

Leo Clarke, III v. U.S. Government Accountability Office

Docket No. 05-03

Date of Decision: May 17, 2006

Cite as: Clarke v. GAO, No. 05-03 (5/17/06)

Before: Michael W. Doheny, Administrative Judge

Headnotes:

Age Discrimination

Burden of Proof

Constructive Discharge

Non-selection

Promotion

Race Discrimination

DECISION

Introduction

This matter is before the Personnel Appeals Board (PAB or Board) on Petitioner's claim that he was discriminated against on the basis of race (African-American) and age (55) when he applied for and was not selected for promotion to Senior Analyst, Band II, in October 2001. He further alleges that the non-selection was part of a pattern of discrimination against African-Americans at the Government Accountability Office (GAO or the Agency), and that his retirement in January 2002 constituted a constructive discharge.

At the time of the promotion opportunities here in question, Petitioner was a Band I full performance Analyst on the Defense Capabilities and Management (DCM) team at GAO. The Petition, filed on May 5, 2005,¹ alleges that Henry L. Hinton, Managing Director of DCM and the selecting official for the vacancies here at issue, offered reasons for Petitioner's non-selection and the non-selection of two other senior African-American applicants that were "pre-textual and

¹ Petitioner challenged his non-selection in a Charge filed with the Board's Office of General Counsel on January 18, 2005. The record fails to provide any explanation for the three year delay between the alleged discriminatory actions and the case reaching the Board.

unsupported by the evidence.” Petition at 2. He further alleges that there was “a pattern of discrimination against African-Americans” within both DCM and GAO as a whole: “Notwithstanding the suggested rationale for the non-selection of [Petitioner] proffered ... *i.e.* the relative qualifications of the selected versus the non-selected applicants, the facts betray Mr. Hinton’s real basis for his decision.” *Id.* Mr. Hinton offered the vacancies to two White females under age 30, with fewer years of experience than Petitioner. Petitioner’s application indicates that he was among the “best qualified”² for the positions, but when the two female applicants declined the offers, the positions were left unfilled and the Vacancy Announcement was cancelled.

Petitioner seeks compensatory damages of \$300,000, “back pay” as well as “front pay” at the Band II level “through mandatory retirement at age 65,” and attorney’s fees.

The evidentiary hearing took place on September 14 and 15, 2005; it was continued on January 20, 2006 because of witness unavailability at the September hearing. Both parties filed post-hearing briefs on March 20, 2006, and the Agency submitted a responsive brief on April 4, 2006.

FINDINGS OF FACT

Background

1. Petitioner Leo G. Clarke, III, began his employment at GAO in December 1970 as a Management Analyst. TR I/111.³ Eventually he was promoted to the GS-12 level, and then converted to a Band I Evaluator (full performance) when GAO changed its personnel system from the traditional GS-system to employee Bands. TR I/111-12.
2. In October 2001, and at the time of his retirement in January 2002, Mr. Clarke was a full performance Band I Analyst on the Defense Capabilities and Management team. Prior to DCM’s creation, Petitioner worked as a Band I Evaluator on National Aeronautics and Space Agency (NASA) issues in the predecessor unit, the National Security and International Affairs Division (NSIAD). TR I/112; *see* TR II/2.
3. Henry L. Hinton, Jr., is the Managing Director of DCM and has held that position since DCM’s inception in 2000. TR II/2. Previously, Mr. Hinton held the comparable position of Assistant Comptroller General for NSIAD. *Id.* As Managing Director, Mr. Hinton is the executive in charge of DCM and is responsible for handling inquiries from Congress on matters relating to the Department of Defense, including preparing audits and evaluations and overseeing the work of approximately 250 DCM employees. TR I/36; TR II/2-3. Approximately 41 of those employees are African-American. TR I/36.

² As discussed in ¶¶9, 11 and 14 *infra*, Petitioner received his “best qualified” or “BQ” designation automatically as a result of fewer than ten people from the unit applying for the promotions. *See also* p. 26.

³ TR I is the hearing transcript for September 14, 2005; TR II is the transcript for September 15, 2005; and TR III is the transcript for January 20, 2006. TR I/111, for example, refers to material at page 111 of September 14 testimony.

4. As Managing Director, Mr. Hinton participates in an annual “needs assessment” at GAO that involves examining the current workforce by number and Band levels, and considering anticipated workload to determine appropriate staff levels for the next few years. This assessment includes identification of promotion opportunities.⁴ As a result of this process, Mr. Hinton makes recommendations to GAO’s executive team. Promotion opportunities that are approved are announced to GAO employees. TR II/4.

5. Since 1994, Mr. Hinton has been the selecting official for promotion decisions within NSIAD and DCM, including the promotion opportunities at issue in this case. TR II/3. In this capacity, he selects the individuals he determines to be “most qualified for the next level of responsibility.” TR II/3. It is his practice not to interview candidates for promotion from Band I to Band II, but rather, to make his decision based upon his own assessment and comparison of the application packages submitted. In his experience, that practice has resulted in “the right decisions” for GAO. TR II/12-13.

6. Mr. Hinton has acted as selecting official for twenty to thirty promotion cycles. TR I/37. He does not seek information as to the race or age of applications for promotion; nor does he consider such information in making promotion decisions. TR II/26-27. During his tenure as a selecting official, 15 African-Americans have been promoted (TR I/38; TR II/25), as well as at least 40 individuals over age 40. TR II/25-26. Mr. Hinton has promoted at least two African-Americans over 40 from Band I to Band II. TR II/30. Petitioner testified that he personally knew five African-Americans under age 40 who were promoted to Band II by Mr. Hinton. TR I/152. Five or six White Band I Analysts in DCM have remained at that level for 10 or more years without being promoted. TR II/25.

The October 2001 Promotion Process

7. On October 26, 2001, GAO issued Vacancy Announcement DCM 02-2, which announced two vacancies for promotion to Band II Senior Analyst positions in DCM. TR II/4-5; Respondent’s Exhibit (Resp. Ex.) 16 at 8. These opportunities were open to members of any team at GAO with at least one year of experience as a Band I Analyst. TR I/45; TR II/5. Mr. Hinton chose to announce the vacancies throughout GAO to broaden the field to find the most qualified candidates. TR I/40; TR II/5.

8. In October 2001, the promotion process for Analysts at GAO was governed by GAO Order 2335.8 (Merit Selection Plan for Analyst and Specialist Positions (Oct. 1, 2001)) (Resp. Ex. 17). Under Order 2335.8, ch. 2 ¶7, for some promotions, promotion panels were required to convene and assess the relative qualifications of candidates eligible and qualified for the particular opening. TR I/25. In such cases, a ranked list of candidates was compiled that identified the “best qualified” (or “BQ”) candidates. Order 2335.8, ch. 2 ¶9; TR I/25-26. The selecting official for a particular vacancy received the BQ list and selected a candidate to fill the vacancy from the list. Order 2335.8, ch.2 ¶11; TR I/25-26.

⁴ Under GAO Order 2335.8, ch. 1 ¶7, “[p]romotion opportunities by band, type of position, unit, and area of consideration are published on the basis of an annual needs determination.”

9. If fewer than 10 employees from a team applied for a specific vacancy announcement, no promotion panel was required. TR I/26; *see* Order 2335.8, ch. 2 ¶7.b(2) (“panel is not required... [w]hen less than 10 employees apply for a specific vacancy announcement in a unit”). In that case, all applicants in the unit would be forwarded to the selecting official for consideration. TR I/25-26, 31-32.

10. When an employee sought promotion outside his or her home unit, the employee was required to be designated as BQ by the home unit before applying for outside positions. Order 2335.8, ch. 2 ¶6.a; TR I/24-25, 31-34.

11. An employee could acquire the BQ designation either: (A) by means of a promotion panel, which evaluated applicants’ relative qualifications and designated those employees as BQ who were most ready for promotion; or (B) when fewer than 10 employees on a team sought promotion to Band II, those individuals automatically were designated as BQ and thus could apply for outside openings. Order 2335.8, ch. 2 ¶7; TR I/25-26, 31-32.

12. Petitioner applied for promotion to Band II in October 2001 in response to Vacancy Announcement DCM 02-2. TR I/126; Pet. Ex. 4; Petition (May 5, 2005) ¶2. An African-American, Petitioner was 55 years old in October 2001. *See* Petition ¶2.

13. Three other Band I Analysts within DCM applied for the promotion listed in DCM 02-2: Marjorie Pratt (African-American, over 40); Stephen Boyles (White, over 40); and James Lawson (White, under 40). Resp. Ex. 12; Exhibit A.⁵

14. As selecting official, Mr. Hinton received a Referral List/Selection Certificate listing Petitioner and the three other DCM applicants as eligible for the promotion announced in DCM 02-2. TR II/8-9; Resp. Ex. 12. Because there were fewer than 10 applicants from DCM, no promotion panel was convened and no BQ list was prepared. TR I/42; TR II/8-9; Order 2335.8, ch. 2 ¶7.b(2); *see* Resp. Ex. 12. The Referral List stated “if no panel was held and all qualified applicants were referred, check this space.” The space was checked and all four DCM applicants were listed.

15. Mr. Hinton received a separate Referral List/ Selection Certificate listing six additional Band I Analysts from teams other than DCM who applied for the promotions listed in DCM 02-2. TR II/18; Resp. Ex. 13. The box was also checked on this List, indicating that all qualified applicants from outside DCM were being referred. It listed those individuals: Johana Ayers (White, under 40); Lara Carreon (Hispanic, under 40); Raymond Denmark (White, over 40); Judy Lasley (African-American, over 40); Andrew Pauline (White, under 40); and Wendy Wierzbicki (White, under 40). Resp. Ex. 13; Exhibit A. Mr. Hinton understood that this Referral List/Selection Certificate implied that these outside applicants had been designated as BQ by their home units and they were eligible to apply for the promotions under consideration. TR II/9-10; Resp. Ex. 13.

⁵ Exhibit A was submitted with Respondent’s Corrected Post-Hearing Brief pursuant to the representation of counsel at the hearing. It provides race and age data for the applicants who applied for DCM 02-2.

16. Mr. Hinton received application materials for all ten applicants for the promotions announced in DCM 02-2. TR II/10; Resp. Exs. 1-10. The application packages included experience and performance information. Applicants could submit the three latest performance appraisals as part of the application package. All nine applicants other than Petitioner submitted either a resume of accomplishments or an Employee Profile (Form 537) as part of their application packages. See Resp. Exs. 1-10. Submission of such a resume or summary is optional when applying for promotion. Petitioner testified that he did not submit a summary because: it was not required; he did not have a prepared form for the pay-for-performance meritorious award process, based upon having already achieved the top of the pay Band; and it would have duplicated the information reflected in his performance ratings. TR I/126-27, 137, 159-61.

Performance Assessments of Applicants for DCM 02-2

17. The ten applicants for the DCM 02-2 promotion opportunities submitted application packages with performance assessments as follows:

Johana Ayers - Outside DCM (White, under 40) Resp. Ex. 2

2000-01 appraisal: 6 Outstandings

Wendy Wierzbicki .Outside DCM (White, under 40) Resp. Ex. 3

2000-01 appraisal: 2 Exceeds expectations, 5 Outstandings

1999-00 partial year appraisal: 2 Exceeds expectations, 4 Outstandings

Leo Clarke - DCM Applicant (African-American, over 40) Resp. Ex. 1

2000-01 appraisal: 1 Meets expectations, 3 Exceeds expectations, 2 Outstandings

1999-00 appraisal: 1 Meets expectations, 3 Exceeds expectations, 2 Outstandings

1998-99 appraisal: 1 Fully successful, 4 Exceeds fully successful, 1 Outstanding

Applicant 4 - DCM Applicant (African-American, over 40) Resp. Ex. 4

2000-01 appraisal: 4 Exceeds expectations, 2 Outstandings

1999-00 appraisal: 4 Exceeds expectations, 2 Outstandings

1998-99 appraisal: 1 Fully successful, 4 Exceeds fully successful, 1 Outstanding

Applicant 5 - Outside DCM (White, under 40) Resp. Ex. 5

2000-01 appraisal: 3 Exceeds expectations, 3 Outstandings

Applicant 6 - DCM Applicant (White, over 40) Resp. Ex. 6

2000-01 appraisal: 1 Exceeds expectations, 5 Outstandings

Applicant 7 - DCM Applicant (White, under 40) Resp. Ex. 7

2000-01 appraisal: 3 Meets expectations, 2 Exceeds expectations, 1 Outstanding

Applicant 8 - Outside DCM (Hispanic, under 40) Resp. Ex. 8

2000-01 appraisal: 2 Exceeds expectations (including supervision), 5 Outstandings

1999-2000 several partial year appraisals: all Exceeds expectations or Outstandings

Applicant 9 - Outside DCM (White, over 40) Resp. Ex. 9

2000-01 appraisal: 4 Meets expectations, 2 Outstandings

1999-00 appraisal: 2 Meets expectations, 2 Exceeds expectations, 2 Outstandings

1998-99 appraisal: 1 Fully successful, 4 Exceeds fully successful, 1 Outstanding

Applicant 10 - Outside DCM (African-American, over 40) Resp. Ex. 10

2000-01: 1 Meets expectations, 4 Exceeds expectations, 1 Outstanding

18. Mr. Hinton spent a few weeks going over the application packages. TR I/44. He reviewed each applicant's qualifications against the GAO performance standards for Band II. TR I/46; TR II/13-14; *see* Resp. Ex. 11 (Performance Appraisal System for Band I, II, and III Employees). He conducted a relative ranking of the applicants, considering how they would perform at the Band II level. Based upon this review, he concluded that Ms. Ayers and Ms. Wierzbicki "had distinguished them[selves] far above everybody else." TR I/53.

19. Mr. Hinton did not interview any of the applicants for the promotions listed in DCM 02-2. He believed that review of application packages was sufficient to make an informed decision for promotion from Band I to Band II. TR I/45; TR II/12. This was consistent with his practice throughout his tenure as a selecting official. TR II/12-13. GAO does not require interviews for competitive promotions. TR I/45; Order 2335.8, ch. 2 ¶11.b (interviews optional but if conducted, specific rules apply).

20. In making selections for promotion to Band II, Mr. Hinton looks for indications that the individual has shown ability to succeed at the next level—not just for an indication that the individual has exceeded expectations as a Band I. TR II/13. Band IIs, in his view, bear increasing responsibility for major segments of the work, including serving as evaluators-in-charge (EICs). TR II/6. Mr. Hinton's criteria for assessing applicants for Band II promotions include "exceptionally strong planning skills, exceptionally strong data analysis, communication skills, ability to function within a team and... think independently and get the work done in the time frames that we have been asked to do it in." TR II/6-7. The ability to supervise is important for a Band II, although generally it is not exercised at the Band I level. TR II/7.

Qualifications of Employees Selected for Promotion

21. Johana R. Ayers worked for the Acquisition and Sourcing Management (ASM) team in 2001. Resp. Ex. 2 at 4. She had been with ASM since joining GAO in 1998. TR I/61-62, 70. Her performance appraisal for 2000-01 reflected the highest possible rating—"outstanding"—in all six dimensions on which she was rated: planning; data gathering/documentation; data analysis; written communication; oral communication; and teamwork. The rating reflected no basis for evaluating supervisory skills.⁶ The narrative descriptions that accompanied the appraisal included detailed, very positive statements about her performance, such as "Ms. Ayers' performance was consistently outstanding... Ms. Ayers was a master at completing difficult and

⁶ In 2001, an Analyst's performance was rated in up to seven dimensions. In descending order of excellence, an assessment could be outstanding, exceeds expectations, meets expectations, below expectations and unacceptable. *See, e.g.*, Petitioner's Exhibit (Pet. Ex.) 4 at 2.

complex analyses under challenging timeframes for both engagements... Ms. Ayers always delivered a very polished presentation... Ms. Ayers was a role model in her dealings with others. She consistently displayed all the qualities necessary for effective, constructive working relationships across organizational boundaries.” Resp. Ex. 2 at 5-6. Ms. Ayers also submitted a resume that highlighted her experience, education, achievements and recognitions. *Id.* at 2-3.

22. Mr. Hinton believed that Johana Ayers stood out among the candidates because of the “outstanding” level of her performance as reflected in the ratings. In addition, her application package reflected “that she was working on a couple of jobs simultaneously,” and that she “was put in place to lead” a few jobs when the EIC was promoted to Band III, and that “she did a very, very capable job in seeing those jobs through to fruition with significant accomplishments with them.” TR I/47. Mr. Hinton also noted that Ms. Ayers had received a Meritorious Service Award, which is a GAO office-wide recognition, as well as the Assistant Comptroller General Award, a division-wide recognition. *Id.* at 48. In addition, Mr. Hinton noted that Ms. Ayers had experience in recruiting and mentoring staff. TR I/48. Finally, he recognized that Ms. Ayers had an advanced degree from George Washington University, and that “she brought a lot of her academic training to bear on the work and her success at GAO.” TR I/49. *See also* TR II/14-16.

23. Ms. Ayers testified convincingly as to her concurrent engagements on which she assumed “primary responsibility” when the Senior Analyst was promoted to Assistant Director. TR I/62, 83-85.

24. Wendy Barkley Wierzbicki worked for the Physical Infrastructure (PI) team in 2001. Resp. Ex. 3 at 2. Her performance appraisal for 2000-01 included a rating of “outstanding” in five job dimensions: planning; data gathering/documentation; data analysis; oral communication; and teamwork. In addition, she was rated as “exceeds expectations” in written communication and in supervision. Resp. Ex. 3 at 8. The narrative accompanying her 2001 appraisal included the following descriptions: “Her decision to build a database rather than use large, cumbersome spreadsheets will greatly reduce the time needed to analyze the results of file reviews. On the basis of her initial audit work, Wendy identified potentially serious weaknesses in HUD’s process for approving lenders who underwrite loans fully guaranteed by the federal government” Her written products were “consistently clear and well-organized.” She “clearly and succinctly presented information” in oral briefings, “she displayed a clear and articulate speaking style that represented GAO in a favorable light She made major contributions to several assignments and successfully took on increasing levels of responsibility.” On one job, she “independently wrote an excellent first draft of the entire project plan. Both the design matrix and project plan were approved with virtually no revisions.” Resp. Ex. 3 at 9-10. Her rating for 2000 reflected six months of experience at GAO, with evaluation at the “outstanding” level in four dimensions: data gathering/documentation; data analysis; oral communication; and teamwork. She was rated as “exceeds expectations” in planning and written communication. Ms. Wierzbicki submitted a resume highlighting her experience at GAO and elsewhere, and reciting her educational qualifications as well as training and awards. *See* Resp. Ex. 3 at 2-5.

25. Mr. Hinton concluded that Wendy Wierzbicki possessed a “very outstanding rating” as part of her application for promotion—comparable to that of Ms. Ayers. TR II/17. In addition, he relied on the fact that she had worked in three different subject areas within a very short time,

and that during that time, “she had been put under some extreme demands and had responded very, very well.” TR II/17. Mr. Hinton also considered that Ms. Wierzbicki stood out because of some supervisory experience at the Band I level, and that she had prior experience as a team leader and supervisor at the Department of the Navy. TR II/17. Further, he considered her awards history (TR II/18), which included receiving the Assistant Comptroller General award. TR II/15; *see* Resp. Ex. 3 at 5.

26. On December 17, 2001, Mr. Hinton sent letters to Ms. Ayers and to Ms. Wierzbicki offering them promotion to Band II. TR II/14, 22; Resp. Ex. 14 at 1; Resp. Ex. 15 at 1.

27. Both Ms. Ayers and Ms. Wierzbicki also received promotion offers from their respective home teams, ASM and PI. They each accepted the offer from the home team rather than the offer from Mr. Hinton for promotion in DCM. TR I/72; TR II/22.

28. Mr. Hinton chose not to fill the positions advertised in DCM 02-2 when Ms. Ayers and Ms. Wierzbicki declined the promotion offers, because he did not believe “that the other candidates could successfully perform at the next level and meet expectations.” TR II/23.

29. The governing Order, 2335.8, ch.2 ¶11.a, specifically provides that a selecting official “may choose not to fill an announced position.”

Petitioner’s Qualifications

30. Petitioner’s application package contained his performance appraisals for the three rating cycles prior to the October 21, 2001 Vacancy Announcement. His performance appraisal for FY 2000-01 included one “meets expectations” (written communication); three “exceeds expectations” (planning, data analysis, and oral communication) and two “outstanding” (data gathering/documentation and teamwork) ratings. Resp. Ex. 1 at 2. His appraisal for FY 1999-2000 included the same distribution of ratings. *Id.* at 11. His 1998-99 appraisal reflected one “fully successful” (written communication); four “exceeds expectations” (planning, data gathering/documentation, data analysis, and oral communication); and one “outstanding” in teamwork. *Id.* at 6. On all three appraisals there was no basis for evaluation of Petitioner’s supervisory skills.

31. The narrative portion of Petitioner’s 2001 appraisal included such descriptions as the following: “Mr. Clarke exceeded expectations in job planning. For example, he prepared effective job management plans on all his assigned tasks and assisted in maintaining the paperwork for his assigned jobs.... Mr. Clarke was outstanding in gathering data and documentation. His clear organization and indexing of workpapers helped ensure ease of referencing the final products on these assignments....” *Id.* at 3.

32. Mr. Hinton viewed Petitioner’s ratings generally as meeting or exceeding expectations for the job dimensions assessed. In his view, Petitioner “had been doing... pretty much what the expectations were that were... set for him and he did a pretty good job of responding to those expectations.” TR I/51. He believed that Petitioner’s performance was in the middle for Band Is

on the DCM team.⁷ TR II/19-20. He did not believe that Petitioner’s application evidenced an ability to perform acceptably at the next level—Band II—and he viewed these ratings as lower overall than those of the candidates selected. TR I/51.

33. Mr. Hinton’s conclusions about Petitioner’s performance relative to that of the two offerees are consistent with the differences in the performance assessments.

34. As to awards, Petitioner testified that he received a spot award of one day off in 2000 and in 2001, and a cash spot award of \$200 in 1999. TR I/136. He also received annual merit pay increases until he had reached the ceiling for Band Is. TR I/133-34.

35. In reviewing the application packages, Mr. Hinton did not know that Petitioner believed that his 2001 performance appraisal should have been higher. TR II/20-21. Even if Petitioner’s written communication had been evaluated as “exceeds expectations” rather than “meets expectations” for that year, Mr. Hinton would not have changed his conclusion as to Petitioner’s promotability. TR II/21, 28. Essentially his performance still would have been a step below that of the two offerees. *See* TR I/51; TR II/30.

36. Petitioner’s appraisal for 2001 was virtually identical to that for 2000—*i.e.*, the rating was the same for each of the job dimensions evaluated.

Petitioner’s Feedback and Decision to Retire

37. After the selections were made as to DCM 02-2, Mr. Hinton met with Petitioner to discuss the matter. Mr. Hinton explained that he believed other applicants distinguished themselves above Petitioner. TR I/57-58. He also explained that he believed applicants for promotion should have “demonstrated results in the areas of planning, conceptualization, [and] written and oral communications.” TR I/58. He informed Petitioner that he needed to improve in written communication. TR I/129.

38. Petitioner testified that he understood his communication with Mr. Hinton as to his non-promotion to effectively be telling him that he should leave GAO. TR I/176. He believed that there was a “general consensus that minorities within GAO, only in the area of written communication, were having difficulties and we could not understand why it is that we could perform outstanding in various other areas but in this one area we would always find ourselves being rated ‘meets expectations’.” TR I/139. Petitioner admitted during cross-examination that Mr. Lundgren, a White supervisor, had agreed to help him in the area of written communication to enhance his promotability. TR I/164.

⁷ Prior to the hearing, Mr. Hinton reviewed the relative performance of Band Is in DCM for 2001. This exercise confirmed the view that Petitioner’s solid performance placed him in the middle of the pack for Band I performance that year. TR II/19-20. Of the 22 other Band I Analysts in DCM at that time, 10 had higher assessments than Petitioner; nine had lower assessments; and three had the same overall assessment as Petitioner. TR II/19-20.

39. Petitioner retired from GAO in January 2002 after more than 30 years of service. TR I/111, 175. He testified that he did not view the retirement as voluntary, but rather, believed he was not recognized for his accomplishments and that, “no matter what [he] did [he] was not going to be promoted” within GAO. TR I/140. He believed that Mr. Hinton by not promoting him had effectively told him “in so many words” to leave the Agency. TR I/176. His “experiences” at GAO “were just draining him” and the situation had become “untenable.” TR I/140.

40. Petitioner was earning approximately \$66,000 at the time of his retirement. TR I/177. In March 2002—two months after retiring from GAO—he commenced working for the U.S. Investigative Services for \$70,000 per year. TR I/177-78. He left that position voluntarily in July 2004. Currently he is employed as a loan officer, with the potential to earn between \$100,000 and \$110,000 per year. TR I/178.

Other Incidents

41. Petitioner alleges that GAO engaged in a pattern of discrimination and testified to a number of personal experiences which he believed evidenced adverse treatment of him because of his race.

42. Petitioner testified that he had been promised a promotion to a higher grade from his prior Federal employer, but that GAO did not grant him the promotion when he came on board in 1970. There was no testimony that GAO had promised Petitioner the promotion; nor did Petitioner relate this non-promotion at GAO to his race. TR I/114, 144-45. Further, this incident is extremely remote in time from the facts here at issue.

43. Petitioner next testified that a former supervisor, Mr. Bontempo, “blatantly discriminated against me in a meeting, an informal lunch meeting with some friends that told me that I was not allowed into the room that they were occupying because of my race.” TR I/114. On cross-examination, Petitioner testified that the incident took place in 1983. TR I/145. He offered no corroboration of this incident. Assuming it took place as Petitioner stated, the incident is too remote in time to be part of the alleged pattern in this case.

44. Petitioner also testified concerning events related to his work in 1990 under his second-line supervisor on NASA-related work at Goddard Space Flight Center, Mark Gebicke. TR I/114-15. Mr. Gebicke noted some concerns about Petitioner’s work performance at that time. TR I/166-68; Resp. Ex. 20. Petitioner testified that Mr. Gebicke told him that based on his time in grade and age, he “should not look to ever be promoted at GAO” and that he “should look to find work elsewhere and leave GAO.” TR I/115.

45. Petitioner testified that one reason underlying this statement from Mr. Gebicke was Petitioner’s race. TR I/174-75. Following the 1990 meeting, Mr. Gebicke sent Petitioner a memorandum, which noted that he had received phone calls from Goddard personnel raising serious concerns about Petitioner’s behavior and interaction with NASA staff members. Resp. Ex. 20 at 1; TR I/168-70. The memorandum further states that Petitioner would henceforth be supervised more closely and would not conduct interviews alone. It also states Mr. Gebicke’s conclusion “that a promotion this year or any time soon was not probable.” Resp. Ex. 20 at 2. It

further explained to Petitioner that if promotion was a priority, looking outside the Agency would be his best course. *Id.* Nevertheless it stated Mr. Gebicke’s assurance that “as long as [Petitioner] worked with me I would ensure we helped him to improve his performance. I promised him honest feedback on how he was doing.” *Id.*

46. Petitioner provided a contemporaneous response memorandum to Mr. Gebicke that included his recollections of the conversations at that time. His summary of the encounter included Mr. Gebicke stating “from what you saw I had problems with my data analysis and writing. You also told me that you felt it would be difficult for me to get a promotion in GAO with the number of years in grade that I have at the full performance level, and from the quality of new employees that you see coming into GAO, you felt they are better qualified than I.” Resp. Ex. 21 at 2. Petitioner did not refer to race in the four-page response memorandum to Mr. Gebicke. TR I/167, 173-75; *see* Resp. Ex. 21.

47. Petitioner further testified concerning two assignments around 1995 on which he served as the evaluator-in-charge, including responsibility to develop the assignment and supervise staff. Two employees whom he supervised during this time as a Band I subsequently were promoted to Band II while he remained in Band I. TR I/116-18. Petitioner believed that his contributions were overlooked. His testimony did not tie this concern to the issue of race; nor did he offer any documentary evidence in support of this discrimination allegation.

48. Petitioner also testified that in approximately 1997-1998, he questioned a performance rating on a defense job on which he felt that he “had performed higher than what was indicated on the rating itself.” TR I/119-20. He further testified that in his first meeting on that appraisal, he was told that his rating had been lowered; Petitioner thought that the “verbiage on the rating also indicated that the marks should have been higher.” TR I/119-20. As a result of his discussion with supervisors, some check marks were moved but some of the verbiage also was edited—to remove reference to Petitioner having shown potential to supervise. Petitioner indicated that he stated his disagreement with the rating and then signed off on it. *Id.*

Petitioner’s 2000-01 Appraisal

49. Petitioner also testified concerning his performance appraisal for 2000-01. This appraisal was part of the application package for the promotions at issue in this case. During that year, Petitioner was under the supervision of Frederick E. Lundgren for “the better part of the year,” and under Joseph W. Kirschbaum for “a short period.” TR I/121. Messrs. Lundgren and Kirschbaum, both White, were Band II Senior Analysts in October 2001. In his testimony, Petitioner stated that Mr. Lundgren had set expectations with him that “focused on the written communication area as an area that I would be given more responsibility for to be able to improve the rating so that it would become competitive during the opportunity for competing for promotion.” TR I/122.

50. At the end of the appraisal year, Petitioner was working under Mr. Kirschbaum, who had not set expectations with him when he began the assignment in July 2001. TR I/122-23. Petitioner objected that Mr. Kirschbaum prepared the rating for 2000-01, based on a relatively short period of the year. TR I/121-23. At appraisal time, the former supervisor was unavailable because of a

Congressional detail, so Mr. Kirschbaum as the current supervisor was asked by his superiors to prepare the rating. TR I/108. Mr. Kirschbaum was “not comfortable” preparing the draft rating after only two and one-half months as Petitioner’s supervisor. TR I/94. Therefore, he “obtained input from his previous supervisors,” added his own observations, and prepared a draft rating for Petitioner based upon the merged views. TR I/94-95, 108. Mr. Kirschbaum testified that he “relied mostly on” the input from Mr. Uldis Adamsons,⁸ whom Mr. Kirschbaum recalled as being the primary prior supervisor. TR I/99. He received input in written form, and followed up with verbal discussions after preparing a draft appraisal. In Mr. Kirschbaum’s opinion, Petitioner “was a very solid analyst, very dependable. He was very able to do every task required of him.” TR I/96.

51. Petitioner also objected to the 2001 assessment on the basis that the appraisal was not as high as the draft appraisal prepared by Mr. Lundgren, in particular in the areas of data gathering and written communication. TR I/123-24. Petitioner believed that his appraisal had been lowered, because “the verbiage pretty much came from exactly the rating that I received the year before, where the word ‘outstanding’ was in the mark it was in the outstanding category. However, on the particular rating that Mr. Kirschbaum handed to me the mark was at ‘exceeds exceptional’ and not outstanding. So I had to question him. I also had to question the written communication due to the fact that the verbiage was supporting an ‘exceeds exceptional,’ [sic] but I was receiving a ‘meets expectation.’” TR I/122.

52. Mr. Kirschbaum initially submitted a draft rating to his superiors with Petitioner assessed as “outstanding” in what he thought may have been data gathering based on the recommendation of prior supervisors. TR I/100. The reviewers questioned that rating based on the corresponding narrative description of Petitioner’s performance; this caused Mr. Kirschbaum to return to the prior supervisors for information to support the higher rating. They did not supply such support, so the rating was adjusted during the review process to “exceeds expectations” in data gathering, which was consistent with Mr. Kirschbaum’s own opinion. *Id.* Mr. Kirschbaum testified that he mistakenly neglected to change the first word of the narrative, which described Petitioner’s work in this area as “outstanding.” TR I/103-04. Petitioner observed that the first word of the narrative and the rating did not match, and succeeded in having the rating for data gathering changed back to “outstanding.” TR I/104-05, 124-25.

53. As to the assessment on the 2000-01 appraisal for writing, Petitioner did testify that Mr. Lundgren had proposed a higher rating in written communication, and that Mr. Kirschbaum had lowered that assessment to “meets expectations.” TR I/124-25. Mr. Kirschbaum’s testimony elaborated on why he had not utilized Mr. Lundgren’s recommendation, stating that Petitioner had not performed the kind of writing work during the year that would warrant such a rating. TR I/198, 105-06. Mr. Lundgren’s testimony also indicated that Petitioner had not done a large amount of writing for him and that their particular project was number oriented. TR III/45. He also noted that his submission would have been an “advisory rating,” a rating which often changes before the final rating. TR III//34.

⁸ According to Mr. Lundgren, Mr. Adamsons was a Band III “group director” in 2001. TR II/39.

54. Mr. Kirschbaum testified that neither race nor age played any role in how he prepared the performance appraisal for Petitioner. TR I/109.

55. Petitioner's ratings for each category or job dimension were identical between the years 1999-2000 and 2000-01. Moreover, there was no written description elaborating on the assessment for "written communication" with his 2001 assessment. *See* Resp. Ex. 1 at 2-3. Petitioner challenged the rating for writing, but Mr. Kirschbaum explained that it would remain at the "meets expectations" level. Petitioner did not submit any documentary evidence to support his testimony on the 2000-01 appraisal.

56. Petitioner further testified that he discussed his non-selection for the Band II vacancies in 2001 with Henry Hinton after the promotion opportunities were withdrawn. TR II/128. He recounted the discussion as follows:

I informed him that I had done work in the past that demonstrated that I was doing the same work as the Band II level. But he said under this circumstance he looked over the rating and that there was a concern in written communication and that's an area that I needed to improve in.

TR I/129.

57. Mr. Lundgren testified that Petitioner "did everything that I could possibly ask of him. And if that was the criteria for promotion to Band II, then I would think that Leo would be promotable." TR III/43. Mr. Lundgren also noted that he had never been involved in promotion decisions. *Id.*

Other Evidence

58. Marjorie Pratt, an over-40 African-American Analyst in DCM in 2001, also applied for the promotion vacancies here at issue. *See* Resp. Ex. 4. She worked at GAO from 1972 until her retirement in January 2006. TR III/3. She testified that she had witnessed subtle race discrimination over the years at GAO. TR III/5-8, 30; *see* Resp. Ex. 22 ¶9. She also testified to having observed "favoritism" over the years. TR III/9. She indicated that age becomes a deterrent to promotion as well. Resp. Ex. 22 ¶9; *see* TR III/6. By the last few years of her career, Ms. Pratt had given up on applying for promotions. TR III/4. She believed that she and Petitioner were discriminated against in the selection process here at issue. TR III/15. She also testified that she did not have any knowledge as to who else applied for the promotion and what their qualifications were. TR III/20-21; Resp. Ex. 22 ¶6. In addition, she testified that she had worked her way up from secretary into the Analyst ranks, and that eventually she reached the earnings ceiling for a Band I. TR III/3-5, 17-18. Finally, she admitted that there "probably were" White Band Is who never were promoted to Band II. TR III/26.

59. Mr. Lundgren, who agreed to assist Petitioner with improving his performance assessment in the dimension of written communications, was a Band II who supervised Petitioner during the beginning of the 2000-01 performance cycle and for the preceding year. TR III/33. He was employed at GAO from 1976 until his retirement in 2004. TR III/32. He testified that he was

not aware of anyone who had been found to have been discriminated against in employment (TR III/33), and that he had not observed discrimination based on race or age against Petitioner during the time that they worked together (TR III/44).

60. Petitioner introduced a number of snapshot documents that reveal Agency composition by race and age in several consecutive years.⁹ For example, Petitioner's Exhibit 8 shows that as of October 2001, there were 84 African-Americans of 556 total Analysts in Band I (15.1%); 177 African-Americans of 1327 total in Band II (13.3%); and 34 African-Americans of 417 total in Band III (8.1%); overall there were a total of 295 African-Americans out of 2,300 Analysts Agency-wide (12.8%). At the same time, the over-40 age group was represented as follows: 144 of 556 in Band I (25.9%), 1028 of 1327 in Band II (77.5%), and 381 of 417 in Band III (91.4%), for a total of 1553 over-40s out of 2,300 Analysts (67.5%). Following the evidentiary hearing, the Agency submitted documentary evidence as a follow-on to Petitioner's Exhibit 8, containing data for the years October 2002-2005. In 2005, African-Americans numbered 81 of 638 in Band I (12.7%), 168 of 1278 in Band II (13.1%), and 46 of 423 in Band III (10.9%), for a total of 295 out of 2,339 Analysts (12.6%). The over-40 group as of 2005 constituted 103 out of 638 in Band I (16.1%), 817 out of 1278 in Band II (63.9%), and 384 out of 423 in Band III (90.8%), for a total of 1,304 out of 2,339 Analysts (55.8%).

61. Petitioner introduced no statistical evidence as to promotion rates for African-Americans or persons over age 40 during the relevant period.

62. Jesse E. Hoskins, Chief Human Capital Officer for GAO, testified that African-Americans comprise approximately 19-20% of the Agency workforce. TR I/14. When asked to rate GAO's hiring and promotional record with respect to African-Americans and other minorities, Mr. Hoskins testified: "I think it's fairly good." TR I/21. He continued, based on the nationwide civilian labor force: "[J]ust thinking about relevant data by racial group, by occupation, just recently I looked at a report that compared our numbers, our demographics with the civilian labor force statistics. We are in real good shape except for Hispanics and Native Americans." TR I/21-22. He further testified that retention of minorities is "a concern of ours," that GAO is looking into the reasons why people leave. He noted that in competing for talent in a competitive marketplace, GAO does lose employees for reasons of salary. TR I/23.

ANALYSIS

Arguments of the Parties

Petitioner alleges that he was discriminated against on the bases of race and age when he was not selected for promotion to Senior Analyst and when the Vacancy Announcement was withdrawn after the individuals selected for the openings declined the positions. Further, he argues that a discriminatory pattern was evidenced "in the discriminatory treatment of [Petitioner] during the consideration of his qualifications by Henry 'Butch' Hinton for the position, in the selection of two less-qualified, inexperienced, younger white females for the advertised positions, and in the decision to terminate consideration of any other applicants when the two white females declined

⁹ Petitioner's Exhibit 8 provided race and age data for the years 1997 through 2002. As supplemented by GAO after the hearing, it included through 2005.

the offers of employment.” Petitioner’s Brief/Closing Argument (P.Brief) at 11. Finally, he argues that his retirement in 2002, after his non-selection, was not voluntary and constituted a constructive discharge.¹⁰ *Id.* at 5; TR I/139-40.

GAO argues that Petitioner has not established by a preponderance of evidence that the Agency discriminated against him on the bases of race and age when it did not select him for promotion to Band II pursuant to DCM 02-2; that the two individuals selected possessed “superior qualifications;” and that Petitioner did not demonstrate that the Agency’s articulated reason for the selections constituted pretext for discrimination. Respondent’s Corrected Post-Hearing Brief (R.Brief) at 28. The Agency also contends that the withdrawal of the Vacancy Announcement after the two selectees declined the offers was not discriminatory; Petitioner was treated like the other applicants who were not offered promotions. Moreover, GAO had a legitimate business reason for that action, based upon the selecting official’s evaluation of the candidates’ relative strengths. As to the allegation of a pattern of discrimination, GAO argues that “[a]t best, Petitioner offered evidence of isolated, sporadic incidents he believed to be discriminatory, with no probative statistical or anecdotal evidence to support his contentions.” *Id.* Finally, the Agency contends that Petitioner did not establish constructive discharge because he failed to show that his working conditions were sufficiently intolerable to drive a reasonable person to retire.¹¹ *Id.*

For the reasons set forth below, Petitioner has failed to establish his claims. While the actions of GAO with respect to Vacancy Announcement DCM 02-2 established a *prima facie* case of discrimination in the selection of two young White females, the Agency established a legitimate, nondiscriminatory basis for its selections. Further, as to the subsequent withdrawal of the Vacancy Announcement when the selectees declined the promotion opportunities, Petitioner did not establish that he was treated disparately; nor did he rebut the Agency’s legitimate business reason for that decision by establishing that the proffered reason was a pretext for discrimination.

Petitioner also failed to establish a pattern of discrimination at GAO. His testimony offered only a variety of instances where he perceived bias, over a period of many years, and with only the testimony of one other individual as corroborating evidence.

As to the claim of constructive discharge, Petitioner’s disappointment at not being promoted and his perception that promotion was not within his reach—while personally discouraging—do not amount to circumstances that would force a reasonable person to retire unwillingly.

¹⁰ Petitioner’s Brief argues that the withdrawal of the vacancy announcement “represents a separate and distinct act of discrimination against the Petitioner—which is separately compensable as egregious and unconscionable behavior that had the effect of embarrassing and humiliating the Petitioner.” P.Brief at 20.

¹¹ GAO’s Response to Petitioner’s Post-Hearing Brief (Reply) reiterated its arguments on the merits of the case and noted that much of Petitioner’s Brief was argument unmoored from the record evidence. Petitioner did not file a Reply brief.

A. The Discrimination Claims

Standard of Proof

In a case involving an allegation of intentional discrimination under Title VII or under the Age Discrimination in Employment Act (ADEA), the petitioner bears the burden initially to show that there is substance to the allegation, *i.e.*, that if left un rebutted the trier of fact could find unlawful discrimination. Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. §2000e *et seq.*; Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. §621 *et seq.*; *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978). To establish a *prima facie* case of discrimination based on race or age, Petitioner must show that: (1) he is a member of a protected class; (2) he was subjected to an adverse employment action; and (3) similarly situated employees outside his protected class were treated more favorably in like circumstances or that the unfavorable action gives rise to an inference of discrimination. *Furnco*, 438 U.S. at 576-78.

The Agency concedes that Petitioner has made his *prima facie* case with respect to the “initial selections” of Ms. Ayers and Ms. Wierzbicki. See R.Brief at 29-30 & n.6. With respect to the selections, it must, therefore, be determined whether the Agency has offered a legitimate business reason for its decision and if so, whether Petitioner has established that such reason is mere pretext for unlawful discrimination. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142-43 (2000); *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981). As to the withdrawal of the Vacancy Announcement and other allegations of discrimination, it is appropriate to review the record for evidence of discrimination and whether the Agency had legitimate business reasons for its actions. See *USPS v. Aikens*, 460 U.S. 711, 713-14 (1983).

The 2001 Promotion Action

Petitioner in this case is a member of a protected class based on both race and age. He was turned down for promotion despite meeting the basic requirement for eligibility (one year at the Band I level) and having a composite performance assessment predominantly in the “exceeds expectations” range. The two openings were offered to two individuals who were under age 40 and White; both offerees had considerably fewer years of experience at GAO than did Petitioner. The selections were based upon a review of application packages and no interviews were conducted. When the two selected individuals declined the promotion offers, the vacancies were cancelled rather than filled from other individuals in the applicant pool who met the basic eligibility threshold. This cancellation action must be considered both in conjunction with the initial offers and separately to see if it is sufficient standing alone to create an inference of discrimination.

GAO contends that the promotions were offered to Ms. Ayers and Ms. Wierzbicki based upon their “superior qualifications.” Mr. Hinton enumerated specific reasons why these two applicants stood out above the rest of the applicants, beginning with top-quality performance assessments. See Findings of Fact (FOF) ##22-25. He also noted that their particular experience demonstrated success while being challenged beyond the norm for Band I. Specifically, as to

Ms. Ayers, Mr. Hinton noted that in addition to her outstanding ratings:

she was working on a couple of jobs at the same time. Her EIC was promoted. She was tasked to assume those responsibilities. She completed the work and did an exceptional job in doing that as is reflected in her rating. I also felt that taking over the responsibilities...is somewhat unique for a Band I person at that point in time.

I also highlighted, too, that there were a couple of significant recognitions of her contributions. One was an office-wide Meritorious Service Award for her exceptional performance that was deemed in, I think it was 2001.

There was also an award that was recommended to me and I awarded to her as an Assistant Comptroller General Award, which is a division-wide award for work that she had done back in—the award was in 2000....Those two awards are significant, in my view. That struck me as a couple of very important distinctions in her paperwork.

TR II/14-15.

As to Ms. Wierzbicki, in addition to a “very outstanding rating,” Mr. Hinton had noted that:

in a very short period of time she had worked in three different subject matter areas...and that through the course of that work she had been put under some extreme demands and had responded very, very well, based on the written appraisals and assessments that were done on her performance.

She also for Band I had some supervisory responsibilities which stood out to me. Another factor that struck me...was her prior work experience over at the Department of Navy as a Logistic Management Specialist. She was there for about four years as part of a program where she took on increasing levels of responsibilities to include at the conclusion of that program where she was a team leader, supervising eight people.

TR II/17.

While Petitioner’s application listed him as “best qualified,” the testimony of officials and the applicable GAO Order show that in the circumstance where fewer than 10 individuals in a unit apply for promotion, if they meet the minimum requirements for promotion, the “best qualified” label will attach. In this circumstance, no promotion panel has met to review and rank the applicants. Therefore, in the context of this case, the term “best qualified” does not imply being among the “best” of all applicants, as Petitioner would argue. Mr. Hinton testified that Petitioner met the threshold requirement for promotion to Band II (having served for at least one year in Band I), but that, in his view, he was not able to perform at that higher level. TR II/20. Further, he did not believe that any of the applicants other than Ms. Ayers and Ms. Wierzbicki would meet the expectations for performance at the Band II level. *Id.*

When Ms. Ayers and Ms. Wierzbicki declined the promotion offers, Mr. Hinton concluded that none of the other candidates “could successfully perform at the next level and meet

expectations.” TR II/23. The application packages (Resp. Exs. 1-10) are fully consistent with the conclusion that the two offerees were considerably above those submitted by the other applicants. The evidence does indicate that two of the applicants submitted performance assessments that approached those of Ms. Ayers and Ms. Wierzbicki. *See* FOF #17 (Applicants 6 and 8). A review of the entire packages of these two applicants supports the Agency’s conclusion as to where to draw the line. This includes narrative descriptions that do not contain the same level of detailed superlative assessments, assumption of responsibility and level of recognition that the two offerees submitted. *Compare* Resp. Exs. 2, 3 *with* Resp. Exs. 6, 8. Moreover, one of these other two applicants was White and over 40; the other was Hispanic and under 40.

Under these circumstances GAO’s proffered explanation for the decision to make the two particular offers and to withdraw the opportunity are reasonable. Management was within its prerogatives to decide to cancel the promotion announcement when the two candidates whose packages were outstanding declined the offers.

Petitioner did not provide much evidence in the nature of a direct comparison of his credentials with those of the two successful applicants. He offered no documentary evidence to show that he was equally or more qualified than either of them, and he did not testify to that effect. He did testify that just prior to 1995 he acted as an analyst-in-charge and supervised other Band Is. TR I/116-18. He provided no corroborating evidence of this supervisory experience, nor of his having excelled at it. Further, he did not include this experience in his application package in 2001; he could have done so by preparing a resume of accomplishments. He did attempt to rely on the length of this tenure at the Agency as a factor that showed he was more qualified. P.Brief at 8; *see* TR II/128-29, 139-41. Length of service alone, however, does not support his qualifications for promotion. *See Hastie v. Henderson*, 121 F.Supp.2d 72, 79 (D.D.C. 2000). In fact, Mr. Hinton provided testimony that five or six Band Is under his supervision had served for 10 years or longer at that level. TR II/25. Further, Petitioner testified that he had received numerous awards over the course of his career. TR I/133-37. These fell into the category of merit pay increases as well as spot and cash awards—the type that 70-75% of DCM employees receive in a year. TR II/16-17. The Agency amply demonstrated through Mr. Hinton’s testimony that the nature of Petitioner’s awards was much more common than the awards that Ms. Ayers and Ms. Wierzbicki had received in their relatively shorter careers.¹² *See* TR I/48, II/15-18.

Cancellation of the Vacancy Announcement

In order to establish a *prima facie* case of discrimination with respect to the promotion after the two selectees declined their offers, Petitioner must establish that, despite his qualifications, he was rejected and “‘someone filled the position or the position remained vacant and the employer continued to seek applicants’.” *Hayslett v. Perry*, 332 F.Supp.2d 93, 99 (D.D.C. 2004) (quoting *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003)). Petitioner has not shown that the

¹² The Agency correctly points out that Petitioner did not ask any witness, including Mr. Hinton, about Ms. Wierzbicki’s qualifications for the Band II position. R.Brief at 31 n.7. Nor did Petitioner call Ms. Wierzbicki to testify.

positions were subsequently filled or that Mr. Hinton continued to solicit applications from candidates with similar qualifications: in this case, the Vacancy Announcement was cancelled. *See Barber v. CSX Distribution Serv.*, 68 F.3d 694, 698 (3d Cir. 1995); *Carter v. Pena*, 14 F.Supp.2d 1, 5 (D.D.C., 1997).

There is some support recognizing that a cancelled vacancy announcement can form the basis of a “failure to promote” claim. *Terry v. Gallegos*, 926 F.Supp. 679, 709-10 (W.D.Tenn. 1996). In that case, the individual established that the agency had a pattern of canceling vacancy opportunities when unwanted applicants were on the certification list. 926 F.Supp. at 710; *Hayslett v. Perry*, 332 F.Supp.2d at 99-100 (distinguishing *Terry v. Gallegos* from norm because evidence supported inference of discrimination). This analysis requires “that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought’.” *Hayslett*, 332 F. Supp.2d at 99 (quoting *Morgan v. Fed. Home Loan Mtg. Corp.*, 328 F.3d 647, 650-51 (D.C. Cir. 2000)). Even under the *Terry* approach, cancellation of a vacancy announcement is subject to the familiar analysis—whether GAO proffered a legitimate, nondiscriminatory reason for the cancellation and whether Petitioner showed that the Agency’s reason was pretextual. *See Hayslett*, 332 F. Supp.2d at 100; *Bowie v. Ashcroft*, 283 F.Supp.2d 25, 31 & n.4 (D.D.C. 2003). It is therefore appropriate to review the record to determine if the evidence raises an un rebutted inference of discriminatory motive.

Neither party here introduced any additional evidence concerning the Agency’s practice with respect to cancellation of a vacancy announcement. Moreover, with respect to the cancellation of the promotion opportunities when Ms. Ayers and Ms. Wierzbicki declined the promotion offers in DCM, Petitioner has not established that he was treated differently from other non-protected applicants who met the threshold for applying but were not offered promotions. There were non-minorities and individuals under 40 in that pool of disappointed applicants. Mr. Hinton concluded that all remaining applicants, including those who were under 40 and/or were White, were sufficiently behind the two offerees in the promotion pool that no further offer should be extended. A review of their application packages confirms this conclusion. In fact, there were a number of disappointed applicants whose composite assessments were higher than Petitioner’s. *See* FOF #17. Specifically, the composite ratings for applicants 6 and 8 were significantly higher than Petitioner’s; applicant 5 was higher; applicant 4 was marginally higher; applicant 9 was in the same general range as Petitioner; and applicants 7 and 10 were slightly lower.

Accordingly, with respect to the withdrawal of the promotion opportunities, Petitioner has not established a *prima facie* case. Even if he had, on this record, the application packages support Mr. Hinton’s drawing a line where he did and declining to fill the positions rather than fill them

with applicants whom he viewed as performing at the middle of the Band I group.¹³ Further, as the Agency points out, Petitioner did not introduce any evidence to show that he was the most qualified among the remaining applicants. In fact, two individuals in the remaining applicant pool were not African-American, were under 40, and both had higher performance assessments than Petitioner. *Compare* Resp. Ex. 1 *with* Resp. Exs. 5, 8. Marjorie Pratt, another over-40 African-American, also was not selected from the promotion pool despite having somewhat higher ratings than Petitioner.

The Agency proved through testimony and exhibits that it had legitimate business reasons for the two individual selections, and for not filling the vacancies after the initial offers were declined. Petitioner has not established that his non-selection for the promotions announced in DCM 02-2 was discriminatory—either initially or after Ms. Ayers and Ms. Wierzbicki declined their offers.

Other Incidents and Allegation of Pattern

Petitioner's allegation of a pattern of discrimination at GAO can best be viewed on this record as going to his theory that the Agency's purported reasons for the selections and for the cancellation of the Vacancy Announcement were mere pretext and that discrimination underlay those actions. *See Lowery v. Circuit City Stores*, 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999). Petitioner requested relief for himself alone. He introduced some statistical snapshot information showing overall GAO employment of Analysts at different times for minorities and by age. He also described a handful of incidents spread out over years in which he believed he personally was the victim of discrimination. He introduced no corroborating evidence to support his opinion that these incidents were based on discrimination.

Petitioner did provide the testimony of Marjorie Pratt, who was similarly situated in DCM and also applied for the vacancies announced in DCM 02-2. Ms. Pratt is an African-American female who was over 40 at the time of the particular vacancies here at issue; she also had spent more than 10 years at Band I. TR III/4. She did testify that she had given up on promotion and had the feeling that her failure to move beyond Band I was racially driven. TR III/4-5. However, her application package, while slightly better than Petitioner's, was not of the same caliber as those of the two offerees. Moreover, individuals in the applicant pool who were not members of protected classes had better performance assessments than either Ms. Pratt or Petitioner and were still passed over during that promotion opportunity. *See* FOF #17. On cross-examination, Ms. Pratt revealed that she had moved up the ranks from GS-5 to GS-12 before being converted to Band I; thus, while she did not move to Band II, she had received numerous promotions during her GAO career.

¹³ Mr. Hinton testified that he routinely reviewed application packages for promotion and reached decisions without interviewing the applicants. It would have been helpful if he had testified to having withdrawn a vacancy announcement in another circumstance than that here at issue, upon concluding that the applicant pool—while meeting the minimum requirements—was not sufficiently promising in terms of potential to succeed at the next level. Neither party sought clarification as to the practice and frequency of withdrawing vacancy announcements in either DCM or GAO generally.

Petitioner introduced no data as to promotion rates of African-Americans in comparison to non-protected groups at GAO. His statistical information consisted only of snapshots of composition by Band level for several consecutive years. *See* FOF ##60, 61. Moreover, there was testimony to support the fact that Mr. Hinton had promoted African-American employees over the years; and that GAO generally had done so as well. Petitioner and Ms. Pratt each testified that they believed their own careers did not advance beyond Band I for discriminatory reasons. This testimony, however, does not suffice to establish that the non-promotion here at issue was discriminatorily based.

Petitioner in his testimony alluded to an environment at GAO that was unfriendly towards African-American Analysts, and suggested that subjective criteria for evaluating written communication obstructed the path to promotion. TR I/162-63, 174-75. While he did not directly refer to the retention of African-Americans, the argument and testimony as to environment created an undercurrent that suggested that a pattern of failure to promote over time may affect retention rates. *See id.*; TR I/39-40. Petitioner attempted to explore this theory with Mr. Hoskins, GAO's Chief Human Capital Officer. While denying that retention rises to the level of "a problem," Mr. Hoskins testified that one explanation for not retaining African-American employees could be an inability to provide competitive salaries, and that GAO is searching for answers to this question. *See* FOF #62. On this record, one cannot infer that retention rates imply or correlate to discrimination in promotion rates.

Petitioner's testimony about sporadic incidents throughout his career, taken with the record as to this promotion announcement and his information as to composition of the GAO workforce by year, does not suffice to show that the Agency's well documented explanation as to the superior qualifications of the two selectees constituted pretext for discrimination in this case.

B. Allegation of Constructive Discharge

Petitioner claims that he was forced to retire when he was not promoted pursuant to DCM 02-2. An employee's decision to retire is presumptively voluntary; this presumption can be overcome by showing that an agency proposed or threatened an adverse action against the employee, or caused the retirement "by creating working conditions so intolerable for the employee that he or she is driven to involuntarily resign or retire." *Shoaf v. Department of Agriculture*, 260 F.3d 1336, 1341 (Fed. Cir. 2001). Ultimately, the employee must show that a reasonable person in his or her position would have felt compelled to resign under the working conditions established in the particular case. *Id.* (citations omitted).

In this case, Petitioner's own testimony falls short of establishing that the action was involuntary. The record shows that Petitioner was performing solidly as a Band I Analyst, achieving assessments in the middle of the pack and occasional recognition in the form of spot or cash awards for his work. He was appreciated for his work and team efforts as well as his personality on the job. TR III/40-41 (Lundgren: "I liked everything Leo did for me....Leo was a joy to work with"); TR I/97-98 (Kirschbaum: Petitioner exhibited "very good" performance in "teamwork and ability to work with others, his ability to engender the respect of his colleagues and show that he demonstrated the same thing in return"); TR II/19 (Hinton: Petitioner "did a very good job on the work that he had been assigned"). He had, however, reached the top of the salary range for Band

I, and was frustrated that he had not been promoted previously. When he was not selected for the promotions announced in 2001, however discouraged he may have been about the prospect of future promotion, this did not establish conditions so untenable that a person could reasonably view the circumstance as forcing one to leave. Petitioner freely chose that course when he applied for retirement. An employee's perception of limited opportunity for advancement does not amount to constructive discharge. *Downey v. Isaac*, 622 F.Supp. 1125, 1132 (D.D.C. 1985).

Accordingly, Petitioner's claim that he was constructively discharged when he was not selected for promotion during the 2001 promotion cycle must fail.

CONCLUSION

Petitioner has failed to establish that he was discriminated against on the basis of race or age when he was not selected for promotion pursuant to Vacancy Announcement DCM 02-2. He also has failed to establish a pattern of discriminatory conduct at the Agency, or that his retirement was anything other than voluntary. Petitioner's request for relief is, therefore, denied.

SO ORDERED.