

# **Patricia Foley-Hinnen v. U.S. Government Accountability Office**

**Docket No. 11-03**

**Date of Decision: July 8, 2013**

**Cite as: Foley-Hinnen v. GAO, No. 11-03 (7/8/13)**

**Before: John L. Braxton, Administrative Judge**

## **Headnotes:**

**Burden of Proof**

**Constructive Discharge**

**Hostile Work Environment**

**Personnel Action/Adverse Action**

**Pretext for Discrimination**

**Prima Facie Case**

**Prohibited Personnel Practice**

**Protected EEO Activity**

**Reprisal/Retaliation**

**Retirement**

**Summary Judgment**

**Timeliness, General**

**DECISION ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

**PERSONNEL APPEALS BOARD  
U.S. GOVERNMENT ACCOUNTABILITY OFFICE  
WASHINGTON, D.C.**

PATRICIA FOLEY-HINNEN, Petitioner	)	
	)	
v.	)	
	)	<b>Docket No. 11-03</b>
UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, Respondent	)	<u>July 8, 2013</u>
	)	

**DECISION ON RESPONDENT’S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Patricia Foley-Hinnen, the Petitioner herein, filed an Amended Petition containing eight Counts on May 12, 2011. The Government Accountability Office (GAO or the Agency or Respondent) filed its Response to the Amended Petition on June 27, 2011.

Following an extended discovery period, on July 16, 2012, the Agency filed a Motion for Summary Judgment along with Respondent’s Statement of Undisputed Material Facts (Resp. Statement) and Respondent’s Memorandum of Law in Support of Motion for Summary Judgment (Resp. Memo) (including Exhibits A through JJ). GAO seeks summary judgment on all Counts of the Petition.

On August 15, 2012, Petitioner filed Petitioner's Memorandum of Law in Opposition to Respondent's Motion for Summary Judgment (Opposition) (including Exhibits 1 through 13), Petitioner's Response to Respondent's Statement of Undisputed Material Facts (Pet. Fact Response), and Petitioner's Statement of Material Facts as to which there is a Genuine Dispute (Pet. Statement).

The Agency filed Respondent's Reply Memorandum of Law in Support of Motion for Summary Judgment (Reply) on September 7, 2012 (with Exhibits 1 through 3). Exhibit 1 to the Agency's Reply is Respondent's Rebuttal to Petitioner's Assertions of Disputed Facts. Petitioner's Response to GAO's Reply Memorandum of Law in Support of Motion for Summary Judgment (Sur-reply) was filed on September 27, 2012.<sup>1</sup>

The Agency claims that it is entitled to summary judgment on the allegations upon which Petitioner's Amended Petition is based, *i.e.*, that GAO retaliated against her by assigning her to a new team in 2001; that the Agency retaliated against her by denying her request for a detail to the Department of State; that she was subjected to a retaliatory hostile work environment (including the 2001 reassignment and the denial of her detail request) for engaging in protected activity; and that she was forced into involuntary retirement because of the retaliatory actions. Resp. Memo at 1.

As to the first two allegations, the Agency contends that Petitioner cannot establish a *prima facie* case. *Id.* at 1-2. Regarding the last two allegations, the Agency asserts that there is

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<sup>1</sup> Pursuant to 4 C.F.R. §28.21(b)(4), both parties obtained leave to file these supplemental submissions. See Orders of Aug. 21, 2012 and Sept. 14, 2012.

insufficient evidence to meet the high standards required to establish either a claim of a hostile work environment or a claim of constructive discharge. *Id.* at 2.<sup>2</sup>

Petitioner maintains that material facts remain in dispute as to each of her claims. Opposition at 3. She argues that “GAO mistakenly believes that Petitioner is alleging only that the reassignment to ASM and the denial of her detail request were retaliatory,” while she also alleges that the denial of her request for an extension of Leave Without Pay (LWOP) and the denial of her request to extend her retirement date were retaliatory acts. *Id.* at 6. She further claims that she was subjected to a retaliatory hostile environment that unreasonably interfered with her work over a period of several years, and that as a result of the Agency’s actions she was compelled to retire. *Id.* at 3-5, 19.

## II. BACKGROUND

Through the provisions of the Government Accountability Office Personnel Act of 1980 (GAOPA), as amended, 31 U.S.C. §§731-755, GAO employees are assured the same protections against discrimination in the workplace and against prohibited personnel practices that are afforded to employees in the Executive Branch. *See* 31 U.S.C. §§732(b), (f); *see also* *GAO v. GAO Personnel Appeals Board*, 698 F.2d 516, 523 (D.C. Cir. 1983). The Amended Petition in

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<sup>2</sup> In her Opposition, Petitioner contends that GAO’s Statement of Undisputed Material Facts does not comport with the requirement of 4 C.F.R. §28.21(c)(2) because the Agency notes that it will dispute some of Petitioner’s factual assertions if part of the case goes to hearing. Opposition at 1 (quoting Resp. Statement at 1). However, the Board’s regulation states only that a summary judgment motion “must be accompanied by a statement of material facts for which there is no genuine dispute and a statement of reasons in support of the motion.” The parties’ statements of facts provide a guideline by which the Board can determine whether there is actually a genuine dispute of material fact. The presiding Board member makes a determination of what material facts are not in dispute, and also considers the facts in the light most favorable to the non-moving party. *See* 4 C.F.R. §§28.21(c)(2)-(5). GAO’s statement is read as a preservation of the right to challenge Petitioner’s assertions should the case proceed to hearing.

this matter raises issues of alleged prohibited personnel practices and alleged unlawful discrimination, subject to the Board’s jurisdiction under 31 U.S.C. §§753(a)(2) and (a)(7). Petitioner alleges violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, as well as prohibited personnel practices as defined in 5 U.S.C. §2302(b)(12).

Title VII requires that all “personnel actions affecting employees” in the Federal workplace be “free from any discrimination based on race, color, religion, sex, or national origin.” 42 U.S.C. §2000e-16(a). This proscription extends to actions taken in retaliation for opposing unlawful discrimination or for participating in any stage of administrative or judicial proceedings under the antidiscrimination statutes. *See* 29 C.F.R. §1614.101; *cf. Gomez-Perez v. Potter*, 553 U.S. 474, 487 (2008) (Federal sector provisions in both Age Discrimination in Employment Act (ADEA) and Title VII contain “a broad prohibition of ‘discrimination,’ rather than a list of specific prohibited practices;” discrimination based on age includes retaliation for making such complaints). In this case, Petitioner alleges that GAO violated Title VII when it subjected her to retaliation and to a retaliatory hostile environment for engaging in protected Title VII activity. Petitioner also alleges a violation of Title VII in the form of constructive discharge based upon the alleged retaliation and alleged retaliatory hostile environment.

Under 5 U.S.C. §2302(b)(12), it is a prohibited personnel practice for an agency official to “take or fail to take [a] personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.” In this connection, Petitioner asserts that GAO committed prohibited personnel practices, in taking personnel actions that violate a law, rule, or regulation that implements a merit system principle, by means of the alleged retaliatory acts, retaliatory hostile environment, and constructive discharge.

After the Amended Petition<sup>3</sup> was filed, the undersigned entertained multiple requests from the parties for additional time in which to conduct discovery and to prepare written submissions for the Board. *See, e.g.*, Orders of May 13, 2011; June 10, 2011; July 22, 2011; October 24, 2011; December 9, 2011; and March 16, 2012. The Motion and Response here at issue were timely filed in accordance with the schedule set at the March 15, 2012 telephone conference, and both parties were granted leave to file an additional responsive pleading.

### III. FACTS

Based on the record, I find the following to be material facts as to which there is no genuine dispute:<sup>4</sup>

1. Patricia Foley-Hinnen began her employment with GAO in 1982. In 1993, after serving in various positions, including ones outside the United States, Petitioner, then a Band II Analyst, was placed in the Denver Field Office. Amended Pet. ¶1; Resp. Statement ¶1.

2. Petitioner was assigned to the National Security and International Affairs Division (NSIAD) and performed defense environmental work for NSIAD's Defense Management and NASA (DMN) group and its Defense Acquisition (DA) group. She also did international work

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<sup>3</sup> The original Petition was filed on April 27, 2011. Petitioner filed an unopposed Motion to Amend Petition on May 12, 2011, which was granted that day. The Amended Petition did not add allegations, but was filed to "clarify what job position the Petitioner held at GAO prior to her constructive discharge, and to clearly state that she is seeking reinstatement to a position equivalent in pay and benefits to her last position." Memorandum in Support of Petitioner's Motion to Amend Petition at 1.

<sup>4</sup> The Petition details ten pages of facts arising prior to September 18, 2001 "as background information relating to Petitioner's hostile environment claim." *See* Petition at 3-11 & n.1; *see also* Pet. Fact Statement ¶¶1-24. The background facts raised have been reviewed as presented. Based upon this review, and in light of the conclusions reached herein, the undersigned concludes that they do not collectively create a triable issue of ongoing retaliation, hostile work environment or constructive discharge.

for NSIAD's International Relations and Trade (IRT) group. Resp. Statement ¶3; Pet. Fact Response ¶3.

3. From 1993-1997, Thomas J. Brew, who was then Regional Manager of the Denver Field Office, assigned Petitioner to supervise Analysts including Band II males who earned more than she did. Resp. Statement ¶71; Pet. Fact Response ¶71. This pattern continued for the period 1997-1999, when James Solomon was Acting Regional Manager. Resp. Statement ¶88.

4. Starting in August 1993, Petitioner raised with Mr. Brew her belief that the Agency was violating the Equal Pay Act (EPA), 29 U.S.C. §206(d), by paying her male counterparts more than she was paid for work of substantially equal value. Amended Pet. ¶2; Resp. Statement ¶¶60-62. She continued to raise with Mr. Brew and James Solomon, then an Assistant Regional Manager of the Denver Field Office (who became acting Regional Manager for Denver when Mr. Brew became Managing Director of Field Operations), her objection to supervising male employees who earned more than she did. Amended Pet. ¶¶8-10; Resp. Statement ¶¶62, 63, 70; Resp. Ex. FF at 15-16. She also raised this concern with Boris Kachura, her supervisor on a job in the International Relations and Trade group, during the 1998-1999 timeframe. Amended Pet. ¶15; Resp. Statement ¶64.

5. In April 1994, Petitioner applied for promotion to a Band III position in the Denver Field Office. She was categorized as among the "Best Qualified." Mr. Brew, as Regional Manager, was to forward the "Best Qualified" list of candidates to the selecting official in Washington, D.C. Petitioner alleges that Mr. Brew omitted her name from the list and delayed telling her she would be interviewed until shortly before the interview took place.<sup>5</sup> Nevertheless, Petitioner was

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<sup>5</sup> Petitioner claims Mr. Brew destroyed her promotion paperwork, but the selecting official, Vic Resendez, was advised that he had to interview another candidate— *i.e.*, Petitioner—five minutes before the actual interview. The record is silent as to further detail on this allegation. *See* Resp. Ex. S at 35; *see also* Pet. Ex. 1 at 173-81.

interviewed, but she was not selected for the position. Amended Pet. ¶¶6, 7; Resp. Statement ¶¶72-73.

6. In 1996, Petitioner's supervisors, Regional Manager Brew and Assistant Regional Manager Solomon, investigated Petitioner's work papers related to the Rocky Mountain Arsenal engagement because of allegations regarding whether she had adhered to GAO's standards in her work. Amended Pet. ¶9; Answer ¶9; Resp. Statement ¶¶78, 79; Sur-reply at 12. The investigation concluded that the allegations lacked merit. Amended Pet. ¶9; Resp. Statement ¶80.

7. From 1996 to 2001, in addition to her ongoing complaints about Equal Pay concerns, Petitioner also informally complained to Messrs. Brew and Solomon about the office assignment policy in the Denver Field Office. Office space in Denver was assigned according to Band level (*i.e.*, Band IIIs would get offices before Band IIs or Band Is) and seniority within the Band level. Resp. Statement ¶¶65-69; Amended Pet. ¶10; *see* Pet. Ex. 4. Petitioner complained that this was discriminatory against women and minorities because, by favoring employees in a higher Band and with more seniority within a Band, the policy resulted in favoritism for white men. Amended Pet. ¶10; Pet. Fact Statement ¶11; Resp. Statement ¶¶68, 77.

8. In 1997, Petitioner told Mr. Brew that the male members of the Defense Acquisition group in NSIAD were subjecting her to a hostile environment because of her gender and her complaints about sex discrimination in pay and office space. Resp. Statement ¶69; Amended Pet. ¶11.

9. In Fall 1997, Petitioner again applied for a Band III promotion in the Denver Field Office. Amended Pet. ¶13; Resp. Statement ¶84. She was not determined to be "Best Qualified"

among the applicants. Amended Pet. ¶13; Resp. Statement ¶84. Messrs. Brew and Solomon were panel members for that Band III selection. Amended Pet. ¶13; Answer ¶13.

10. In December 1999, Petitioner filed an expedited grievance regarding her Fiscal Year 1998 performance appraisal, alleging that it was retaliatory. Amended Pet. ¶19; Answer ¶19.

11. In approximately 2000, GAO began a structural reorganization from five divisions encompassing 35 issue areas into 13 teams. Resp. Statement ¶4; Pet. Fact Response ¶4; Resp. Ex. B at 7-10 (Walker Deposition).

12. As part of the reorganization, once employees were initially assigned to teams, GAO undertook an employee preference survey. Resp. Statement ¶6; Pet. Fact Response ¶6; *see* Resp. Ex. D. The survey was voluntary, and the Agency indicated it would take into account employee preferences for changing work groups or assignments after considering organizational needs. Resp. Exs. D, G at 214. Mr. Brew, then GAO's Managing Director of Field Offices, led the analysis of the employee preference survey for field office employees. Resp. Statement ¶7; Pet. Fact Response ¶7.

13. At the time of the survey, four teams were planning to have a presence in the Denver Field Office: Acquisition and Sourcing Management (ASM), Financial Management and Assurance (FMA), Information Technology (IT), and Natural Resources and Energy (NRE). Resp. Statement ¶10; Resp. Ex. G at 220; Sur-reply at 7.

14. Petitioner participated in the survey and listed the International Affairs and Trade team as her first choice and the NRE team as her second choice. She did not list a third choice but indicated that she wanted to remain in the Denver Field Office. Resp. Statement ¶9; Pet. Fact Response ¶9.

15. Sometime in 2000, the Denver Field Office stopped doing international work. Amended Pet. ¶21; Answer ¶21.

16. At the time of the survey, Robert Robinson was Managing Director of NRE. Resp. Statement at ¶11; Pet. Fact Response ¶11. Petitioner had recently worked on an assignment for one of Mr. Robinson's Assistant Directors, Edward Zadjura. Mr. Zadjura had expressed to Mr. Robinson his concerns about the quality of Petitioner's work on several occasions. Resp. Statement ¶12; Pet. Fact Response ¶12.

17. Based upon Mr. Zadjura's representation regarding Petitioner's performance, Mr. Robinson did not support Petitioner's permanent assignment to NRE. Resp. Exs. H at 27-31, I at 4; Resp. Statement ¶13; *see also* Sur-reply at 7. Petitioner was not given an opportunity to rebut Mr. Zadjura's comments. Pet. Fact Statement ¶25. At the time of his decision, Mr. Robinson had no knowledge of Petitioner's involvement in any alleged protected activity including her participation in Personnel Appeals Board (PAB) cases. Resp. Ex. I at 300; Resp. Statement ¶14; Sur-reply at 7 ¶14.

18. In April 2001, Petitioner was advised that she would be placed in ASM in the Denver Field Office, a choice that she had not listed on her preference survey. Amended Pet. ¶¶23, 24; Answer ¶¶23, 24; Resp. Statement ¶16. Shortly thereafter she met with Susan Westin, Managing Director of the International Affairs and Trade team, to explore the possibility of relocating to an office in Washington, D.C. or Los Angeles. Amended Pet. ¶24; Answer ¶24. Petitioner did not begin working with ASM upon receiving the placement decision. She was doing environmental work at the time and continued to work on that assignment until September. Resp. Statement ¶17; Pet. Fact Response ¶17.

19. In May 2001, Petitioner was interviewed by Patrick Halter, an EEO investigator for the Agency's Office of Opportunity and Inclusiveness (O&I), in connection with allegations of discrimination and reprisal raised by another employee in the Denver Office, Maria Vargas. Ms. Vargas claimed that Messrs. Brew and Solomon were among the Responsible Management Officials in her case. Amended Pet. ¶25.

20. Petitioner was listed as a witness in the PAB hearing on Ms. Vargas' complaint scheduled for July 18, 2001. However, ultimately, she did not testify at the hearing. Amended Pet. ¶¶26, 31; Resp. Statement ¶53.

21. Petitioner was also scheduled to testify in a PAB hearing for Sandra Davis, another GAO employee in the Denver Field Office, in November 2001. Amended Pet. ¶29. Mr. Solomon was the only Responsible Management Official named in the Petitions of both Ms. Davis and Petitioner, herein. *See* Resp. Ex. II; Amended Pet. at 2. She was interviewed by attorneys in connection with the case on several occasions in March, October, and December 2000 and October 2001. Resp. Statement ¶54; Amended Pet. ¶¶20, 29. Ultimately, she did not testify in that hearing. Amended Pet. ¶31.

22. In August 2001, Petitioner's NRE assignment was coming to an end and she asked Mr. Brew and Mr. Solomon that she be allowed to remain in NRE. Mr. Brew told Petitioner that NRE was full. Mr. Solomon told her that at the end of her assignment in NRE she would be assigned to ASM. Amended Pet. ¶¶27, 28; Answer ¶¶27, 28. Petitioner then took a six-week vacation through the end of October, using a combination of annual leave and Leave Without Pay (LWOP). Amended Pet ¶28. Petitioner did not receive an assignment in ASM until November 2001. Resp. Statement ¶17; Pet. Fact Response ¶17.

23. In August 2001, Petitioner spoke to Mr. Brew about the possibility of serving a one-year detail at the Department of State. Mr. Brew advised her to contact Gloria Jarmon, the then-head of the Office of External Liaison. Mr. Brew advised her that Ms. Jarmon did “the details for international work. All the GAO auditors that go to NATO work through her office.” Resp. Ex. A at 251; *see also* Resp. Statement ¶19; Pet. Fact Response ¶19.

24. In her deposition, Petitioner states that her first contact with the Office of External Liaison was with Don Drock.<sup>6</sup> Mr. Drock indicated that he only had experience with details to NATO (North Atlantic Treaty Organization), an intergovernmental military alliance. Resp. Ex. A at 251. Petitioner later spoke with Ms. Jarmon, who advised Petitioner to obtain a formal request from the Department of State addressed to then-Comptroller General David Walker. *Id.* at 255-56; Resp. Statement ¶20; Pet. Fact Response ¶20.

25. A letter dated September 19, 2001 from the Department of State was addressed to the Comptroller General, proposing that Petitioner be permitted to participate in a “non-reimbursable detail.” Resp. Ex. K. Under such an arrangement, GAO would pay Petitioner’s salary and the Department of State would pay official travel expenses. The Comptroller General did not receive a copy of the letter until several months later; no explanation was provided for the delay. Resp. Statement ¶21; Pet. Fact Response ¶21.

26. As of September 24, 2001, Jesse Hoskins, GAO’s Chief Human Capital Officer, was in charge of handling Petitioner’s detail request. Resp. Statement ¶22; Pet. Fact Response ¶22. On October 11, 2001, Mr. Hoskins advised Petitioner that he told Department of State officials that GAO could only approve a detail that would reimburse 100% of Petitioner’s salary. He further advised her that the Department of State did not have sufficient resources for a reimbursable

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<sup>6</sup> There is no reference in the record regarding what Mr. Drock’s position was within the Office of External Liaison.

detail but would contact him if resources became available. Resp. Statement ¶23; Resp. Ex. M; Pet. Fact Response ¶23; *see* Amended Pet. ¶30. In his deposition, Mr. Hoskins testified that Petitioner's detail request was the only request he received at GAO for a detail to another Federal agency. Resp. Ex. 2 at 20.

27. On or about October 26, 2001, Petitioner was interviewed by Jim Lager, an attorney with GAO's Office of the General Counsel, regarding an employment case involving Messrs. Brew and Solomon. Amended Pet. ¶29. Petitioner claims that she told Mr. Lager about the alleged discriminatory and retaliatory actions that Mr. Brew and Mr. Solomon had taken against her. *Id.* She also claims that in November 2001, she advised Mr. Hoskins that she was seeking a detail because of her protected activities and because she was being returned to a retaliatory hostile environment, *i.e.*, working for or with Messrs. Brew and Solomon in ASM. Opposition at 14.

28. On or about December 11, 2001, Petitioner attended an awards ceremony at Headquarters where Comptroller General Walker gave her a Community Service award. At that ceremony she talked to Mr. Walker about the detail she was seeking. Mr. Walker stated that he was not familiar with the matter and had not seen the letter from the Department of State. Petitioner later left a copy of the letter with his assistant. Amended Pet. ¶36; Resp. Statement ¶24; Pet. Fact Response ¶24.

29. At the ceremony, Petitioner also spoke with Gene Dodaro, the Agency's Chief Operating Officer at the time, and mentioned that the Department of State was hoping that GAO would agree to pay for the detail. Mr. Dodaro stated that GAO would not pay her salary for a detail to the Department of State. Amended Pet. ¶36; Resp. Statement ¶25; Pet. Fact Response ¶25.

30. On December 21, 2001, Petitioner advised Mr. Hoskins that the Department of State agreed to pay her salary for the detail. Mr. Hoskins told her that she needed final approval from

Jack Brock, Managing Director of ASM, and that proper paperwork was required from the Department of State. On or about December 26, 2001, Mr. Brock approved the detail and an official letter from the Department of State was sent to GAO. Amended Pet. ¶38; Resp. Statement ¶26; Pet. Fact Response ¶26; Resp. Ex. N at 25.

31. On January 4, 2002, Mr. Hoskins advised Petitioner that GAO's Executive Committee had met and decided that Petitioner could not be detailed to work at the Department of State. Amended Pet. ¶40; Resp. Statement ¶27; Pet. Fact Response ¶27. The Executive Committee would allow Petitioner to work at the Department of State through other means, such as using Leave Without Pay from GAO for one year so she could work directly for the Department of State. Resp. Statement ¶27; Pet. Fact Response ¶27.

32. Then-Comptroller General Walker recalled in his deposition that the Executive Committee met to discuss Agency policy on details to the Executive Branch, because the issue was raised as a result of Petitioner's request. The discussion centered on whether, and if so, under what circumstances, to allow such details. Resp. Ex. B at 17-19. "It was a higher-level policy decision that needed to be made." *Id.* at 19. Mr. Walker testified that Agency cut-backs had resulted in reduced resources and significantly reduced details to the Legislative Branch. Reduced resources, along with the potential conflict of interest, meant that precluding Executive Branch details would be preferable. *Id.* at 20. Mr. Walker recalled that he personally approved all details, including to Capitol Hill, and that he was therefore surprised to learn that discussions about Petitioner's request to be detailed to the Department of State had been ongoing at a lower level, leading to "an unfortunate expectation gap" for Petitioner. *Id.* at 22. He also stated that, to his knowledge, no Executive Branch details had occurred while he was Comptroller General. He believed that the lack of a written policy had led to the confusion in Petitioner's case. *Id.* at 21.

Nevertheless, the Agency ultimately produced a written policy in November 2003 to the effect that the Executive Committee must approve all details to other agencies. *Id.* at 26-27; *see* GAO Order 2300.1, General Employment Policy, Ch. 4, ¶a (Nov. 7, 2003). While the unwritten policy preferred precluding Executive Branch details, the written policy left open the possibility that some future circumstance might be approved. Resp. Ex. B at 26-27.

33. Mr. Dodaro also stated in his deposition that details outside of GAO, including to Capitol Hill, were decided as a matter of policy and practice by the Comptroller General with the Executive Committee. Resp. Ex. C at 24-25. He distinguished the practice of details within GAO which were “done at the level of the managing directors and the unit.” *Id.* at 24. Mr. Dodaro described the policy as to external details as follows:

The policy was to consider each situation on a case-by-case basis because there were a wide variety of detail possibilities including the Congressional detail, international organizations, [E]xecutive [B]ranch agencies, et cetera.

The policy was that it was not, we believed, to be a good idea to detail people to the [E]xecutive [B]ranch agencies because of independence concerns and because we were being given our appropriation to provide support to the Congress and carry out our mission. So for those reasons we decided that details to the [E]xecutive [B]ranch were not appropriate.

Resp. Ex. C at 35-36. Mr. Dodaro also stated that the policy was implemented consistently during Mr. Walker’s tenure and that it continues to be GAO policy. *Id.* at 34-35.

34. GAO contends that the denial of Petitioner’s detail request was based on a concern that detailing its employees to an Executive Branch agency could potentially compromise GAO’s independence, particularly to the extent a GAO employee might become involved in Executive Branch or policymaking activities in connection with matters for which GAO might be asked to provide support to Congress. Resp. Statement ¶29. Petitioner states that Mr. Hoskins informed

her that the reason the detail was denied was because the Agency had a policy against detailing to Executive Branch agencies. Pet. Fact Statement ¶38.

35. On January 4, 2002, Petitioner contacted GAO’s Office of Opportunity and Inclusiveness to raise allegations of retaliation. Amended Pet. ¶40; Answer ¶40.

36. On January 7, 2002, Petitioner e-mailed then-Comptroller General Walker and asked him to reconsider the decision denying the detail. Resp. Ex. O. She attached a letter explaining her position that the denial seemed “suspiciously coincidental to my involuntary involvement in a couple of the most contentious personnel cases in Denver involving Tom Brew and Jim Solomon.” *Id.*; Resp. Ex. P at 4; Resp. Statement ¶32; Pet. Fact Response ¶32.

37. On the same day, Mr. Walker e-mailed Petitioner and told her that she could use Leave Without Pay for one year and be employed by the Department of State during that period. Resp. Ex. Q at 2. Mr. Walker explained that,

for a variety of reasons we have never done a detail to an Executive Branch agency and we have said no to a number of requests within the past year. I’ve said no to a[t] least two myself. I’m concerned about consistency and fairness. At the same time, I’m concerned about any potential miscommunication that may have occurred in your case and want to get the facts. I’m the one who suggested the unpaid leave.... I saw it as a way to meet you[r] need without establishing a troubling precedent.

*Id.*

38. In an e-mail dated January 10, 2002, Mr. Walker stated that he was “not familiar with the past issues you allude to in your note,” and he “felt that we needed to stick with our policy on Executive Branch details. At the same time, given the circumstances, [he] wanted to see if [they] could provide [Petitioner] some options, which [they] did.” Resp. Ex. R. He further stated that he did not speak with Mr. Brew about the detail before the Executive Committee made its decision. *Id.*; see Resp. Statement ¶33; Pet. Fact Response ¶33. Petitioner alleges that

“[Mr.] Brew was behind the detail denial as part of his ongoing retaliation against her.”

Amended Pet. ¶41. She believed that “[Mr.] Dodaro could [not] be objective as he was a close friend of Brew.” *Id.* She also alleges that on the day she talked to Mr. Dodaro about the detail, Mr. Dodaro was sitting with Mr. Brew. Pet. Ex. 1 at 287. She claims that Mr. Dodaro was aware of her protected activities because of his position in GAO. However, she also states that she did not have firsthand knowledge of what Mr. Dodaro actually knew. *Id.* at 287-88.

39. In February 2002, Petitioner went on LWOP status and accepted a one-year position at the Department of State. Amended Pet. ¶45. During that year, Petitioner did not receive retirement contributions from GAO. *Id.*; Answer at ¶45.

40. On April 16, 2002, O&I notified Petitioner of her right to file a formal complaint of discrimination. Amended Pet. ¶46; Answer ¶46. On May 2, 2002, Petitioner filed such a complaint. *Id.* The complaint (dated April 30, 2002) alleged that Petitioner was discriminated against on the bases of sex and age and retaliated against in connection with her assignment to ASM and in connection with the denial of the detail. She named the following people as Responsible Management Officials: Thomas Brew, James Solomon, Boris Kachura, Susan Westin, and Edward Zadjura. Amended Pet. ¶46; Resp. Statement ¶¶35, 36; Pet. Fact Response ¶36; *see* Resp. Ex. S.

41. On November 4, 2002, GAO issued a memorandum notifying all employees of a Voluntary Early Retirement Authority (VERA) opportunity.<sup>7</sup> Resp. Ex. T. The VERA was provided pursuant to the 2000 amendment to the GAOPA, Pub L. No. 106-303, which authorized the Comptroller General to allow for voluntary early separation during a period determined to be

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<sup>7</sup> Under GAO Order 2831.1, Voluntary Early Out Authority (Apr. 27, 2001), during a VERA opportunity employees meeting certain criteria could apply to retire with 20 years of service and age 50 or 25 years of service regardless of age. GAO Order 2831.1 at ¶5.d.

necessary and appropriate for the purpose of—(i) realigning GAO’s workforce in order to meet budgetary constraints or mission needs; (ii) correcting skill imbalances; or (iii) reducing high-grade, managerial, or supervisory positions. Pub. L.No. 106-303, §1(a). *See also* Order 2831.1, ¶3 (Apr. 27, 2001). Under the VERA, GAO employees could elect to submit an application for voluntary early retirement by December 20, 2002. If their applications were approved, employees had a pre-determined retirement window of between February 1, 2003 and March 14, 2003 by which time they had to leave GAO. Resp. Ex. T at 2. Petitioner submitted an application under VERA by the December 20<sup>th</sup> deadline. Resp. Statement ¶¶38, 39; Pet. Fact Response ¶¶38, 39.

42. On January 17, 2003, Petitioner received notification from Mr. Hoskins that her Voluntary Early Retirement application had been approved. Resp. Statement ¶40; Resp. Ex. A at 363-64.

43. On January 28, 2003, Petitioner wrote a letter to Mr. Hoskins and Sallyanne Harper (then-Chief Administrative Officer) stating that she had “decided against taking the Early Retirement option at this point.” Resp. Ex. U; Resp. Statement ¶41; Pet. Fact Response ¶41. The Department of State was willing to extend her appointment. Amended Pet. ¶48. Petitioner explained that she was not comfortable returning to GAO and working for Mr. Solomon or in ASM while her O&I complaint was pending. She also stated that while she had hoped to return to NRE, that seemed “unrealistic” and, based on what she “learned about why [she] was pulled out of NRE,” she was not comfortable returning to that group either. Therefore, she requested an extension of her LWOP for another one-year period. Resp. Ex. U; Resp. Statement ¶41; Pet. Fact Response ¶41.

44. Petitioner's request for an extension of her LWOP was sent to Jack Brock, the Managing Director of her assigned team (ASM). *See* Resp. Ex. Z; Resp. Statement ¶42.

45. GAO Order 2630.1, Ch. 12, ¶2, states that granting LWOP is a matter of "administrative discretion." Resp. Ex. W. LWOP requests that exceed 30 days require that there be "reasonable assurance that the employee will return to duty... and that GAO will benefit in some measure from the absence." GAO Order 2630.1 (Jan. 27, 1982), Ch. 12, ¶4.d (Resp. Ex. W). LWOP requests for such extended periods must be "closely examined to insure that the benefits to the government and the serious needs of the employee are sufficient to offset the costs and administrative inconveniences to the government" resulting from retaining the employee in a LWOP status. *Id.*, Ch. 12, ¶4.e; Resp. Statement ¶45; Pet. Fact Response ¶45.

46. GAO's policy generally was that LWOP not exceed 52 weeks. Resp. Ex. B at 33.

47. On January 30, 2003, Petitioner wrote to Messrs. Hoskins, Brock, Howard and Ms. Harper to explain her request to extend LWOP for another year. Resp. Ex. X. In that letter she stated: "Because I do not want to go back to ASM even in a year, I recommend we let Jack Brock have my slot back so he can fill it with someone else. If the Denver Office cannot hold a generic slot for me for another year, I am willing to give up my slot in the Denver Office.... I want very much to return to GAO in a year, to a group that needs my skills.... However, if GAO cannot hold a slot open for me for another year, I guess I will be forced to take early retirement." *Id.* at 2.

48. Later that day, Petitioner's LWOP request was denied by letter from Mr. Brock. Resp. Ex. Z. He stated that he had considered the factors listed in GAO Order 2630.1, "that approval of such a request must be contingent upon GAO benefiting from your absence and may be given for employee health reasons." *Id.* Mr. Brock determined that Petitioner did not meet these

criteria for an additional year of LWOP but he would approve a LWOP request for a shorter period of time for her medical reasons. *Id.* Mr. Brock believed it was not in the interest of GAO to carry Petitioner on the roster for a year absent a “return on value” to the team. Resp. Ex. Y at 346. He considered the fact that she was at the Department of State “doing work that was not related to what we were doing, the fact that she expressed no desire ... on any part in returning to my group.” Resp. Ex. V at 61-62. He noted that he understood from Petitioner’s letter that she did “not wish to work with either the ASM or NRE teams in Denver.” *Id.*; Resp. Statement ¶46. Petitioner states that this is a mischaracterization of her statement. Sur-reply at 10.

49. Mr. Brock also stated in his January 30, 2003 letter that Petitioner would have an opportunity to seek placement in another team by completing the upcoming preference survey during the following month and that “[m]oving to a team outside the Denver office would be considered.” He also offered to grant LWOP for a shorter period of time than the one year requested, to allow Petitioner to address medical issues. Resp. Exs. Y, Z; Resp. Statement ¶47.

50. After receiving the denial, Petitioner wrote to Mr. Walker requesting that he approve her LWOP extension. Resp. Ex. AA (Jan. 30, 2003). Petitioner also e-mailed Mr. Hoskins and Harold Howard, a Human Capital Officer serving the ASM team, and stated that she wanted to reinstate her application for Voluntary Early Retirement and would like the retirement to be effective on February 12, 2003, the date she was scheduled to return to Denver. Resp. Ex. BB at 2; Resp. Statement ¶48; Pet. Fact Response ¶48.

51. On February 5, 2003, Petitioner received an e-mail from Mr. Hoskins advising her that Mr. Walker supported Mr. Brock’s decision to deny her LWOP request. Resp. Ex. BB at 1 (“on behalf of the CG I am informing you that Mr. Brock’s decision on this matter stands”). *See also* Resp. Ex. B at 34. Mr. Hoskins also advised Petitioner that her Voluntary Early Retirement

request had not been cancelled. Resp. Ex. BB at 1; Resp. Statement ¶50; Pet. Fact Response ¶50; Amended Pet. ¶52.

52. Petitioner responded to Mr. Hoskins' e-mail and requested that she be allowed to extend her LWOP until October 1, 2003 or January 4, 2004, and then retire on one of those dates. This was in order "to give [her] more time to prepare for Early Retirement." Resp. Ex. BB at 1; Resp. Statement ¶51; Pet. Fact Response ¶51.

53. Mr. Hoskins responded that "the VERA announcement required the applicant to retire between February 1 and March 14, 2003." Resp. Ex. BB. Thus, he could not authorize such a delay in her retirement date. *Id.*; Resp. Statement ¶51. Petitioner disputes that Mr. Hoskins had the authority to decide her request, alleging that "such authority rested only with the CG or his Executive Committee designee." Amended Pet. ¶53. Mr. Walker testified in his deposition that he believed the Comptroller General had authority to waive VERA timeframes, "under extraordinary circumstances," but that he did not recall ever doing so. Resp. Ex. B at 36.

54. On February 6, 2003, Petitioner asked O&I to amend her complaint to encompass the Agency's denial of her request for extension of her LWOP status and postponement of her retirement date. *See* Resp. Ex. EE. O&I characterized the amendment as a claim that she was "forced to retire in retaliation for engaging in protected activity." Resp. Ex. EE at 2. The Agency states that the complaint speaks for itself. Answer ¶54.

55. Petitioner retired effective February 10, 2003. Resp. Ex. CC; Resp. Statement ¶52; Pet. Fact Response ¶52.

#### IV. POSITIONS OF THE PARTIES

##### GAO

GAO contends that it is entitled to summary judgment because Petitioner cannot establish a *prima facie* case with respect to her claims relating to the denial of her detail and her assignment to a new team. Resp. Memo at 1-2.

As to the denial of the detail, the Agency argues that Petitioner cannot establish a *prima facie* case of retaliation because she cannot demonstrate that any of the individuals who made the decision to deny her detail request had knowledge of her alleged protected activities when they made the decision or that a nexus exists between any protected activity and the detail decision. *Id.* at 32-33. The Agency also contends that it articulated legitimate, nondiscriminatory reasons for the denial, *i.e.*, GAO did not want to approve details to Executive Branch agencies because it could potentially compromise GAO's independence and because its appropriations were to support the Legislative Branch. Given these reasons for the denial, in the Agency's view, Petitioner cannot establish that the reasons are pretextual. *Id.* at 9, 30-33.

Regarding the assignment to ASM, the Agency claims that Petitioner cannot establish retaliation under Title VII because she was not subjected to a "materially adverse action;" she was "simply moved... from one team to a different team." *Id.* at 38. Moreover, the Agency claims that it articulated legitimate business reasons for the assignment. NRE Managing Director Robert Robinson opposed her placement in NRE for performance reasons, and NRE did not need additional resources. That left only ASM in the Denver Field Office. *Id.* Further, GAO argues that Petitioner cannot prove that there is a nexus between the assignment and the protected activity — specifically, the supervisors who made the decision to reassign her did not

know of her protected activity with respect to participating in her colleagues' employment cases. *Id.* at 37-46.

GAO also contends that Petitioner did not engage in protected activity with respect to her informal complaints about Equal Pay Act violations, sex discrimination and hostile work environment because she did not file a formal complaint, and thus, her actions do not fall under the participation clause of Title VII. *Id.* at 41-42. Further, because Petitioner had an inaccurate view of the EPA, *i.e.*, she did not have "an objectively reasonable belief that GAO was violating the law," GAO maintains that her actions do not fall within the opposition clause of Title VII to support a claim of retaliation on that basis. *Id.* at 42-43.

Further, the Agency claims that Petitioner cannot survive a motion for summary judgment regarding her hostile work environment claim because she cannot prove that she suffered from severe and pervasive insult and ridicule. Instead, the Agency argues that Petitioner has raised "disparate acts of alleged discrimination taken sporadically by unconnected individuals that cannot now be bootstrapped into a hostile work environment claim." *Id.* at 2, 52-53. GAO also contends that Petitioner cannot prove that she was constructively discharged because she chose to participate in the Voluntary Early Retirement program rather than continue to work in her current position or transfer to a new team or location. *Id.* at 2, 56-57.

### Petitioner

Petitioner claims that material facts are in dispute as to each of her claims, thus precluding summary judgment. Opposition at 3. As to the claim of retaliatory hostile environment, Petitioner contends that there are material facts in dispute as to whether an objectively reasonable person would have viewed the events as "hostile and abusive," as she

does. *Id.* at 5. She complains about a pattern extending from 1993 to 2003, including the 2001 denial of her request not to be reassigned to ASM, the denial of her detail to the Department of State, the denial of a one-year extension of LWOP, and the denial of her request to postpone her retirement under VERA. *Id.* at 4-5. Petitioner also raises other incidents as part of this pattern. *Id.* at 3-5. She alleges that she began to raise the issue of pay disparity with Mr. Brew in August 1993, and continued to present her concerns about pay discrimination over the ensuing years. *See* Pet. Statement ¶¶2-4, 15, 16; Amended Pet. ¶¶57, 59, 61, 63, 65; Opposition at 6-8.

As to retaliation, Petitioner alleges that the reassignment to ASM, the denial of her detail, the denial of her requested extension of LWOP, and the denial of her request to postpone her retirement date were all acts taken in retaliation for her protected activities. Opposition at 6; *see* Amended Pet. ¶¶24, 28, 40, 41, 46, 49, 50, 54, 65, Count V. She argues that, to establish a claim of retaliation she only needs to show a “materially adverse action” that would dissuade a reasonable person from making a charge of discrimination. Opposition at 8 (citing *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006)). She further contends that the Agency’s actions “must be look [ed] at collectively,” to determine whether retaliation took place. Opposition at 9.

Petitioner’s protected activities consisted of raising complaints to her supervisors that she was being paid less than her male counterparts for substantially equal work and that she had to supervise those higher-paid male employees; that the Agency was violating the Equal Pay Act with the implementation of the pay band system; and that her pay increase in December 1993 was discriminatory because her male counterparts were paid more. She also was interviewed in connection with two PAB cases and asked to be a witness in those cases, although she never actually testified at the hearings. Opposition at 6-8.

Petitioner claims that her actions are protected because the EPA does not require intent and thus, it does not matter that she may have incorrectly explained the motivation for the Agency's actions as long as she knew they were discriminatory. *Id.* at 7-8. She also argues that because this is a retaliation claim, she only needs to show that the adverse action was one which would dissuade a reasonable person from making a charge of discrimination. *Id.* at 8-9.

## V. ANALYSIS

### Summary Judgment Standard

Summary judgment is appropriate under the guidelines of the Federal Rules of Civil Procedure<sup>8</sup> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *37 Named Petitioners v. GAO*, Docket No. 09-01 at 9 (3/31/10). In determining whether a genuine issue of material fact exists, the trier of fact must view all facts, and reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Bryant v. GAO*, Docket No. 10-03 at 13-14 (7/11/11); *Jones v. GAO*, Docket No. 08-04 at 2 (12/18/08) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986)).

### Retaliation

To establish a claim of retaliation, Petitioner must show that she engaged in a statutorily protected activity, that the Agency took an adverse employment action, and that a causal

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<sup>8</sup> The Board is guided, but not bound, by the Federal Rules of Civil Procedure in procedural matters not specifically addressed in its own regulations. 4 C.F.R. §28.1(d); *see* 4 C.F.R. §28.21(c).

relationship exists between the protected activity and the adverse employment action.<sup>9</sup> *Rattigan v. Gonzales*, 503 F.Supp.2d 56, 75 (D.D.C. 2007); *see also Gill v. GAO*, Docket No. 08-07 at 19 (4/20/10). An adverse employment action in a retaliation case does not need to be a formal “personnel action” (e.g., denial of promotion, discharge, suspension), but can be any action which “could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern*, 548 U.S. at 57; *Baird v. Gotbaum*, 662 F.3d 1246, 1249 (D.C. Cir. 2011). The concept of adverse employment action is broader in the context of establishing a retaliation claim than for establishing a discrimination claim. *See Baird*, 662 F.3d at 1250.

In this case, Petitioner repeatedly complained to her supervisors about the discriminatory effect of pay banding on pay for women, and specifically about being asked to supervise higher paid men on different assignments. Such complaints are sufficient to constitute protected activity. *See Gill*, Docket No. 08-07 at 19 n.22 (concerns expressed to management about alleged discriminatory hiring practices were protected activity); *Lasley v. GAO*, Docket No. 08-02 at 2 and n.3 (5/28/09), *aff’d* (1/20/10) (complaints about lack of African-American analysts and managers constituted protected activity). Petitioner also was interviewed and prepared to testify for two cases before this Board brought by employees of the Denver Field Office. This participation in the GAO administrative process for the review of discrimination cases also constituted protected activity. *See Davis v. GAO*, Docket No. 00-05 at 26 (7/26/02),

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<sup>9</sup> The Supreme Court recently tightened the requirement for causation stating that an employee would have to show that “the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.” *University of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. \_\_\_, slip op. at 20 (June 24, 2013). Thus, Petitioner would have to prove that retaliation was the motivating factor for the Agency’s adverse personnel actions, and that but for the retaliatory reasons the Agency would not have taken those actions. The *Nassar* decision does not change the outcome of this case.

*aff'd* (7/11/03). Accordingly, Petitioner has established the first element needed to prove a retaliation case.

#### Assignment to ASM

The Agency argues that Petitioner was not subjected to a “materially adverse action” when she was assigned to ASM, citing a line of cases in support of the view that reassignment alone does not support retaliation. Resp. Memo at 38-39. GAO argues that it “simply moved Petitioner from one team to a different team. Petitioner was not demoted, did not have her salary or benefits decreased, and did not face any other tangible alteration of her duties and responsibilities.” Resp. Memo at 38. Such effects, however, are not necessary in a retaliation claim. *Baird*, 662 F.3d at 1249.

Since the *Burlington Northern* decision, the term “adverse employment action” has had a broader meaning with respect to retaliation claims, and is “not limited to discriminatory actions that affect the terms and conditions of employment” but includes any harm that might dissuade a reasonable employee from making or supporting a charge of discrimination. *Baird*, 662 F.2d at 1248-49 (citing *Burlington Northern*, 548 U.S. at 64). Petitioner need only show that the Agency’s action was sufficient to dissuade a reasonable person from making or supporting a discrimination charge. *Baird*, 662 F.2d at 1248-49. Reassignments can constitute adverse employment actions in retaliation cases if the duties are considered less desirable. *Burlington Northern*, 548 U.S. at 70-71. Whether a particular reassignment is actionable as retaliation depends upon the particular circumstances of a case, from the perspective of a reasonable person in Petitioner’s position. *Id.* at 71.

It is not necessary to resolve this question, however, because Petitioner’s complaint about the reassignment was not timely and because she has not rebutted the Agency’s legitimate nondiscriminatory reasons for the assignment.

Petitioner states that she was notified of her assignment to ASM in April 2001. Pet. Statement ¶¶22. She further states that her assignment in NRE continued until September 2001. Pet. Fact Response ¶17. Thereafter, on November 6, 2001, she returned from vacation and was told she would be supervised by Ted Baird, one of the supervisors who contributed to the alleged hostile work environment. Amended Pet. ¶¶30, 34; Opposition at 9-10. But she did not contact O&I until January 4, 2002 – about 60 days later. Amended Pet. ¶40.

Under GAO Order 2713.2, Petitioner had “45 days [from] the date of the matter alleged to be discriminatory” to contact an O&I counselor. GAO Order 2713.2, *Discrimination Complaint Process*, Ch. 3, ¶1.a(1) (Dec. 2, 1997). Her informal complaint about the assignment to ASM was outside of the 45-day period even if the complaint period did not begin to run until her return in November 2001.<sup>10</sup> Thus, the only actions that were timely raised by Petitioner include denial of the detail, denial of extension of her LWOP, denial of request for extension of her retirement date and constructive discharge.<sup>11</sup>

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<sup>10</sup> Either the April 2001 notification of her assignment or the August 2001 discussion with Messrs. Brew and Solomon (*see* ¶¶ 18, 22, *supra*) also could be viewed as the triggering event. Furthermore, Petitioner states in her Amended Petition that “[f]acts arising prior to September 18, 2001 are presented as background information relating to Petitioner’s hostile environment claim.” Amended Pet. at 3 n.1.

<sup>11</sup> GAO argues that Petitioner failed to raise two of these claims in the Amended Petition: (1) the denial of her request for an extension of LWOP in 2003 was retaliatory; and (2) the denial of her request to extend her Voluntary Early Retirement date was retaliatory. Reply at 6. GAO claims that the Amended Petition only raises claims regarding denial of the detail, the assignment to ASM, claims of hostile work environment and constructive discharge. The Agency further contends that it “should not be forced to guess which of the numerous events referred to in the body of the [P]etition are intended to be recoverable legal claims and which are not.” *Id.* at 7. However, Petitioner does include claims (1) and (2) above in Count V and, therefore, GAO had sufficient notice that Petitioner was alleging these matters as retaliatory actions. *See* Amended Pet. ¶65.

Even assuming the ASM assignment was an adverse employment action and the complaint was timely, Petitioner fails to rebut the Agency's legitimate nondiscriminatory reasons for her assignment. Petitioner claims that she was assigned to ASM because of her protected activities. GAO denies this contention, claiming that the reassignment was the result of a reorganization to change its structure from five Divisions including NSIAD (where Petitioner was assigned) into 13 teams. Thus, NSIAD no longer existed and NSIAD staff members were initially assigned to one of the newly formed teams in October 2000. Reply at 19.<sup>12</sup>

During the survey placement process, Robert Robinson, Managing Director of NRE, had concerns regarding Petitioner's performance. Resp. Statement ¶¶11-13. In addition, there were no more openings available in NRE. Given his performance-related concerns, Mr. Robinson did not request permission to exceed NRE's staffing levels in the Denver Field Office for Petitioner. She therefore was assigned to ASM in April 2001. Resp. Ex. H at 30-31. Mr. Robinson had no knowledge at the time of his decision of any of Petitioner's alleged protected activities. Resp. Memo at 5; Resp. Ex. I at 1-2; Resp. Statement ¶14; Sur-reply at 7.

Petitioner disputes the Agency's assertion that Mr. Robinson opposed her permanent assignment to NRE "due to her recent performance on an NRE assignment." Sur-reply at 7; Resp. Memo at 5. She objects to the assertion, noting that while "Robinson had been told that Petitioner's work was not very good," "she was not given an opportunity to rebut the comments made to Robinson, and Robinson relied upon the representation made about her performance." Sur-reply at 7. Petitioner also disputes the contention that NRE was full because other

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<sup>12</sup> Petitioner argues that in October 2000 she was transferred to NRE. Pet. Fact Statement ¶19. The Agency contends that Petitioner was not actually assigned to NRE, but she was doing some NRE work when the reorganization took place. *Id.*; Pet. Fact Statement ¶¶24-25. I do not find this discrepancy to be material to the outcome herein.

individuals were transferred to NRE during the reorganization.<sup>13</sup> *Id.* at 8; Pet. Fact Statement ¶26.

The evidence shows that the Agency conducted a reorganization in October 2000 (Pet. Fact Statement ¶¶20-21); that Petitioner was advised that she would be assigned to ASM in April 2001 (Pet. Fact Statement ¶22); that she did not have the necessary skills to join two of the other teams (information technology and financial/accounting skills) (Resp. Ex. A at 312); and that Mr. Robinson did not support her placement in NRE because he had been told that she had performance problems. Resp. Ex. H at 30-31. Mr. Robinson also stated that a “secondary factor” for not supporting her assignment to NRE was that the team was already above its authorized level in the Denver Field Office. *Id.* at 31. However, Mr. Robinson’s *primary* concern in not supporting her assignment to his team was that he believed that she had performance problems. Petitioner does not dispute the fact that Mr. Robinson had concerns about her performance. She claims only that she was not given an opportunity to rebut what Mr. Robinson was told. There is no evidence that Mr. Robinson knew of her protected activities such that he would have motivation to retaliate against her. Accordingly, summary judgment for the Agency is granted as to the claim of retaliation in the assignment to ASM.

#### Denial of Detail to the Department of State

Petitioner claims that the denial of her detail to the Department of State was in retaliation for her protected activities. Amended Pet. ¶61. She contends that there was close temporal proximity between that denial (January 2002) and those protected activities. In particular, she states that on or about October 26, 2001, she was interviewed by Jim Lager, an attorney with GAO’s Office of the General Counsel, in connection with another employee’s PAB case.

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<sup>13</sup> Petitioner did not provide any evidence that there were questions about these employees’ performance.

Amended Pet. ¶29. Petitioner states that she “related to Lager her knowledge of the alleged discriminatory and retaliatory actions of [Messrs.] Brew and Solomon, told him that she had been retaliated against by [them] for her protected activities, and told him she did not want to testify at the upcoming hearing because she feared additional retaliation were she to do so.” *Id.*

She also claims that she told Jesse Hoskins, then-Chief Human Capital Officer, in November 2001 that she was seeking a detail because of her protected activities and because she was being returned to the retaliatory hostile environment in ASM. Opposition at 14. Petitioner attempts to connect this activity with the Agency’s action in denying the detail by pointing to Mr. Hoskins’ deposition, where he testified that he “‘almost certain[ly]’ shared with the [Executive] Committee whatever information he had about the detail request.” *Id.* She was advised on January 4, 2002 that the Executive Committee decided she could not use a detail to work at the Department of State but could take LWOP for one year for such purpose. *See* Resp. Ex. P; Resp. Statement ¶27; Pet. Fact Response ¶27.

There is no evidence to support Petitioner’s view that the detail denial was premised on retaliation. Indeed, the evidence points to a GAO policy against such details. Mr. Dodaro, then Chief Operating Officer and now Comptroller General, reiterated the policy as Mr. Walker described, and stated further that the policy continues in place today. *See* ¶33, *supra*. Thus, the Agency’s top officials are uniform in explaining the policy against Executive Branch details.

Comptroller General Walker testified that there was no expressed *written* policy that dealt directly with details to Executive Branch agencies. Resp. Ex. B at 22. He then clarified that “it would’ve been better if I said a standing practice rather than policy because in reality, we didn’t have a written policy.” *Id.* at 30. He also testified that he “personally approved all details, including to Capitol Hill.” *Id.* at 22. Thus, Mr. Walker clarified that, while there was in fact no

written policy, GAO's practice was to not approve details to Executive Branch agencies. *Id.* at 30-31. He also stated that, to his knowledge, no Executive Branch details took place while he was Comptroller General. *See* ¶32, *supra*.

The Agency has articulated a legitimate non-discriminatory reason for denying the detail. GAO contends that it did not approve details to Executive Branch agencies because of the potential appearance of a conflict of interest. *Resp. Memo* at 9. Petitioner claims that this explanation is pretextual because it is not credible; she believes that a material issue exists as to whether GAO had such a policy in fact. *Opposition* at 14-15. Petitioner also maintains that Mr. Hoskins testified in his deposition that there had been details to the Department of Defense, an Executive Branch agency. *Id.* at 15, *Pet. Ex. 8*, at 21 (Hoskins transcript) ("I know there was some [*sic*] details made oversees[*sic*] and with, I believe, the Department of Defense"). What Petitioner does not mention, however, is that Mr. Hoskins also testified in his deposition that Petitioner's was the only request for a detail to another Federal agency during his time as GAO's Chief Human Capital Officer. *Resp. Ex. 2* at 20-21.

Petitioner also challenges the denial because the Agency asserts that it could not approve Petitioner's detail request since Congress had provided GAO with appropriated funds to support Congress, not the Executive Branch. *Opposition* at 15. However, the Department of State had agreed to a reimbursable detail, *i.e.*, no GAO funds would have been used. For this reason, Petitioner believes the Agency's contention is questionable. *Id.* However, Petitioner must show more than temporal proximity and her own allegations of retaliation to establish that the denial of the detail request constituted retaliation.

At the summary judgment stage, Petitioner may establish pretext based on close temporal proximity and some other independent evidence. *See Stevens v. St. Louis Univ. Med. Ctr.*, 97

F.3d 268, 272 (8<sup>th</sup> Cir. 1996) (summary judgment where plaintiff introduced no evidence that dismissal was based on unlawful discrimination other than her own testimony and assertion that timing of her termination raised inference of retaliation); *see also Glass v. Bemis Co.*, 22 F.Supp.2d 1063, 1068 (D.Neb. 1998) (mere temporal connection between protected activity and adverse action not sufficient to draw inference of pretext to defeat summary judgment); *Mastio v. Wausau Service Corp.*, 948 F.Supp. 1396, 1412 (E.D. Mo. 1996) (close proximity in time could establish genuine issue of material fact to prove causal connection but once defendant has come forward with legitimate nondiscriminatory reason, plaintiff must produce some additional probative evidence of pretext that raises inference of retaliation).

Petitioner submits that Mr. Hoskins' testimony provides independent evidence of retaliation. She states that "Hoskins testified that he believed the Agency had detailed employees to the Department of Defense." Opposition at 15. GAO contends that Mr. Hoskins' testimony that referenced the Department of Defense concerned requests for details, not the details themselves. Reply at 15, n.6. However, both parties seemed to have overlooked the fact that Mr. Hoskins was responding to a question regarding *internal* details:

Q. Had you dealt with any other types of details, say *internal details*, while you were at GAO and prior to Ms. Hinnen's request?

A. I don't remember, but I know there was some details made oversees [*sic*] and with, I believe the Department of Defense.

Pet. Ex. 8 at 21 (emphasis added).

To view this response as pertaining to internal GAO details involving work assignments related to the Department of Defense would be consistent with Mr. Hoskins' previous statement that he had not been involved with details to other Federal agencies during his tenure at GAO. *Id.* at 20; *see* ¶26, *supra*. The view that Mr. Hoskins was talking about an internal detail is also

consistent with Mr. Walker’s testimony regarding details to the Executive Branch: “none ever occurred during my tenure.” Resp. Ex. B at 20. Mr. Walker further states with regard to the handling of Petitioner’s request: “I don’t know when [was] the last time GAO did a detail to the [E]xecutive [B]ranch. Best I can determine is that people were treating this as they would treat a detail to a non-executive branch entity.” *Id.* at 21, 32. Mr. Walker indicated displeasure with the handling of Petitioner’s request. He felt that failure to communicate the policy about Executive Branch details had led to an “unfortunate expectation gap.” *See id.* at 22; ¶32, *supra*.

Viewing Mr. Hoskins’ statement as referencing internal GAO details involving defense-related details is also confirmed by Mr. Dodaro in his deposition testimony:

My main point is that there are different types of details that [GAO Order 2300.1 (Oct. 8, 1993), *superseded by* Nov. 7, 2003] is covering. If one part of GAO wants to detail somebody to another part of GAO, that’s done at the level of the managing directors and the unit.... [t]he details outside GAO, you know, it was our policy and practice at the time was that the [E]xecutive [C]ommittee should be making those decisions in that regard.

Resp. Ex. C at 24.<sup>14</sup> This is also consistent with what Petitioner was told regarding details to NATO—the Office of External Liaison only had experience with details to NATO, which is not an Executive Branch agency. *See* ¶24, *supra*.

Petitioner has failed to provide any probative evidence that there may in fact have been details to Executive Branch agencies during the time in question.<sup>15</sup> She provides only her opinion to counter the testimony of Comptroller General Walker and Mr. Dodaro that there were

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<sup>14</sup> The governing Order defined a detail as “the temporary assignment of an employee to a different position or set of duties for a specified period of time.” GAO Order 2300.1 (Oct. 8, 1993). The personnel supplement elaborated that “GAO may detail employees for any legitimate management purpose, for example, for handling unexpected work loads or special projects, for filling in during another employee’s absence, or for training. GAO Order 2300.1 (Oct. 8, 1993), *superseded by* Nov. 7, 2003.

<sup>15</sup> For example, personnel records in support of such a claim, or affidavits of participants or officials who approved Executive Branch details might have been probative.

none. Thus, while Petitioner attempts to establish that there are inconsistencies with the Agency's legitimate nondiscriminatory reason for denying her detail request that are sufficient to raise an inference of retaliation, I find that there are not. On the contrary, the testimonies of Messrs. Walker, Dodaro and Hoskins are all consistent in stating that a policy was developed that details to Executive Branch agencies had to be approved by the Executive Committee and that there were no details to Executive Branch agencies during Mr. Walker's tenure. Resp. Ex. B at 18-21; Resp. Ex. C at 34-37; Pet. Ex. 8 at 20-21. Moreover, I find that the Agency's offer of extended LWOP to afford Petitioner the opportunity to work at the Department of State, despite the detail policy, to evidence an effort at resolving Petitioner's dilemma rather than an act of retaliation. *See* ¶38, *supra*.

Petitioner also attempts to create a nexus between Mr. Walker's denial of the detail, her discussion with Mr. Dodaro, and Mr. Dodaro's connection with Mr. Brew. She claims that Mr. Walker made this decision based on discussions with Mr. Brew about her protected activities. However, Petitioner testified that she had no evidence that Mr. Dodaro spoke with Mr. Brew about her protected activities. Pet. Ex. 1 at 287-88. Petitioner also states that she has no evidence that Mr. Walker retaliated against her for protected activity. Resp. Ex. A at 80. Mr. Walker and Mr. Dodaro both testified in their depositions that they did not speak with Mr. Brew regarding her request for a detail. Resp. Ex. B at 27; Resp. Ex. C at 27; *see also* Resp. Ex. R. Petitioner's attempt to establish a nexus between the denial of the detail and her protected activity fails.

Accordingly, Petitioner cannot establish that the Agency retaliated against her in denying her request to be detailed to the Department of State. Summary judgment is therefore granted for the Agency as to this claim.

### Extension of LWOP

Petitioner also timely raised claims that her requests for an extension of her LWOP and postponement of her retirement date were denied in retaliation for her protected activity. As to the first request, the Agency's explanation for the denial is that the requested one-year extension of LWOP did not meet the "benefit to GAO" test. Particularly, GAO did not believe that Petitioner's continued work at the Department of State would be of benefit to GAO because Petitioner had stated that she had no intention of returning to GAO's Denver Field Office. *See* Resp. Ex. V at 61-62.

Petitioner contends that these reasons are not legitimate because she had advised Agency officials that she would be willing to give up her slot in the Denver Field Office and relocate to another GAO office. Opposition at 16. Petitioner's January 30, 2003 letter to Ms. Harper, Mr. Hoskins, Mr. Brock and Mr. Howard states that Petitioner wanted "very much to return to GAO in a year . . . and would like to come back and finish my career there." Resp. Ex. X at 86. Petitioner further claims that an inference of retaliation also can be made because Agency officials, including Mr. Brock and Mr. Hoskins, refused to meet with her to discuss her request for an extension of her LWOP. Opposition at 16.

Viewing the facts in the light most favorable to Petitioner, summary judgment is nevertheless appropriate as to this claim. Approving most requests for LWOP is discretionary.<sup>16</sup> *See* Order 2630.1, Leave Policies and Procedures, Ch.12, ¶2. With limited exceptions not here

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<sup>16</sup> "Employees cannot demand that LWOP be granted as a matter of right, except in the case of disabled veterans requiring medical treatment and persons injured on the job who are entitled to employees' compensation benefits from the Office of Workers' Compensation." Order 2630.1, Leave Policies & Procedures, Ch.12, ¶2. LWOP will also be granted to male and female employees with newborn infants and adoptive parents for 6 months; and also to employees on active military duty for a period exceeding the military leave authorized by law; employees receiving benefits from the Office of Workers' Compensation; employees temporarily incapacitated by pregnancy; employees who have filed a claim of disability retirement; or employees accompanying a family member on an official U.S. Government civilian or military assignment. *Id.*

relevant, “approval of LWOP is granted only when an employee demonstrates a real need to be absent from official duties and the overall employment record justifies favorable action.” *Id.*

As to “extended” LWOP (defined as more than 30 days), the Order states that:

As a basic condition to approval of requests for extended LWOP, there should be reasonable assurance that the employee will return to duty at the end of the approved period and that GAO will benefit in some measure from the absence.

*Id.*, Ch. 12, ¶4.d. The Order further provides that:

Each request for extended leave without pay is closely examined to insure that the benefits to the government and the serious needs of the employee are sufficient to offset the costs and administrative inconveniences to the government which result from retention of an employee in a leave-without-pay status.

*Id.*, Ch. 12, ¶4.e.

Petitioner had already been granted one year of LWOP when she submitted her follow-up request for an additional year. Her request stated that she was “not comfortable” about the prospect of working in ASM. She also stated that she was not comfortable working for NRE even if that were possible. She further claimed that an extra year would allow time for her complaint to be resolved, and for her to “look into transferring to another GAO region or core group if that becomes necessary,” as well as to “wrap up my projects for the Department of State, have some medical procedures done, and recover from the exhausting pace I’ve been keeping over the past year,” and also to care for her elderly mother and aunt who “have medical and aging problems.” Resp. Ex. U.

In response to the request for an additional year of LWOP, Mr. Brock denied the request on the grounds that Petitioner failed to meet the criteria outlined in the governing Order. Resp. Ex. Z.

Mr. Brock's reason for denying the request for extension of LWOP is based on information that Petitioner did not intend to work for either ASM or NRE in the Denver Field Office. Resp. Ex. Z. Petitioner contends that she informed the Agency that she would be willing to be transferred out of the Denver Field Office and as a result, other positions could have been considered for her return. Mr. Brock advised her that she could seek placement in another team and that "[m]oving to a team outside the Denver [O]ffice would be considered." Resp. Ex. Z; Resp. Statement ¶47; *see also* ¶49, *supra*. He also offered her a shorter period of LWOP to address medical concerns raised in Petitioner's request for the extension. Resp. Ex. Z.

While Petitioner has shown that Mr. Brock knew about her problems with the Denver Field Office, since she had written or spoken to him about those issues, she has failed to show that Mr. Brock had any reason to retaliate against her even if he knew of her other protected activities. *See* Resp. Ex. Y at 346. Mr. Brock was not mentioned as one of the Responsible Management Officials in her Amended Petition. *See* Amended Pet. at 2; Resp. Ex. N at 2, 12. The record does not show that Mr. Brock was involved in any of Petitioner's protected activities. Petitioner also states in her deposition that she has no evidence that Mr. Brock was motivated in whole or in part by her protected activity.<sup>17</sup> Resp. Ex. A at 80-81. In view of the discretionary nature of even an initial LWOP request and the circumstances surrounding the denial of Petitioner's request for a second year, summary judgment is granted for the Agency as to this claim.

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<sup>17</sup> Petitioner appealed Mr. Brock's denial of her request for extended LWOP to Mr. Walker. Mr. Walker concurred with the decision to deny the request. Opposition at 17; *see* ¶¶50, 51, *supra*.

### Postponement of Retirement Date

After learning that her LWOP extension had been denied, Petitioner asked Mr. Hoskins to reinstate her VERA application and requested an extension of the retirement date from February 2003 to October 2003 or January 2004. *See* ¶¶50-51, *supra*. Petitioner's request to postpone her retirement date was denied by Mr. Hoskins. Pet. Fact Statement ¶48. He informed her that the VERA announcement required that individuals taking the early retirement opportunity retire between February 1 and March 14, 2003. *See* ¶53, *supra*. Petitioner alleges that his denial of the request to postpone her retirement date was retaliatory. Amended Pet. ¶54. The record on summary judgment, however, shows no evidence of animus on Mr. Hoskins' part. Petitioner claims that "a reasonable fact-finder could infer retaliation because the denial was made by Hoskins, but only the Comptroller General or the Executive Committee had the authority to decide that question." Opposition at 17-18 (citations omitted).

The Agency has proffered a legitimate explanation for the denial: that Petitioner's request for an extension of 8-11 months was well beyond the pre-established early retirement window (February 1 to March 14, 2003). Reply at 9. While he did not specifically recall Petitioner's situation, Mr. Hoskins, in his deposition, stated that it is likely he would have spoken to Mr. Walker about Petitioner's request:

Q: Did you notify Mr. Walker of Ms. Hinnen's voluntary early retirement application extension request?

A: As I recall, the process, the VERA process, I met with the executive committee on all of the applications for early retirement. And I would furnish the [E]xecutive [C]ommittee with the expected dates of the retirement, as well as the managing directors.

So they had to select dates. And I shared that with the executive committee. And I believe I did that on a weekly basis until the closing.

Q: So would that have included Ms. Hinnen?

A: If she was an applicant and she requested it, yes.

Pet. Ex. 8 at 51.

Petitioner also has not presented evidence that there were other employees who did not engage in protected activities who were given prolonged extensions under VERA. In fact, there is no evidence of anyone retiring subject to VERA outside the VERA window. Mr. Hoskins' deposition implies that all VERA applications that he brought to the Executive Committee involved retirements within the prescribed window:

Q. Now, what about if an employee requested an extension of the start date of their retirement? Would you have communicated with someone regarding that?

A. Yes. If it was still within the window of retirement.

Q. I don't understand what that means.

A. If there was a specific start date that was selected for retirement and an end date by which people had to retire, within that window, if they made changes and adjustments, I would communicate that to the [E]xecutive [C]ommittee, their request.

*Id.* at 53. The record therefore shows that Mr. Hoskins followed the same practice with respect to VERA applicants, requiring the proposed retirement date to fall within that prescribed window. Petitioner suggests that Mr. Hoskins could have been motivated to retaliate in the denial of her request for an extension of her retirement date because he was named in her EEO complaint. Amended Pet. ¶¶50, 53, 54. The evidence shows, however, that she did not name Mr. Hoskins as a Responsible Management Official until *after* the denial of the extension took place. Resp. Ex. S at 11-12 (April 2002 complaint); Resp. Ex. BB (Feb. 5, 2003 e-mail denying extension); Resp. Ex. EE (Feb. 6, 2003 e-mail request to amend complaint).

The record shows that Mr. Hoskins applied the criteria in the VERA announcement to Petitioner's request. There is no evidence to show that Mr. Hoskins retaliated against Petitioner in denying an extension of her retirement date. Accordingly, the Agency is granted summary judgment on this claim.

#### Hostile Work Environment Claim

Petitioner alleges that she was subjected to a hostile work environment because of her protected activity. Specifically, Counts II, IV, V and VII of her Amended Petition allege that Petitioner was subjected to a retaliatory hostile work environment when GAO: denied her request not to be reassigned to the weapons section of the ASM team; denied her request to be detailed to the Department of State; denied her request for an additional year of LWOP; and denied her request for extension of her retirement date, thereby causing her to involuntarily retire, which she alleges constituted a constructive discharge. The Agency contends that "Petitioner's evidence of an allegedly retaliatory hostile environment falls well short of the standard necessary to survive a motion for summary judgment." Resp. Memo at 47.

In determining whether a hostile work environment exists, the following factors should be considered: the frequency of the conduct, the severity of the conduct, whether the conduct is physically threatening or merely offensive, and whether the conduct unreasonably interferes with an employee's work performance. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998). The conduct must create a "workplace [that] is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'." *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1983). Additionally, the hostile work environment must be a result of

discrimination based on the employee's protected status. *See Horton v. GAO*, Docket No. 01-09 at 33 (11/7/03).

These standards for establishing a hostile work environment claim are sufficiently demanding to ensure that Title VII does not become a “general civility code’.” *Faragher*, 524 U.S. at 788 (quoting *Oncala v. Sundowner Offshore Serv.*, 523 U.S. 75, 81 (1998)). If applied correctly, the standards would “filter out complaints attacking ‘the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes and occasional teasing’ .... [C]onduct must be extreme to amount to a change in the terms and conditions of employment....” *Faragher*, 524 U.S. at 788 (internal citation omitted).

Further, Petitioner cannot simply allege that a hostile work environment exists based on disparate acts of discrimination. She must establish that there were:

“a series of separate acts that collectively constitute one unlawful employment practice” and accordingly “are subject to a different limitations rule ....“Provided that an act contributing to the claim occurs within the filing period....”

*Baird*, 662 F.3d at 1251 (quoting *Singletary v. District of Columbia*, 351 F.3d 519, 526-27 (D.D.C. 2003)). The incidents must be “adequately linked into a coherent hostile environment claim—if, for example, they ‘involve[] the same type of employment actions, occur[] relatively frequently, and [are] perpetrated by the same managers’.” *Baird*, 662 F.3d at 1251 (citations omitted); *see also Nurridin v. Bolden*, 674 F.Supp.2d 64, 94 (2009). This also requires an inquiry into whether “incidents ‘occurring outside the statutory period are *sufficiently related* to those incidents occurring within the statutory period as to form one continuous hostile work environment’.” *Baird*, 662 F.3d at 1251. While “discrete discriminatory... acts are not actionable if time barred,” if one alleged act occurs within the filing period, the entire time period may be considered for purposes of determining liability. *Id.* (citations omitted).

In this case, Petitioner lists several incidents to which she was subjected as evidence of the alleged retaliatory hostile work environment. She claims that these events were “hostile and abusive, and unreasonably interfere[ed] with her work.” Opposition at 5. Petitioner further claims that she was subjected to a hostile work environment for a ten-year period from 1993 to 2003. *Id.* at 3. In addition to the claims laid out in Counts II, IV and VII, Petitioner also claims that she was subjected to a hostile work environment by her supervisors when they interfered with her promotion applications; refused to allow her to attend awards ceremonies; insisted on investigating her work papers; removed her as Core Group leader; allowed her co-workers to constantly taunt and insult her, and subject her to ridicule; gave her one of the lowest pay raises in her career; lowered her performance appraisal because she was too assertive in protesting Equal Pay Act violations; discussed her performance and claimed she was “terribly troubled” and had a “performance problem”; “torpedo[ed] her working a part-time schedule”; repeatedly questioned her time card charges; denied her request for official time for training; denied her request for extension of leave without pay; and denied her request for extension of her retirement date. *Id.* at 3-5.

While listing events dating back as far as 1993, Petitioner did not contact an EEO counselor regarding most of these events until January 2002, well past the 45 days required by the GAO Order for doing so. GAO Order 2713.2, Ch.3, ¶1.a(1) (Dec. 2, 1997). Thus, the only incidents that were timely raised are the denial of the detail, denial of the request to extend LWOP, denial of the request to postpone her retirement date, and her alleged involuntary retirement. These employment actions are discrete actions and are not similar or coherently connected to the other incidents that Petitioner is alleging to support a hostile work environment finding.

Even assuming that these actions had been timely raised and were coherently connected, Petitioner has failed to establish a hostile work environment because these allegations, viewed in the light most favorable to her, do not meet the very high standard needed to establish a hostile work environment under current law. Courts have consistently demanded more than workplace disputes to prove hostile work environment claims. Petitioner must show that the work environment is “sufficiently severe and pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Harris v. Forklift Sys.*, 510 U.S. at 21. Even in cases involving blatant discriminatory incidents, summary judgment has been granted to the employer on the hostile work environment claim. *See* Resp. Memo at 55; *see, e.g., George v. Leavitt*, 407 F.3d 405 (D.C. Cir. 2005) (statements by three employees over six-month period telling plaintiff to “go back where she came from,” separate acts of yelling and being singled out for undesirable work assignments not sufficient to show hostile work environment); *Dudley v. Washington Metro. Area Transit Auth.*, \_\_\_ F.Supp.2d \_\_\_, 2013 WL 617024 (D.D.C. 2013) (summary judgment granted for defendant where plaintiff was allegedly subjected to several incidents of unfair treatment by supervisor regarding work assignments and leave; incidents in office included racially offensive statements); *Lester v. Natsios*, 290 F.Supp.2d 11, 31 (D.D.C. 2003) (incidents included “reprehensible” and “highly derogatory letter with a reference to the Ku Klux Klan”).

The Agency relies on a number of cases in the United States District Court for the District of Columbia where work-related actions were not sufficient to establish a hostile work environment claim. Resp. Memo at 49-51; *see Nurridin*, 674 F.Supp.2d at 93-94; *Bell v. Gonzales*, 398 F.Supp.2d 78, 92 (D.D.C. 2005); *Singh v. United States House of Representatives*, 300 F.Supp.2d 48, 56 (D.D.C. 2004). In *Nurridin*, the Court found that disparaging remarks,

criticisms of the employee's work, and other negative comments did not rise to the level of a hostile environment. Removal of important assignments, lowered performance evaluations, and close scrutiny of assignments by management could not be characterized as sufficiently intimidating or offensive to constitute a hostile work environment. *Nurriden*, 674 F.Supp.2d at 94; *see also Veitch v. England*, 471 F.3d 124, 130-31 (D.C. Cir. 2006) (non-selection for desirable position, assignment to undesirable duties, sharing small office, and being criticized by supervisors do not establish hostile work environment); *Williams v. Spencer*, 883 F.Supp.2d 165, 180-81 (D.D.C. 2012) (no hostile work environment despite unjustified unsatisfactory performance appraisal; supervisor failed to talk to employee; charged her with AWOL for doctor's appointment; required her to provide advance notice of doctor's appointment; and fired her without providing opportunity to improve performance); *Brooks v. Grundmann*, 851 F.Supp.2d 1, 6 (D.D.C. 2012) (no hostile work environment where employee claims she was unjustly criticized, marginalized and humiliated at work over many years).

Most of Petitioner's claims involve disputes regarding work-related actions. None of Petitioner's claims were severe or pervasive in nature nor were any of the alleged actions intimidating. They do not rise beyond the level of "ordinary tribulations of the workplace." *Faragher*, 524 U.S. at 788.

Petitioner also fails to establish a hostile work environment because she cannot establish that the alleged incidents were coherently related. Several of the actions alleged, *e.g.*, the denial of the detail, unfavorable reassignment, non-promotions, denial of LWOP, etc., are discrete actions. Opposition at 3-5; *see also* Resp. Memo at 49. Furthermore, the alleged incidents occurred over a period of ten years, thus not meeting the pervasive standard. *See Nurridin*, 674 F.2d at 94 (events occurring over a four year period were temporally diffuse suggesting lack of

pervasiveness); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 753 (4<sup>th</sup> Cir. 1996)

(occurrence of alleged incidents intermittently over seven-year period “suggests the absence of a condition sufficiently pervasive to establish Title VII liability”). The actions also involved nine different managers over this ten-year period. The matters that Petitioner raises were not severe, or pervasive, *i.e.*, they were not frequent enough, to constitute a hostile environment.

Accordingly, summary judgment is granted to the Agency as to Petitioner’s claim of hostile work environment.

### Constructive Discharge Claim

Petitioner alleges that her retirement was not voluntary and therefore it constituted “constructive discharge.” Specifically, Count V of her Amended Petition alleges as follows:

GAO retaliat[ed] against Petitioner for engaging in protected Title VII activity, subjecting her to a hostile environment in retaliation for engaging in protected activity, denying her a reimbursable detail to the Department of State, denying her additional LWOP to find other GAO employment options, denying her request for an extension of her involuntary retirement date and requiring her to work with and be supervised by the same individuals who had previously subjected her to a hostile environment and to perform work that the Agency knew she was morally opposed to, caused her to involuntarily resign from the Agency, and constituted a constructive discharge in violation of Title VII of the Civil Rights Act of 1964, as amended.

*See also* Count VIII (alleging prohibited personnel practices based upon constructive discharge).

Petitioner thus alleges that GAO’s assertedly retaliatory actions and retaliatory hostile environment “caused” her to retire involuntarily. In her Prayer for Relief, among other requests, she asks that she be placed in “a Band IIB position equivalent in pay and responsibilities to her last position at GAO, but not within ASM”; and she requests back pay and front pay with interest

and related adjustments to her retirement and insurance accounts based upon the alleged constructive discharge. Amended Pet. at 24.

GAO maintains that Petitioner’s decision to retire was entirely voluntary and that Petitioner has failed to meet the rigorous test to establish constructive discharge— *i.e.*, that the Agency effectively forced her out. Resp. Memo at 56. More specifically, the Agency argues that it did not “effectively impose the terms” of Petitioner’s retirement; nor did she have no realistic alternative but to retire. *Id.* at 57. In support of this position, GAO notes that Mr. Brock outlined several options that would have allowed Petitioner to continue to work: returning to ASM in the Denver Field Office; returning to the Denver Field Office and completing the placement preference survey the following month; or obtaining a placement in a different location through the preference survey. *Id.* He also offered her an extension of LWOP for “a shorter period of time to allow for [her] scheduled surgery and recovery.” Resp. Ex. Z.

An employee’s decision to retire is presumptively voluntary. *Clarke v. GAO*, Docket No. 05-03 at 21 (5/17/06), *aff’d* (12/8/06). The presumption can be overcome by showing that the 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’.” *Id.* (quoting *Shoaf v. USDA*, 260 F.3d 1336, 1341 (Fed. Cir. 2001)). The employee must show that a reasonable person in the same position would have felt compelled to resign under the working conditions established in the particular case. *Id.* As the Federal Circuit has recognized, “the doctrine of coercive involuntariness is a narrow one. It does not apply to a case in which an employee decides to resign or retire because he does not want to accept a new assignment, a transfer, or other measures that the agency is authorized to adopt, even if those measures make continuation in the job so unpleasant for the employee that he feels

that he has no realistic option but to leave.” *Staats v. USPS*, 99 F.3d 1120, 1124 (Fed. Cir. 1996). “[T]he fact that an employee is faced with an unpleasant situation or that his choice is limited to two unattractive options does not make the employee’s decision any less voluntary.” *Id.* The Federal Circuit applies a three-part test for establishing involuntary coercion by an agency:

To establish involuntariness on the basis of coercion this court requires an employee to show: (1) the agency effectively imposed the terms of the employee's resignation or retirement; (2) the employee had no realistic alternative but to resign or retire; and (3) the employee's resignation or retirement was the result of improper acts by the agency.

*Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1329 (Fed. Cir. 2006) (citing *Shoaf*, 260 F.3d at 1341).

In this case, Petitioner attempts to counter GAO’s position by stating that the Agency placed her “under great duress to resign by denying her requests for an extension of her LWOP and extension of her retirement date. In so doing, they attempted to force her into returning immediately to a situation that was so horrendous that she would have been hospitalized. . . . Because of the risk to her health, Petitioner felt she had no choice but to resign.” Opposition at 18-19. Petitioner cites to her deposition, in which she testified that her “choice was to go back to ASM and land in the hospital.” Pet. Ex. 1 at 400. She also testified that she “fell apart completely” and was “being treated medically.” *Id.* at 401-02. She submitted no supporting documentation.

As noted above, however, it is not Petitioner’s subjective view as to the choices she faced but the perspective of a reasonable person faced with the alternatives that determines whether the retirement was voluntary. It is thus necessary to objectively review the facts surrounding her departure.

As discussed earlier, Petitioner was not given the assignment she preferred in August 2001, when her NRE work was ending and she was informed that NRE did not have more work for her. She was told that her next assignment would be in ASM. She began pursuing the possibility of a detail for one year to the Department of State, took a six-week vacation, and did not receive her ASM assignment until November 2001.

The facts surrounding the denial of Petitioner's detail request are described above in the section on retaliation. *See* pp. 29-34, *supra*. Although the detail was denied, Petitioner was allowed to take a year of LWOP in order to pursue her opportunity at the Department of State. At the end of the year, when Petitioner sought another year of LWOP, GAO exercised its discretion to deny the request based upon GAO Order 2630.1. *See* ¶¶43-49, *supra*.

The facts show that Petitioner did not want to return to the Denver Field Office at that time or at a future date, as the Agency alleges. Resp. Memo at 57; Resp. Ex. X. However, Petitioner did have alternatives, as explained to her by Mr. Brock. *See* Resp. Ex. Z. The Agency points out that Mr. Brock (who was not a named retaliator) proposed several options to Petitioner: returning to the Denver Field Office to work for ASM; returning to Denver and obtaining a placement in a different Denver Field Office team via the placement survey beginning the next month; or obtaining placement in a different geographic location via the survey. Mr. Brock also offered to approve a LWOP request for "a shorter period of time to allow for [her] scheduled surgery and recovery." *Id.* Petitioner saw these options as unattractive and unacceptable to her—but that did not make the decision to retire coerced.

Petitioner's own Opposition states that "[t]he record clearly establishes that Petitioner did not wish to retire." *Id.* at 18. After applying for the early retirement opportunity, she then

sought an additional exception that would have allowed her to remain on Leave Without Pay for an extended period to “prepare for retirement.” Amended Pet. at ¶46.

That Petitioner was uncomfortable with her choices does not overcome the presumption of voluntariness that attaches to her decision to accept the early retirement opportunity. She took advantage of the opportunity to work in a different environment for one year. That she could not continue for another year in LWOP status does not point to coercion by the Agency. Petitioner has not established that the Agency abused its discretion in denying her requested lengthy extension of her LWOP or her request for retirement well outside the VERA timeframe. Accordingly, summary judgment is granted for the Agency on Petitioner’s claim of constructive discharge.

#### Prohibited Personnel Practices

The Amended Petition included allegations that the Agency violated 5 U.S.C. §§2302(b)(9)(A) and (B) and (b)(12). However, in her Sur-reply, Petitioner states that she “withdraws her (b)(9) claim.” *See* Sur-reply at 1. This removes the allegation of prohibited personnel practices involving retaliation for engaging in or participating in protected activity.

In Counts VI, VII and VIII, Petitioner also claims that the Agency committed prohibited personnel practices subject to 5 U.S.C. §2302(b)(12) in violation of 31 U.S.C. §732(b)(2). Amended Pet. at 23. Under 5 U.S.C. §2302(b)(12), it is a prohibited personnel practice if an employee who has authority to do so,

take[s] or fail[s] to take [a] personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of [Title 5].

5 U.S.C. §2302(b)(12).

In order to establish a violation of §2302(b)(12), Petitioner needs to show that: (1) GAO took a personnel action; (2) the personnel action taken violated a law, rule, or regulation; and (3) the law, rule, or regulation implements, or directly concerns, one of the merit system principles identified in 5 U.S.C. §2301. *See, e.g., 37 Named Petitioners v. GAO*, Docket No. 09-01 at 10 (3/31/10); *Davis v. GAO*, Docket No. 00-05 at 34-42 (7/26/02), *aff'd* (7/11/03). As noted above, Petitioner states that her (b)(12) allegations are premised on a violation of 31 U.S.C. §732(b)(2). That section provides that GAO's personnel management system shall "prohibit personnel practices prohibited under section 2302(b) of title 5." Section 732(b)(2) thus merely reiterates the applicability of the prohibited personnel practice provisions to GAO employees, but does not state the necessary statutory violation to establish a claim of prohibited personnel practice. The statutory provision which implements or directly concerns a merit systems principle, within the meaning of 5 U.S.C. §2302(b)(12), cannot be both the merit systems principle and the violated law; the provision relied upon must implement or directly concern one of the enumerated principles.<sup>18</sup> *Tekeley v. GAO*, Docket No. 06-16 at 19-21 (8/9/07) (citing *Radford v. OPM*, 69 M.S.P.R. 250, 255 n.3 (1995)); *see Bryant*, Docket No. 10-03 at 18-19. Thus, Petitioner fails to satisfy the three-prong analysis required to establish a violation of 2302(b)(12).

Further, I find that the matters alleged in Counts VI, VII and VIII do not constitute prohibited personnel practices because they are based on the allegations addressed in prior sections of this Decision that are found to be without merit. *See Lasley*, Docket No. 08-02 at 34.

Accordingly, summary judgment is granted for the Agency on Petitioner's claims raised under 5 U.S.C. §2102(b)(12).

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<sup>18</sup> The Board discussed the meaning of this prong of the (b)(12) proof in some detail in *37 Named Petitioners*, Docket No. 09-01 at 21-22.

**CONCLUSION**

The Agency's Motion for Summary Judgment is granted on all Counts.

**SO ORDERED.**

Date:

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John L. Braxton  
Administrative Judge

## NOTICE—BOARD REVIEW

This Decision will become final on August 7, 2013, unless a request for review by the full Board is filed by one of the parties within fifteen (15) days of service of this Decision [by July 23, 2013], or unless the full Board, prior to August 7, 2013, decides to review the Decision on its own motion. *See* 4 C.F.R. §§28.87, 28.4.

In the alternative, either party may, within ten (10) days of service of this Decision [by July 18, 2013], file and serve a request for reconsideration with the Administrative Judge who rendered this Decision. The filing of such a request will toll the commencement of the fifteen-day period for filing a notice of appeal with the full Board, pending a decision by the Administrative Judge on the request for reconsideration.

The original and five copies of a notice of appeal requesting review by the full Board shall be filed with the Board in person or by commercial carrier at the office of the Board, or by mail (address listed below). When filed by mail, the postmark shall be deemed to reflect the date of filing. The party filing the request shall serve a copy of the notice of appeal on all other parties. Within twenty-five (25) days following the filing of a notice of appeal requesting review by the full Board, the appellant shall file and serve a supporting brief. The brief shall identify with particularity those findings or conclusions in the Initial Decision that are challenged and shall refer specifically to the portions of the record and the provisions of statutes or regulations that assertedly support each assignment of error. The responding party shall have twenty-five (25) days, following service of appellant's brief, to file and serve a responsive brief. Within ten (10) days of service of appellee's responsive brief, appellant may file and serve a reply brief.

The Board may grant a request for review when it finds that:

1. The findings in the Decision are unsupported by substantial evidence in the record viewed as a whole; or
2. New and material evidence is available that, despite due diligence, was not available when the record was closed; or
3. The Decision is based on an erroneous interpretation of statute or regulation; or
4. The Decision is arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; or
5. The Decision is not made consistent with required procedures and results in harmful error.

*See* 4 C.F.R. §28.87.

MAILING ADDRESS (Postal Service or Hand Delivery)

Personnel Appeals Board  
U.S. Government Accountability Office  
441 G Street, NW  
Suite 1566  
Washington, DC 20548

**CERTIFICATE OF SERVICE**

This is to certify that on July 8, 2013, the foregoing Decision in the case of *Foley-Hinnen* v. *GAO*, Docket No. 11-03, was sent to the parties listed below in the manner indicated.

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Patricia Reardon-King  
Clerk of the Board