 day) work schedule or conditions of abuse are involved." *Id.*, ch. 3 ¶4.b. In addition, abuse of the program's requirements, including "[f]requent instances of documented tardiness and absences from the work site without prior approval," could result in limitation of choice or exclusion from participation. *Id.*, ch. 3 ¶6.c.

## **3. GAO Policy on Employment of Individuals with Disabilities**

GAO's Order 2306.1, Employment of Individuals with Disabilities (Jan. 17, 1992), sets forth the Agency's framework and policy for employment of individuals with disabilities (R.Ex. 5). Paragraph 3.b states that the Agency's policy is

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<sup>3</sup> The relevant Order was superseded by Interim Order on November 19, 1999 and by final Order on June 28, 2000.

to make positive efforts to provide employment opportunities . . . and to take steps to enhance the potential for . . . retaining persons with disabilities through appropriate job structuring and design and the reduction or elimination . . . of . . . procedural, and attitudinal barriers.

Moreover, ¶5.a notes that “GAO has targeted for emphasis the employment of individuals with the following severe disabilities,” including “mental illness.”

The duty of reasonable accommodation is set forth in ¶6.a:

Reasonable accommodation must be made to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can be shown that the accommodation would impose an undue hardship on GAO operations.

Under the Order, the employee with a disability who seeks accommodation bears the responsibility to alert Management to his or her “job-related needs for reasonable accommodations.” Order 2306.1, ¶5.k; *see* TR 453.

Possible accommodations listed in the Order include: part-time or modified work schedules; job restructuring; and reassignment to a vacant position. *See* ¶6.e. The Order notes that:

Employees with performance and conduct deficiencies not related to any disability are subject to appropriate disciplinary and/or performance-based action. Reasonable accommodation will be provided to employees with performance or conduct deficiencies prior to taking appropriate disciplinary or performance based action, where performance or conduct deficiencies are due to disability.

¶6.d. (R.Ex. 5) (emphasis added).

On May 15, 1996, division and office heads were reminded by memorandum from John Luke, then Deputy Assistant Comptroller General for Human Resources, about the Agency’s commitment to and policy on providing reasonable accommodations, *i.e.*, “to accommodate known physical or mental limitations of otherwise qualified employees unless such accommodation would impose an undue hardship on the operation of agency programs.” R.Ex. 6. *See also* R.Ex. 4 (clarification from Mr. Luke’s predecessor that decisions as to reasonable accommodation be made at unit level, but that the Assistant Comptroller General for Operations (ACG Ops) reviews negative determinations) (Dec. 17, 1992).

The Agency did not maintain centralized records of requests for accommodation and disposition of those requests. *See* TR 390.

#### **4. GAO Policy on Medical Determinations**

Order 2339.1 (June 10, 1994) contains the Agency's rules on medical determinations, establishing its authority to require or offer medical examinations in certain circumstances involving the Americans with Disabilities Act. *See* Petitioner's Exhibit (P.Ex.) 100. This Order defines "reasonable accommodation" as follows:

[M]aking adjustments or modifications to the job and/or work environment, in response to the known physical or mental limitations of qualified individuals with disabilities, that do not impose an undue hardship on the operation of GAO's programs. Undue hardship means an action requiring significant difficulty or expense to GAO. In determining whether an accommodation would impose an undue hardship, factors to be considered include

- (1) the overall size of GAO with respect to the number of employees, number, type, and location of facilities, and the size of the budget;
- (2) the nature of the work performed by GAO, or specific unit within GAO, including the composition and structure of the work force; and
- (3) the nature and cost of the accommodation.

Order 2339.1, ch. 2 ¶1.i (P.Ex. 100).

The Supplement to Order 2339.1 contains additional explanation and definitions, defining "subtle incapacitation" as the "gradual, initially imperceptible impairment of physical or mental functions, whether reversible or not, that is likely to result in performance or conduct deficiencies." 2339.1 SUP, ch. 2 ¶2-1-2 (P.Ex. 101). The supplemental guidance states that medical statements in support of accommodation requests might include whether the condition is static or whether it is subject to sudden or subtle incapacitation. *See id.* ¶2-6-1-g. Moreover, the Supplement provides that "when health status becomes a potential factor in the deficiency of an employee's performance or conduct, the employee is responsible for demonstrating that a medical condition exists<sup>4</sup> that management should consider when making an employment-related decision." 2339.1 SUP, ch. 1 ¶1-4.b.<sup>5</sup>

## **5. GAO's Leave Policies**

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<sup>4</sup> The Executive Branch places the burden on the employee to make known the need for reasonable accommodation unless such need is obvious. However, "[i]f an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that the accommodation is needed." EEOC Interpretative Guidance on Title I of the ADA, 29 C.F.R. Pt. 1630 App. at 1630.9.

<sup>5</sup> In the Executive Branch, an agency may, at its option, offer a medical examination "in any situation where the agency needs additional documentation to make an informed management decision," including situations "where the individual has a performance or conduct problem which may require agency action." 5 C.F.R. §339.302.

The Agency’s rules governing leave use are set forth in Order 2630.1 (R.Ex. 11). Chapter 2, ¶2.a establishes the Agency core hours of 6 a.m. to 6 p.m. Chapter 3, ¶5.b, sets forth the expectation that all employees “be regular in their attendance. Employees must demonstrate not only the capability for producing a reasonable amount of acceptable work but also dependability in being available when and where services are needed. . . .”

The Order also provides that “[a]n employee whose physical or mental condition obviously prevents strict compliance with the regulations [regarding sick leave] may be granted sick leave on the basis of proper certification, court order, or other acceptable evidence.” Ch. 6 ¶4.i. “Absence because of sickness should be reported . . . not later than 2 hours after the start of the employee’s regularly scheduled workday.” Ch. 6 ¶6. When an employee “fails to report for duty or is absent from the work area during the workday and does not inform the supervisor . . . within a reasonable time,” the employee will be charged as “absent without leave.” Ch. 7 ¶2.a. The Order authorizes extended leave without pay in cases where the individual has applied for disability retirement. *See* ch. 12 ¶5.d.

The Order provides for leave restrictions after an employee has been counseled concerning a poor leave record. *See* ch. 17 ¶3. Failure to comply with leave restrictions may result in absence being charged as absent without leave or without pay, or more serious consequences. *See id.* at ¶5.

## **6. GAO’s Discipline Policy**

GAO’s discipline policy is explained in Order 2751.1 SUP (R.Ex. 82). The Order requires that certain factors be considered in the selection of penalties, including, *inter alia*, the nature and seriousness of the offense, past work record, length of employment, and any mitigating circumstances. *See* R.Ex. 82, ch. 2 ¶2-1.b. The Supplement includes a table of penalties (Appendix I). Adverse actions, including removals, are governed by Order 2752.1.

### **B. Performance Expectations for GAO Evaluators**

Evaluator work includes the following five categories for purposes of performance assessment: job planning, data gathering and documentation, analysis, communication (written and oral), and establishing and maintaining teamwork and working relationships. *See* Joint Stipulation (JS2) ¶5. Petitioner’s duties as an evaluator also encompassed attending meetings with agency officials, drafting segments of reports, preparing work papers, and indexing reports to work papers. *See* TR 36.

Petitioner’s job description states that she was expected to perform the full range of evaluator functions, including such typical assignments as:

- developing job plans, audit guidelines and tasks;
- taking the lead in data collection efforts or reviewing data collection efforts of other[s], performing report processing functions, referencing, or clearing referencing points;

- selecting and applying analytical methods appropriate to the situation from a number of alternatives to develop conclusions and recommendations;
- integrating and consolidating analyses and written summaries of others to develop draft chapters of complete draft products; and
- participating in and/or leading meetings with GAO and agency officials to communicate results of work.

As experience and skills advance, evaluators are expected to “perform moderately complex tasks with minimal supervision.” R.Ex. 23A.

Regular and reliable attendance is an important function of the evaluator position. *See* R.Ex. 83 at 5; TR 545. Predictable, timely productivity is inherent in the job of evaluator. *See* R.Ex. 48 at 2; TR 438.

### **C. Petitioner’s Employment History with GAO**

Petitioner was employed by GAO from April 1, 1974 until her resignation in the face of removal on September 19, 1997. *See* JS2 ¶¶1, 2, 15.

Petitioner became an evaluator in October 1980. *See* R.Ex. 48 ¶1. During the period relevant to this case, Petitioner worked as an evaluator in the division known as NSIAD. *See* TR 22.

Petitioner was under treatment for clinical depression for most of the period of her employment at GAO. *See* TR 497-98, 500-10, 512, 520-27, 529-30.

#### **1. Petitioner’s Medical Condition, Her Absences, and GAO’s Handling of the Situation Between the Late 1980s and Late 1995**

For at least five years between the late 1980s and early to mid-1990s Lawrence Kiser supervised Petitioner on various assignments. *See* TR 21-22. As early as 1991 Petitioner made Mr. Kiser aware that she was being treated for depression. *See* TR 47.

During most, if not all, of this period Frank Degnan was Petitioner’s second line supervisor. *See* TR 69.

Petitioner had an attendance problem that began in the early to mid-1990s, first sporadic and then more frequent and covering longer periods of time. *See* TR 23-24.

Petitioner’s performance appraisals for the period between the late 1980s and late 1995 reflect that she was meeting and/or exceeding expectations and performing her assigned tasks but that there were issues regarding her absences.<sup>6</sup>

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<sup>6</sup> June 1986 - June 1987: 3 Fully Successful; 3 Superior; 1 Exceptional (P.Ex 32);  
 January 1987 - June 1987: 3 Fully Successful; 4 Superior (P.Ex 33);  
 January 1987 - September 1987: 6 Superior; 1 Exceptional (P.Ex 34);  
 June 1988 - June 1989: 3 Superior; 4 Exceptional (P.Ex. 35);  
 June 1989 - October 1989: 6 Superior (P. Ex.36);

In her ratee comments on her June 1991 performance appraisal on which Mark Gebicke, NASA Issue Area Director, was the reviewer, Petitioner referenced that she had clinical depression. *See* P.Ex. 37 at 3.

In the Fall of 1991, Mr. Kiser took supervisory notes over a period of approximately three months concerning Petitioner's attendance, at Mr. Gebicke's direction. *See* TR 24-28; P.Ex.11. No disciplinary action was taken by the Agency after the notes had been compiled. *See* TR 25.

During this period, Petitioner's absences had a timeliness impact but not a quality impact on the workload, with either Mr. Kiser or Mr. Degan picking up the tasks or Petitioner completing them upon returning to work. *See* TR 29.

In answer to the question "Did you as a supervisor do anything to try to assist . . . [Ppetitioner] with her attendance?" Mr. Kiser testified:

Nothing beyond our discussions of what was causing the absences. She was very open with the problems she was having. We had regular discussions about that. I accommodated from the standpoint of allowing the flexible time schedules. She would say that she was going to be late but would stay late to make it up and I would okay that.

TR 29-30.

Mr. Degan testified that in the 1992-1993 period, based on advice he had been given "not to add additional stress on her," he "tried to take as much pressure off as" he could. TR 71, 75. From approximately the late 1980s until the mid-1990s, Mr. Degan attempted to give her assignments without tight deadlines, to circumvent her frequent absences. *See* TR 75. Over the course of years, he allowed Petitioner to "borrow" leave from the next pay period so that she would not be in a leave without pay status (TR 76-80) and encouraged her to come in even when she did not feel well (*see* TR 77).

Petitioner discussed her depression with Mr. Kiser and encouraged him to contact her therapist at the time, Carol Libonati, concerning her medical condition. *See* TR 26, 47, 58-59.

Ms. Libonati provided the following assessment as of November 27, 1991:

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June 1990 - June 1991: 5 Fully Successful; 1 Superior (P.Ex. 37);  
June 1991 - August 1991: 6 Exceeds Fully Successful (P. Ex. 38);  
August 1991 - June 1992: 3 Fully Successful, 3 Exceeds Fully Successful (P.Ex. 44);  
June 1992 - January 1993: 3 Fully Successful; 3 Exceeds Fully Successful (P.Ex. 41);  
January 1993 - September 1993: 4 Fully Successful, 2 Exceeds Fully Successful (P.Ex. 39);  
October 1993 - September 1994: 3 Fully Successful; 3 Exceeds Fully Successful (P.Ex. 42);  
September 1994 - September 1995: 5 Exceeds Fully Successful; 1 Outstanding (P.Ex. 46).

[W]e found no major medical problems that would interfere with her ability to work. However, a possible contributor to work lateness may be morning sedation as a side effect of her medication. Another possible contributor identified during reassessment is a feeling of demoralization centered around recent organizational changes at work. . . . [Petitioner] expresses a continuing desire to address your concerns and will be meeting with me to do so.

We consider her fit for work with no reservations and she can perform the duties of her position. We do ask that you recognize her actively addressing the problem of attendance and that you be supportive of her efforts. The attendance problem should be resolvable but may take a few months because of the adjustments . . . [Petitioner] will attempt to achieve a resolution.

P.Ex. 11.

Petitioner received a written warning from David R. Warren, Associate Director, NSIAD/DMN, dated October 13, 1993, concerning her attendance problems and specifically noting that her “lack of dependability is beginning to impact . . . [her] assignments.” R.Ex. 50; *see* JS2 ¶6. The Memorandum of Warning also stated that her “continuing failure to report for duty as scheduled will cause other staff members to have to assume . . . [her] work.” R.Ex. 50; *see also* TR 24, 29. The Memorandum made no mention of Petitioner’s medical situation. It did warn Petitioner “that if your attendance problems persist it will result in consideration of more severe disciplinary action, up to and including your removal from employment from GAO.” R.Ex. 50.

In a September 1995 review, covering work done over the past twelve months, her supervisor rated her as outstanding in the dimension of data gathering and documentation, and stated that “[d]espite a high absentee rate, she clearly demonstrated that she is a very capable evaluator who possesses the knowledge, breadth of skills, and critical instincts necessary to perform well beyond the fully successful level.” P.Ex. 46 at 2.

## **2. Late 1995 - September 1997**

In late 1995, Thomas V. Schulz assumed supervisory responsibility for the group in which Petitioner worked. *See* TR 105, 107, 118-19. Shortly thereafter, he spoke to Messrs. Degnan and Kiser concerning a delayed work product, and learned that Petitioner’s absence was preventing completion of the product. *See* TR 238. Mr. Schulz spoke to them about Petitioner’s use of “flexitime,” and the need to remind Petitioner of the importance of completing the work. *See* TR 132-34. Another manager, Brad Hathaway, had also inquired about these problems. *See* TR at 434. At Mr. Schulz’s request, Mr. Kiser took supervisory notes on Petitioner’s attendance, to serve as “memory joggers should any disciplinary action be taken.” TR 31.

### **a. Revocation of Petitioner’s Use of Flexitime**

On March 28, 1996, Mr. Kiser, Mr. Schulz, and Mr. Degnan met with Petitioner to discuss her attendance problems and the need to “get the product out.” TR 134-35; *see* TR 33-35; R.Ex. 1. The purpose of the meeting was to set parameters for more timely assignment completion and improved attendance. *See* TR 33.

Prior to the March 1996 meeting, Petitioner had been permitted to use leave on an unpredictable basis and report to work when she could. *See* TR 133-34.

At the time of the March meeting, Mr. Kiser noted that “Mr. Schulz explained . . . that this was not a disciplinary action but rather an opportunity to let her know that we are concerned about her problem and are willing to work with her to resolve the situation.” R.Ex. 1. Petitioner’s “current lack of dependable availability for duty was the reason for . . . [Mr. Schulz’s] calling for certain actions.” *Id.*

Following the meeting, Petitioner was required to work a regular, 8-hour day, 40-hour week rather than the flexible schedule she had been working. *See* TR 34. She was required to choose a standard starting and quitting time within GAO’s core hours. Within these requirements, Petitioner chose to work from 6:15 a.m. to 3:00 p.m. In addition, Petitioner was required to e-mail Mr. Schulz daily to confirm her arrival time at work. *See* TR 34; R.Ex. 1.

During the March 28, 1996 meeting, Petitioner agreed that she would meet with Dr. Janet Wilson of GAO’s Office of Counseling and Career Development (OCCD), and that with her permission, Mr. Schulz would follow up with Dr. Wilson “for advice on how we can best deal with . . . [Petitioner’s] situation.” R.Ex. 1. Petitioner also agreed that she would provide advance notice of medical appointments. R.Ex. 1; JS2 ¶7. At the time, Mr. Schulz noted that Petitioner “agreed with the problems in her coming to work.” TR 136.

Petitioner was warned during the meeting that if her “availability for duty continues to be unreliable, further administrative action, i.e., leave restriction, will be imposed.” R.Ex.1; JS2 ¶7. According to Mr. Kiser’s notes, Petitioner’s eligibility for disability retirement was also discussed, and “she may decide to obtain more information. (She is not being requested to do so, however.)” R.Ex. 1 ¶4.

After the March 1996 meeting, Petitioner continued to arrive late and take unapproved absences. Mr. Schulz suggested a later start time to Petitioner and her supervisor. *See* TR 137.

#### **b. April 12, 1996 Imposition of Leave Restrictions**

Two weeks after the March meeting, on April 12, 1996, Mr. Schulz “went to the next step” and placed Petitioner on leave restrictions. TR 137. The leave restriction letter was based on Petitioner’s absence without leave (AWOL) on April 5, 9, and 10 for a total of 20 hours. The attachment to the letter detailed Petitioner’s absences since the beginning of 1995. *See* R.Ex. 51. Following a discussion, the AWOL charges were changed to leave without pay (LWOP). *See* R.Ex. 32; TR 140-41.

Although agreed to in March, there is no evidence in the record of any contact between Mr. Schulz and Dr. Wilson of the OCCD between the March 28 meeting and the imposition of leave restrictions.

The leave restriction letter imposed the following restrictions on Petitioner effective April 15, 1996: 1) official work hours of 7:30 a.m. to 4:15 p.m., with required e-mail to Mr. Schulz upon arrival and prior to departure; 2) formal application for annual and sick leave at least 2 days in advance, and medical certification of the time Petitioner was attending medical appointments for which sick leave was sought; 3) any unscheduled absence reported directly by Petitioner to Mr. Schulz or Mr. Degnan by 9:00 a.m. on each day of absence, subject to Mr. Schulz's determination that emergency leave was warranted, and followed by written request documenting justification for the absence within one workday; 4) on each sick day, Petitioner to contact Mr. Schulz or Mr. Degnan directly by 9:00 a.m., and submit a signed doctor's certificate verifying the absence and illness; 5) arrival after 7:30 a.m. to be charged as AWOL in multiples of one hour; 6) LWOP granted only with advance permission in verified cases of emergency. *See* R.Ex. 51 at 1-3.

The letter also reminded Petitioner that GAO offered counseling services if she wished to discuss the reasons for continued leave problems. *See* R.Ex. 51 at 3. It made no specific mention of a possible disability.

According to Louis J. Rodrigues, Director, Defense Acquisitions Issues, NSIAD, the imposition of leave restrictions was viewed as a necessary first step to determining whether Petitioner's situation posed "really a performance problem or whether we just have a conduct problem." TR 334.

### **c. May 1996 Three-Day Suspension**

On April 26, 1996, two weeks after the imposition of the leave restrictions, GAO proposed to suspend Petitioner for three days because she had been AWOL on four occasions, totaling 29 hours, between April 17 and April 25, 1996, and for failure to follow leave procedures (unscheduled, unexcused absences) imposed by Mr. Schulz's letter of April 12, 1996. *See* R.Ex. 13.

The four absences stemmed from oversleeping; on three of these occasions Petitioner decided not to come in late because of her 4:15 p.m. scheduled departure time. On one occasion, April 19, Petitioner came in late but "Mr. Schulz denied . . . [Petitioner's] request to work until 6:00 p.m. without prior notification." R.Ex. 13. The proposed suspension stated that "in spite of continuous efforts to assist you in improving your attendance, you have failed to show improvement." R.Ex. 13 at 2. This suspension notification letter was signed by Mr. Rodrigues. The three-day suspension was designed "[t]o impress on . . . [Petitioner] the seriousness of not coming to work and not complying with the leave restriction letter." TR 442.

Mr. Schulz was aware that Petitioner believed her medical problems were affecting her attendance. *See* TR 143. The record reflects no evidence of his consulting Dr. Wilson before the proposed suspension in April 1996.

On April 29, 1996, Petitioner wrote to Henry L. Hinton, Jr., Assistant Comptroller General (ACG), NSIAD, in reply to the April 26, 1996 suspension notification letter. *See* R.Ex. 14. Petitioner stated that she had not read the leave restriction letter because it upset her and took her by surprise,<sup>7</sup> and therefore, her “failure to comply with imposed leave restrictions was not intentional.” *Id.* at 1. She noted her commendable performance rating for the previous year as the reason for her surprise at the imposition of leave restrictions. *See id.*; TR 520. She stated that she would submit written justification for future absences, but as to the requirement of calling her supervisors early on sick days, Petitioner stated:

I do not know what I can do about calling Messrs. Degnan and Schulz before 9:00 a.m. if I oversleep. Over the 8 years that I have been in treatment for clinical depression, I developed what has been diagnosed as a sleep disorder. I am not flouting the leave restriction policy; I truly do not wake up. The 9:00 a.m. call-in time dooms me to be in perpetual violation of the leave restriction policy by the nature of the disorder itself.

R.Ex. 14 at 1 (emphasis added).

Petitioner believed the leave restrictions, with the 9:00 a.m. call in requirement, were intended to document grounds for removal. *See* TR 531. Further, Petitioner requested cancellation of the proposed suspension for financial reasons, because of the expense of her treatment and the effect of leave without pay:

I cannot afford to simultaneously pay for the independent evaluation, psychotherapy, my psychiatrist, and prescribed medication on partial paychecks. I am doing everything within my power to get over the depression: I have given up all my rights to privacy by signing waivers permitting GAO knowledge of my condition; I have a treatment plan that I am following at GAO’s behest; I have already called for appointments at an independent clinic and with a professional group of psychologists; I keep the appointments with my psychiatrist; and I keep Dr. Janet Wilson in OCCD apprised of my actions. However, I do need GAO to meet me part of the way in my efforts. Cancelling the proposed 3-day suspension would at least allow me to pursue the treatment plan more expeditiously.

R.Ex. 14 at 2.

On May 9, 1996, ACG Hinton sent Petitioner a reply to her response to the suspension notification letter. *See* R.Ex. 15. Noting her statement that she was undergoing treatment for

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<sup>7</sup> Petitioner had acknowledged receipt of the leave restriction letter by initialing the document on April 12, 1996. *See* R.Ex. 51 at 3.

clinical depression and had been diagnosed with a sleep disorder, Mr. Hinton ordered that Petitioner supply him with the following information within 5 days,<sup>8</sup> otherwise, “I will be forced to make a decision regarding your proposed suspension based on the information I have at this time:”

1. History of specific medical condition;
2. Summary of clinical findings from most recent medical evaluations including information on physical examinations, laboratory tests, and any specialized evaluations;
3. Assessment of current clinical status and plans for future treatment;
4. Diagnosis/prognosis;
5. Estimated date of full or partial recovery;
7. [sic] Explanation of the impact of the medical condition of the activities of your position;
8. Explanation of the medical basis for any conclusion that the medical condition has or has not become static or well established and;
9. A statement certifying that Petitioner was unable to work or to report to work at 7:45 a.m. due to the condition under treatment on April 17, 19, 23, and 25.

R.Ex. 15.<sup>9</sup> Petitioner viewed the 5-day time frame as a further effort to document failure to comply with Management requests. *See* TR 533.

On May 17, 1996, Mr. Hinton sent Petitioner a final decision stating that she would be suspended for three days for being AWOL on four occasions in April 1996 and for failure to follow leave restrictions. *See* R.Ex. 16. The decision letter from Mr. Hinton stated that his determination to suspend was based upon an examination of the record supporting the proposal and Petitioner’s reply. The letter noted that Petitioner had not submitted the requested medical documentation, nor “any written justifications showing that your absences or tardiness were based on emergency situations.” *Id.* at 1-2. He also stated that she had never told her supervisors that she had an illness that would prevent her meeting the requirement to call by 9:00 a.m. *See* R.Ex. 16 at 2. The suspension was carried out from May 21 to May 23, 1996.

On May 30, 1996, Mr. Schulz made Notes for the Record concerning Petitioner’s absences that week.<sup>10</sup> His statement indicated that Petitioner potentially had sleep apnea, and that she

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<sup>8</sup> The then-applicable GAO governing Order, 2752.1 (Adverse Actions, Oct. 25, 1990) required "a reasonable time (i.e., at least 3 days where feasible)" for an employee to furnish affidavits or documentary evidence in support of an answer to a proposed adverse action. *Id.*, ch.2 ¶5.

<sup>9</sup> Mr. Schulz testified that the information requested "came from the front office" and he understood it to be "boilerplate based on GAO's prior activities in this area." TR 144.

<sup>10</sup> Throughout the period from May 1996 to April 1997, Petitioner exchanged e-mails with Mr. Schulz concerning her attendance. *See* R.Exs. 45, 59-64. These messages detail a history of late reporting of absences for various reasons, some medical and some not. *See* TR 90-91, 143, 194-95. For example, Petitioner listed the train schedule, her reluctance to drive, and oversleeping. TR 143, 296. The majority of these absences were recorded for timekeeping purposes as AWOL. *See* R.Exs. 73-76, 78,

had discussed this with Dr. Janet Wilson, the Agency's counseling psychologist. Mr. Schulz contacted Dr. Wilson, and noted that Dr. Wilson was not sure if sleep apnea were in fact present "what kind of accommodation would be most appropriate—possibly a later starting time, but consistent arrival at work is a requirement of the job." R.Ex. 33 at 1.

Mr. Schulz reported speaking with Petitioner on May 30, 1996, asking her for medical certifications that met the format of the leave restriction letter, and telling her that "she should not be treated any differently that [sic] others who are placed under leave restrictions." *Id.* at 1. Petitioner noted that she was "sick and tired of trying to prove . . . that she is sick!" *Id.*

Notes confirming medical appointments from treating professional indicated no restrictions on Petitioner's work during this time. *See* R.Exs. 37, 39 (Dworkin). On May 14, 1996, Petitioner's psychiatrist, Dr. Karen McAfee, sent to Agency psychologist Dr. Janet Wilson a note stating that she "recommended that she [Petitioner] get ready and go in to work as soon as possible today." R.Ex. 85 at 1. In an earlier file note about a discussion with Dr. Wilson, Dr. McAfee stated that she had expressed concern about "the inconsistencies" and that Petitioner "doesn't seem to take seriously the concerns at work." R.Ex. 85 at 34.

Dr. McAfee drafted a specific treatment plan for Petitioner and shared that plan with the Agency's counseling department in April 1996. *See* R.Ex. 85 at 35. Petitioner changed psychiatrists (from Dr. McAfee to Dr. Merrill Berman) shortly thereafter, as reported by her psychologist, Dr. Edward Dworkin, in a July 14, 1996 letter to ACG Hinton. *See* R.Ex. 86 at 17-18.

On May 31, 1996, Dr. McAfee sent to Dr. Wilson a report summarizing her treatment of Petitioner over a period of two-and-a-half years. The letter included a diagnosis of major depression and alcohol abuse, and recommended further treatment including evaluation for substance abuse. It contained no recommendations with respect to modifications to the work environment. *See* R.Ex. 20.

Petitioner removed Dr. Wilson's access to the substance abuse counselor on June 25, 1996. *See* TR 254-55. She also withdrew Dr. Wilson's access to Dr. McAfee when she changed to Dr. Berman as her psychiatrist. *See* TR 590.

In June 1996, Petitioner's immediate supervisor, Mr. Kiser, acting on her behalf, obtained information from Personnel about the type of medical information needed to obtain an accommodation. Mr. Schulz advised him that he had probably pursued it as far as he could and that Personnel would handle the matter henceforth. *See* TR 62-63.

#### **d. August 1996 14-Day Suspension**

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81. When Mr. Schulz viewed them as genuine emergencies within the meaning of the leave restrictions, annual or sick leave was permitted if available. *See id.* The e-mails reveal a more open approach following the lifting of leave restrictions by Mr. Luke. *See* R.Exs. 67, 69, 71, 72.

Mr. Schulz met with personnel specialists on June 12, 1996 to discuss a second proposed suspension. In his "Note for the Record," Mr. Schulz stated that he and Dr. Wilson had received a letter from Petitioner's psychiatrist at the end of May that "discussed treatment and gave a diagnosis, but said nothing regarding . . . [Petitioner's] capacity to work." He continued: "We discussed whether we should have another physician review the report to see if there was indications that I missed that might warrant an accommodation for a medical condition. During this discussion we contacted Janet Wilson [by phone] to obtain her views." They discussed having a Public Health Service physician review the report; they also considered contacting the psychiatrist "for amplification on capacity to work" and/or talking to Petitioner's psychologist. They decided against these options and went ahead to prepare the proposed suspension letter.<sup>11</sup> P.Ex. 17; *see* TR 259-61, 288.

On June 21, 1996, Mr. Rodrigues proposed a second suspension of Petitioner (for 14 days) because she had been AWOL on 15 occasions, totaling 92 hours, from May 7 to June 13, 1996, and for failure to follow leave restrictions.<sup>12</sup> The letter stated that "[i]n spite of continuous efforts to assist . . . [Petitioner] in improving . . . attendance, . . . [she had] failed to improve." R.Ex. 22 at 6. Mr. Rodrigues further stated, "I am hopeful that this suspension will impress upon you the seriousness of your offenses." *Id.* GAO's Table of Penalties for violation of properly imposed leave restrictions called for a 5 to 14-day suspension for the second offense. *See* R.Ex. 82 at 13. The 14-day suspension was intended to convey to Petitioner that if her record did not improve, "further action would be taken." TR 442.

Before the second suspension had been formally proposed, Mr. Schulz had been concerned that Petitioner's medical condition "might warrant an accommodation," but decided to proceed with drafting the proposed suspension letter. *See* P.Ex. 17.

Petitioner met with Mr. Hinton and Clarence C. Crawford, then NSIAD's operations director, on June 26, 1996 to discuss the proposed 14-day suspension. She requested an extension of time in which to provide medical documentation for her absences, indicating that she was awaiting results of some tests and having difficulty obtaining the required verification of doctors' visits. She also raised concerns about the handling of her case. Her reply deadline was extended from June 28 to July 8, 1996. *See* R.Ex. 17.

Petitioner met with Mr. Schulz on July 1, 1996; in e-mail follow-up to that meeting, Mr. Schulz stated: "You said that I should be able to conclude that depression should cause

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<sup>11</sup> Mr. Schulz noted: "Parenthetically--Janet Wilson did subsequently discuss . . . [Petitioner's] situation with the psychologist on a professional counsel-to-counselor basis. Janet informed me that they discussed a treatment plan for . . . [Petitioner]. We concluded the meeting by agreeing on a process to review and prepare the proposed suspension letter." TR 260.

<sup>12</sup> The 3-day suspension in May and the proposed 14-day suspension were within the guidelines for a first and second offense respectively for AWOL on a scheduled day of work and violation of properly imposed leave restrictions. *See* R.Ex. 82 at 13. However, one factor to be weighed in determining appropriateness of penalty is any "mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, . . ." *Id.* at 8 ¶2-1(11).

inability to come to work on time. I said that I need a statement from a qualified medical provider saying that, in order for me to note such a conclusion.” R.Ex. 66 at 2. Petitioner noted that the leave restriction policy “forces me to incur medical debts that I do not think are necessary or appropriate.” R.Ex. 66 at 1.

On July 8, 1996, Petitioner submitted a sleep report from Dr. Helene A. Emsellem. The report noted

a total absence of stage V rapid eye movement sleep. REM sleep may be absent in the setting of a medication effect and may also not occur if the patient is very tense. Clinical correlation is suggested to better understand the importance of these findings.

R.Ex. 46.

On July 13, 1996, Petitioner received a memorandum from Mr. Rodrigues (dated July 9, 1996), advising her that she must provide medical documentation establishing that 1) she had a “medical condition which needs to be taken into account;” and 2) “the condition is causing or exacerbating the leave problem/performance problem. Further, the documentation should articulate the accommodation(s) for the condition needed while at work.” R.Ex. 23 at 1. Petitioner was warned that absent the medical information Management would have to “proceed as we normally would where serious attendance problems are found to exist.” *Id.* at 2. She was given six days from receipt of the letter—until July 19, 1996--to supply medical documentation addressing seven specific issues.<sup>13</sup> *See id.* at 1-2.

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<sup>13</sup> Petitioner's physician was to address:

- 1) The history of the medical conditions, including references to findings from previous examinations, treatment and responses to treatment;
- 2) Clinical findings from the most recent evaluation, including any of the following . . . findings of physical examinations; results of laboratory tests; and other special evaluations or diagnostic procedures; and in the case of psychiatric evaluation of psychological assessment, the findings of a mental status examination and the results of psychological tests, if appropriate;
- 3) Diagnosis, including current clinical status;
- 4) Prognosis, including plans for future treatment and an estimate of the expected date of full or partial recovery;
- 5) An explanation of the impact of the medical conditions on overall health and activities, including the basis of any conclusion that restrictions or accommodations are or are not warranted, and where they are warranted an explanation of their therapeutic or risk avoiding value;
- 6) An explanation of the medical basis of any conclusion which indicates the likelihood that the individual is or is not expected to suffer sudden or subtle incapacitation by carrying out, with or without accommodation, the tasks or duties of your position;
- 7) Narrative explanation of the medical basis for any conclusion that the medical condition has or has not become static or well stabilized and the likelihood that the individual may experience sudden or subtle incapacitation as of [sic] a result of the medical condition. In this context, "static or well-stabilized medical condition" means a medical condition which is not likely to change as a consequence of the natural progression of the condition, specifically as a result of the normal aging process, or in response to the work environment of the work itself. "Subtle incapacitation" means gradual, initially imperceptible impairment of physical or

On July 14, 1996, Dr. Edward Dworkin, psychologist, sent GAO a letter noting that he needed more precise information but that Petitioner

continues to report chronic debilitating problems with sleep and chronic overwhelming fatigue which prevents her from waking in the morning and from arriving on [sic] work on time if at all, and that even when she is present at work it is very difficult for her to perform her job at the high standards she has set for herself and which are required by her job description.

R.Ex. 18 at 2. He referred her to a specialist in “sleep-chronic fatigue” disorders, and stated that he could not give a prognosis until he obtained the results of consulting evaluations. *See id.*

In a July 17, 1996 e-mail to Mr. Schulz regarding a review of the “records and reports” in Petitioner’s matter, Michele Hamilton, NSIAD human resources manager, stated that “[t]he reports suggest that there is justification to the behavior. This problem could be enhanced if medications and/or other chemical [sic] are taken in any form.” P.Ex. 16; *see also* TR 258.

On July 29, 1996, Dr. Jonathan Forman sent Mr. Rodrigues his assessment of Petitioner’s medical condition, with a diagnosis of chronic fatigue, depression, and sleep disturbance. He did not foresee any change in the near future, nor did he offer suggestions for accommodation. He listed her prognosis as “guarded” and suggested a future option of possibly weaning Petitioner off antidepressants “and see out come.” R.Ex. 24.

On July 31, 1996, GAO sent Petitioner a final decision letter stating that she would be suspended for 14 days. In that letter, Mr. Hinton rejected Dr. Emsellem’s sleep report as justification for Petitioner’s absences, because it “did not state that there is a sleep disorder.” R.Ex. 19 at 1.

The suspension letter also stated that Petitioner had failed to provide evidence to support her medical claims, and that even if she were to do so, “reliable attendance is a critical function of your position.” *Id.* at 6. The suspension took place from August 4 to August 17, 1996.

#### **e. Petitioner’s September 1996 Performance Appraisal**

In September 1996, a year after having received five exceeds fully successfuls and one outstanding, Petitioner received two unsatisfactory ratings—in planning and teamwork—as well as one needs improvement in data gathering, two fully successful and one exceeds fully successful. *See* P.Ex. 48. Her appraisal stated that “she did not allow for contingencies and did not plan and use her time effectively. . . . Consequently, she did not complete all of her assigned tasks within a reasonable period of time even after repeatedly being counseled to do so.” P.Ex. 48 at 2. That appraisal noted that “due primarily to not being available for work,”

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mental function where reversible or not which is likely to result in performance or conduct deficiencies. "Sudden incapacitation" means abrupt onset of control of physical or mental function. [R.Ex. 23 at 1-2.]

she missed an initial deadline, and that she had not been available “on six of the final eleven work days of the fiscal year.” *Id.* at 3. Her unavailability was noted in the category of teamwork, both because she was “frequently unavailable for work and was frequently observed performing nonwork-related activities.” *Id.*

On October 11, 1996, Dr. Merrill Berman provided Mr. Schulz with a letter concerning Petitioner’s medical condition and prognosis. Dr. Berman believed the prognosis was excellent, and that if Petitioner’s appropriate antidepressant medication could be determined, psychotherapy and a good alarm clock likely would lead to full recovery. The condition was described as “depression with insomnia and the neurological findings of absence of REM sleep” which “impact globally on her general emotional status as well as her central nervous system and autonomic nervous system.” R.Ex. 42 at 2. Dr. Berman further explained:

At the current time, this is obviously a chronic and sometimes incapacitating condition. In summary, with such a complete absence of REM sleep, there is no adequate sleep occurring and this would certainly precipitate a physiological problem in attending work regularly. However, there is no reason to believe that it is static or permanent. Once the appropriate medical intervention is made and the sleep pattern becomes reorganized, there is every assumption that she will fully recover.

*Id.* (emphasis added).

Petitioner was notified by e-mail that Dr. Berman’s letter was insufficient because it did not articulate the accommodation needed and the basis for such conclusion, and did not state the expected date of Petitioner’s recovery. *See* R.Ex. 80.

Dr. Berman followed up with a second letter dated October 25, 1996, stating the conclusion that without unforeseen setbacks, a full recovery could be expected within a year. *See* R.Ex. 43. As to an accommodation, Dr. Berman stated that Petitioner would be in a better position to know what would benefit her but that “adjusting . . . [her] work hours to permit her to arrive at work later than presently scheduled and to work past her current departure time should improve her attendance.” *Id.*

Mr. Schulz interpreted Dr. Berman’s letter as: “Do whatever she asks.” TR 175. He maintained that Petitioner’s doctors should propose a specific appropriate recommendation as to an accommodation. TR 212-14. He further believed that the responsibility to ask Agency follow-up questions rested with Petitioner, not Management. *See* TR 212.

On October 30, 1996, Dr. Edward Dworkin, a clinical psychologist, wrote Mr. Schulz to provide requested medical information concerning Petitioner. *See* R.Ex. 44. In particular, he noted that Petitioner

continues to suffer from depression and insomnia. Her insomnia is most likely directly related to neurological findings of absence of REM sleep.

Lack of sleep impacts dramatically on her ability to awaken in the morning and contributes to her symptoms of depression, her ability to arrive at work on time, to concentrate on her work once she has arrived at the office, and to be as productive as she has been in the past.

*Id.* at 2. Dr. Dworkin concluded that complete recovery was likely once Petitioner “has an appropriate antidepressant medication regimen and her REM sleep patterns return to minimally effective levels.” *Id.* He further recommended that

it would be medically appropriate for her to be given a flexible schedule. Examples of this are (a) Flexiplace Program, which permits her to work at home certain days per week, (b) flexitime, which allows her to arrive at work later in the morning and leave later in the evening, or working 40 hours per week in 4 days, (c) removal from leave restriction since the nature of her illness is unpredictable on a day-to-day basis. I believe that . . . [Petitioner] might be able to perform her work within the above mentioned parameters even before she is medically healed.

*Id.* (emphasis added).

If accommodations were not developed, Dr. Dworkin predicted that in light of Petitioner’s medical condition at the time, “she will not be medically able to get to work on time and/or be as productive as past history has shown.” *Id.* He predicted dramatic improvement in attendance and productivity within six months if leave restrictions were removed and accommodations made. *See id.* at 3.

By the end of October 1996, the diagnoses provided by Petitioner’s doctors established a disability—depression—that could be addressed through adjustment of medications over time. Further, they provided GAO with information tying some of the attendance difficulties, particularly late arrival, to her disability. The Agency’s counseling psychologist, Dr. Wilson, also was aware that depression or medication for depression can cause sleep disruption. *See* TR 369, 401-02.

Mr. Schulz maintained that Petitioner presented a “behavior” issue, “leaving . . . co-workers in a lurch.” TR 213-14.

The Agency’s expert on occupational medicine, Dr. Neal Present, noted the usual practice with depression is to discuss suggested accommodations and potential for turning around the situation with the employee’s doctor. *See* TR 623-24. There is no evidence in the record that the Agency discussed Petitioner’s situation with her doctors after the May-June 1996 timeframe.

Petitioner was disabled by depression at the time of her formal application for accommodation. *See* TR 379. Dr. Wilson, the Agency’s psychologist, confirmed that treatment for depression, including medication adjustment, typically can be stabilized within a year but may take longer. *See* TR 397.

**f. Petitioner Files a Discrimination Complaint**

Petitioner filed a discrimination complaint with the Civil Rights Office at GAO when the medical information she submitted led to no relief from her supervisors. *See* TR 540-42.

During mediation efforts in the Fall of 1996, she was offered part-time employment on condition that she fulfill the terms of her treatment plan; she did not view this as economically feasible. *See* TR 575-76.

**g. Petitioner's Appeal of the Denial of Accommodation**

Following the unsuccessful mediation efforts, Petitioner learned that she could appeal the denial of her accommodation request to John H. Luke, then Deputy Assistant Comptroller General for Human Resources. *See* TR 540-41. Previously Petitioner had not been aware that managers could not unilaterally deny accommodation requests. *See id.*; TR 490; R.Ex. 4.

On January 27, 1997, Petitioner submitted a written request for an accommodation of her work schedule to Mr. Luke. *See* P.Ex. 59 (R.Ex. 7). Specifically, Petitioner stated:

I am requesting an adjustment to my work schedule, or such other accommodation as your office may deem appropriate, while I am under treatment for the following medical conditions: major depression with insomnia; chronic fatigue syndrome; and central nervous system and autonomic nervous system malfunction with complete absence of REM sleep on a 16-channel EEG. I am currently under medical treatment of three doctors, each of whom has provided documentation to NSIAD management of the above diagnoses. . . .

*Id.* at 1. Petitioner asked to be able to work at home on Tuesdays and Thursdays, on a trial basis. *See id.*; TR 525, 578. Further, she noted that she had been trying to obtain an accommodation from GAO since 1989, and that

[u]ntil recently, I believed that the decision to grant or withhold an accommodation rested solely with division management, and NSIAD management neither advised me that they could not deny my request nor that I had recourse to your office.

*Id.* at 1-2. Petitioner did not know if flexiplace would be successful for her, because of the connection between medicating the depression and oversleeping. *See* TR 523-26.

On February 25, 1997, Mr. Luke replied to Petitioner's request for an accommodation of her work schedule. He denied the request to work at home on Tuesdays and Thursdays, for the stated reason that

[a] flexiplace arrangement for evaluators is intended to be episodic in nature with measurable work results and not a matter of routine with no definable work or project. Additionally, in your particular situation, it is not appropriate because of your past record of attendance and your most recent performance appraisal (see GAO Order 2330.5).

R.Ex. 8 at 1. Petitioner's supervisor, Mr. Kiser, believed her presence in the office was necessary on a daily basis and that flexiplace would not have been appropriate. *See* TR 44.

Petitioner was not considered for flexiplace because of "[d]ependability, reliability, performance, and the suitability of work to be done at a location." TR 268. Mr. Schulz approved flexiplace arrangements in 1999 for a Band II terminal cancer patient to work at home and in the hospital. P.Ex. 91 at 3, 4; TR 262-63. In 1999 he approved over four hundred hours of flexiplace for a Band II evaluator-in-charge for maternity, child care and work environment reasons. TR 266-68; P.Ex. 89.

The Agency's psychologist, Dr. Wilson, also noted as to Petitioner that "tak[ing] her further away from contact with the work and from the people in the workplace, . . . is usually not a good kind of situation for somebody who is depressed, and not typically the treatment of choice." TR 383. In her view, with depression, "people who are able to get out the door are better off if they try to be engaged and at work, rather than staying away from work." TR 391-92 (emphasis added).

Mr. Luke did lift Petitioner's leave restrictions and allowed her to work a daily schedule with varying arrival and departure times, as long as she arrived between 6:00 and 9:15 a.m. *See* R.Ex. 8 at 1; TR 189. She was told to continue to notify Mr. Schulz or Mr. Degnan of arrival and departure times. She was allowed two hours to report absence due to illness, and two hours to notify her supervisors if emergency annual leave was necessary. She was also told to come to work when possible, even if late. *See* R.Ex. 8 at 1-2; TR 191-92. The letter further stated:

The variable daily work schedule discussed above, as well as the lifting of leave restrictions, will be in effect for the next 60 days in an attempt to help accommodate your medical condition. We hope that you will begin to show improvement during this period in your ability to reach a routine eight-hour workday with regular starting and ending times.

*Id.* at 2.

The Agency viewed the policies set forth in Mr. Luke's letter as accommodations. The February 1997 adjustment to Petitioner's schedule and reporting time for absences were the only "accommodation efforts" listed by GAO in support of the disability application to the Office of Personnel Management. *See* R.Ex. 83 at 37.<sup>14</sup> Time off, part-time schedule, and

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<sup>14</sup> GAO's Certification of Reassignment and Accommodation Efforts stated: "In an effort to accommodate . . . [Petitioner], she was approved February 1997 to vary her arrival time at work anywhere from 6:00 a.m. to 9:15 a.m. She previously worked a tour of duty from 7:30 a.m. to 4:15 p.m. at her own

flexible schedule are typical options at GAO for mental health accommodation. *See* TR 379-80. Working at home was not considered a suitable accommodation for depression. *See* TR 622.

Dr. Wilson testified that it would not be unusual at GAO to give a flexible arrival and departure time to a person with attendance problems as an accommodation because of a problem. *See* TR 380-81.

Throughout this period, Mr. Schulz viewed Petitioner as having an “attendance and reliability” issue rather than a need for medical accommodation. TR 202. He did not believe her attendance and reliability were sufficient to warrant participation in flexiplace. *See id.*

The Agency’s psychologist viewed the attendance problem as complicated by “motivational factors,” not solely related to depression and sleep difficulty, based on correspondence from mental health professionals and Petitioner’s own statements about job dissatisfaction. TR 375. Depression was a “major issue” affecting Petitioner’s attendance, while medication and self-medication may also have been factors. TR 620.

In her May 1997 appraisal, Petitioner received 4 unacceptable ratings: data gathering, data analysis, written communication and teamwork. *See* P.Ex. 51.<sup>15</sup>

On May 26, 1997, Mr. Luke authorized continuation of the work hour procedures established for Petitioner on February 25, 1997 “in light of her medical condition and performance status.” R.Ex. 12.

#### **h. GAO’s Proposal to Remove**

On July 25, 1997, GAO proposed to remove Petitioner from her position for being AWOL on 67 occasions, totaling 447 hours, from September 1996 to April 1997, and her failure to follow leave restrictions. Of the 67 specifications under the heading Absence Without Leave, 56 occurred prior to the request for an accommodation sent to Mr. Luke. The remainder occurred from April 8-11, 14, 16-17, 21-24, 1997. In total, this amounted to 82 hours of AWOL over approximately two months; the five months prior, she had over 350 hours of AWOL. Under the heading Failure to Follow Leave Procedures, 41 of 44 specifications took place before the appeal to Mr. Luke. The remaining 3 occurred on 3 consecutive days in April 1997. These specifications were also listed under the Absent Without Leave category. *See* R.Ex. 25.

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choosing. (Full-time GAO employees are required to report to work no later than 9:15 a.m. each day.) She was required to call her supervisor before 11:15 a.m. if she was going to be out for medical reasons or tardiness. [Petitioner's] . . . attendance did not improve with this accommodation. In the majority of absences, she called her supervisors after 11:15 a.m. not feeling well or waking midday. She stated she was unable to get [sic] work for even a half day due to reduced public transportation." R.Ex. 83 at 37.

<sup>15</sup> Six months earlier a different supervisor had rated her fully successful in data analysis and exceeds fully successful in written communication. *See* P.Ex 48. The record contains no evidence of the mandatory opportunity period, presumably because this is not a performance-based action. *See* GAO Order 2432.1 ¶8 (1996).

The proposal letter, from Gregory J. McDonald, Director of Operations for NSIAD, stated that he had considered several factors in deciding to propose removal: the past disciplinary record (2 suspensions in 1996 for AWOL and failure to follow leave procedures); her 23 years of federal service; her past and present performance (unacceptable in 4 dimensions at the time of the proposal); and the fact that she had been advised repeatedly to follow leave procedures. *See* R.Ex. 25 at 16-17.

Mr. McDonald also reported considering the interest in promoting the efficiency of the Agency. *See id.* at 17. He told Petitioner that her “record shows little evidence to support a finding that you have profited from previous disciplinary actions or that anything short of a proposed removal would end these continuing problems.” R.Ex. 25.

On August 7, 1997, Petitioner met with Mr. McDonald and NSIAD ACG Hinton to present her oral comments on the proposed termination. *See* R.Ex. 26; TR 416. Petitioner stated that her “sleep problem” precluded her from complying with the leave restrictions, and that she did not believe she could improve her attendance. TR 417-18.

Petitioner further stated that she did not see herself as permanently disabled, would like to return to the workforce eventually, and therefore, would not want a termination on her record. She inquired about changing jobs—to a support position—and about working part-time. *See* R.Ex. 26 at 1. Management claimed that these requests were not considered because of the Agency’s downsizing and need for full-time, evaluator employees (*see* TR 437-38) and the then-ongoing hiring freeze (*see* TR 418-19). A hiring freeze would have precluded the Agency from replacing Petitioner either on a part-time or full time basis, and would have prevented replacement of support staff who left during that time.

Petitioner also inquired about a delay in her removal until the Office of Personnel Management could rule on her application for disability retirement, filed on August 15, 1997. *See* TR 418.

### **i. Decision to Remove Petitioner**

On September 11, 1997, GAO notified Petitioner of its decision to remove her for the reasons stated in the July 25, 1997 letter proposing removal. *See* R.Ex. 47. In this letter, signed by Assistant Comptroller General Hinton, Petitioner was denied the options of working in another position or part-time, for the stated reason that “[r]egular and reliable attendance is an essential element of positions in” NSIAD. “Your frequent unscheduled attendance would affect the division’s work performance and productivity, as well as your own, regardless of what position you held.” *Id.* at 1.

Dr. Dworkin pointed out in his medical notes that the letter proposing removal did not mention Petitioner’s documented medical problems. *See* R.Ex. 86 at 30.

The removal letter noted that medical documentation was provided in October 1996 from two doctors: one had stated that if leave restrictions were removed and accommodations made, Petitioner’s attendance and work productivity should improve dramatically within 6 months;

the other stated that allowing Petitioner to arrive for work late and work past her then current departure time should improve attendance, and that full recovery could reasonably take one year. *See* R.Ex. 47 at 3. The letter noted that 3 months later, following Petitioner’s appeal to Mr. Luke, the following “accommodations” were provided:

(1) your leave restrictions were lifted immediately and (2) you were allowed to report for duty . . . at any time between 6:00 a.m. and 9:15 a.m. You were required to work an 8-hour day; notify Mr. Schulz or Mr. Degnan of your arrival and departure times through the electronic mail system; and follow procedures for requesting annual and sick leave or leave without pay as outlined in GAO Order 2630.1, including notifying Mr. Schulz or Mr. Degnan no later than 2 hours . . . from the time you were to report for duty.

*Id.*

The decision letter stated that in assessing the penalty of removal, Mr. Hinton had considered Petitioner’s 23 years of federal service; past and present performance; past disciplinary record; and that she had been “counseled on numerous occasions about your time and attendance and that your work schedule was changed to assist you.” In addition, he noted considering the negative impact of her misconduct on the supervisor’s ability to rely on her to perform her assignments. Finally, he concluded that “the record shows little evidence that you profited from previous managerial sanctions or that anything short of removal would end your continuing problems.” *Id.* at 5-6.

Petitioner ultimately received a disability retirement under the civil service retirement system. In her application, she stated: “My agency has been unable to grant an accommodation for me that would mitigate my absences due to the medical conditions.” R.Ex. 83 at 5. *See also* TR 348. The Supervisor’s Statement portion of the application lists “[I]liberal leave usage approved and flexible starting time authorized at employee’s election” as the accommodation and reassignment provided. R.Ex. 83 at 7. Supporting doctors’ statements indicate permanent partial disability. *Id.* at 10, 16.

In support of the disability retirement application, Dr. Dworkin stated that Petitioner’s condition had not changed between 1996 and August 1997, and that it was therefore to be considered “chronic and unlikely to respond to present medical/psychological treatments.” Accordingly, she “should be considered as permanently, partially disabled, with problems in cognitive functioning, work productivity, ability to arrive at work on time, and frequent absences from work.” R.Ex. 86 at 32.

## **IV. Discussion**

### **A. Applicability of the ADA to Petitioner’s Situation**

The threshold question in this case is whether Petitioner was entitled to the protections of the Americans with Disabilities Act. The ADA requires employers to provide “reasonable

accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee, unless . . . [the employer] can demonstrate that the accommodation would impose an undue hardship.” 42 U.S.C. §12112(b)(5)(A). The Supreme Court has held that this statutory framework requires a case-by-case analysis to determine if the ADA applies. See *Toyota v. Williams*, 534 U.S. 184, 122 S.Ct. 681 (2002). The Court stated that “[a]n individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person.” 122 S.Ct. at 692.

Review of the applicable standard and the facts of this case leads to the conclusion that Petitioner was disabled within the meaning of the ADA, but that she was not “otherwise qualified” for her position so as to meet the standard necessary for protection under the ADA.

### **1. Petitioner was Disabled**

Petitioner must first establish that she suffered from a “disability” within the meaning of the ADA. See *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Murphy v. UPS*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). To establish that she had a disability, Petitioner must show that she had “a physical or mental impairment that substantially limits one or more of the major life activities.” 42 U.S.C. §12102(2)(A). As the Supreme Court explained in *Bragdon*, this requires a three-step analysis: 1) whether a physical or mental impairment exists; 2) what life activity is involved and whether that constitutes a major life activity under the ADA; and 3) whether the impairment substantially limits the major life activity. See 524 U.S. at 631.

Mental disorders, including emotional or mental illness, are within the regulatory definition of impairment under the ADA. See 29 C.F.R. §1630.2(h)(2); *Bragdon*, 524 U.S. at 632. In this case, Petitioner established that she suffered from the mental impairment of depression. See *Criado v. IBM*, 145 F.3d 437, 442-43 (1<sup>st</sup> Cir. 1998). Petitioner had a history of depression and had been under treatment for that illness for the vast majority of her 23-year career at GAO. Her supervisor, Mr. Kiser, knew that she was being treated for depression as early as 1991. Petitioner openly discussed her situation with Mr. Kiser, and indeed, for a period of years, they had an informal arrangement whereby she could make up for her attendance problems by varying her work schedule. Through 1995, Petitioner’s work performance had met or exceeded expectations, although attendance issues had surfaced from time to time. See n.6, *supra*.

The record indicates that Petitioner’s attendance problems apparently affected product delivery in her unit in late 1995 or early 1996, around the time that Thomas Schulz assumed the role of supervisor of the group in which Petitioner worked. These problems had also drawn attention and inquiry from another manager, Brad Hathaway. See TR 434. Mr. Schulz asked Mr. Kiser and Mr. Degnan to remind Petitioner of the importance of completing her work, which was in turn delaying their work product. In March 1996, Messrs. Schulz, Kiser and Degnan met with Petitioner to stress the importance of completing the work and to address the “problems in her coming to work.” TR 134-36. Mr. Schulz informed the meeting participants that the Agency’s “flexitime” arrangement was being inappropriately applied because Petitioner was not seeking advanced approval for varying her schedule and was behind on her work. See TR 133.

Petitioner was warned that any further unreliable attendance would lead to leave restrictions. The meeting notes indicate that Mr. Schulz planned to follow up with the Agency's Office of Counseling, and that Petitioner's potential eligibility for disability retirement was also discussed. At the time of the March 1996 meeting, therefore, Petitioner's supervisors clearly saw that she had an impairment and that she was inappropriately using an unapproved work schedule rather than complying with the Agency's standard schedule.

Following that meeting, Petitioner was required to work a regular, 8-hour day, 40-hour week, and to check in by e-mail with Mr. Schulz upon arrival each day. She was told that this was initiated because of her "current lack of dependable availability for duty." R.Ex. 1. Petitioner agreed to work a regular schedule, and suggested that it commence each day at 6:15 a.m. She did not then press the issue of a rigid work schedule.

Because the ADA was not intended to apply to insignificant or transitory conditions, Petitioner must further establish that her impairment of depression substantially limited a major life activity in order to qualify for the protections afforded by the ADA. See *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 642 (2d Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999). The difference between coverage under the ADA and noncoverage is whether the impairment "merely affect[s] major life activities" or "substantially limit[s] those activities." *Ryan v. Grae & Rybicki*, 135 F.3d 867, 870 (2d Cir. 1998) (emphasis added). To meet the substantiality test, the individual's limitation must be "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to . . . the average person." 29 C.F.R. §1630.2(j)(1)(ii); see *Bond v. DOE*, 82 MSPR 534, 539-40 (1999). The nature and severity, duration or expected duration, and permanent or long-term impact of the impairment are all factors in the determination whether the impairment rises to the level of a disability. See 29 C.F.R. §1630.2(j)(2); *Bond*, 82 MSPR at 540.

The major life activity at issue in this case is that of working. See 29 C.F.R. §1630.2(i). To be substantially limited in the major life activity of working, and thus, within the purview of the ADA, the employee must be unable to perform in a broad range or class of jobs rather than in one particular job. See *Sutton*, 527 U.S. at 491; *EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 656 (5<sup>th</sup> Cir. 1999). While the evaluator position itself constitutes a broad category of professional jobs at GAO, given Management's insistence on strict adherence to the "core hours" concept in her case, Petitioner's impairment would have impacted any job at GAO that fell within those hours. Petitioner's impairment of depression manifested itself in her inability to arrive on time for work and, at times, inability to report for duty at all. Although Petitioner's depression had been present and known in the workplace for a period of years, its impact on her ability to work increased markedly following the March 1996 meeting as she was unable to meet the requirements of the new schedule.

As Petitioner struggled with leave restrictions, followed by suspensions, the effect of her disability heightened and she experienced a growing difficulty with meeting attendance requirements. The record also reveals that the disability had an impact at this stage on her ability to perform while at work, as reflected in the marked decline in her performance appraisal for fiscal year 1996. The 1997 appraisal similarly evidenced deterioration in her performance. Petitioner's likeness to the plaintiff in *Criado v. IBM* is striking:

But by the time Criado requested the leave of absence she had become unable to perform some of the functions of her job. She was having trouble dealing with stress and relating to both co-workers and clients. Depression and anxiety were causing sleep deprivation which affected her timeliness and ability to report to work. This evidence showed that her mental impairments had substantially limited her ability to work, sleep, and relate to others. Overall, there was evidence indicating that she was unable to adequately perform her job as she had in the past. That her depression had been adequately treated through therapy in the past and was expected to be adequately treated through therapy and medication in the future does not establish that she does not have a disability.

145 F.3d at 442.

This picture is consistent with depression as a disability, rather than the transitory condition that is a normal response to specific events and improves with change in circumstance or the passage of time. *See Patterson v. Widnall*, 03970123 (EEOC 1998) (depression that “limits the ability to think, concentrate and make decisions” meets the criteria for a disabling condition). While Petitioner’s depression extended back over a period of years, clearly she was significantly affected in the major life activity of working by the time of the 1996 appraisal. By this time, her depression was of several months duration in its significant impact on her ability to perform her job, and could not be considered episodic or transitory. This constituted a disability within the meaning of the ADA. *See Office of Senate Sergeant at Arms v. Office of Senate FEP*, 95 F.3d 1102, 1105-06 (Fed. Cir. 1996); 29 C.F.R. §1630.2(j).

In addition to depression, Petitioner also attempted to establish that she suffered from a sleep impairment that was disabling. While the sleep study that she provided to her supervisors raised questions about the sufficiency of her sleep pattern, there was no evidence of the recommended follow-up study. The statements submitted by her medical providers in October 1996 tied the sleep difficulty to her depression. *See* R.Exs. 42, 44. Petitioner did establish a likely connection between her depression and sleep difficulty, but she did not prove that she was significantly restricted as to the condition, manner, or duration of her ability to sleep as compared to the average person. *See Popka v. Penn. State Univ.*, 84 F.Supp. 2d 589, 593 (M.D. Pa. 2000), *aff’d*, 254 F.3d 1078 (3d Cir. 2001); 29 C.F.R. §1630.2(j)(1). The evidence did not establish a distinct impairment in this regard for purposes of the ADA.

Petitioner’s attempt to argue that she was disabled based upon chronic fatigue syndrome also must fail. The Agency’s expert testified that such a diagnosis did not fit a situation like Petitioner’s, where other diagnoses explain the medical condition. *See* TR 618-19. This expert testimony was uncontroverted.

## **2. Petitioner was Not “Otherwise Qualified”**

In addition to establishing that she had a disability, Petitioner must show that she was “otherwise qualified” for her job, *i.e.*, that she could perform the essential functions of the position despite having a disability. The ADA defines a “qualified individual with a disability” as:

an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds. . . . [C]onsideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before . . . this description shall be considered evidence of the essential functions of the job.

42 U.S.C. §12111(8). EEOC’s regulation on this topic provides more detail to the definition:

*Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position . . . and who, with or without reasonable accommodation, can perform the essential functions of such position.

29 C.F.R. §1630.2(m). The decision as to whether an individual is qualified must be made with reference to the time the relevant employment action occurred. *See Cisneros v. Wilson*, 226 F.3d 1113, 1129 (10<sup>th</sup> Cir. 2000); *Crocker v. Runyon*, 207 F.3d 314, 319 (6<sup>th</sup> Cir. 2000). In this case, Petitioner’s basic qualification for the evaluator position is not in dispute. The critical question is whether she could perform the “essential functions” of the evaluator position during the relevant time, at least with an accommodation. *See Sutton*, 527 U.S. at 482; *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563-64 (7<sup>th</sup> Cir. 1996); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994).

The Agency argues that Petitioner’s inability to report for work on a regular, timely basis meant that she was unable to perform an essential function of her position—regular and reliable attendance—and thus, she was not a qualified individual with a disability. *See* R.Br. at 55. Three different approaches to whether job attendance is an essential function have developed in the law of disability discrimination. *See generally* Hadley, Guide to Federal Sector Disability Discrimination Law & Practice (2000) at 210.

While many courts take the view that attendance is *per se* an essential function of most jobs, *see, e.g., Greer v. Emerson Electric Co.*, 185 F.3d 917, 921-22 (8<sup>th</sup> Cir. 1999), the better or middle approach holds that whether a certain form of attendance is an essential function requires an individualized determination in each case. *See Humphrey v. Memorial Hospitals Assoc.*, 239 F.3d 1128, 1135 n.11 (9<sup>th</sup> Cir. 2001). Under this line of thinking, the Agency must prove—as with all essential job functions—that punctuality and predictability are essential. *See Ward v. Mass. Health Research Inst.*, 209 F.3d 29, 35 (1<sup>st</sup> Cir. 2000). The third approach is the one taken by the Agency charged with enforcing the ADA’s employment provisions. EEOC takes the view that attendance “is not an essential function as defined by the ADA because it is not one of ‘the fundamental job duties of the employment position’.” EEOC, Enforcement

Guidance: Reasonable Accommodation & Undue Hardship Under the ADA, at n.61 (Mar. 2, 1999) (emphasis supplied) (*quoting* 29 C.F.R. §1630.2(n)(1) (defining “essential functions” under the ADA)). EEOC further notes that attendance is “relevant to job performance,” and that “if the time during which an essential function is performed is integral to its successful completion, then an employer may deny a request to modify an employee’s schedule as an undue hardship.” *Id.* (emphasis in original). Under the middle approach, acknowledging that a “regular and reliable schedule may be an essential element of most jobs,” nevertheless “resolution of the issue in each case requires a fact-intensive inquiry into the pattern of the attendance problem and the characteristics of the job in question. And the defendant, who has better access to the relevant evidence, should bear the burden of proving that a given job function is an essential function.” *Ward*, 209 F.3d at 35.

In this instance, GAO takes the position that attendance is *per se* an essential function for Petitioner’s case and is implicit in the job description. Petitioner herself acknowledged that regular and reliable attendance is an important function of the evaluator position, but disputed that it is an essential function, noting that it is not referenced in the position description and that it is waived in the case of flexiplace participation. *See* TR 545. Petitioner introduced evidence of the Agency granting evaluators liberal application of the workplace rules for various purposes, including use of flexiplace for reasons of serious illness, childcare, and the like. In some cases, flexiplace use was quite limited in time, while other arrangements were repeatedly renewed for extended periods. Thus, strict interpretation of “core hour” attendance for evaluators does not comport with actual practice at GAO. Exceptions have been made when the circumstances seemed to warrant that an employee could perform his or her essential functions with a more flexible arrangement. Thus, it is regular and reliable attendance that is the essential element in this case. *See Walders v. Garrett*, 765 F.Supp. 303, 310 (E.D. Va. 1991), *aff’d*, 956 F.2d 1163 (4<sup>th</sup> Cir. 1992) (“the necessary level of attendance and regularity is a question of degree depending on the circumstances of each position”).

Certain evaluator tasks do imply regular, reliable “attendance” and productivity. Teamwork and working relationships is specifically noted as a category for performance assessment, and the teamwork approach to report production, including meeting attendance, implies the need for timely completion of assignments even if an exception to work site is approved and appropriate. Thus, while attendance *per se* cannot be read into the evaluator position as a “job duty,” its impact on the performance of the job functions of evaluator must be considered. In particular, attendance during crunch periods associated with job conclusion seems critical. Petitioner’s absences were repeatedly noted on the fiscal year 1996 and April 1997 performance appraisals, for their effect of shifting responsibility to others and causing missed deadlines. *See* P.Exs. 48 at 3; 51 at 2-3.

In this circumstance, the employer’s obligation to provide reasonable accommodation must be considered. *See Ward*, 209 F.3d at 33; *Garcia-Ayala v. Lederle Parenteral’s Inc.*, 212 F.3d 638, 647-48 (1<sup>st</sup> Cir. 2000) (individualized assessment required to determine whether employee’s need for leave beyond employer’s absence policy meant that employee was unqualified); *Criado*, 145 F.3d at 443 (temporary leave for treatment would enable employee to perform essential functions). Accordingly, the requirement of “regular and reliable attendance” must be viewed in

the context of Petitioner's request for accommodation, not as a *per se* disqualification of Petitioner for the position of evaluator.

### **3. Petitioner's Request for Accommodation**

Critical to Petitioner's being "otherwise qualified" for the evaluator position is whether she could perform the essential functions of evaluator with an accommodation to her disability. *See* Annotation, *Who Is "Qualified Individual" Under ADA*, 146 ALR Fed. 1, ¶40f (2001). In other words, was there a reasonable accommodation that would have enabled Petitioner to overcome the attendance problem and produce timely evaluator work? By statutory definition this question must be considered in determining whether Petitioner was qualified for her position "with or without reasonable accommodation." 42 U.S.C. §12111(8); *see* Hadley, *supra* at 210.

A reasonable accommodation "enable[s] a qualified individual with a disability to perform the essential functions of . . . [his] position." 29 C.F.R. §1630.2(o)(ii). It is intended to remove workplace barriers, "such as physical obstacles or rules about how a job is to be performed," so as to open up jobs to persons with disabilities and to expand the pool of talent available to employers. EEOC, Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate Provision of Reasonable Accommodation at 2 (Oct. 20, 2000). Job restructuring, modified work schedules and part-time arrangements are all potential reasonable accommodations. *See Ward*, 209 F.3d at 36; *Criado*, 145 F.3d at 441, 443; 42 U.S.C. §12111(9). In some circumstances, an agency must consider reassignment as a reasonable accommodation of a qualified employee with a disability. *See Ignacio v. U.S. Postal Service*, 30 MSPR 471 (Spec. Pan. 1986).

During most of 1996, Petitioner's medical providers did not supply suggestions to support an accommodation in the GAO workplace. Indeed, some offered opinions counterproductive to her cause, such as the suggestion for a functional alarm clock and notations that there were no restrictions on her ability to work. *See* R.Exs. 37, 39, 40, 42. Moreover, Petitioner's own excuses submitted during this time for absence and tardiness included non-medical as well as medical reasons, such as train and car difficulty. *See* n.10, *supra*. Application of the strict schedule agreed to in March 1996 did not cure Petitioner's problem in meeting attendance rules and work expectations. Although Mr. Schulz suggested—as the attendance difficulties continued—that Petitioner select an official start time later than 6:15, she did not do so. Within two weeks of being placed on leave restrictions,<sup>16</sup> Petitioner was AWOL for 29 hours and otherwise violated the restrictions by not submitting written justification for unscheduled absences in a timely manner in accordance with the leave restriction letter. For this reason, Management proposed to suspend Petitioner for three days, in accordance with the Agency's Table of Penalties for violation of leave restrictions. At this time, her supervisors knew that

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<sup>16</sup> Petitioner argues that the Agency improperly failed to take her disability into account before placing her on leave restrictions. *See* P.Br. at 12; P.Reply Br. at 14. The Agency's responses that 1) such action was not discipline and 2) Petitioner "did not advise GAO that she had a medical condition that might impact her attendance until April 29, 1996" are disingenuous at best. *See* R.Reply Br. at 10. Clearly Management was aware of that much during the March 1996 meeting. *See* discussion, *supra*, at 11-16. It has not been established, though, that Management would have known that the impairment constituted a disability at the time leave restrictions were imposed.

Petitioner believed her medical problems were affecting her attendance, but also were aware of the various non-medical reasons Petitioner cited for her attendance difficulties. *See* TR 143. After Petitioner responded to the proposed suspension, the Assistant Comptroller General gave her 5 days to supply detailed information from her medical provider concerning her condition and its impact on her work; otherwise, she was told, his decision would be made on the information then available to GAO.

The Agency imposed the suspension after Petitioner did not provide the requested medical documentation. Petitioner's attendance difficulties continued, and she changed medical providers. In addition, she withdrew the Agency counselor's access to her former psychiatrist and the substance abuse counselor.

In June 1996, Management began preparing a second suspension proposal—this one for 14 days. Mr. Schulz looked at the medical information Petitioner had recently submitted but found nothing concerning Petitioner's capacity to work, and therefore nothing to warrant an accommodation for a medical condition. The proposed 14-day suspension was within GAO's Table of Penalties for a second violation of properly imposed leave restrictions. Petitioner was given an extension of time to secure medical information to support her response.

The medical documentation Petitioner submitted did support the fact that she had a disabling condition, but did not suggest any accommodation that might allow her to perform her job at that time. If medical documentation does not contain the employee's functional limitations, the Agency may seek further documentation before providing an accommodation. *See Gosa v. West*, EEOC 01972468 (2000). At the time of the second suspension, therefore, Petitioner clearly did not satisfy the requirement that she was "otherwise qualified" for her position, since her medical providers did not even propose accommodations that potentially could reverse her attendance difficulties. *See Morrow v. FAA*, 14 MSPR 354 (1983). The Agency was required to specify what types of information it needed to decide the question of whether an accommodation was in order. *See Stander v. Runyon*, EEOC 01930152 (1994). It did so in specific detail in this instance.<sup>17</sup>

Petitioner's medical providers finally submitted suggested accommodations in October 1996: a later work shift, permission to use flexiplace or flexitime, and removal from leave restrictions because of the unpredictability of her condition. During mediation efforts shortly thereafter, Petitioner was offered the option of working part-time, but she declined because she did not believe it was economically feasible. She did not succeed in getting any other accommodation at the unit level, and therefore, in February 1997, asked Deputy Assistant Comptroller General for Human Resources John Luke to consider her request.<sup>18</sup> Specifically, she asked for an adjustment

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<sup>17</sup> It does appear that the Agency could have been more proactive, by telephoning the medical provider and engaging in conversation to ascertain the situation. *See Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1285-86 (7<sup>th</sup> Cir. 1996).

<sup>18</sup> Since denial of a request for accommodation must be referred to a higher authority than the unit level, Management's failure to inform Petitioner of this raises some concern. *See* Policy Memorandum to Division and Office Heads from John Luke (May 15, 1996) (R.Ex. 6); *see also* R.Ex. 4; TR 540-43.

to her work schedule to allow her to work at home two days per week on a trial basis, while acknowledging that she did not know if such an accommodation would succeed.

Mr. Luke denied Petitioner's specific request on the basis that flexiplace was not appropriate without a specific task to be completed and because of Petitioner's ongoing attendance and performance difficulties. The former reason is of questionable validity in light of other evaluators' use of flexiplace. However, Management was following GAO procedure in denying flexiplace based on attendance and performance issues. *See* R.Ex. 9; discussion, *supra*, at 4-5. The Agency's position places too much reliance on internal rules, without reference to the requirement to bend and adjust rules where appropriate in the interest of reasonable accommodation. However, in addition to Petitioner's formal disqualification for flexiplace, both the Agency's staff psychologist—Dr. Wilson, and the expert at the hearing—Dr. Preasant—gave uncontroverted testimony that work at home was not an appropriate course for a person suffering from depression.<sup>19</sup> *See* TR 383, 391-92, 622.

The recurring leave and attendance issues, coupled with the expert view on the appropriateness in this instance, leads to the conclusion that Petitioner's suggested accommodation of flexiplace<sup>20</sup> was not reasonable for her at that time. Accordingly, GAO's decision requiring Petitioner to come to work was appropriate. *See Vande Zande v. State of Wisconsin Dep't of Admin.*, 44 F.3d 538, 545 (7<sup>th</sup> Cir. 1995); *Langon v. HHS*, 959 F.2d 1053, 1061 (D.C. Cir. 1992). The Agency amply established that Petitioner's requested accommodation would not have been reasonable under the circumstances and was in fact medically "contraindicated." *See Carr*, 23 F.3d at 530.

Mr. Luke offered Petitioner a variable daily work schedule within the Agency core hours, and lifted the leave restrictions as accommodations to her condition.<sup>21</sup> Neither of these measures proved effective in curing Petitioner's attendance problems. After Mr. Luke's accommodation letter, Petitioner sustained further AWOL time of 82 hours, and failed to follow leave procedures 3 times. Based on this continued unreliable attendance, as well as more numerous incidents preceding Mr. Luke's intervention, Management proposed to remove Petitioner from

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Petitioner testified that she learned about this requirement not from her unit but through follow-up to the mediation process in November 1996. *See* TR 490, 540-41.

<sup>19</sup> Although Petitioner offered no expert testimony, one of her physicians—Dr. Dworkin—suggested that flexiplace was "medically appropriate" in his October 1996 letter to Mr. Schulz. *See* discussion, *supra*, at 28; R.Ex. 44.

<sup>20</sup> She asked for one specific accommodation—flexiplace—in her appeal to Mr. Luke. An individual with a disability is not entitled to any particular accommodation of her own choosing. *See* 29 C.F.R. Pt. 1630 at App. 1630.9; *Keever v. City of Middletown*, 145 F.3d 809, 813 (6<sup>th</sup> Cir.), *cert. denied*, 525 U.S. 963 (1998); *Newman v. Silver Cross Hospital*, 1998 U.S. Dist. LEXIS 11094 at 16 (E.D. Ill. 1998).

<sup>21</sup> At least the lifting of leave restrictions had been specifically requested by one of Petitioner's medical providers in October 1996. *See* R.Ex. 44. However, the Agency's characterization of the permission to come in anytime between 6 and 9:15 as among the specific suggestions is not quite accurate. *See* R.Reply Br. at 8. Both Dr. Berman and Dr. Dworkin had proposed a later start time, which may well have meant a time beyond the "core hours" start time. *See* R.Exs. 43, 44.

employment. Petitioner then asked for another position or part-time employment. Her request was denied, however, because her attendance difficulties would adversely impact her own and the Agency's performance and productivity, regardless of the position she were to occupy. *See* R.Ex. 47 at 1.

Once Petitioner's medical providers had submitted sufficient information to alert the Agency to the need to identify and provide reasonable accommodation, GAO was obligated to make reasonable efforts toward that goal. As the EEOC Guidance states,

Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability.

29 C.F.R. Pt. 1630 at App. §1630.9.

The ADA does impose on employers an affirmative duty to engage in an interactive process with an individual seeking an accommodation for reasons of medical disability. *See Barnett v. U.S. Air*, 228 F.3d 1105, 1111-14 (9<sup>th</sup> Cir. 2000), *cert. granted*, 532 U.S. 970 (2001). Once the issue is raised, the Agency must undertake to determine if a disability is present and whether the individual could perform the essential functions with an accommodation. In Petitioner's situation, this required considering rules about how the evaluator job is normally performed, and whether fashioning an exception would enable Petitioner to fulfill her duties. If so, then the Agency may show that the particular accommodation would impose an undue hardship.

EEOC's Guidance seems to place the burden on the employer to "make a reasonable effort to determine the appropriate accommodation." 29 C.F.R. Pt. 1630, at App. §1630.9. The regulations state that "it may be necessary for the . . . [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. §1630.2(o)(3). The Guidance further states that the employer should

[i]n consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and . . . [c]onsider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

. . .

This process requires the individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular individual in need of accommodation.

29 C.F.R. Pt. 1630, at App. §1630.9.

The EEOC Guidance does require the individual with a disability to “describe the problems posed by the workplace barrier,” while not necessarily specifying “the precise accommodation.” EEOC, Enforcement Guidance: Reasonable Accommodation at Quest. 5. The parties both bear a burden of showing that there is a plausible, reasonable accommodation. To do this requires interaction: “[I]t would make little sense to insist that the employee must have arrived at the end product of the interactive process before the employer has a duty to participate in that process.’ . . . At the same time, the employee holds essential information for the assessment of the type of reasonable accommodation which would be most effective.” *Barnett*, 228 F.3d at 1113 (*quoting Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 316 (3d Cir. 1999) (citation omitted)). In each case, the specific facts must be examined to determine whether an efficacious accommodation exists. The employer ordinarily possesses greater access to information about the feasibility of potential job modifications. *See Gilbert v. Frank*, 949 F.2d 637, 642 (2d Cir. 1991).

As the Second Circuit summarized, the courts are split on the burdens of proof on this issue:

The D.C. Circuit . . . places the burden of both production and persuasion on the plaintiff. . . . [and] divides the issues of reasonable accommodation into two elements. First, the accommodation must be effective—that is, the plaintiff must show that the accommodation allows her to perform the essential functions of the job in question. . . . Second, the plaintiff must show that the accommodation is reasonable in terms of the burdens that it places on employers.

. . .  
In contrast . . . the Fifth and Ninth Circuits have essentially placed the burden on the issue of reasonable accommodation, as well as on undue hardship, on the employer.

. . .  
This court charts a middle course. . . . [T]he plaintiff bears the burden of production and persuasion on the issue of whether she is otherwise qualified for the job in question. . . . It follows that the plaintiff bears the burden of proving either that she can meet the requirements of the job without assistance, or that an accommodation exists that permits her to perform the job’s essential functions. . .

. . .  
As to the requirement that an accommodation be reasonable, we have held that the plaintiff bears only a burden of production. . . . This burden . . . is not a heavy one. It is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits. Once the plaintiff has done this, she has made out a prima facie showing that a reasonable accommodation is available, and the risk of nonpersuasion falls on the defendant.

*Borkowski v. Valley Cent. School Dist.*, 63 F.3d 131, 136-38 (2d Cir. 1995) (citations omitted). See also *Nesser v. TWA*, 160 F.3d 442, 445-46 (8<sup>th</sup> Cir. 1998). The Tenth Circuit has described the interactive process to include “good-faith communications between the employer and employee. . . . The exact shape of this interactive dialogue will necessarily vary from situation to situation and no rules of universal application can be articulated.” *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172-73 (10<sup>th</sup> Cir. 1999) (*en banc*) (citations omitted).

During Petitioner’s final months of employment, her chronic absenteeism, tardiness, and failure to conform to leave procedures continued, and she was still unable to meet the dependability, reliability and productivity requirements expected of evaluators at GAO. Even after the leave restrictions were lifted, and Petitioner was allowed a varying start time, she failed to meet that approved schedule. Moreover, in both 1996 and 1997, Petitioner’s job performance was not acceptable; it did not improve but declined after Mr. Luke’s intervention. Thus, the modified schedule did not result in her satisfying the job requirements.

Under EEOC’s Enforcement Guidance, if the accommodation provided proves to be ineffective, the agency must determine if an alternative accommodation that is effective can be provided (without causing undue hardship). See Enforcement Guidance: Reasonable Accommodation at Quest. 31. While Petitioner argues that her proposal to work at home two days per week should have been granted, the Agency was not required to “modify its policy concerning where work is performed” in this instance, because the evidence showed that such an accommodation would not have been effective. See *id.* at Quest. 33.

Nor was GAO obligated to create a position for reassignment in this case. The Agency properly reasoned that reassignment would not obviate Petitioner’s difficulty with attendance, and thus, reassignment to a support position would not be an effective accommodation. Moreover, in light of the downsizing of support staff in 1996, availability of such a position would not have been likely. See TR 357, 419, 437-38; *Cravens v. Blue Cross & Blue Shield*, 214 F.3d 1011 (8<sup>th</sup> Cir. 2000); *Bracey v. OPM*, 236 F.3d 1356, 1362 (Fed. Cir. 2001).

Regardless of the standard applied, in this instance no plausible accommodation has been established that would have rendered Petitioner qualified for her position. See *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11<sup>th</sup> Cir. 2000). With expert opinion that Petitioner’s disability made her an unsuitable candidate for flexiplace, Petitioner’s favored suggestion for an accommodation was not required. Moreover, although the Agency clearly made exceptions to rigid attendance requirements, there is no evidence to suggest this was done without supervisory approval or in situations where there were questions about the dependability and productivity of the particular employee. The record amply demonstrates that the “core hour” concept was the norm at GAO, that meeting attendance, data gathering, interviews and the team approach required general conformity to the regular schedule. Petitioner herself acknowledged the importance of attendance for her job during the hearing. See TR 545. She also acknowledged this concept in her Post-Hearing Brief (at 7).

Even under Mr. Degnan’s “liberal treatment” of Petitioner’s leave abuse, prior to the March 1996 meeting about her attendance, her situation had reached the point that it could no longer be

overlooked by her supervisors. *See* R.Exs. 1; 51 at 1, 4-5; TR 434, 431-32. Thus, flexibility itself had proven ineffective before Management intervened.

The expectation of regular and reliable attendance was within Management's prerogative. *See Carr*, 23 F.3d at 529-30; *Jackson v. VA*, 22 F.3d 277, 278-79 (11<sup>th</sup> Cir. 1994). Petitioner's unreliability and faltering performance rendered her unqualified for her position even after Mr. Luke's accommodative efforts. Moreover, Petitioner did not establish that a reasonable accommodation would have compensated for her sporadic work schedule, *i.e.*, would have enabled her to perform her job. *See Palazzolo v. Galen Hospitals*, 1997 U.S. Dist. LEXIS 21915 at 12-13 (N.D. Ga. 1997). Petitioner was therefore not a qualified individual with a disability for purposes of the ADA. *See Cisneros*, 226 F.3d at 1129-30.

Late in the process, as she faced the proposed removal, Petitioner sought the accommodation of a part-time schedule. This option had been offered and declined the previous Fall. *See* TR 355-56, 575-76. The Agency was under no obligation after several additional months of attendance difficulties to make that option available again. *See Smith*, 180 F.3d at 1177; *Hankins v. Gap, Inc.*, 84 F.3d 797, 801 (6<sup>th</sup> Cir. 1996).

On this record, the Agency's expert testimony supports the conclusion that variation from the core hours concept would not have been reasonable. However, that is not to preclude the conclusion that a more flexible approach to job schedule would be required under a slightly different set of facts, *i.e.*, where dependability and reliability were not so clearly at issue. If an individual with a similar disability sought to deviate from the core working hours before establishing a pattern or record of attendance problems, a different result might be required. The Agency did not establish that deviation from the core hours concept would *per se* impose an undue hardship, only that it was not an appropriate accommodation in this case.<sup>22</sup> There is no evidence that a reasonable accommodation existed for the particular facts of this case. *See* 42 U.S.C. §12112(b)(5)(A); *Gilbert*, 949 F.2d at 642.

### **B. Petitioner's Disparate Treatment Theory**

Petitioner also raised in her Petition for Review an allegation that she was treated disparately because of the nature of her disability, on the theory that other employees in the same job category and division were granted the flexiplace accommodation she requested and was denied. *See* Petition at 1, 4, 6-7. In her view, GAO violated this provision by allowing certain employees to make use of flexiplace whose disabilities or medical conditions did not involve a mental illness. *See* P.Br. at 9, 11-15, 19; TR 561-64. Mr. Luke testified to the contrary, stating that mental and physical health issues are handled in the same manner, on an individual basis. *See* TR 469. The only other evidence produced on this point was that the Agency occasionally allowed employees to use flexiplace based upon medical reasons. *See, e.g.*, P.Exs. 77, 84, 86, 87, 90, 92, 93, 97, 98; TR 562. As to a number of these instances, there was uncontroverted testimony that the individuals were dependable, reliable and/or exceptional performers. *See* TR

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<sup>22</sup> With increasing reliance on computer technology, the use of flexiplace to accommodate disability likely is appropriate in more and more circumstances. The Agency suggests as much in its Post-Hearing Brief (at 30-31). The development also would support increased variation from core hours as appropriate.

197-99, 440-41. Petitioner herself acknowledges that she does not know whether the other employee who suffered from depression and did not participate in flexiplace even requested that particular accommodation. *See* P.Br. at 14; P.Ex. 70.

Several witnesses testified for the Agency as to the appropriate characteristics of a flexiplace candidate. These qualities uniformly were tied to the productivity and reliability rather than the physical or mental condition of the employee. *See, e.g.*, TR 200 (“a dependable, reliable, high-performing person”) (Schulz); TR 44 “motivated, self-starters . . . and those who were performing a type of work that would not necessarily require their presence within the office” (Kiser); TR 467 (two conditions: “performance . . . and . . . independent, self starter, delivering on schedule”) (Luke). And Mr. Luke testified that Petitioner met neither condition set forth in the governing order, “both from the performance standpoint, as well as a leave standpoint-- . . . she was under leave restrictions.” TR 467. In addition, Mr. Kiser provided specific, work-related reasons for Petitioner’s unsuitability for flexiplace:

Because of the nature of the work that we were doing, I . . . needed . . . [Petitioner] at the office on a daily basis to retrieve documents from the agency, should that be necessary, on a moment’s notice, to be available to provide documentation . . . to attend meetings. . . . I just personally felt that with she being the only staff that I had, that I would have needed her there on a daily basis.

TR 44. There was no evidence adduced that supported the notion that the use of flexiplace was allowed for any individual whose attendance record made them unsuitable candidates for the program. *See* Order 2300.5 at ¶6.a (R.Ex. 9). As explained above, application of the rule governing flexiplace participation was the appropriate course in Petitioner’s situation. Petitioner has not established a factual basis for her claim of disparate treatment because of her mental disability.

Moreover, based upon the language of the ADA, Petitioner did not meet the threshold for this provision to apply: “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . [the] terms, conditions, and privileges of employment .” 42 U.S.C. §12112(a). The statute itself thus states that application of this provision hinges on the individual being a “qualified individual with a disability.” Hence, for the reasons set forth above in the section on reasonable accommodation, Petitioner was not covered by this provision.

### **C. The Removal Action**

The only challenge Petitioner raises to the removal action is the Agency’s failure to accommodate her disability. While her affirmative defense has failed, it is nonetheless appropriate to review the removal action to ascertain that GAO has met its burden on this issue. The Agency must establish by a preponderance of the evidence that the charged conduct occurred. *See* 5 U.S.C. §7701©(1)(B); 4 C.F.R. §28.61(a)(2). Moreover, under 5 U.S.C. §7513(a),<sup>23</sup> it must establish that the removal was undertaken “for such cause as will promote the

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<sup>23</sup> This provision is applicable to GAO employees pursuant to 31 U.S.C. §732(d)(4).

efficiency of the service,” *i.e.*, that there is a nexus between the conduct charged and the efficiency of the federal service. *Hayes v. Department of Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1984). Lastly, the Agency must show that the penalty selected was reasonable. *Bryant v. National Science Foundation*, 105 F.3d 1414, 1416 (Fed. Cir. 1997); *Douglas v. Veterans Administration*, 5 MSPR 280, 305-07 (1981). These requirements are spelled out in GAO’s regulation governing adverse actions, Order 2752.1, Appendix 1.

The record amply demonstrates that Respondent met its burden on the basis for removal of Petitioner. This was a conduct-based removal, premised on Petitioner’s extensive and repeated AWOL status and failure to follow leave restrictions. The occurrence of the AWOL events is well documented in the record. *See* TR 137, 430-32, 542, 592; R.Exs. 13, 19, 22, 25, 26, 47, 73-81; JS2 at ¶¶8-12, 14. In addition, the Agency established that Petitioner was warned in the March 1996 meeting that previous lax enforcement of its rules and policies concerning leave use would end, and if her “availability for duty continues to be unreliable, further administrative action, *i.e.*, leave restriction, will be imposed.” R.Ex. 1; *see* TR 137. To that end, Petitioner agreed to set hours commencing at 6:15 a.m. and to provide advance notice of medical appointments. *See* R.Ex. 1. As the unapproved absences and late arrivals continued, the Agency placed Petitioner on leave restrictions. Two weeks later, Petitioner received her first proposal of suspension based upon her AWOL status and failure to follow leave procedures imposed by that letter. Because her response raised medical issues, Petitioner was given five days in which to submit documentation in support of that position. When no documentation was submitted, the Agency imposed the suspension of three days. This was within its Table of Penalties for unauthorized absence on a scheduled work day, recurring tardiness that has been reprimanded, and violation of properly imposed leave restrictions. *See* R.Ex. 82 at 12-13. When further incidents of AWOL and leave violations ensued, the second suspension—for fourteen days—followed. Again, Petitioner raised medical issues, but as discussed above in the accommodation section, did not provide sufficient documentation to avert suspension. The fourteen-day suspension also was within the Agency’s Table of Penalties for a second offense in the attendance category. Eleven months passed before the Agency took further action, proposing Petitioner’s removal. In the interim, mediation efforts were undertaken, and Mr. Luke adjusted the requirements for Petitioner to contact supervisors about unscheduled absence and allowed her to adopt a variable schedule within the Agency’s core hours.

After Mr. Luke’s intervention, Petitioner still incurred 82 hours of AWOL and 3 incidents of failure to follow leave procedures. The penalty of removal was within the Agency’s Table of Penalties for attendance-related offenses after the second offense. *See* R.Ex. 82 at 12-13. Moreover, the record is replete with testimony and documentary support for the conclusion that Petitioner’s unreliable attendance negatively impacted the work of her unit as well as her own productivity and performance. The nature of Petitioner’s offense—chronic absenteeism in various manifestations—clearly was tied to the efficiency of the federal service. Thus, the Agency’s determination, after repeated efforts to correct the problem, to institute removal proceedings was an acceptable exercise of its managerial discretion. *See Bryant*, 105 F.3d at 1416-18; *Fisher v. Department of Defense*, 54 MSPR 675 (1992).

Finally, the Agency must establish that the penalty of removal was reasonable in the circumstances. This requires consideration of the so-called “*Douglas* factors” enunciated in

*Douglas v. Veterans Administration*, 5 MSPR at 305-06, and reiterated by GAO in Order 2752.1 Appendix 1. In this decision, the Agency’s managerial discretion is entitled to considerable deference. See *Washington v. Department of Army*, 813 F.2d 390 (Fed. Cir.), cert. denied, 484 U.S. 985 (1987).

On the record in this case, it is clear that GAO has exercised its managerial judgment properly and within the “tolerable limits of reasonableness.” See *Douglas*, 5 MSPR at 302. The proposing and deciding letters on Petitioner’s removal show that the Agency considered and evaluated a number of the *Douglas* factors in reaching its decision: the long history of attendance problems, including supervisory warnings; the ineffectiveness of leave restrictions, warnings, and suspensions in correcting the attendance problems; the ineffectiveness of the February 1997 accommodations in curing the absenteeism; Petitioner’s faltering performance; and her 23-years of service. See R.Ex. 25 (proposal to remove); (R.Ex. 47) (decision letter).

While the *Douglas* factors constitute neither an exhaustive list of relevant considerations in the penalty determination, nor an enumeration of factors that all apply in each case, one factor at least bears discussion here. Under *Douglas*, an Agency is expected to consider “mitigating circumstances” in assessing a penalty. In her oral reply to the proposal to remove, Petitioner requested a delay in the removal until the Office of Personnel Management could rule on her application for disability retirement, or alternatively, either a job change to a support position or a part-time schedule. See R.Ex. 26. The decision letter reiterates these requests, but its statement denying the requests is rather conclusory:

I have decided that it is not in GAO’s or the division’s best interest to delay making a decision on the proposal for your removal. Also, I have decided not to consider you for other types of positions or a part-time work schedule. Regular and reliable attendance is an essential element of positions in the . . . Division. Your frequent unscheduled attendance would affect the division’s work performance and productivity, as well as your own, regardless of what position you held. I have based my decision on a thorough review of the entire record of events that culminated in . . . [the proposal to remove] letter.

R.Ex. 47 at 1.

Although Petitioner did not meet the requirements for ADA protection, because she was not “otherwise qualified” for her position, it is striking that GAO did not consider her impairment as a mitigating factor at the end-stage of her employment when removal was at stake. The Agency’s recitation of offenses and factors considered in both the proposal and decision letters evidences no reference to Petitioner’s disability. In light of the extensive record supporting the impairment of depression and Petitioner’s 23 years of service, it is unclear why the Agency rejected the request that Petitioner’s removal be stayed pending OPM action—even on a part-time basis during the interim—or did not otherwise give some weight to this as a mitigating factor. This is not to question the Agency’s decision that the other *Douglas* factors—particularly the unlikelihood that the absenteeism could be turned around and the length of time over which it extended—did not outweigh Petitioner’s impairment. While not legally required, a

different approach could have been applied to the interim while Petitioner awaited OPM's decision.<sup>24</sup>

#### **D. Other Matters**

Petitioner continues to assert in her Post-Hearing Brief that “GAO’s guidance implementing the ADA discriminates against the disabled and perpetuates discrimination.” P.Br. at 2, 20-23. This claim was previously determined not to provide an independent basis for seeking relief, and was dismissed by Order of July 11, 2000.

The Petition for Review also alleges that Petitioner should have been allowed the accommodation of working during the nighttime hours, because of her diagnosed sleep disorder and the Agency’s precedent in allowing another employee with a sleep disorder to do so. *See* Petition at 4. Petitioner did not pursue this aspect of her claim at the evidentiary hearing.<sup>25</sup> The Agency argues that such an accommodation would not have been reasonable, because it would have been outside the Agency’s core hours and would have precluded her from performing essential functions requiring interaction among evaluators. *See* R.Br. at 57. More importantly, Petitioner did not establish that she was disabled based on a sleep disorder, which was the rationale underlying this theory. Furthermore, the lack of reliable attendance and declining performance—the basis for her unsuitability for flexiplace—would seem equally relevant on the ability to work wholly outside the core hours. The Agency does not adequately address the use of night work as a potential accommodation, but under the circumstances of this case, it would not have been a suitable option.

#### **Conclusion**

The Agency’s removal action against Petitioner based upon her chronic absenteeism and repeated failure to follow leave procedures was clearly supported by the evidence. Petitioner failed to establish her affirmative defense premised on the alleged failure to provide a reasonable accommodation because, while disabled, she was not “otherwise qualified” for her position due to her lack of reliable, dependable attendance. While the difficulties detailed in this record might have been handled in a more compassionate manner, and with greater deference to her length of service, they were not handled unlawfully. The removal is, accordingly, **sustained**.

#### **SO ORDERED.**

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<sup>24</sup> Petitioner did not introduce any evidence of specific harm flowing from the Agency’s refusal to keep her on the rolls for the interim period. In light of the extensive record of sporadic attendance, one cannot assume that her absenteeism would have improved while she awaited OPM’s decision. Ultimately, Petitioner received disability retirement retroactive to the date of her departure from GAO. *See* TR 545, 571-72.

<sup>25</sup> It appears that Petitioner waived her right to present testimony or evidence concerning the other employee allowed to work during the night. *See* Status Conference Report and Order of Oct. 4, 1999 at 3.