

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

RYAN MURPHY, Appellant,

vs.

DEPARTMENT OF SAFETY, DENVER SHERIFF'S DEPARTMENT,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on Nov. 7, 2011 before Hearing Officer Valerie McNaughton. Appellant was represented by Nikea Bland, Esq. Assistant City Attorney Jennifer Jacobson represented the Agency. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE APPEAL

Appellant Ryan Murphy has been a Deputy Sheriff with the Agency for about two and a half years. This appeal challenges his Feb. 11, 2011 disqualification by the Denver Sheriff's Department (Agency). Agency Exhibits 1 – 3, 6 and 10, and Appellant's Exhibits A – J were admitted by stipulation of the parties, and Exhibit 9 was admitted during the hearing.

II. ISSUE

The sole issue in this appeal is whether the Agency established that Appellant's disqualification was taken in compliance with the Career Service Rules, § 14-20 *et. seq.*

III. FINDINGS OF FACT

On Dec. 29, 2009, Appellant was granted six months of intermittent leave under the federal Family Medical Leave Act (FMLA). In July 2010, Appellant obtained recertification of the intermittent leave based on the serious health conditions of anxiety, panic attacks, and depression for the period July 10, 2009 to July 9, 2010.¹ The certification estimated that Appellant would require leave for episodes approximately

¹ Neither party submitted the original certification into evidence, and its terms are not at issue in this appeal. Appellant testified that the Dec. 2009 request for FMLA leave was for depression arising from marital and other problems, and this was not disputed by the Agency. [Appellant, 12:01 pm.]

one to two times per month with an average duration of one to two days per occurrence. [Exhs. 6-19 to 6-22.] On Nov. 2, 2010, Senior Human Resources (HR) Professional Cindy Torres erroneously² informed Appellant by letter that he had used 392.03 hours of FMLA, and that it would be exhausted when his usage reached 495 hours. [Exhs. 3-40, 3-41.] Torres' letter also informed Appellant that the Agency would initiate the interactive process (IAP) if he used all of his FMLA leave entitlement. An IAP is used to determine whether an employee is disabled within the meaning of the Americans with Disabilities Act of 1990 (ADA), and, if so, whether there are reasonable accommodations that can be provided. CSR §§ 5-84 E; 14-21.

As of Dec. 2, 2010, Torres calculated that Appellant had used 433.31 hours of FMLA since July, well above his psychiatrist's estimate of 16 to 32 hours per month as stated in the July certification. Based on this pattern of usage, Torres emailed Captain Connie Coyle and Sr. HR Professional Melissa Miera, seeking their assistance on whether the interactive process should be commenced. [Exhs. 3-44; 10.] The next day, Miera sent Appellant a letter informing him that his leave usage had exceeded the frequency and duration listed on his medical certification, and asked him to obtain a new certification from his medical provider by Dec. 18, 2010. [Exh. 9.] The FMLA entitles an employer to request a recertification if circumstances such as the duration or frequency of the absence have changed significantly. 29 CFR § 825.308(c)(2). Appellant did not thereafter submit a recertification to the Agency with fifteen days, or assert that deadline was impractical despite his "diligent, good faith efforts", as he was required to do under 29 C.F.R. § 825.308(d). In any event, Appellant's FMLA leave was approved up to July 9, 2011 or the date he used up all 495 hours, the first to occur. [Exh. 9.] Since Appellant had exhausted all his leave before the Agency requested recertification based on changed conditions, the FMLA period had expired before he could obtain recertification. [Miera, 9:57 am.]

On Dec. 15, the Agency initiated the interactive process. [Exh. 6-27.] That day, it was discovered that Appellant had exhausted his FMLA leave on Oct. 9, 2010, since his entitlement period actually began in Dec. 2009, and leave used from that time to July 2010 had not been included in Torres' previous calculations. [Exh. 3-47.] Coyle and Miera met with Appellant when he came to the Roslyn Building out of uniform on another matter. Miera told him he would need a return to work pass under Agency policy because he had incurred three consecutive sick days. Appellant appeared sad and began to cry. He asked Coyle about keeping his job, but stated he was not ready to return to work. [Coyle, 11:09 am; Miera, 9:48, 9:59 am.]

On Dec. 20, 2010, Coyle informed Appellant in writing that the interactive process had been initiated. Coyle told him that his continued use of leave after exhausting his allotment under the FMLA led her to begin the process in order to determine three issues: 1) whether he was able to perform the essential functions of his job, 2) whether he was disabled under the ADA, and 3) whether there were reasonable accommodations available to help him perform his essential functions. Appellant was then directed to provide further clarification from his medical providers about his

² As noted later in this decision, this was a miscalculation which was discovered by Melissa Miera on Dec. 15, 2010. [Exh. 3-45.]

medical condition and ability to work. In aid of that, Coyle enclosed Appellant's job description, his Performance Enhancement Plan (PEP), a Reasonable Accommodation Questionnaire (RAQ), and a medical release, with instructions to have the doctor fax the RAQ and medical release to ADA Coordinator Rita Murphey or bring it to the IAP meeting, then set for Jan. 11, 2010. "The medical release will enable Ms. Murphey to have dialogue with your health care provider if that should become necessary. Please note that we reserve the right to have our own medical expert review the findings of your provider." The letter advised Appellant that if it finds Appellant is not able to return to his position full time, he may qualify for reassignment to a vacant CSA position. Appellant was also informed that he may be disqualified if he is not disabled and cannot perform the essential functions of his job, or if he is disabled but cannot be reasonably accommodated. [Exhs. 3-20 to 3-39.]

The day the IAP meeting was set to be held, Appellant's counselor from Kaiser medical group, Michelle Larson, sent Coyle a note that Appellant was unable to attend the meeting or to work from Jan. 4 to Jan. 18, 2011. Larson asked Coyle to reschedule the meeting based on this illness. [Exh. 6-17.] In response, Coyle reset the meeting for Jan. 20, 2011, and sent Appellant another copy of the medical release to sign and return to the Agency by Jan. 18th. [Exh. 3-16, 3-17.]

Three days before the newly scheduled IAP meeting, the ADA Coordinator still had not received any medical information from Appellant's providers or a signed medical release. Murphey and Coyle had already contacted the providers to encourage them to return the completed RAQ, without success. Murphey then contacted Appellant to again request that he return the release. Appellant signed and returned the releases for both providers on Jan. 17, and returned them to Murphey the next day, two days before the IAP meeting. [Exhs. 6-8, 6-9; Murphey, 10:45 am.] Murphey then faxed another copy of the RAQ and Appellant's job description to his psychiatrist and counselor. [Murphey, 10:33 am.]

Just before that meeting, Rita Murphey received a statement by Appellant's therapist Judith Libby-Lauwereins and the completed RAQ from Dr. Jody Robinson. [Exhs. 6-6 to 6-14.] Libby-Lauwereins recommended that Appellant remain in treatment for his condition, but reported that she was not able to assess Appellant's ability to return and safely perform the job "[b]ased on the high risk level of [Appellant's] employment", and that she could not determine what accommodations could be offered him. [Exh. 6-6.] Murphey followed up by telephoning Libby-Lauwereins, "stressing that I needed an understanding of his ability to work in this job or any other." [Murphey, 10:54 am.] Libby-Lauwereins stated that the Kaiser behavioral health department had a strong preference for keeping people working, but she could not assess Appellant's ability to perform his job. Murphey then remarked, "For whatever reason, Deputy Murphy was taken off work. If you took him off work, why can you not tell me if he is able to return to work in some capacity?" We went round and round on that." [Murphey, 10:55 am.]

Dr. Robinson confirmed Appellant's diagnosis of "major depression, recurrent with insomnia, lack of motivation, isolation, irritability and anger, some suicidal feelings [and] recommended continued therapy and medication." [Exh. 6-10.] As to the disability

issues, the doctor indicated she could not assess Appellant's ability to perform the essential functions of his job or work at all, and could not inform the Agency when he may be able to return to work. She added that her patient "reports low energy and insomnia are interfering with daily tasks and work tasks because of impaired focus, concentration and fatigue", and that Appellant told her he is currently unable to perform his job or to work in any capacity because of those problems. [Exhs. 6-11, 6-12.]

At the IAP meeting, Appellant told Murphey he was "feeling much better and able to return to work." [Exh. 6-3.] Based on that information, Murphey encouraged Appellant to go back to his treating physician to discuss his medical situation and his ability to do his job. [Appellant, 12:19 pm.] Murphey noted that Appellant's mental health issues were of concern because he serves as a deputy and carries a gun, and that his behavioral therapist relied on "the high risk level of Mr. Murphy's employment" in declining to assess his ability to "return and safely perform his job." [Murphey, 10:44 am; 6-6.] Murphey testified that if she had received a medical statement returning him to work, she would have then referred the matter back to the Agency for a fitness for duty evaluation because of his mental health issues and the public safety nature of his employment. [Murphey, 10:44 am; Exh. 3-30.] Murphey told Appellant that if he could not work as a deputy sheriff based on his medical condition, there was a possibility of a reassignment to a position he could perform. [Murphey, 10:53 am.]

On Feb. 1, 2011, after having received no further information from Appellant or his medical providers, Murphey informed Appellant and the Agency that she was concluding the interactive process. She noted that Appellant's medical providers were unable to assess his ability to work or perform his job, but that Appellant had told his doctor he was unable to work "due to ongoing mood symptoms, low energy, and insomnia which are interfering with his daily tasks and work tasks because of impaired focus, concentration and fatigue." [Exhs. 6-1, 6-2, 6-12.] Based on the information available to her, Murphey determined that Appellant could not work in any capacity, and therefore ended the IAP without investigating a job reassignment. She did not refer Appellant for an independent medical examination because there was no conflicting medical information which needed to be resolved. [Murphey, 10:42.]

The next day, the Agency sent Appellant notice that it was considering disqualification under CSR § 14-20 because he had exhausted his FMLA leave and continued to take time off. The letter noted that the IAP had concluded with findings that Appellant was unable to perform his essential job functions and there were no reasonable accommodations that could be offered him. Appellant was informed that the pre-disqualification meeting was set for Feb. 9, 2010 to determine three issues: 1) did a physical or mental impairment prevent Appellant from satisfactorily performing the essential functions of his position, 2) was Appellant disabled under the ADA, and 3) was there a reasonable accommodation that would allow him to perform those duties? [Exh. 2.]

At the pre-disqualification meeting, Appellant told Director of Corrections and Undersheriff Gary Wilson that he was feeling better, but that his doctors could not release him back to work because they did not understand the qualifications of his position. Appellant did not provide any additional medical information or request

additional leave, both of which are the employee's responsibility. [Wilson, 9:26 am.]

Wilson made the decision to disqualify Appellant after reviewing the Internal Affairs file and considering both the medical reports and Appellant's statements at the pre-disqualification meeting. [Exh. 3.] Wilson relied on ADA Coordinator Murphey's conclusion that Appellant was unable to perform the essential functions of his job or work in any capacity, and that reasonable accommodation could not be provided. Wilson therefore disqualified Appellant under CSR § 14-22, which authorizes disqualification of an employee who is unable to perform his essential duties because of a mental or physical impairment or incapacity. [Exh. 1.]

IV. ANALYSIS

The Agency bears the burden to prove that its disqualification of a career service employee complies with the Career Service Rules governing disqualifications. In re Crescente, CSA 82-06, 6 (2/2/07); see also In re Cullen, CSB 165-04, 4 (1/18/07); C.R.S. 13-25-127(1) (2006).

An employee shall be disqualified "if a legal, physical, mental or emotional impairment or incapacity, occurring or discovered after appointment, prevents satisfactory performance of the essential functions of the position." CSR § 14-21. An agency need not explore reasonable accommodation before a disqualification unless the employee is determined to be disabled under the ADA. Id.

1. Did Appellant suffer from a mental or physical impairment under the ADA?

The Career Service Board has found that an impairment as that term is used in the disqualification rule "is the same as the definition of 'impairment' used in the ADA", including, in pertinent part, "[a]ny mental or psychological disorder, such as . . . emotional or mental illness". In re Cullen, CSA 165-04, 3-4 (CSB 1/4/07), citing 29 CFR 1630.2 (h)(1)(2); CSR § 14-21.

The Guidelines for the Equal Employment Opportunity Commission recognize major depression as a mental impairment under the ADA, relying on the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) which identifies major depression as a mental disorder. <http://www.eeoc.gov/policy/docs/psych.html>. Accord, Ogborn v. United Food & Commercial Workers Union, Local 881, 305 F.3d 763, 767 (7th Cir. 2002); Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1088 (9th Cir.2001); Doyal v. Oklahoma Heart, Inc., 213 F.3d 492 (10th Cir. 2000); Pritchard v. S. Co. Servs., 92 F.3d 1130, 1132 (11th Cir.1996), amended on other grounds 102 F.3d 1118 (11th Cir.1996), cert. denied, 520 U.S. 1274 (1997).

Appellant first applied for FMLA leave in December 2009 based on his ongoing depression and its symptoms, and it was granted for a period of six months. In July 2010, his psychiatrist submitted a certification to extend the FMLA period. The certification stated Appellant suffered bouts of anxiety, panic attacks and depression lasting one to three days and requiring therapy and medication, and that this condition was

expected to continue intermittently for another year. [Exh. 6.] Appellant used 495 hours of leave because of that condition over ten months, which totaled about 48 days of 10.32 hour shifts. [Exh. 10.]

On Jan. 18, 2011, Dr. Robinson reaffirmed Appellant's diagnosis of recurrent major depression, with symptoms including insomnia, mood disorder, intense anger and suicidal feelings. The most recent episode began on Jan. 4th, and required Appellant to be off work for two weeks. That incident required intensive individual therapy and medication, which was not yet showing benefits. The psychiatrist was unable to assess Appellant's ability to perform his or any job, but reported that Appellant told her he was not able to work in any capacity. [Exh. 6-10 to 6-13.] Appellant did not seek additional time to consult with his physician prior to the IAP meeting, although he was informed on Dec. 20th that he had the right to do so. [Exh. 3-21.] Appellant was also aware that he could still request a return to work pass from his doctor, even after the IAP meeting had been concluded. [Appellant, 12:29 pm.]

I find based on the evidence that Appellant was suffering from major depression at the time of his disqualification. That condition constituted a mental impairment under the Career Service Rules and the ADA, satisfying the first element of proof for disqualification. CSR § 14-21; 29 CFR § 1630.2(h)(1), (2). See In re Cullen, CSA 165-04, 4 (CSB 1/18/07).

2. Did the impairment occur or become discovered after Appellant's appointment to his position?

The only evidence on this issue is Appellant's testimony that he applied for and received certification for FMLA leave for depression in December 2009, well after his appointment in July 2008. [Appellant, 12:01 pm; Exh. I-2.] Therefore, the Agency satisfied its burden to prove that the impairment arose after Appellant's date of hire. See In re Cullen, CSA 165-04, 4 (CSB 1/4/07).

3. Did the impairment prevent Appellant from satisfactorily performing the essential functions of his position?

Next, it must be determined whether the Agency proved Appellant's impairment prevented him from performing his essential job duties within the meaning of the Career Service Rules governing disqualifications. The Agency contends that Appellant was unable to perform his duties because his impairment - major depression - prevented him from maintaining regular attendance.

The identification of the essential functions of a position must be made on a case-by-case basis. In re Cullen, CSA 165-04, 5 (CSB 1/18/07); 20 CFR 1630.2. "A job function may be considered essential for any of several reasons". 20 CFR 1630.2(n)(2). "Evidence of whether a particular function is essential includes, but is not limited to: (i) The employer's judgment as to which functions are essential; [and] (ii) Written job descriptions prepared before advertising or interviewing applicants for the job." 20 CFR 1630.2 (n)(3)(i), (ii); 42 USC § 12111(8).

The overwhelming majority of courts considering this issue have recognized that attendance is an essential function of almost any job. Mulloy v. Acushnet Co., 460 F.3d 141 (1st Cir. 2006); Vandenbroek v. PSEG Power CT LLC, 356 Fed.Appx. 457, 460 (2nd Cir. 2009); Miller v. Univ. of Pittsburgh Med. Ctr., 350 Fed.Appx. 727, 729 (3rd Cir.2009); Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal., 31 F.3d 209, 213 (4th Cir.1994) ("An employee who cannot meet the attendance requirements ... cannot be considered a 'qualified' individual protected by the ADA."); Hypes ex rel. Hypes v. First Commerce Corp., 134 F.3d 721, 727 (5th Cir.1998); Brenneman v. MedCentral Health Sys., 366 F.3d 412, 418-19 (6th Cir.2004); Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co., 201 F.3d 894, 899-900 (7th Cir.2000); Brannon v. Lupo Mop Co., 521 F.3d 843, 849 (8th Cir. 2008); Mason v. Avaya Communications, Inc., 357 F.3d 1114, 1119-1120 (10th Cir.2004); Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1306 (11th Cir.2000); Carr v Reno, 23 F.3d 525, 530 (DC Cir. 1994); 5 Emp. Coord. Employment Practices § 9:47.

It is not disputed that attendance at work is an essential function of the job of Deputy Sheriff, whose job it is to provide for "the security, care, custody and safety of Denver County prisoners and the public *in detention, medical, court and transportation settings.*" [Exh. 3-29, emphasis added.] The Agency considered attendance essential to allow Appellant to perform his central duty of guarding and protecting prisoners in the jail setting. Wilson reviewed Appellant's leave and attendance records, and determined that Appellant's use of leave was excessive. [Wilson, 9:26 am.] He noted that Appellant never requested additional leave and was aware of his right to do so, as outlined in the collective bargaining agreement that governed his employment. [Wilson, 9:27 am.] Appellant presented no evidence and does not argue that his public safety duties could be completed on a part-time basis, "off site or deferred until a later day." Jackson v. Veterans Admin., 22 F.3d 277, 279 (11th Cir. 1994).

The Agency approved FMLA leave for Appellant based on his diagnosis of depression in Dec. 2009, which was recertified in July 2010. Appellant exhausted all of his FMLA leave by Oct. 9, 2010, but continued to be granted FMLA leave until Nov. 29, 2010 because of an Agency miscalculation of his leave usage. [Exhs. 3-40, 10-2.] As a result of his continued use of leave after his FMLA hours were depleted, the Agency initiated the interactive process to determine if his continued absences were due to a disability, and if so, whether he could be reasonably accommodated.

The interactive process spanned from Dec. 15, 2010 to Feb. 1, 2011. The Dec. 20th letter requested medical information from Appellant confirming his ability to do the job, and informed him the Agency could have its own medical experts review his submittals. Appellant was informed that the issues to be addressed were whether he was disabled, and if so, whether he needed reasonable accommodations. He was aware that his medical providers had confirmed he was still undergoing intensive treatment for major depression that Appellant believed was causing his inability to work in any capacity. Appellant was also advised of the possibilities of reassignment and disqualification from his position, depending on the outcome of the interactive process. Finally, Appellant was assured that he could request additional time to consult with his medical providers if he needed it, even after the IAP meeting had been held. Thus, Appellant was on notice of his rights and responsibilities during the IAP and disqualification processes. Appellant had the opportunity and ability to produce a

complete assessment on those issues, but failed to do so.

Instead, Appellant's medical providers submitted two reports that confirmed his mental impairment but were inconclusive as to his ability to do his job. Appellant admits that Rita Murphey told him at the IAP meeting that he needed to go back to his doctors and discuss whether he could perform his job if he believed he was now ready to return. [Appellant, 12:29 pm.] During the six weeks consumed by the two processes, Appellant failed to submit any medical or other information supportive of his statements at the IAP and pre-disqualification meetings that he was able to perform his duties. In addition, his statements were contradicted by Appellant's own report to his psychiatrist in January that he believed he could not work in any capacity, and Appellant's continued lengthy absences from work because of his impairment. Under these circumstances, the Agency was not required either to extend the interactive process or to conclude it without determining the issues.

At the conclusion of the interactive process, the ADA Coordinator was left with the following facts relevant to whether Appellant could perform his duties: according to his medical providers, Appellant was currently suffering from long-term major depression with serious symptoms, including intense anger, panic attacks, and feelings of suicide. Appellant's medical providers were unable to determine whether his impairment prevented him from performing his essential functions, despite their receipt of his job description and performance plan detailing his duties as a Deputy Sheriff to protect jail inmates and carry a gun. Appellant failed to respond to numerous Agency reminders to seek medical opinions regarding his medical condition and his ability to perform his job, including the need to maintain regular attendance. Appellant did not request additional time to obtain that information, and failed to seek additional FMLA or other leave, instead asserting that he was ready to return to work. Murphey was not in possession of any contradictory medical information that would have justified a referral to the city's own medical expert to obtain a second opinion as to any issues arising from his use of FMLA leave. *See* 29 CFR § 825.307. Appellant's failure to submit a request for leave in any form defeats any claim or defense under the FMLA. 29 USC § 2612(e)(1), (2); *Brohm v. JH Properties, Inc.*, 149 F.3d 517 (6th Cir. 1998).

Appellant's attendance records and all other evidence demonstrate that his mental impairment caused continuous lengthy absences over the course of the last thirteen months. The only contrary evidence was Appellant's statements to Murphey on Jan. 20th and Wilson on Feb. 9th, that he now felt fine and believed he could return to work. In the face of his contrary statement reported by his doctor on Jan. 18th that "[patient] reports he is unable to perform work responsibilities in any capacity", a statement Appellant never denied making, the Agency acted reasonably in requesting that Appellant provide additional information regarding his ability to work prior to concluding the IAP or disqualification procedures. Appellant alone was able to obtain an assessment from his medical providers about his current medical condition, his ability to work, and whether any limitations would be expected to continue into the future.

Even in the absence of any additional information from Appellant, Murphey did have substantial non-medical information establishing that Appellant was prevented by his depression from regular attendance at work, an essential function of his position.

First, Appellant told Coyle in December and his psychiatrist in January that he could not work at all due to his depression. Second, his leave and attendance records indicated that he was unable to come to work because of his depression several months out of the past year, during which he worked only 21 full or partial days in the past five months and used 27 days of unauthorized leave. [Exh. 10.] Third, Appellant's most recent bout of depression occurred in early January, two weeks before the IAP meeting, and lasted for the entire two weeks. [Exh. 6-17.] Fourth, his leave use for his depression was well in excess of his maximum FMLA leave allotment and other paid leave, and continued to be excessive during the interactive process. These undisputed facts effectively rebut Appellant's statement that he was ready and able to return to work.

In addition, Murphey reasonably relied on the consistent medical certifications from July 2010 to January 2011 that Appellant's mental impairment was continuing and severe, and not yet responsive to therapeutic treatment and medication. Appellant had the exclusive ability to obtain his own medical assessments, and had a responsibility to do so similar in nature to that imposed on applicants for FMLA leave in obtaining recertifications. 29 CFR § 825.308(d). Despite his knowledge that he could obtain a statement from his doctor about his ability to return to work and Murphey's diligent efforts to obtain an assessment from Appellant's medical providers, Appellant failed to submit any information, medical or otherwise, on this issue, and failed to present any evidence at hearing to rebut the Agency's evidence as to the current nature of his impairment, or that he is able to maintain regular attendance and perform all other essential functions of his job.

Appellant was in a unique position to present information from his own medical providers that he was capable of performing his duties, and had a full six weeks within which to do so. It may be reasonably inferred from his failure to produce that information that it would have been adverse to his position in the disqualification process and in this appeal. See Interstate Circuit v. US, 306 US 208 (1939); Ackmann v. Merchants Mortgage & Trust Corp., 659 P.2d 697 (Colo.App. 1982). In weighing the evidence as a whole, I find that Appellant's unexplained failure to produce medical or any other corroborating evidence tends to show that the Agency's evidence, including Appellant's continued use of excessive leave and his statements to Coyle, Miera and Dr. Robinson that he could not work in any capacity, was more persuasive than Appellant's unsupported statement that he could return to work. The latter statement is further weakened as evidence by the fact that he stated the opposite to his psychiatrist a few days previously, and told Coyle and Miera the same thing – that he could not work – a month before that. Appellant never addressed this contradiction during the appeal. Moreover, it was in Appellant's financial interest to tell Murphey he could work in order to avoid disqualification, in the absence of any proof that he was a qualified disabled individual.

The Agency satisfied its burden to produce persuasive evidence that Appellant could not perform his essential functions because of his impairment, and Appellant failed to rebut that evidence. On the totality of the information presented at the IAP and disqualification meetings, the Agency properly concluded that Appellant was prevented from performing the essential functions of his position because of his impairment, depression. After a full de novo hearing on the same issue and evidence,

Appellant likewise failed to rebut the Agency's case supporting disqualification.

Appellant argues that he was misled by the Agency's Nov. 2010 miscalculation of his FMLA leave usage into using more leave than he would have if he had known his accurate leave balance. First, Appellant was not prejudiced by the Agency's mistake. The Agency permitted Appellant to use FMLA leave without penalty from Oct. 9 to Nov. 29, 2010, although it had been depleted as of the former date. Appellant does not dispute that he continued to be absent from work in early Dec. 2010, after his FMLA leave and the additional leave granted in error were both exhausted. The Agency was then free to initiate the interactive process to determine if Appellant was disabled and could be reasonably accommodated. Second, Appellant's actual attendance record was an appropriate factor to consider in determining whether Appellant was prevented from performing his essential job functions based on an impairment.

Appellant also argues that he was unaware he could have requested more leave as a reasonable accommodation. However, Appellant did in fact request two weeks of leave during the interactive process, and told Murphey at the IAP meeting that he could return to work, two actions inconsistent with this argument. In addition, an employer is not required to offer a reasonable accommodation unless the employee is a qualified person with a disability, i.e., an employee who can perform the essential functions of his position, with or without reasonable accommodation. 42 USC § 12111 (8). Rita Murphey properly determined based on credible information that Appellant was not able to perform his essential functions. Thus, Appellant was not a qualified person with a disability, and the Agency was not required to consider reasonable accommodations.

Finally, Appellant argues that he was confused by Coyle's statement on Dec. 15, 2010 that he was required to submit a return to work statement from his physician under Agency policy after having missed three consecutive days of work, as contrasted with the change in emphasis during the interactive process to the issue of whether he could perform the essential functions of his position. Since Appellant never produced either a return-to-work pass or a medical statement that he was able to perform his job, any such confusion did not mislead Appellant into producing the wrong kind of medical information for the IAP, and thus had no effect on the disqualification decision. Moreover, Appellant testified that he understood the issues to be determined during the interactive process, and was not confused about the nature of the medical report he needed to submit at the meeting with Murphey. [Appellant, 12:35 pm.]

Therefore, the Agency established that Appellant had a mental impairment which occurred or was discovered after his appointment, which impairment prevented him from satisfactorily performing the essential functions of his positions, and properly disqualified Appellant in accordance with CSR § 14-20 *et. seq.*

Order

Based on the foregoing findings of fact and conclusions of law, the Agency's disqualification action dated February 11, 2011 is AFFIRMED.