

# **Horton v. U.S. General Accounting Office**

**Docket No. 01-09**

**Date of Decision: September 19, 2002**

**Cite as: Horton v. GAO, No. 01-09 (9/19/02)**

**Before: Jeffrey S. Gulin, Administrative Judge**

## **Headnotes:**

**Exhaustion of Remedies**

**Jurisdiction**

**Motion to Dismiss**

**Motions Practice**

**Personnel Action/Adverse Action**

**Prima Facie Case**

**Standard of Review**

**Timeliness of Complaint**

**Work Assignments**

## **MEMORANDUM AND ORDER ON RESPONDENT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

This matter is before the Personnel Appeals Board on a Petition for Review (PfR) filed on November 5, 2001 by Petitioner, Michael Horton, a Band 1-F analyst (formerly auditor/evaluator) in the Physical Infrastructure Team in the U.S. General Accounting Office. His Petition alleges that, in his previous position in the General Government Division (GGD), Management officials discriminated against him based on race (African-American) and retaliated against him with regard to his job assignment on the "Review of Time and Attendance at GGD" (T&A job), and the performance appraisal he received for his work on that job from May through August 1999 (T&A appraisal), in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, as amended (Title VII). He also contends that GAO's Office of Opportunity and Inclusiveness (OOI) failed to investigate concerns he raised in April 1999 about being assigned to the T&A job. In addition, he claims that the Agency has repeatedly denied him assignments commensurate with his experience and skills, thereby prohibiting him from being more competitive for promotion. As to remedy, Petitioner asks that the Agency cease all

retaliation, and refrain from giving him “lowered ratings on his assignments,” and provide work assignments commensurate with his expertise. PfR at 5. He also requests backpay, compensatory damages, and attorney’s fees. PfR at 5.

## I. Procedural History

On June 17, 2002, the Agency filed a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and supporting Memorandum (hereinafter R.Br). In its Motion, the Agency seeks dismissal of the Petitioner’s claim regarding the performance appraisal rating Petitioner received for his work on the T&A job because he failed to exhaust his administrative remedies. R.Br. at 2. The Agency also seeks dismissal of all of Petitioner’s race and retaliation claims alleging the failure to investigate, on the grounds that Petitioner failed to state a claim upon which relief can be granted. Finally, the Agency requests dismissal of Petitioner’s claims because there exists no genuine issue as to any material fact.

After several extensions of time, Petitioner filed an Opposition (hereinafter P.Br.) stating that OOI blocked his attempts to file an EEO complaint and prevented him from exercising his rights, including discouraging him from filing a complaint and misleading him as to the status of his complaint. P.Br. at 14. As to the T&A appraisal, Petitioner alleges that he did not file an EEO complaint on this T&A appraisal because he was “frustrated with OOI.” P.Br. at 16. Petitioner also claims that the job assignments and performance appraisals are “adverse actions” because they were “predetermined to ensure that [Petitioner does] not compete for higher grade positions (Band II).” P.Br at 26 (quoting Petitioner’s PAB complaint dated May 14, 1996).

The Agency filed its Reply on August 30, 2002. As stated in the Order of September 5, 2002, and for the reasons set forth below, the Motion to Dismiss, or in the Alternative, for Summary Judgment is granted in part and denied in part.

## II. Facts

The facts recited below are essentially undisputed.

Petitioner was a Band I Auditor/Evaluator in the General Government Division (GGD) from 1996-1999. R.Br. at 2. Petitioner has been a Band I Auditor/Evaluator (or equivalent) since he began his employment over 20 years ago. *Id*; P.Br., Attach. Horton Dep. at 14-15, 23. Petitioner previously filed a charge with the Personnel Appeals Board in May 1996. PfR at 2. The 1996 charge is one basis for his current claim of retaliation. Petitioner claimed that the Agency retaliated against him for his involvement in 1984 in the Fogel/ Mason lawsuit by giving him performance appraisals and job assignments that have prevented him from competing for higher grade positions. R.Br. Ex. C; P.Br., Attach. Motley Dep. Ex. 8. Petitioner has also been active in the African-American Advisory Council as well as GGD’s Diversity Committee. These activities are also the basis of his retaliation claim. PfR at 2.

In February 1999, Petitioner was given an assignment to work on a report reviewing the funding of the Olympic Games. PfR at 3; R.Br. at 3. Shortly thereafter in April 1999, Petitioner was reassigned to review the time and attendance procedures within the Agency. He subsequently

contacted the Office of Civil Rights (now the Office of Opportunity and Inclusiveness) about this job assignment. From April 1999 to about August 1999, Petitioner and Dennis O'Connor, an EEO counselor in OOI, had several discussions regarding Petitioner's concerns. Pfr at 3. However, Petitioner never filed a formal EEO complaint. Petitioner claims that OOI did not inform him about the process for filing a discrimination complaint and that they failed to investigate his claims. Pfr at 3-4.

In September 1999, Petitioner was issued a performance appraisal covering the period from February 1999 to August 1999. P.Br. at 12; R.Br. at 4. He received "needs improvement" in four of the six dimensions in which he was rated. R.Br., Ex. F. Dissatisfied with his performance appraisal and "given his negative experiences in filing a complaint with the OOI" (P.Br. at 13), Petitioner filed a grievance. In doing so, Petitioner requested, *inter alia*, that he receive separate performance appraisals for the work he performed on the Olympics job and the T&A job. R.Br. at 4. Although the grievance official found in favor of the Agency, Petitioner was eventually given two separate appraisals in March 2000. P.Br. at 13; R.Br., Ex. I at 4. Petitioner was also dissatisfied with these appraisals and filed a charge with the Personnel Appeals Board Office of General Counsel on April 14, 2000. R.Br. at 5 & Ex. I. Petitioner did not initiate contact with an EEO counselor regarding these appraisals. R.Br. at 5; *see* P.Br. at 16.

### III. Discussion

#### A. Standard of Review

A motion to dismiss should be granted if the Petitioner has failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal is appropriate if the facts asserted do not entitle Petitioner to a remedy. *See Hishon v. Spalding*, 467 U.S. 69, 73 (1984).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of demonstrating the absence of genuine issues of material fact. "The moving party, however, need not produce evidence showing the absence of a genuine issue of material fact but rather may discharge its burden by showing... that there is an absence of evidence to support the nonmoving party's case." *Conroy v. Reebok Int'l Ltd.*, 14 F.3d 1570, 1575 (Fed. Cir. 1994). Summary judgment must be granted if the nonmoving party fails to come forward with sufficient evidence to establish that there is a genuine issue of material fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Where the nonmoving party bears the burden of proof at trial, she must come forward and demonstrate the existence of specific evidence to support each element of her case. Without such evidence, there is no issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). All disputes as to material facts must be resolved in favor of Petitioner. *See Bishop v. Wood*, 426 U.S. 341, 347 n.11 (1976). Summary judgment should not be granted if the evidence presents a sufficient disagreement to require resolution by trial. Summary judgment is in order if the evidence is "so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

B. Claims regarding the T&A Performance Appraisal and OOI Investigation are Dismissed.

1. T&A Performance Appraisal

The Agency contends that Petitioner’s claim regarding the T&A performance appraisal should be dismissed because he failed to exhaust his administrative remedies. R.Br. at 2. Title VII is the exclusive remedy for federal government employees for alleged discrimination on the basis of race, religion, sex, or national origin. *Brown v. GSA*, 425 U.S. 820, 835 (1976). Under Title VII, a litigant must exhaust available administrative remedies in a timely fashion. *Id.* at 832. The administrative remedies available to Petitioner are found in GAO Order 2713.2, Discrimination Complaint Processing (Dec. 2, 1997). Order 2713.2 requires that an employee alleging discrimination must “contact a civil rights counselor within 45 days of the date of the matter alleged to be discriminatory.” Order 2713.2, ch. 3 ¶1.a(1). If the issue has not been resolved satisfactorily for the aggrieved person during the counseling period, the counselor must notify the individual in writing of the right to file a formal discrimination complaint. In order to continue fulfilling the requirement of exhausting administrative remedies, a complainant must then file a formal EEO complaint within fifteen days of receiving notice of the right to file a discrimination complaint. Order 2713.2, ch. 3 ¶1.d(1). The filing of a formal complaint requires the Agency to investigate the allegations. The filing of a formal complaint also gives the complainant the right to file a charge with the PAB/OGC and the PAB, 4 C.F.R. §28.98(a), or to file a civil action in district court.<sup>1</sup> *See* Order 2713.2, ch. 6 ¶¶2, 4. The Board’s jurisdiction over discrimination claims is generally limited to appeals for claims timely made to the GAO Office of Opportunity and Inclusiveness.<sup>2</sup>

Petitioner has provided no evidence showing that he ever contacted an EEO counselor regarding his T&A performance appraisal. Based on the pleadings and supporting evidence, Petitioner last spoke with an EEO counselor sometime in July or August of 1999. PfR at 3-4. Petitioner received his first performance appraisal in September 1999 and then two revised performance appraisals—one for the Olympic job and one for the T&A job—in March 2000. R.Br. at 4. There is no evidence that Petitioner contacted an EEO counselor subsequent to receiving any of these appraisals.

On the contrary, Petitioner claims that because of “his negative experiences in filing a complaint with the OOI, . . . [he] filed a grievance concerning his ratings on the Olympics and T&A Jobs in September 1999.” Response at 13. Petitioner also admitted during his deposition that he had

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<sup>1</sup> A complainant may file a civil action in district court within 90 days of receiving a final decision or dismissal of the complaint from GAO, or after 180 days have passed since the filing of the complaint, provided GAO has not issued a decision. The complainant may file a charge with PAB Office of General Counsel within 30 days of receipt of GAO’s final decision or dismissal of a whole or a portion of the complaint, or after 120 days have elapsed from the date the complaint was filed, provided GAO has not issued a final decision. *See* GAO Order 2713.2, ch. 6 ¶¶2,4.

<sup>2</sup> There are exceptions for adverse and performance-based actions and Reductions in Force where discrimination is alleged. *See* GAO Order 2713.2, ch. 3 ¶2. However, none of these exceptions are applicable to the instant case.

“lost confidence in [OOI]” and “was so busy writing rebuttals [for the grievance]” that he never contacted OOI after receiving his initial appraisal in September 1999 or after receiving the revised appraisals in March 2000. R.Br., Ex. G at 4.

The doctrine of exhaustion of administrative remedies can only be waived under exceptional circumstances. *See Beard v. GSA*, 801 F.2d 1318, 1321 (Fed. Cir. 1986) (exception to principle of exhaustion of remedies sometimes appropriate for constitutional challenges to agency’s actions). *See also Williams v. Navy*, 787 F.2d 552, 559 (Fed. Cir. 1986). No exception is applicable here. Petitioner’s claim that he lost confidence in the office is not sufficient to waive the doctrine. Petitioner did not exhaust his administrative remedies regarding his T&A appraisal since he failed to initiate contact with an EEO counselor within 45 days of receiving his T&A performance appraisal. Thus, the PAB has no jurisdiction over this claim. Accordingly, the Motion to Dismiss the claim regarding the T&A performance appraisal is granted.<sup>3</sup>

## 2. OOI’s Failure to Investigate

Petitioner also claims that the GAO’s Office of Opportunity and Inclusiveness “affirmatively misrepresent[ed]” the status of his case by not investigating his claim or informing him of the requisite steps for a formal complaint. Pfr at 4. The Agency argues that this claim should be dismissed because Petitioner has failed to state a claim upon which relief can be granted. The Agency’s Motion regarding this claim is granted.

In a recent case before the PAB, Petitioner alleged that the Civil Rights Office and the PAB/OGC had improperly investigated her complaints. The PAB determined that it was not privy to the investigative results or conclusions reached by the PAB/OGC. *Gaston v. GAO*, Dkt. No. 99-02, Apr. 25, 2002, slip op. at 3. The PAB also concluded that the Petitioner’s right to review before the Board went to the merits of her complaint, and not to a review of any prior investigation. Thus, the case did not offer a forum for challenging the investigations conducted by either the Civil Rights Office or the PAB/OGC. *Id.* Similarly, in this case, insofar as Petitioner is asking for a review of the investigation rather than the merits of his complaint, the PAB does not offer a forum for challenging investigations conducted by the Civil Rights Office, now the Office of Opportunity and Inclusiveness. Accordingly, the allegation regarding OOI’s failure to investigate is dismissed.<sup>4</sup>

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<sup>3</sup> As the Agency points out, it is unclear whether Petitioner is raising Title VII claims about the Olympics appraisal. To the extent that he is, the claim regarding the Olympics appraisal is also dismissed for failure to exhaust administrative remedies.

<sup>4</sup> As noted in *Gaston*, Petitioner is not bound by the investigation, or lack of an investigation, but may proceed to present his best case before the Personnel Appeals Board. *Gaston*, at 4.

C. Motion regarding the T&A Job Assignment is Denied.

The Agency also argues that Petitioner's claims regarding the T&A job assignment and performance appraisal should be dismissed because neither constitutes an adverse personnel action required to establish a *prima facie* case of discrimination.<sup>5</sup>

To state a *prima facie* claim of discrimination the Petitioner must establish that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination. *Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999)). For retaliation, the Petitioner must show that: (1) he engaged in a statutorily protected activity; (2) the employer took an adverse personnel action; and (3) a causal connection existed between the two. *Id.* The Agency claims that under *Brown v. Brody*, a job assignment is not an "adverse personnel action." R.Br. at 9.

In *Brown v. Brody*, the D.C. Circuit held that lateral transfers did not constitute adverse personnel actions. *Brown v. Brody*, 199 F.3d at 457. Relying on that case, the Agency argues that, "where a transfer is not actionable, a job assignment would be even less so." R.Br. at 11. The Agency further argues that since job assignments do not constitute adverse employment actions, Petitioner cannot fulfill a *prima facie* case under Title VII. *Id.* at 14.

The Court in *Brown* held that a plaintiff who is forced to take or denied a lateral transfer

does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions, or privileges of her employment or her future employment opportunities such that a reasonable trier of fact could conclude that the plaintiff has suffered objectively tangible harm.

*Brown v. Brody*, 199 F.3d at 457.

In subsequent cases, the courts have concluded that while a "lateral transfer or the denial thereof, *without more*, does not constitute an adverse employment action," if a plaintiff alleges that the failure to provide the transfer had certain additional adverse consequences which, if proven, could lead a reasonable trier of fact to conclude that she suffered objectively tangible harm, it could constitute an adverse employment action. See *McGuire-Rivera v. Evans*, 206 F.Supp.2d 25, 27 (D.D.C 2002) (quoting *Stewart v. Evans*, 275 F.3d 1126, 1135 (D.C. Cir. 2002)). See also *Stella v. Mineta*, 284 F.3d 135, 146 (D.C. Cir. 2002) ("no question that failure to promote is an 'adverse action' for purposes of the *prima facie* case"); *Gatlin-Brown v. GAO*, Dkt No. 00-02, Mar. 23, 2001, slip op. at 18 (PAB found no adverse personnel action because Petitioner did not provide any evidence that her promotional opportunities were affected or that she had even applied for a promotion).

In this case, Petitioner claims that there were "material adverse consequences" affecting his future employment opportunities. P.Br. at 29. In particular, he alleges that he was denied four

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<sup>5</sup> Since Petitioner's claim regarding his T&A performance appraisal is dismissed for failure to exhaust administrative remedies only the claim regarding the T&A job assignment need be addressed here.

promotions as a result of the assignments he received. PfR at 2. If proven true, the T&A assignment could constitute an adverse personnel action. Accordingly, I find that Petitioner's claim regarding the T&A job assignment could constitute an adverse employment action.<sup>6</sup> However, since additional information is necessary to make a determination, the Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, regarding the T&A job assignment is denied.

#### IV. Conclusion

Based on the foregoing, Respondent's Motion to Dismiss, or in the Alternative, for Summary Judgment, is granted regarding Petitioner's claims that he was discriminated against based on race and retaliation when he was given ratings not consistent with his performance on the time and attendance assignment. The Motion is also granted regarding Petitioner's claim that OOI refused to investigate his claims. The Motion is denied regarding Petitioner's claim that he was discriminated against based on race and retaliation when he was given the time and attendance assignment.

**SO ORDERED.**

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<sup>6</sup> It does not appear that the Agency is requesting dismissal of this claim based on a failure to exhaust administrative remedies. However, even assuming such a request, the Motion would be denied because there is still a question of material fact as to whether OOI misled Petitioner into not pursuing his claim.