

Johnetta Gatlin-Brown v. U.S. General Accounting Office

Docket No. 00-02

Date of Decision: March 23, 2001

Cite as: Gatlin-Brown v. GAO (3/23/01)

Before: Jeffrey S. Gulin, Vice-Chair

Summary judgment

Hostile work environment

Discrimination

Retaliation

DECISION ON RESPONDENT'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Procedural Posture

This matter is before an administrative judge on behalf of the Personnel Appeals Board (the Board) on a Petition for Review filed on February 19, 2000 by Johnetta Gatlin-Brown, a Band I evaluator in the Dayton office of the U.S. General Accounting Office (GAO). Proceeding *pro se*, Petitioner alleges that she was subjected to a hostile work environment and to discriminatory treatment as to job assignments that negatively affected her chances of promotion. She also claims that these actions were in retaliation for her having filed a discrimination complaint in 1994.¹ As a remedy, Petitioner seeks promotion to Band II and back pay from 1995.

On March 23, 2000, the Respondent (GAO) filed an Answer denying Petitioner's allegations and claiming that Petitioner is entitled to no relief. Further, Respondent argued that Petitioner's

¹ In her original Petition and in subsequent filings, Petitioner also alluded to a "medical accommodation" that she asserts was established in 1988, but not subsequently honored. *See, e.g.*, Petition for Review at 9; Petitioner's Statement of Facts filed August 28, 2000, ¶3. However, at her deposition, Petitioner clearly stated that she does not now, nor has she ever, sought an accommodation under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* *See* Deposition of Johnetta Gatlin-Brown at 51. *See also*, Letter to Leslie Aronovitz, dated Oct. 31, 1997; Affidavit of Leslie G. Aronovitz at 4. Accordingly, the issue of whether Petitioner is entitled to a reasonable accommodation under the ADA, is not now before the Board.

failure to apply for promotion to Band II makes her ineligible for promotion even if she were entitled to relief.

Following the discovery period, on June 30, 2000, GAO filed a Motion to Dismiss and for Summary Judgment with attachments. In its Motion, Respondent seeks dismissal of the claim relating to hostile work environment as either untimely or moot. In the alternative, Respondent argues that it is entitled to summary judgment on this claim, because Petitioner failed to allege conduct constituting a hostile work environment and management responded to Petitioner's complaints by reassigning her within a reasonable period of time. GAO also requests summary judgment on the issues relating to discrimination and retaliation, arguing that Petitioner's job assignments do not constitute an adverse employment action, and that even if they were, Petitioner was not treated disparately regarding these assignments. Further, GAO contends that Petitioner can not establish a causal connection between her job assignments and her protected activity.

After a time extension was granted, on August 28, 2000,² Petitioner filed a response to the Motion to Dismiss and for Summary Judgment. Petitioner's submission consisted of a chronology of events entitled "Statement of Facts," a separate document entitled "Summary Judgement Standard," and numerous exhibits. Because the submission was insufficient to defeat Respondent's motion, by *sua sponte* order of November 14, 2000, Petitioner was permitted to re-submit her Statement of Facts in affidavit form and to specify the facts she intended to prove to establish her claims of unlawful discrimination. Petitioner's re-submission of her Statement of Facts, in affidavit form, was timely filed on November 27, 2000, and GAO filed a timely response on December 8, 2000. On December 12, Petitioner was granted retroactive leave to file a supplemental submission, consisting of a memorandum with an attachment, that she filed on December 11, 2000. Respondent was granted a time extension to reply and it timely filed a reply to the supplemental submission on January 8, 2001.

On January 8, 2001, Petitioner again filed additional documents outside of the filing schedule, along with a request for leave to file. GAO objected to the submission, and the request to file these additional materials was denied. However, the administrative judge noted that much of the material was duplicative and many of the documents were already in the record. By order of January 17, 2001, oral argument on the Motion to Dismiss and for Summary Judgment was scheduled for February 1, 2001, via telephone conference.

On January 25, 2001, Petitioner submitted yet another document outside the filing schedule entitled "Petitioner's Opposition to Respondent's Motion to Dismiss." At the outset of the oral argument on February 1, GAO noted its objection to the submission. The administrative judge ruled that the submission would be stricken but Petitioner was informed that she could refer to its contents during the oral argument.³

² This filing contained technical deficiencies. However, Petitioner was allowed to remedy the deficiencies while preserving the original filing date in order to comply with a prior order granting a time extension. The filing was perfected on September 14, 2000.

The oral argument was conducted on the record, with the parties first responding to questions of the administrative judge. Thereafter each party, beginning with GAO, presented its argument on the pending Motion. Upon consideration of the oral argument, the official submissions of the parties, and the applicable law, the administrative judge concludes that summary judgment should be granted in favor of Respondent as to all claims. The reasons for this conclusion are set forth more fully below.

The Facts

After considering the evidence of record⁴ and after resolving all genuine disputes as to material facts in favor of Petitioner, for the limited purpose of deciding the pending Motion, the administrative judge finds the following facts.

1. Petitioner, an African American woman, has been employed by GAO since April 1, 1974, and has worked as an evaluator at the Dayton office since 1981. See Petitioner's Statement of Facts filed August 28, 2000 (S/F), ¶1.
2. In 1979, Petitioner began working a variable, flexible schedule in which she would take unpredictable leave for health reasons. See *id.* at ¶2; Deposition of Johnetta Gatlin-Brown (Dep.) at 12.
3. In 1994, Petitioner filed an equal employment opportunity (EEO) complaint alleging, *inter alia*, racial discrimination. The complaint was administered by the Cincinnati Regional Office.⁵ See S/F ¶1; Affidavit of Leslie G. Aronovitz (Aronovitz Aff.) at 7.
4. Prior to filing the 1994 discrimination complaint, and thereafter, Petitioner has been assigned various projects pertaining to defense logistics issues and "budget scrub" assignments. Although

³ Indeed, Petitioner did read portions of this document into the record. See Transcript of Oral Argument (TR) at 66-67.

⁴ For purposes of considering the instant motion, the evidence of record consists of the following documents: Excerpts from the Deposition of Johnetta Gatlin-Brown (Dep.) (Motion, Attach. 1); JGB's Limited Chronology of Events with Strittmatter, dated Oct. 24, 1997 (Chron.) (Motion, Attach. 2); Affidavit of Leslie G. Aronovitz (Aronovitz Aff.) (Motion, Attach. 3); Petition of Review (Motion, Attach. 4); GAO Civil Rights Counselor's Report (Motion, Attach. 5); Petitioner's Statement of Facts filed August 28, 2000 (S/F), with attachments consisting of duplicates of several Respondent exhibits, along with several letters and e-mails; and Petitioner's Dec. 11 filing entitled Submissions to the PAB (including attached Petitioner's Performance Appraisal for the period of October 1, 1999 through September 30, 2000).

⁵ The Dayton office subsequently came under the jurisdiction of the Chicago Regional Office, which administered the instant EEO complaint in 1998. See Affidavit of Leslie G. Aronovitz at 7.

white males have also performed budget scrub, Petitioner believes that budget scrub assignments are undesirable, assigned disproportionately to African Americans, and do not prepare evaluators for more desirable assignments or promotion. Petitioner believes that she performed budget scrub more than other employees at Dayton, both before filing her 1994 discrimination complaint and thereafter until 1998 – when she filed the instant complaint with the GAO Civil Rights Office. Moreover, Petitioner believes that she has been under-utilized, often sitting idle with no assignments. See S/F ¶¶5, 10, 15, 18, 73; Dep. at 71, 274-76.

5. From October 1995 through October 1997, Petitioner’s direct supervisor was Richard Strittmatter. Throughout this period of time, Mr. Strittmatter questioned her about her attendance and preparation of her biweekly attendance form. See S/F ¶¶20-21; JGB’s Limited Chronology of Events with Strittmatter, dated Oct. 24, 1997 (Chron.), at 1.

6. In January 1997, in the presence of other staff, Mr. Strittmatter questioned Petitioner about digressing from a previously approved work schedule. See S/F ¶22; Chron. at 1.

7. Over the next 5 or 6 months, whenever Petitioner submitted her biweekly attendance form, Mr. Strittmatter questioned Petitioner about some aspect of her completed form. See S/F ¶23; Chron. at 1.

8. On or about July 28,⁶ 1997, in the presence of other staff, Mr. Strittmatter questioned Petitioner about her prepared attendance form and stated that he would no longer approve her variable schedule. See S/F ¶24; Chron. at 1.

9. On July 30, 1997, in the presence of a visiting colleague, Mr. Strittmatter questioned Petitioner about an entry on her attendance form. See Chron. at 2.

10. On or about July 31,⁷ 1997, Petitioner first wrote to Leslie Aronovitz, Chicago Field Office Manager. She complained that Mr. Strittmatter’s consistent failure to respect her need for “irregular hours” was causing her “blood pressure . . . [to] soar[]” and requested a reassignment away from Mr. Strittmatter. Letter to Aronovitz, dated July 31, 1997. See also S/F ¶26; Chron. at 2; Dep. at 150-51.

11. On August 1, and again on August 2, 1997, Mr. Strittmatter initiated discussions with Petitioner about her attendance form and use of “flex time.” Petitioner was on leave from August 4 through August 12, 1997.⁸ Chron. at 2. See also S/F ¶27.

12. Upon returning to work on August 13, 1997, Petitioner received a call from Ms. Aronovitz.

⁶ The date is stated as “July 26” in Petitioner’s Statement of Facts, but as “July 28” on the earlier prepared Chronology.

⁷ The date is stated as “July 31” in the Statement of Facts, but as “July 30” in the Chronology.

⁸ Again, the dates cited in Petitioner’s Statement of Facts conflict with those cited in her Chronology.

Believing that Petitioner was requesting a formal medical accommodation and that such an accommodation would resolve the conflict with Petitioner's supervisor, Ms. Aronovitz requested Petitioner to provide medical documentation. See S/F ¶33; Chron. at 3; Aronovitz Aff. at 3.

13. On August 14, Mr. Strittmatter "waved a work schedule in front of [Petitioner's] face" and demanded she re-submit another work schedule. Petitioner refused to "fill out anything" until "management has resolved the issue [of a flexible work schedule]." S/F ¶36. See also Chron. at 4.

14. On August 14, 1997, Stewart M. Herman, Chicago Field Office Deputy Manager, called Petitioner to further discuss her complaints. He scheduled a meeting with Petitioner and Ms. Aronovitz for August 25, 1997, and stated that he would personally call Mr. Strittmatter to "tell him not to bother [Petitioner] . . . until the issue regarding [Petitioner's] accommodation had been determined." Mr. Herman also reminded Petitioner to obtain medical documentation. S/F ¶¶38, 39. See also Chron. at 4-5.

15. Apparently because he had not yet received any medical documentation, on August 21, 1997, Mr. Herman called Petitioner to reschedule the August 25 meeting for September 2, 1997. See S/F ¶39; Chron. at 5; Dep. at 165.

16. On September 2, 1997, Petitioner met with Ms. Aronovitz and Mr. Herman to discuss her complaints and the letter, dated August 20, 1997, received from her physician. Petitioner agreed to remain on her current assignment, under supervision of Mr. Strittmatter, for about one more month provided that they again admonish Mr. Strittmatter not to "bother" Petitioner. S/F ¶¶40-41. See also Chron. at 5; Dep. at 165-67; Letter from Glenda Lopez-Blaza, M.D., dated Aug. 20, 1997.

17. From August 15 through October 22, 1997, Mr. Strittmatter did not attempt to approach Petitioner. See S/F ¶42; Dep. at 168.

18. On October 23, 1997, Mr. Strittmatter twice questioned Petitioner about a post-pay period adjustment that she had previously agreed to enter on her time form. After the first incident, Petitioner was "incensed" and "stormed out of" Strittmatter's office. See S/F ¶44. She apprised Ms. Aronovitz and Mr. Herman of the incident and stated that Mr. Strittmatter's conduct was continuing to adversely affect her health. Later that day, Mr. Strittmatter questioned her again about the time form, following her back toward her desk. Petitioner became frightened, and screamed "Mr. Strittmatter, get your . . . [d]amned ass away from me!" She also reported this incident to the Chicago managers. See S/F ¶¶44-47; Chron. at 9-10.

19. On October 24, 1997, Petitioner sent an e-mail, requesting assistance, to Nilda I. Aponte, then Director of the Office of Civil Rights, with a copy to Allen R. Elliott, an EEO counselor. In the e-mail, Petitioner describes "an abusive and out-of-control supervisor." E-mail dated Oct. 24, 1997.

20. On October 27, 1997, Petitioner again met with Ms. Aronovitz and Mr. Herman. Ms. Aronovitz told Petitioner that Petitioner would be reassigned after her current assignment was

completed. However, she also requested further medical documentation to support a claim for a reasonable accommodation under the ADA,⁹ and admonished Petitioner regarding her conduct on October 23. See S/F ¶¶50-52; Chron. at 8.

21. When Petitioner arrived at work on October 29, 1997, she observed Mr. Strittmatter standing near her work area and “he wrote down [her] arrival time.” Petitioner immediately notified Ms. Aronovitz that Mr. Strittmatter was again “harassing and scaring” her. S/F ¶53. See also Chron. at 8.

22. On October 30, 1997, Mr. Strittmatter requested Petitioner to “provide him with some job information.” Petitioner refused and told him to “get away.” Mr. Strittmatter apparently apprised Ms. Aronovitz of the incident. Ms. Aronovitz subsequently called Petitioner and explained that while she remained under Mr. Strittmatter’s supervision, she was expected to perform tasks assigned by him. This conversation with Ms. Aronovitz upset Petitioner and she began to mentally question whether Ms. Aronovitz had been truthful with her (regarding management’s admonishments to Mr. Strittmatter and their intention to reassign her). S/F ¶55. See also Chron. at 9-10.

23. The incident of October 30, 1997 was Petitioner’s last contact with Mr. Strittmatter. See Dep. at 198-99.

24. By letter dated October 31, 1997, Petitioner objected to Ms. Aronovitz’s prior requests for more medical documentation and exclaimed that she had “never requested” an accommodation under the ADA.¹⁰ Letter to Leslie Aronovitz, dated Oct. 31, 1997. See also Aronovitz Aff. at 3-4.

25. On November 5, and again on November 6, 1997, Petitioner received calls from Allen Elliott, and they discussed her complaints. See S/F ¶¶59-60. She filed a formal EEO complaint, by e-mail, on January 23, 1998. The civil rights counselor’s report recites “January 23, 1998” as the “[d]ate of initial contact.” GAO Civil Rights Counselor’s Report, dated May 20, 1998. See also Chron. at 10-11.

26. From July through November 1997, Petitioner spoke with GAO managers on at least 15 occasions; met with the Chicago managers twice; and wrote numerous letters and e-mails regarding her perceived harassment by Mr. Strittmatter and her subjective fears. On no occasion did Petitioner allege, nor does she now allege, that Mr. Strittmatter ever once raised his voice, used inappropriate language of any kind, touched her, used threatening gestures, called her an offensive name, or overtly threatened to physically harm her. Petitioner believed that Mr. Strittmatter’s inquiries about her attendance and schedule were excessive and demeaning, and

⁹ Apparently, from September through October, Ms. Aronovitz made several requests for medical documentation. See S/F ¶64.

¹⁰ Petitioner believes that she *already* had obtained an informal “accommodation” granted back in 1979, apparently because her prior supervisors did not object to her variable, flexible schedule. See S/ F ¶57.

caused her to feel physically ill. Having heard about prior altercations between Mr. Strittmatter and other African Americans, Petitioner feared for her safety. She also believed that Mr. Strittmatter treated her in a demeaning manner because she was an African American. Petitioner also believed that a male employee also worked a variable schedule but was never challenged by Mr. Strittmatter. Accordingly, Petitioner believed she was treated disparately due to her sex. See S/F ¶¶28, 47, 50, 63, 96; Dep. at 135-36, 139, 150; Aronovitz Aff. at 5, 10.

27. In the early 1990s, mandatory diversity training was conducted at the Cincinnati Regional Office. Petitioner believes that “[a] consensus emerged from focus groups that angry and bitter white males made Dayton a difficult place in which to work.” S/F ¶72.

28. Petitioner believes that “managers never promoted any African Americans in Dayton until after [Petitioner] filed [her] discrimination complaint in 1994” and in 1999, “no African Americans in Dayton received ratings higher than their white counterparts.” S/F ¶73.

29. At Petitioner’s request, in June 1998, Petitioner was reassigned to another division at Dayton and has not since been assigned “budget scrub.” Dep. at 68-70.

Discussion

Motion to Dismiss

Respondent contends that the Petitioner’s claims relating to a hostile work environment should be dismissed as time-barred. This contention is unsupported by the record. The Board’s jurisdiction over discrimination claims is generally limited to appeals from claims timely made to the GAO Civil Rights Office (CRO). Excepting adverse and performance based actions, and Reduction in Force actions alleging discrimination, an aggrieved employee of GAO must “contact a civil rights counselor within 45 days of the date of the matter alleged to be discriminatory.” 4 C.F.R. §28.98(a), (c), (d); GAO Order 2713.2, ch. 3, ¶1 (July 24, 1996). Respondent contends that (1) the last discriminatory act alleged by Petitioner occurred on October 30, 1997 – her last contact with Mr. Strittmatter; and (2) Petitioner did not raise a discrimination complaint with a civil rights counselor until January 23, 1998. Even accepting, *arguendo*, Respondent’s first proposition,¹¹ its latter contention is clearly incorrect. It is true that the civil rights counselor’s own report recites “January 23, 1998” as the “[d]ate of initial contact.” However, Petitioner’s contention that she contacted the CRO in late October and early November 1997, is substantiated by the e-mail correspondence copied to Allen Elliott, the CRO counselor, dated October 24, 1997. The e-mail cites “an abusive and out of control supervisor.” This e-mail also corroborates, and explains, the telephone calls *from* Mr. Elliott *to* Petitioner on November 5 and 6, 1997, in which they discuss Petitioner’s complaints. Accordingly, Petitioner complied with the above cited time provision and her Petition for Review is not barred.

¹¹ Apparently, the civil rights counselor did *not* accept this proposition. His report recites that Petitioner “made a timely contact with the Civil Rights Office.” GAO Civil Rights Counselor’s Report at 4.

Respondent also urges dismissal on the ground that Petitioner's hostile work environment claims are moot because management ultimately remedied the alleged conduct by transferring her away from Mr. Strittmatter. This argument can also be rather summarily rejected. A case should not be dismissed as moot unless subsequent events have completely eradicated the effects of the alleged violation. *See County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Petitioner obviously believes that the effects of the conduct she alleges have not been eradicated. She seeks money damages and other relief, partly due to her subjective, but uncontroverted, alleged suffering. Under Respondent's theory, an employee could never prevail in a hostile work environment case so long as the employer ultimately remedies the problem. Respondent has failed to meet the "heavy" burden of demonstrating mootness.¹² *Id.*

Motion for Summary Judgment

A. Standard of Review

Attention is now directed to Respondent's various arguments embodied in its Motion for Summary Judgment. The applicable standard governing consideration of a motion for summary judgment is set forth in Rule 56 of the Federal Rules of Civil Procedure. See 4 C.F. R. §28.1(d). Summary judgment shall be rendered "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 [citations omitted]. 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) (citations omitted). See also, *Madson v. GAO*, PAB Docket No. 96-07 at 13 (Apr. 23, 1997), *aff'd en banc*, Dec. 2, 1997. Summary judgment must be granted if the nonmoving party (Petitioner) 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). But, in assessing whether Petitioner has produced sufficient evidence to support each element of her case, the essential inquiry is not whether Petitioner produced *any* evidence, or even a scintilla of evidence, but whether she produced *any* evidence upon which a reasonable person *could* rely to support a judgment in her favor. See *Anderson v. Liberty Lobby*, 477 U.S. at 250-51. Stated otherwise, summary judgment should *not* be rendered if the evidence presents a sufficient disagreement to require resolution by trial. Summary judgment *should* be rendered if the evidence is "so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

¹² Respondent's more persuasive argument, subsumed within its Motion for Summary Judgment, is that because management acted promptly to remedy the alleged conduct, Petitioner has not satisfied all of the elements for a *prima facie* case of hostile work environment based upon race or sex. This issue is briefly addressed *infra*.

B. Claim of Discriminatorily Hostile Work Environment

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin, 42 U.S.C. §2000e-16(a), “which includes requiring people to work in a discriminatorily hostile or abusive environment.” *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986).¹³ Title VII is violated when the workplace is permeated with “discriminatory intimidation, ridicule, and insult,” *Meritor*, 477 U.S. at 65, “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Id.* at 67 [internal brackets and quotation marks omitted]. However, “[c]onduct that is not severe or pervasive enough to create an *objectively* hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview.” *Harris v. Forklift Sys.*, 510 U.S. at 21 (emphasis added). Conduct that is merely offensive or that merely renders a workplace unpleasant does not violate Title VII. *See id.*

To prevail on a hearing on the merits, Petitioner would be charged with the burden of proving, by a preponderance of the evidence, that she was subjected to a discriminatorily hostile work environment. *See* 4 C.F.R. §28.61(c); *Meritor*, 477 U.S. at 66. Accordingly, to survive a motion for summary judgment, Petitioner must demonstrate sufficient evidence to support each element of her claim. The conduct characterized by Petitioner as abusive consists of inquiries by her supervisor, Mr. Strittmatter, concerning her attendance, completion of time cards, and her use of unpredictable, variable, flex time. No doubt, Petitioner found these inquiries to be bothersome and distressing. But, they can not be said to be objectively abusive. Monitoring attendance is obviously a legitimate supervisory function. This is particularly true in light of the apparent confusion pertaining to Petitioner’s belief that she was entitled to special treatment due to her alleged medical problems. Petitioner simultaneously contended that she had, in fact, already been granted “an accommodation” while steadfastly denying that she wanted a formal accommodation under the ADA. The environment described by Petitioner simply does not rise to the level of a discriminatorily hostile or abusive environment. There is little doubt as to Petitioner’s sincerity, or her *subjective* feelings of humiliation, fear, and distress. And the administrative judge renders no judgment as to whether her supervisor’s inquiries were either appropriate or excessive. But, no evidence has been adduced to suggest that the inquiries were so grossly excessive as to enter the realm of abuse. The record is devoid of evidence from which a reasonable and objective person could conclude that Petitioner was subjected to legally abusive conduct. Petitioner has been explicitly invited, on numerous occasions,¹⁴ to provide specific

¹³ Federal employment practices and private employment practices are regulated under separate, but similar, provisions of Title VII. *Compare* §§2000e-2(a)(1) (private) and 16(a) (federal). Although *Meritor* was decided under §2000e-2(a)(1), courts have generally applied identical tests and restrictions to federal agencies and to private employers. *See, e.g., Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999). *Cf. United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983) (Supreme Court applied an identical discrimination test, crafted under §2000e-2(a)(1), to federal government).

¹⁴ *See e.g.,* TR at 22-26.

examples of abusive conduct. Despite ample opportunity, she has not offered a single example of when Mr. Strittmatter raised his voice, used inappropriate language of any kind, touched her, used threatening gestures, called her an offensive name, or threatened her physically. Viewing the totality of circumstances here, the described inquiries alone, particularly where the inquiries appear at least arguably justified, do not constitute a hostile or abusive work environment within the meaning of established law.

Besides Petitioner's failure to support the previous element of her claim, Title VII prohibits only abusive conduct that is discriminatory – "based on race, color, religion, sex, or national origin." 42 U.S.C. §2000e-16(a). A plaintiff must affirmatively prove that the alleged conduct occurred "because of" her race or sex. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 80 (1998).¹⁵ See also, *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 563 (5th Cir. 1998); *Childers v. Slater*, 44 F. Supp.2d 8, 27 (D.D.C. 1999). Again, the administrative judge does not doubt Petitioner's *subjective* belief that her supervisor's alleged animus was motivated by Petitioner's race and sex. But, again she fails to adduce any evidence upon which a reasonable person could rely to support her contentions. Petitioner's vague and general assertions pertaining to diversity training and focus groups in the early 1990s, are certainly insufficient to establish discrimination. Many organizations provide diversity training as a prophylactic measure, a sound managerial practice. She also asserts that managers never promoted any African Americans in Dayton until after she filed her discrimination complaint in 1994. This bald assertion is similarly insufficient. Indeed, it is unclear whether this statement is based upon any kind of personal knowledge, or mere rumor. Even if true, it is meaningless unless placed in context. Any alleged promotional disparity at Dayton can not be assessed without additional information such as the number of employees, by race, that applied vis-à-vis the number promoted. Furthermore, the events described by Petitioner occurred 3 years *after* 1994. Indeed, the implication of this assertion is that since 1994, Petitioner claims no racial disparity regarding promotions. Petitioner also claims that in one year, 1999, "no African Americans in Dayton received ratings higher than their white counterparts." S/F at 73. For similar reasons, this statement is insufficient. And Petitioner's complaint involves conduct that occurred 3 years *prior* to 2000. Interestingly, Petitioner fails to address the most relevant years – 1995 through 1997 – when she was under the supervision of Mr. Strittmatter. Finally, Petitioner alludes to non-specific "altercations" between Mr. Strittmatter and unnamed African-American male employees, sometime in the past. She also cites an unnamed male employee who worked a variable schedule, but was never challenged by Mr. Strittmatter. These vague, unsubstantiated claims, which could be little more than sheer office rumor, offer no tangible support for Petitioner's claim of discrimination.

Accordingly, as to Petitioner's claim of a discriminatorily hostile work environment, she has failed to produce evidence of two elements of her claim upon which a reasonable person *could* rely to support a judgment in her favor.¹⁶

¹⁵ Though *Oncale* was decided under §2000e-2(a)(1), the rationale is the same. See n.13, *supra*.

¹⁶ Respondent additionally urges the administrative judge to adopt the view that requires an employee to affirmatively prove that the employer knew, or should have known, of the harassment but failed to take action to prevent the harassment. Memorandum in Support of

C. Claim of Disparate Treatment Discrimination

To prevail on a hearing on the merits, Petitioner would be charged with the burden of producing¹⁷ evidence of disparate treatment discrimination. See 4 C.F.R. §28.61(c); *McKenna v. Weinberger*, 729 F.2d 783, 789 (D.C. Cir. 1984). Accordingly, to survive a motion for summary judgment, Petitioner must demonstrate sufficient evidence to support each element of her claim. Unlike a claim of a discriminatorily hostile work environment, to establish a claim of disparate treatment discrimination under Title VII, a statutorily protected plaintiff must prove that she suffered an “adverse employment action” and she must further prove that the action “give[s] rise to an inference of discrimination.” See e.g., *Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999); *Nowlin v. Resolution Trust Corp.*, 33 F. 3d 498, 507 (5th Cir. 1994); *Cooper v. North Olmsted*, 795 F.2d 1265, 1271-72 (6th Cir. 1986); *Fuchilla v. Prockop*, 682 F. Supp. 247, 263 (D.N.J. 1987); *Prince v. Commissioner, INS*, 713 F. Supp. 984, 996 (E.D. Mich. 1989); *Madden v. Cisneros*, 830 F. Supp. 1251, 1257 (E.D. Ark. 1993); *Thompson v. Price Broadcasting Co.*, 817 F. Supp. 1538, 1543 (D. Utah 1993).

Petitioner does not allege she was at any time suspended, demoted, or denied a promotion. She complains that the “adverse employment actions” consisted of intermittent assignment to budget scrub work and excessive idleness. In *Brown*, the Court of Appeals for the District of Columbia Circuit conducted an exhaustive search of the issue of when a “lateral transfer” constitutes an adverse employment action. After a considerable review of federal case law, the Court

Motion at 10. However, this requirement is applicable only in cases where an employee alleges harassment by a co-worker. In cases where an employee is exposed to a hostile environment created by a supervisor with immediate (or successively higher) authority over the employee, the employer is subject to vicarious liability. See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). See also, *Kolstad v. American Dental Association*, 527 U.S. 526, 545-46 (1999); EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors at 3.

Citing *Burlington Industries v. Ellerth*, 524 U.S. at 765, Respondent also suggests that an affirmative defense lies here, where the employer exercised reasonable care to prevent and correct the harassment promptly. As the Supreme Court stated in *Faragher*, “[w]hen no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” 524 U.S. at 807. Because Petitioner failed to produce evidence to support a finding of discriminatorily hostile work environment, this issue need not be reached.

¹⁷ Unlike a claim of hostile work environment, most Title VII discrimination claims involve a framework of shifting burdens of production as first enunciated in *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). However, the initial burden of producing sufficient evidence to establish a *prima facie* case of either disparate treatment or retaliation, lies with the Petitioner. See e.g., *McKenna v. Weinberger*, 729 F.2d 783, 789-90 (D.C. Cir. 1984).

concluded that “the authority requiring a clear showing of adversity in employee transfer decisions is both wide and deep.” 199 F.3d at 455-56 (citations omitted). The Court announced the following rule with respect to both private and federal employees:

[A] plaintiff who is made to undertake or who is denied a lateral transfer – that is, one in which she suffers no diminution in pay or benefits – 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. Mere idiosyncrasies of personal preference are not sufficient to state an injury.

199 F.3d at 457 (emphasis added). The actions alleged by Petitioner do not even rise to the level of a lateral transfer. Petitioner merely expresses *subjective* sentiments about her assignments and workload. Even accepting Petitioner’s claim that she has been assigned more budget scrub than her colleagues, her conclusory assertion that her intermittent budget scrub work precludes her from promotion¹⁸ is unsupported by evidence. Similarly, Petitioner’s assertion that she has been under-utilized, and frequently idle, can not establish an adverse employment action. Indeed, no evidence indicates that Petitioner has even applied for a promotion. See Aronovitz Aff. at 2.

Even assuming, *arguendo*, that intermittent assignment to budget scrub (or insufficient workload) constitutes an adverse employment action, Petitioner has failed to demonstrate that the action “give[s] rise to an inference of discrimination.” Indeed, she concedes that white male evaluators at Dayton have also performed intermittent budget scrub. See Dep. at 275-76. Accordingly, with respect to Petitioner’s claim of disparate treatment discrimination, summary judgment must also be rendered in favor of Respondent.

D. Claim of Retaliation

¹⁸ During oral argument (*see* TR at 66-68), Petitioner cited two cases respecting the issues of job assignments and adverse employment action: *Taylor v. Safeway Stores, Inc.*, 365 F. Supp. 468 (D. Colo. 1973), *aff’d in part and rev’d in part on other grounds*, 524 F.2d 263 (10th Cir. 1975); and *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). Both cases are inapposite. In *Taylor*, evidence of the employer’s deliberate manipulation of job assignments for the purpose of restricting an employee’s work production, was held to negate the employer’s defense that the employee’s *termination* was based on the employee’s poor production. In the instant matter, there is no allegation that Respondent has undertaken any action against Petitioner based on inadequate work. Nor has Petitioner been denied a promotion based on inadequate work experience or any other reason. Again, Petitioner has not applied for, nor been denied, a promotion. In *Robinson*, due to an employer’s history of overt racial discrimination in hiring, its restrictive systems of seniority and interdepartmental transfers were held to impermissibly discriminate on the basis of race. None of these factors is presented here.

As to her final claim, to prevail on a hearing on the merits, Petitioner would be charged with the burden of producing evidence of retaliation. See 4 C.F.R. §28.61(c); *McKenna*, 729 F.2d at 790. Accordingly, to survive a motion for summary judgment, Petitioner must demonstrate sufficient evidence to support each element of her claim. To establish a claim of retaliation under Title VII, Petitioner must prove (1) that she engaged in a statutorily protected activity; (2) that Respondent took an adverse personnel action; and (3) that a causal connection existed between the two. See *Brown*, 199 F.3d at 452.

As previously discussed, because Petitioner can not prove an adverse personnel action under the *Brown* rule, she can not survive summary judgment as to her retaliation claim. It is also noteworthy that any alleged retaliation in the form of failure to protect Petitioner from a hostile work environment is yet further flawed because Petitioner has failed to produce evidence of a hostile work environment. See Section B, Claim of Discriminatorily Hostile Work Environment, *supra*. And any alleged retaliation in the form of assignment to budget scrub is further flawed because Petitioner can not prove that a causal connection existed between the budget scrub assignments and the protected activity (1994 discrimination claim). Petitioner asserts that she performed budget scrub more than other employees at Dayton, both *before* filing her 1994 discrimination complaint and thereafter until 1998. Obviously, this assertion vitiates any claimed causal nexus between budget scrub and the 1994 discrimination complaint. Petitioner has failed to produce evidence of two elements of her claim of retaliation upon which a reasonable person *could* rely to support a judgment in her favor. For these reasons, Petitioner's retaliation claim can not survive summary judgment in favor of Respondent.

Accordingly, summary judgment is granted in favor of Respondent against Petitioner with respect to each and every claim.

SO ORDERED.