

Leon Gill v. U.S. Government Accountability Office

Docket No. 08-07

Date of Decision: April 20, 2010

Cite as: Gill v. GAO, Docket No. 08-07 (4/20/10)

Before: Paul M. Coran, Administrative Judge

Headnotes:

Legitimate Business Reason

Pretext for Discrimination

Prima Face Case

Prohibited Personnel Practice

Race Discrimination

Retaliation

Similarly Situated Employees

Travel Expenses

DECISION

Leon Gill (Petitioner), through the Personnel Appeals Board Office of General Counsel (PAB/OGC), filed a seven count Amended Petition on October 24, 2008. Petitioner alleged that the U.S. Government Accountability Office (GAO or the Agency or Respondent) in proposing his suspension without pay for two calendar days, and ultimately issuing him a written reprimand: discriminated against him on the basis of his race (African-American); and retaliated against him because he had opposed Respondent's allegedly discriminatory hiring practices. Petitioner predicated his allegations upon 31 U.S.C. §§732(b)(2), 732(f)(1) and 5 U.S.C. §2302(b)(1)(A).

An evidentiary hearing was conducted on May 5, 6 and 7, 2009.¹ The parties filed their post-hearing briefs on July 17, 2009 and responsive briefs on August 7, 2009. Petitioner filed his sur-

¹ Testimony was obtained from witnesses William Graveline, GAO's Huntsville, Alabama Field Office Manager and Acquisition and Sourcing Management (ASM) Assistant Director, and Steven Stearn, a Senior Analyst in Huntsville, by means of video teleconferencing on the afternoon of May 6, 2009. Tr. 391, 454.

reply on September 4, 2009, whereas Respondent informed the Board in writing on that date that it did not deem it necessary to file a sur-reply to Petitioner's Opposition to Respondent's Closing Brief.

On March 30, 2010, Petitioner filed a Motion for Reimbursement of Travel Expenses in connection with his attendance at the hearing before the Personnel Appeals Board in this matter on May 5-7, 2009. With his Motion, Petitioner submitted a travel and per diem claim for the amount of \$2,265.43. Respondent's Opposition, filed on May 5, 2010, does not contest the quantum of the claim but instead argues that the Agency lacks the legal authority to pay the claim. This Motion will be addressed in the final section below.

I. STATEMENT OF FACTS

A. Background

1. Fewer than three months before the hearing in this matter, on February 27, 2009, Petitioner (an African-American male over the age of forty) retired from GAO's employ as a Band IIB Senior Analyst after approximately nineteen years with the Agency. Hearing Transcript (Tr.) 13-15.
2. Prior to the matter *sub judice*, Petitioner had never been the subject of a disciplinary action. Tr. 13-14, 100, 156. Moreover, he received "numerous" letters of commendation and certificates while at GAO. In either 2001 or 2002, he received the Comptroller General's Award for equal opportunity "in helping to enhance diversity within the organization" and for his respect for the inclusiveness of others. Tr. 28-29. He also was consistently rated as "exceeds expectations" from 2003 to 2007 in the performance competencies of Leading Others and Collaborating with Others. Tr. 27-28.
3. Petitioner was assigned to GAO's Huntsville, Alabama Field Office, which is totally dedicated to the work of the Agency's Acquisition and Sourcing Management (ASM) team. Respondent's Answer to Request for Admission #2 (Petitioner's Exhibit (Pet. Ex.) 12); Tr. 31-32. That team is responsible for review of Department of Defense acquisition of weapons systems. Tr. 21.
4. Previously, Petitioner had served almost twenty-two years in the United States Army, retiring as a Sergeant First Class. His military assignments included serving as a combat soldier in Vietnam, a drill instructor, and an enlistment recruiter. Tr. 13-15.
5. During June 2007 between twenty-two and twenty-five employees were assigned to the Huntsville Office of GAO. Tr. 32. William Graveline was the Field Office Manager. Tr. 33. When Petitioner retired in February 2009, Letonya Miller was the only other African-American Analyst assigned there. Tr. 33. During Petitioner's tenure in Huntsville that Office never had more than two or three African-American Analysts assigned at any given time. Tr. 35.

B. Petitioner's Advocacy for Diversity

6. Petitioner served on the Huntsville recruiting team and on the Comptroller General's recruiting and retention task force. Tr. 38-39. He made a number of suggestions to ASM management calculated to enhance the recruitment and retention of qualified African-American candidates, from 2002 through 2007. Tr. 41. He advised both at the Huntsville and Comptroller General levels that the Agency needed to broaden the range of schools where recruitment took place in order to improve its diversity. Tr. 40-41. He also suggested expanding the types of academic disciplines from which to recruit. Tr. 43-44. Through various means, including an annual employee survey and conversations with ASM management, Petitioner reported that the Huntsville Office did not have any African-Americans above the Band IIB level and that it was not doing a good job of hiring African-Americans. Tr. 60-61. Petitioner continued to bring his ideas on diversity in the workplace to the attention of Katherine Schinasi when she became ASM Managing Director in February 2004. Tr. 38-44, 319, 340-41. Ms. Schinasi advised him that she had delegated the hiring function to Eastern Regional Manager Denise Hunter. Tr. 45-46. To his knowledge, Ms. Schinasi did not adopt any of Petitioner's recommendations. Tr. 41-46, 60-62. The current ASM Managing Director Paul Francis testified that "several times over the years," while he was a Director, Petitioner had expressed to him a concern over the lack of opportunities for African-Americans for Analyst positions in Huntsville. Tr. 202, 210. Ms. Schinasi testified that several times over the course of the years, Petitioner had expressed to her that "he was concerned about the lack of diversity in the Huntsville Office, and called to encourage me to pay attention to that, and to provide information that he thought might be helpful to me as we went through our recruitment process." Tr. 340-41. She further testified: "I was glad to hear from him. I believe I expressed that. I was supportive of what he was trying to do and his goals for that office. We shared those goals." Tr. 341. She noted that Petitioner, a couple of times, identified to her candidates whom he described as a good fit for GAO. Tr. 341-42.

7. Tiffany Atkins was an African-American graduate student at the University of Alabama in Huntsville. She was referred to Petitioner by a co-worker, who introduced them in December 2006. Petitioner was very favorably impressed by the relevance of Ms. Atkins' coursework to the ASM function and by her "appreciable" GPA level. She applied for a Summer 2007 internship with the Huntsville Office while working on her Masters degree. Tr. 47-49.

8. Subsequently, Petitioner learned from Michael Hesse, a Huntsville Band I Analyst in the Professional Development Program (PDP)² who had brought Ms. Atkins' application to Petitioner, that she had not "made the cut." Tr. 51. Petitioner described Mr. Hesse as "sort of heading up the [local] recruiting team, they were all PDP." Tr. 50. In Petitioner's view, the Huntsville system used PDP employees for initial interviews and to recommend for further consideration. According to Petitioner, these employees "were the interviewers in Huntsville, what we call racking and stacking applicants and decid[ing] who would be ranked where. And then when they call for the rankings, send me your top three or top four, they would send those

² According to Petitioner, the Professional Development Program is "when candidates come to work for GAO, their first two years they are placed in a probation program. . . . It's the time when they are at-will[] employees." Tr. 57-58.

names up to the [ASM] interviewers. And these were PDP-ers that didn't have a clue about what GAO needed and [were] making decisions about who was ranked where." Tr. 56.

9. In Ms. Atkins' case, the initial interview team had found her "to be too soft spoken." Tr. 51. Petitioner objected to this decision not to recommend a second interview for a qualified African-American female applicant for its summer intern program; therefore, in March 2007, he complained and told Denise Hunter, the Eastern Regional Director who was responsible for recruiting in Huntsville, that hiring Ms. Atkins would afford the opportunity to increase diversity in the Huntsville Office.³ Tr. 51, 548. Ms. Hunter arranged for Ms. Atkins to have a second interview, this time with the ASM interview team on which she participated. Tr. 549-50. This ASM interview team also did not select Ms. Atkins. Tr. 52, 545-46, 551. Consequently, *circa* April or May 2007, Petitioner phoned the Office of Opportunity and Inclusiveness (O&I), and expressed to Carolyn Taylor, O&I Assistant Director, that Ms. Atkins had not been fairly treated. Tr. 53, 374, 382-85. According to Ms. Hunter, following Ms. Atkins' second interview, Ronald Stroman, then Managing Director of O&I, phoned and asked Ms. Hunter how Ms. Atkins' interview went. Tr. 552. Ms. Hunter was unaware of the course of the decisional process until she learned that Ms. Atkins was coming on board as an intern. Tr. 547-52. While Petitioner was unaware of what transpired, Ms. Taylor subsequently phoned him and advised that GAO was going to offer Ms. Atkins the summer intern position. Tr. 54. However, according to Petitioner, Ms. Taylor cautioned him that someone would have to "watch [Atkins'] back" because "[i]t didn't go as smooth as we thought it would go." Tr. 54. Ms. Taylor's testimony reflects no such admonition.⁴ Ms. Atkins thereafter entered as a summer intern⁵ and Letonya Miller served as her mentor. Tr. 55. Petitioner testified that although he believed it to be the case, he could not swear that Ms. Hunter discussed his advocacy of Ms. Atkins with Katherine Schinasi or Paul Francis. Tr. 143-44.

10. Petitioner objected to the Huntsville practice of using PDP employees to do initial interviews of intern candidates and "rack and stack" the applicants—*i.e.*, decide on the leading candidates and forward those applications to the ASM interview team. He raised his concern with the Comptroller General in May 2007, and obtained clarification that Agency policy was to use the PDP employees "to meet and greet" potential employees but not to make decisions. Pet. Ex. 5; Tr. 55-59.

³ Ms. Hunter testified that she never told Paul Francis or Katherine Schinasi about that conversation. Tr. 556. However, Mr. Francis testified that Petitioner did speak with him about the termination of Ms. Atkins' candidacy for the intern position. Tr. 210-11. Ms. Schinasi did not recall whether she discussed Ms. Atkins with Ms. Hunter. Tr. 349-50.

⁴ Ms. Taylor testified, in this regard: "I don't remember if I called him or he called me, but we talked. And [I] wanted to convey two things: to make sure [Petitioner] knew that [Ms. Atkins] was coming, and to—again to thank him for being a good diversity champion and helping the agency overall." Tr. 388-89.

⁵ GAO denies that Petitioner's approach to personnel in the Office of Opportunity and Inclusiveness precipitated the hiring of the African-American summer intern. Answer to Request for Admission #8 (Pet. Ex. 12).

11. Katherine Schinasi testified that she considered Tiffany Atkins to be a qualified candidate for a Huntsville summer intern position. Tr. 347. However, Ms. Schinasi initially “selected out” Ms. Atkins from further consideration because she was then employed by the Department of the Army, and Ms. Schinasi “did not believe it appropriate for [GAO’s] independent standards to have someone working for GAO that was also working for an agency that GAO audited.” Tr. 347. When that impediment was removed, Ms. Atkins came on board in Huntsville as a summer intern. Tr. 350-51. Subsequently, GAO offered Ms. Atkins a permanent appointment, but she declined. Tr. 144-45, 352. Ms. Schinasi assumed that declination stemmed from her subsequent employment negotiations with the Human Capital Office. Tr. 352. Ms. Schinasi testified that she did not recall that Petitioner had advocated on behalf of Ms. Atkins’ appointment as a summer intern. Tr. 354. Moreover, she was unaware of any prior impediment to Ms. Atkins’ employment—such as, being disqualified in the interview process—apart from a perceived conflict of interest due to her Army employment. Tr. 354-55.

C. Petitioner’s Interaction with Wendy Smythe

12. Petitioner started working with Wendy Smythe (a Caucasian female) in 1998 shortly after he was promoted to Band II Analyst. He served as the Analyst-in-Charge (AIC) and she served as a Band I staff member on the engagement. Tr. 23, 68, 100. Over time Petitioner occasionally maintained a supervisory role with Ms. Smythe on other individual engagements on which he served as AIC. The last engagement he shared with Ms. Smythe was completed in 2005. In Petitioner’s view, they worked well together, although she “could be difficult sometimes;” he believed their relationship was more friendly on his part than on hers. Tr. 22-25, 68. Petitioner testified that Ms. Smythe was “doing great work. . . . I was really impressed” (Tr. 68), although he once cautioned her about improperly charging time to his job code (Tr. 180).

13. In June 2007, the offices of Wendy Smythe (then a Band IIA) and Petitioner were approximately 20 or 25 feet apart. Tr. 67; Resp. Answer to Request #12.

14. On or about June 21, 2007, Petitioner received a phone call from Lena Godfrey, a Department of Army official responsible for coordinating GAO’s entrance conferences at the Redstone Arsenal in Huntsville, reporting that Wendy Smythe had made “disparaging” comments about him. Tr. 69; Resp. Answer to Request #11. During the call, Ms. Godfrey reported her dissatisfaction with this earlier conversation with Ms. Smythe, in the context of discussing the impending arrival of a GAO Headquarters Analyst, Gregory Harmon, at the Huntsville Office. In response to Ms. Smythe’s comment that Mr. Harmon would be required to check in with GAO’s Huntsville Office before beginning work on the engagement, Ms. Godfrey stated that Mr. Harmon had already discussed his arrival with Petitioner. Ms. Smythe responded that Petitioner was not in charge of the Huntsville Office and that Mr. Harmon should check in with the Field Office Manager. Ms. Godfrey took offense at Ms. Smythe’s tone and thereafter called Petitioner to complain about it. Tr. 69-71.

15. After the phone call with Ms. Godfrey, on June 21, 2007 Petitioner entered Ms. Smythe’s office to speak with her.⁶ Petitioner recalled also seeing Tana Davis (Caucasian female Analyst)

⁶ Petitioner was unsure whether he waited a day following the phone conversation with the Army official to confront Ms. Smythe, or whether their follow-up conversation took place the same day. Tr. 69, 72.

in Ms. Smythe's office. Tr. 70, 100. Ms. Davis left the office before any conversation ensued. Tr. 70. Ms. Smythe agreed to the discussion, and Petitioner closed the door. Tr. 69-70. In his own view, Petitioner was not angry or upset.⁷ Tr. 73. Petitioner asked Ms. Smythe questions about her conversation with Ms. Godfrey. He then redressed Ms. Smythe for telling the Army official, in essence, that Petitioner had exceeded his authority and was usurping that of the Huntsville Field Office Manager. Tr. 71-72. Petitioner told Ms. Smythe that he did not speak to outside agency officials about her and that he would appreciate the same courtesy. Tr. 72. Because Petitioner had spoken his peace, Ms. Smythe then directed him to leave her office at once. *Id.* Petitioner asked Ms. Smythe why she was dismissing him in that manner. She reiterated that he should "now get up and get out." Tr. 73. Ms. Smythe then arose from her desk, raised her voice, and started shaking her finger at Petitioner. Petitioner reacted by telling Ms. Smythe: "If you ever do that to me again your ass is mine." *Id.* Ms. Smythe exited her office and headed toward Ms. Davis' office; Petitioner followed her into the hallway. Ms. Smythe then exclaimed: "Did you hear what he said? He threatened me." Tr. 74-75. Other employees observed the scene. When they looked back at Petitioner he sensed them posturing, suggesting to him hostility.⁸ Tr. 75. Petitioner then uttered: "[W]ell you didn't hear it I'll say it again, if you ever do that to me again your ass is mine." Tr. 75, 77-78.

16. Petitioner acknowledged making that statement in a raised voice. Tr. 116. He further testified that he never had made such a remark to a GAO employee previously. Tr. 156. Petitioner stated he was provoked into making that statement to Ms. Smythe, because she "got up out of her seat, . . . started pointing her finger and yelling at me, get up and get out of my office and shaking her finger. . . ." Tr. 81.

17. At no time during their conversation did Petitioner touch or otherwise physically assault Ms. Smythe. *See* Pet. Ex. 4 at 1-3.

18. Petitioner went to his office and shut his door. He was planning to stay at work, but was so upset because Ms. Smythe "had really been disrespectful" to him, he left for the rest of the day. Tr. 78-79.

19. I credit Petitioner's account of this event. In so doing, I was favorably impressed by his demeanor and the forthright manner of his testimony. Moreover, Ms. Smythe was not called to testify and the Agency offered no explanation for her not appearing at the hearing. The import of my credibility finding is that by Ms. Smythe's verbal dismissal of Petitioner, and her finger waving, she provoked a response from him. However, I still must determine, *infra*, whether Respondent's disposition of Petitioner's response was discriminatory and retaliatory.

⁷ The second-hand account of the tenor of the meeting is to the contrary. *See* Finding #22, *infra*.

⁸ Petitioner explained that when he said "posturing," "you have to understand I'm the only black man in that office and we're dealing with a lot of deep southern white folks there." Tr. 77.

20. Petitioner testified that he did not intend, by his statement, to harm Ms. Smythe or to threaten harm to her or to her family.⁹ Tr. 76-77, 117. He repeated his remark in front of others because he “felt threatened at that time, that’s why I said it again. . . .” Tr. 78. He submitted that the expression “your ass is mine,” in military parlance, denotes that repetition of the precipitating conduct will result in elevating the dispute higher in the chain of command. Tr. 76. Petitioner further explained that the idiom is comparable to “your ass is up the creek without a paddle,” meaning “If you continue to act out this kind of behavior, you’re going to be in trouble. You’re going to have to answer for your behavior.” Tr. 119-20, 162-63.

21. The record contains no evidence that Petitioner conveyed his interpretation of the phrase “your ass is mine” to Ms. Smythe or to any other GAO official prior to the initiation of this proceeding. Moreover, no evidence was presented supporting Petitioner’s interpretation of the phrase. I find, in its context, Petitioner informed Ms. Smythe that he would employ his leverage over her if she repeated the conduct to which he had objected. He left it to Ms. Smythe’s imagination and fears as to what he would do. Petitioner’s statements do not import, as he contends, that Petitioner would leave it to higher management to deal with Ms. Smythe.

22. Huntsville Office Manager William Graveline returned to his office from a business trip mid-day on June 21, 2007. Tr. 428. Wendy Smythe came to him and reported that when Petitioner entered her office in an agitated state,¹⁰ she tried to extricate herself from the situation and leave her office, because she felt threatened. Tr. 429. Mr. Graveline recalled her attributing to Petitioner the statement that if she acted dismissively toward him again he was going to “kick her ass.” Tr. 429-30. While Mr. Graveline did not discuss this with Petitioner, he did report it to ASM Director Paul Francis in Washington, after other individuals in the Office confirmed that they heard Petitioner’s outburst and “the threats.” Tr. 431, 433-34. Mr. Graveline was told to diffuse the situation and to keep Petitioner and Ms. Smythe apart. Tr. 433. Mr. Graveline also spoke by phone with Ms. Godfrey, who stated that she believed Ms. Smythe’s comments about Petitioner were “inappropriate and unprofessional.” Tr. 439. Management did not ask Mr. Graveline whether he believed that Petitioner should be disciplined for his actions. Tr. 438. At the hearing he testified that he believed the incident warranted discipline, because he did not “think it’s ever appropriate to ever threaten anybody in an office environment, and it’s just—it seems way past—way past the line.” Tr. 438. In subsequent weeks Mr. Graveline mentioned to Washington management officials Paul Francis and Katherine Schinasi that Huntsville staff were still tense over this event. Tr. 452. Mr. Graveline also testified that this was “just one of several events during that period of time that Leon had been involved in. I’ll just keep it to that. And people were concerned about that, that something should be done, or what is being done about that. So, it was a good level of concern about that.” Tr. 449. He further explained that employees communicated to him in individual conversations that some type of action should be taken against Petitioner. Tr. 449-50.

⁹ Petitioner described Ms. Smythe as not being a “big person.” He identified his weight as 207 pounds. Tr. 115-16.

¹⁰ Because Ms. Smythe did not testify, there is no first-hand testimony to counter Petitioner’s statement that he did not appear angry or upset at the beginning of the June 21 encounter.

23. ASM Director Paul Francis managed many of the Huntsville engagements and shared an “informal role” of overseeing Huntsville, because there was no on-site Director (Senior Executive Service member) there. Tr. 204. Mr. Francis received a call from Huntsville Field Office Manager William Graveline reporting the June 21 incident between Petitioner and Ms. Smythe. Tr. 217-18. Mr. Francis replied that he would go to Huntsville to speak to the parties, and after hearing that there were continuing discussions about the incident, he sent an email to Petitioner and to Ms. Smythe directing that they stop talking about the incident until he was there. Tr. 218-19. The email, captioned “In the interest of stewardship” and dated June 21, 2007, stated: “I will be in Huntsville Monday and Tuesday of next week to meet with each of you to discuss the disagreement you’ve been having. In the meantime, I do not want you to have any further discussion with other Huntsville staff on this matter. Trying to get other people to take sides is divisive, a disservice to them and the office, and will only make matters worse. I want these discussions and closed door sessions to stop now, and I am being purposely formal about this so there will be no question about my direction.” Resp. Ex. 1.

24. Shortly after the June 21, 2007 incident, Petitioner phoned Mr. Francis in Washington; Mr. Francis advised him not to try to handle matters like his dispute with Ms. Smythe, but rather, to call him in those situations. He also noted that he would be traveling to Huntsville to discuss what had taken place. Tr. 80.

25. Mr. Francis went to Huntsville on approximately June 25, 2007, and discussed the incident with Petitioner and Ms. Smythe. Tr. 81-82, 219. He met separately with Petitioner and Ms. Smythe to understand the events and to counsel each of them, if necessary. Tr. 219-20. During their meeting, Mr. Francis told Petitioner that he had reason professionally to confront Ms. Smythe for what she had said about him to the Army official; however, he did not have the right to yell at her and, instead, he should have brought the matter to a higher official. Tr. 222-23. Mr. Francis told Petitioner prior to coming to Huntsville that he understood his frustration, but if such a situation ever arose again Petitioner should phone him and not tell a co-worker “that their ass is yours if they do it again.” Tr. 81-82; 222. During the meeting in Huntsville, Petitioner acknowledged that he should not have said what he did, apologized to Mr. Francis and assured him that it would not happen again. Tr. 82. Mr. Francis informed Petitioner that both he and Ms. Smythe were at fault. Tr. 81-82. Mr. Francis told Petitioner that that was the end of the matter, but if Petitioner were to repeat that type of conduct it would be reflected in his performance appraisal. Tr. 81-83. Ms. Smythe was unapologetic and told Mr. Francis that she felt professionally threatened by Petitioner because he was higher graded than she was. Tr. 224, 227. Mr. Francis told Ms. Smythe that if she had not made the comment to the Army official about Petitioner, the whole series of events would not have occurred. Tr. 224-27. Upon leaving Huntsville, and discussing the matter with a superior back in Washington, D.C. (John Anderson, then Managing Director, Field Operations (Tr. 205)), Mr. Francis “felt that the situation had been dealt with and I didn’t think necessarily that there was a need for follow-on action or disciplinary action at that time.” Tr. 228. However, he acknowledged, based upon his subsequent knowledge of Agency disciplinary policy for unprofessional conduct flowing from the O&I Report written by Mr. Stroman on the incident, “I did not have that context at the time when I went down to Huntsville.” Tr. 230-31.

26. Within a few weeks of the confrontation between Petitioner and Ms. Smythe, two other incidents occurred which were later investigated by Ronald Stroman in connection with his investigation of the June 21 encounter. The first involved an exchange between Petitioner and an intern, Helena Brink, during which he said that Ms. Brink was a woman who “hooked up” with her Army recruiter. Pet. Ex. 4 at 4. Ms. Brink understood Petitioner to be saying that she had had sex with her recruiter. Upon learning of the exchange, Mr. Francis suggested that John Ortiz, a Huntsville staff member, mediate a meeting between Petitioner and Ms. Brink. *Id.* at 3. According to Ms. Brink, during this meeting Petitioner explained that he meant “hooking up” to mean “getting together with;” explained that he was not attracted to white women; and repeatedly banged his fist on the arm of Ms. Brink’s chair. Pet. Ex. 4 at 3. Neither Petitioner nor Mr. Ortiz recalled that Petitioner banged his fist on Ms. Brink’s chair. *Id.* at 3-4.

27. The other incident involved Tana Davis, another Huntsville staff member. Tr. 239; Pet. Ex. 4 at 4. Petitioner advised Marcus Ferguson, also a Huntsville staff member, to be careful supervising Ms. Davis because she could hurt Mr. Ferguson’s career and that Ms. Davis abused her telework arrangement. Pet. Ex. 4 at 5.

28. Denise Hunter, then GAO’s Eastern Regional Director, visited Huntsville as part of her normal job responsibilities in late July 2007. Tr. 530, 537. During her visit, at least three female staff members came to her to discuss their concerns regarding Petitioner. Tr. 558, 564-65. According to these women, Petitioner had been making comments of a sexual nature to women in the Office for a long time. Tr. 566. Although they had not come forward in the past, they chose to do so in the Summer of 2007 because Petitioner had begun making such comments to the younger women in the Office, and they did not wish to see these younger women subjected to the same behavior they had endured. Tr. 567. These women told Ms. Hunter that they had been afraid to come forward because Petitioner would have labeled them as racists. Tr. 566-67.

29. ASM Managing Director Katherine Schinasi learned from ASM Director Paul Francis about the June 21, 2007, Smythe-Petitioner incident shortly after the event. Tr. 324. Upon his return from Huntsville, Mr. Francis reported back to Ms. Schinasi that he thought the matter had been resolved, but “[t]here seemed to be a lot of unhappiness about what was going on.” Tr. 325, 357-58. Ms. Schinasi continued to hear reports that there was a lot of “roiling of the staff down there” and that “things had not been settled.” Consequently, she asked the Office of Opportunity and Inclusiveness to conduct an independent review of alleged incidents in the Huntsville Office. Tr. 326-27, 357-59. That is the only time in a disciplinary setting where she had approached O&I to conduct an investigation; she indicated that she did not know who else to ask for a “status report on what was going on” in Huntsville. Tr. 327, 360. Other cases, involving computer abuse or performance issues, were investigated by either the Information Technology Office (IT) or the Human Capital Office (HCO). Tr. 321, 327.

D. The Stroman Investigation

30. In August 2007, Ronald Stroman, then Managing Director of the Office of Opportunity and Inclusiveness, came to the Huntsville Field Office to investigate three allegations of unprofessional conduct in Huntsville, including the interaction between Petitioner and Wendy Smythe that occurred on June 21, 2007. Pet. Ex. 4 at 1; Tr. 154-55; Request for Admissions #12.

Previously, Petitioner had implored Mr. Stroman to visit Huntsville to investigate complaints of racial discrimination. Tr. 88-89. Mr. Stroman informed Petitioner that he was there to investigate the incident with Ms. Smythe. Tr. 89. Petitioner demurred, stating that he already admitted what had taken place, was remorseful, and that no investigation was necessary. However, he agreed, as a courtesy to Mr. Stroman, to cooperate with his investigation. Tr. 89-90. In conducting his investigation, Mr. Stroman interviewed twelve GAO Huntsville Office staffers, as well as the Huntsville Army coordinator for GAO entrance conferences. Pet. Ex. 4 at 2.

31. Following this trip, Mr. Stroman addressed a six-page memorandum to ASM Managing Director Katherine Schinasi, dated September 12, 2007, and entitled “Allegations of Unprofessional Conduct in the Huntsville Regional Office.” Pet. Ex. 4, Resp. Ex. 2 (Stroman Report). It posed the issue: “Whether [Petitioner’s] statements to Wendy Smythe constitute unprofessional conduct unbecoming a GAO employee?”¹¹ As a result of his inquiry, Mr. Stroman found: “In view of [Petitioner’s] tone and the plain meaning of his words, it would not be unreasonable for Wendy to conclude that [Petitioner’s] comments were threatening. Such threatening conduct would clearly be unacceptable and constitute unprofessional conduct.” He went on to conclude:

Even if [Petitioner’s] statements were determined not to be a threat against Wendy, they still constitute unprofessional conduct. [Petitioner] yelled “if you ever do that again your ass is mine” in the corridor of the Huntsville office with the intention that anyone near by would hear his remarks. In view of the small size of the Huntsville office, anyone standing in that corridor or located on that side of the building, including outside guests, could easily have heard [Petitioner’s] yelling. I believe that yelling and using inappropriate language in the corridor of the Huntsville office constitutes unprofessional conduct.

Id. at 2-3. Mr. Stroman noted several mitigating factors, including that Petitioner had never before been so accused during his then eighteen year GAO career; that Petitioner expressed remorse; and the fact that Wendy Smythe’s “own inappropriate and perhaps unprofessional behavior was a contributing factor to [Petitioner’s] statements.” *Id.* at 3. Mr. Stroman went on to examine two other unrelated claims against Petitioner of unprofessional conduct and retaliation and concluded that they were not supported by sufficient evidence. *Id.* at 3-5.

E. Disciplinary Action

32. GAO Order 2751.1, Discipline (Sept. 26, 2005), establishes the Agency’s “policies for initiating and taking disciplinary actions . . . and provides general management guidelines for taking disciplinary actions.” Pet. Ex. 11 (Rep. Ex. 4), Ch. 1 ¶1. The Order defines “Reprimand” as: “A written disciplinary action against an employee that is more severe than an admonishment. A reprimand is placed in the employee’s official personnel folder for a period of at least 1 year but not more than 3 years.” Ch. 1, ¶4.g. In the Guide for Disciplinary Offenses

¹¹ It also raised questions about Petitioner’s conduct toward two other Huntsville Office employees.

and Penalties, the Order lists the offense of “Unprofessional conduct: Conduct unbecoming a GAO employee.”¹²

33. ASM Director Paul Francis issued a letter to Petitioner, dated October 12, 2007, proposing his suspension for two work days without pay “for conduct unbecoming a GAO employee.” Pet. Ex. 3; Tr. 110. The disciplinary proposal cited the investigation by O&I, and the underlying factual scenario of the incident between Petitioner and Wendy Smythe on June 21, 2007. Pet. Ex. 3. Mr. Francis testified that it was not his option whether or not to propose formal discipline: The Human Capital Office had instructed him to propose a formal disciplinary action against Petitioner. Tr. 215. He believed that GAO’s Office of General Counsel and ASM Managing Director Katherine Schinasi were also involved in that decision. Tr. 215-16. Mr. Francis testified that Petitioner’s race played no role in the proposed discipline; nor did Petitioner’s advocacy on behalf of the African-American intern applicant inform the decision. Tr. 250. Mr. Francis further testified that Petitioner was properly concerned about the intern hiring action. Tr. 250, 254.

34. No disciplinary action was proposed against Wendy Smythe.¹³ Tr. 230.

35. ASM Managing Director Katherine Schinasi was the deciding official on the proposed suspension, who issued a written reprimand to Petitioner in connection with the June 21, 2007 incident on January 14, 2008. Pet. Ex. 2; Resp. Ex. 9. In reaching that decision, she reviewed Petitioner’s written response as well as Mr. Francis’ letter proposing a suspension. *Id.* at 1. She also considered Mr. Stroman’s on-site Report of the incident. In addition, Ms. Schinasi looked at GAO’s Order dealing with the imposition of discipline. *Id.* at 2; Tr. 335.

36. Ms. Schinasi ultimately concluded that Petitioner had “made two inappropriate comments towards another GAO employee while at work. Specifically, on June 21, 2007, while in Ms. Wendy Smythe’s office, [he] stated to Ms. Smythe, that ‘If you ever do that again your ass is mine.’ [He] then followed Ms. Smythe into the hall and yelled, ‘I will say it again, if you ever say it again, if you ever do that again your ass is mine.’ The charge in the proposed suspension letter is supported by the required preponderance of the evidence, and accordingly, sustained.” Resp. Ex. 9 at 1.

37. In determining the appropriate penalty, Ms. Schinasi noted that Petitioner had “acted without malice, but rather, out of frustration.” *Id.* She also considered that he made inappropriate comments twice, “and that the second comment was made out loud in a hallway for other employees to hear.” Further, she considered his work record, including performance, as well as

¹² The Order defines the condition for citing this offense: “‘Unprofessional conduct: conduct unbecoming a GAO employee’ should only be used to describe an offense if none of the more specific types of offenses contained in the Guide accurately describe the misconduct. In such cases, the discipline documents must describe in detail the nature of the misconduct.” Order 2751.1, Guide for Disciplinary Offenses & Penalties, n.7.

¹³ Ms. Schinasi claims that Ms. Smythe was given a written admonishment by email shortly after the incident occurred. Tr. 338. However, the email to which she refers simply advises Petitioner and Ms. Smythe not to discuss the incident with others in the Office. Resp. Ex. 1.

the fact that he was a Senior Analyst with many years of experience. Based upon the considerations, Ms. Schinasi decided to issue a letter of reprimand rather than impose the suspension as proposed. *Id.* at 1-2. In addition, she initially included a written requirement that Petitioner attend an anger management program (letter dated January 7, 2008 (Resp. Ex. 10)), but modified her decision to remove that written requirement at Petitioner's request. Tr. 326-30; Pet. Ex. 2. Ms. Schinasi testified that neither Petitioner's race nor his advocacy for greater ASM personnel diversity played a part in her decision to issue a letter of reprimand to him. Tr. 353.

38. The January 14, 2008 written reprimand, signed by ASM Managing Director Katherine Schinasi, was placed in Petitioner's Official Personnel Folder (OPF).

39. Ms. Schinasi deemed Wendy Smythe to have received an informal admonishment as evidenced by Mr. Francis' email, dated June 21, 2007, to Ms. Smythe and Petitioner. Tr. 336-38; Resp. Ex. 1. That email was captioned "In the interest of stewardship," and advised Ms. Smythe and Petitioner to refrain from further discussion of their confrontation. *See* n.13, *supra*.

F. Other Huntsville Events

40. Petitioner testified that in approximately June 2007, an event¹⁴ occurred at the Huntsville Field Office between two white employees where Senior Analyst Steven Stearn threw a banana peel into co-worker William Allbritton's trashcan. Tr. 182-83. According to Petitioner, Mr. Allbritton pointed his finger in Mr. Stearn's face and said "if you ever do that again I'm going to kick your ass or beat your ass." Tr. 182-83. Petitioner learned of this event after it had taken place, but asserts that management also became aware of it. Tr. 181-84, 190-92. Huntsville Manager William Graveline testified that he did not learn of the incident until the time of the Huntsville depositions on the instant matter in January 2009. Tr. 424-28. ASM Director Paul Francis also testified that he did not learn of this event until months thereafter. Tr. 240-41. Mr. Stearn testified that Mr. Allbritton's response to his tossing a banana peel in his trashcan was to admonish him never to do that again, while Mr. Allbritton was walking towards Mr. Stearn. Tr. 483. When Mr. Stearn exclaimed "Please tell me you're joking," Mr. Allbritton sat down and said, "Oh my God, I'm sorry." *Id.* Mr. Stearn does not recall Mr. Allbritton saying anything to him about "kicking his ass" or "beating him up." Mr. Stearn did not report this incident to management because he did not think "it was an incident to reach that level." Tr. 483-84. Later that day Messrs. Stearn, Allbritton, and one other co-worker lunched together. Tr. 489-90.

41. I find that Mr. Allbritton reacted with open pique and annoyance towards Mr. Stearn in the aftermath of seeing Mr. Stearn toss a banana peel in his trashcan. However, the testimony does not establish that a public disturbance was created, or that Mr. Allbritton said anything importing what action he might take towards Mr. Stearn—*i.e.*, "kick his ass."

42. Petitioner testified that in late 2006 or early 2007, when co-worker Ruthie Williamson turned age 50, some male co-workers decorated her work cube with ghosts and goblins; one colleague hung a black large-sized brassiere. It had the notation: "[I've] fallen and I can't get up." Tr. 193. Petitioner stated that Field Office Manager William Graveline was aware of that

¹⁴ Petitioner offers this as an instance of disparate treatment asserting that Mr. Stearn's unpunished conduct was comparable to that for which he was disciplined. Tr. 182-85.

incident but took no action. *Id.* According to Petitioner, he spoke with the reputed perpetrator, who agreed not to repeat that behavior. Tr. 193-94. Mr. Graveline acknowledged receiving a complaint about the brassiere decoration from a female employee. Mr. Graveline did not know by whom, but the undergarment was removed rapidly. Tr. 422-23. He did not believe that it warranted disciplinary action, because although “a little excessive,” it had been removed promptly and Ms. Williamson thought it was all in good fun and not inappropriate. Tr. 420-24, 474 (testimony of Steven Stearn). ASM Managing Director (then Director) Paul Francis testified that he did not learn of this incident until months after its occurrence, and that he had not received a call from the employee whose cube had been decorated or from her supervisor or Assistant Director. Tr. 242-43.

II. DISCUSSION ON RACE DISCRIMINATION AND RETALIATION CLAIMS

A. Introduction

Petitioner contends that he suffered actionable adverse treatment in the form of a proposal to suspend him without pay for two calendar days, which was later reduced to an official written reprimand and placed in his official personnel file.¹⁵ Petitioner submits that his claims are cognizable both as a prohibited personnel practice under 5 U.S.C. §2302(b)(1) and under Title VII of the Civil Rights Act of 1964, as amended. While both statutory provisions track each other in proscribing, *inter alia*, racial discrimination and retaliation, Petitioner contends that 5 U.S.C. §2302(b)(1) has broader scope in what constitutes an actionable adverse action. Petitioner’s Closing Brief at 12. Respondent argues that the scope of 5 U.S.C. §2302(b)(1) and Title VII is coextensive and that under either provision the written reprimand is not actionable for the race discrimination and retaliation claims. GAO’s Post-Hearing Reply Brief at 8. It is unnecessary to resolve this conflict because of the conclusion, *infra*, that the written reprimand is actionable under Title VII for the racial discrimination and retaliation claims.¹⁶

B. Legal Framework for Discrimination

The parties both submit that the matter is subject to analysis under the paradigm established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny, for consideration of racial discrimination disparate treatment and retaliation claims. I agree.

¹⁵ GAO Order 2751.1 states that a Letter of Reprimand “will be filed in [the employee’s] official personnel folder for a period of at least 1 year but not more than 3 years, and [the employee] can ask, after 1 year, that the letter be removed from the official personnel folder.” Ch. 2, ¶2. However, there was no evidence presented that Petitioner asked that the letter be removed from his OPF, or that it was in fact removed from his OPF.

¹⁶ The Order of October 22, 2008, denying Respondent’s Motion to Dismiss, determined that the proposed suspension and the written reprimand merged for purposes of this proceeding. It also presaged the conclusion herein by preliminarily determining that the written reprimand was actionable under Title VII. Although the proposed suspension is not being treated separately because of the merger finding, the conclusions herein regarding causation and ultimate liability addressed to the written reprimand are fully applicable to the proposed suspension.

Racial disparate treatment occurs when an employer intentionally treats an individual less favorably than another because of his or her race. Disparate treatment must be intentional to be actionable. “Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.” *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

In *McDonnell Douglas, supra*, the Supreme Court first established the specific order of indirect proof in individual disparate treatment cases. If the employee sets forth a *prima facie* case of discrimination, the burden of production shifts to the employer “to articulate some legitimate, nondiscriminatory reason” for the challenged action. *McDonnell Douglas*, 411 U.S. at 802. The employee may then proceed to prove that the employer’s justification constitutes a mere ruse or subterfuge to mask discrimination. *Id.* at 804. This may be accomplished through the introduction of additional evidence at the conclusion of the employer’s case or through effective cross-examination of the employer’s witnesses. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

Under the *McDonnell Douglas* model, the burden of persuasion remains, at all times, with the employee. *Burdine*, 450 U.S. at 253-54. Nonetheless, this approach gives employees with no direct evidence their day in court. This model creates a legal inference of discrimination based on proof of a series of events or circumstances designated as the *prima facie* case. The elements of a *prima facie* case vary depending on the nature of the challenged employment action. Whatever the variation, however, one constant remains: an employee may prove discrimination indirectly if the employer fails to articulate a credible explanation for its actions. *Id.* at 254.

The established order of analysis of discrimination allegations, in which the first step normally consists of determining the existence of a *prima facie* case, need not be followed in all situations. Where the employer has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the *McDonnell Douglas* analysis, the ultimate issue of whether the employee has shown by a preponderance of the evidence that the employer’s actions were motivated by discrimination. *U.S. Postal Service Board v. Aikens*, 460 U.S. 711, 713-14 (1983).

Although the *McDonnell Douglas* standard was adopted in the context of racially discriminatory hiring practices, it has subsequently been extended to various types of discrimination, including retaliation. *Kersey v. Washington Metropolitan Area Transit Authority*, 586 F.3d 13, 16-17 (D.C. Cir. 2009).

To prevail in a racial discrimination disparate treatment claim such as the one presented in this matter, Petitioner must establish a *prima facie* case by demonstrating that he was subject to an adverse employment action under circumstances that would support an inference of discrimination. *Furnco Construction Co. v. Waters*, 438 U.S. 567, 575 (1978). To prevail ultimately, Petitioner must prove by a preponderance of the evidence that the Agency’s explanation is a pretext for discrimination. *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 146 (2000); *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 519 (1993).

A Title VII plaintiff must show “actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions ‘were based on a discriminatory criterion illegal under the act’.” *Furnco Construction Co.*, 438 U.S. at 576. Most often the inference of motive or intent is accomplished through the use of comparative evidence. *Gates v. Georgia-Pacific Corp.*, 326 F. Supp. 397, 399 (D.Ore. 1970), *aff’d*, 492 F.2d 292 (9th Cir. 1974). If persons of one race, color, sex, religion or national origin are treated differently from persons who are similarly situated but are of a different race, color, sex, religion or national origin, and the employer fails to proffer a nondiscriminatory reason for the difference in treatment, it is reasonable to infer that an impermissible factor motivated the employment action. *See St. Mary’s Honor Center*, 509 U.S. at 509.

However, it is critical that the employee and the co-workers used as comparators are truly “similarly situated” in all relevant respects.¹⁷ Employees are “similarly situated” if it is reasonable to assume that they would be treated equally in the context of a particular employment decision. *See McGuinness v. Lincoln Hall*, 263 F.3d 49, 54-55 (2d Cir. 2001). The employees need not be identically situated as long as the co-workers used as comparators were in a sufficiently similar situation to support a minimal inference of discrimination. *Id.* at 53-54. The requirements vary from case to case. *Barricks v. Eli Lilly & Co.*, 481 F.3d 556, 560 (7th Cir. 2007). As a general rule, however, two employees are similarly situated if they dealt with the same supervisor, were subject to the same performance and discipline standards, and, if the employee alleging discriminatory discharge or discipline *engaged in comparable misconduct without such differentiating mitigating circumstances that would justify the employer’s different treatment of them.* *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000) (emphasis added); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617-618 (7th Cir. 2000); *see also Silvera v. Orange County School Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001) (comparator’s misconduct must be nearly identical to plaintiff’s in all relevant aspects).

¹⁷ *See, e.g., Fane v. Locke Reynolds*, 480 F.3d 534, 540-541 (7th Cir. 2007) (paralegal and secretary who performed different jobs and reported to different supervisors were not similarly situated); *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 710-11 (6th Cir. 2006) (wrongful conduct of male security guard who sexually harassed subordinate employees was more serious than that of female guard who allowed unauthorized people to enter employer’s facility); *Singfield v. Akron Metropolitan Housing Auth.*, 389 F.3d 555, 562 (6th Cir. 2004) (comparators had not engaged in broad range of offenses like plaintiff); *Watts v. City of Norman*, 270 F.3d 1288, 1293-94 (10th Cir. 2001) (supervisor and lower-level employee may not be similarly situated, since employer demands greater responsibility from supervisor); *Conward v. Cambridge School Committee*, 171 F.3d 12, 20-22 (1st Cir. 1999) (male African-American teacher who gave lewd document to female student was not similarly situated to white teachers who spontaneously shoved and struck male students or another white teacher whose alleged inappropriate behavior toward male students was not proven); *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1554-55 (D.C. Cir. 1997) (African-American law firm associate who alleged salary discrimination failed to prove that he was similarly situated to other associates used as comparators; he compared himself to “homegrown” associates rather than to other lateral hires, and he did not show that attorneys in different cities where firm had offices were similarly situated); *Wallace v. SMC Pneumatics*, 103 F.3d 1394, 1398 (7th Cir. 1997) (American employee of American subsidiary of Japanese corporation failed to show that any similarly situated Japanese employee was treated better).

Of course, the employees used as comparators must have actually been more favorably treated than the aggrieved employee. *See Tysinger v. Police Dep't of City of Zanesville*, 463 F.3d 569, 574 (6th Cir. 2006). For example, if two employees, one black and one white, get into a fight on the employer's premises and each is equally responsible for the altercation, it would be a violation of Title VII for the employer to discharge one and not the other. However, if one employee is more at fault than the other, it would be lawful for the employer to discharge only the more culpable employee, since the two employees would not be similarly situated. *Buie v. Quad/Graphics, Inc.* 366 F.3d 496, 508-09 (7th Cir. 2004); *Ward v. Procter & Gamble Paper Prods.*, 111 F.3d 558, 560-61 (8th Cir. 1997).

C. Petitioner's Racial Discrimination Claim

In applying the foregoing principles, I must determine the following: (1) Is Petitioner a member of a protected group? (2) Did Petitioner suffer an actionable adverse event in the work place? (3) Did GAO subject Petitioner to an adverse employment action under circumstances that would support an inference of discrimination? (4) Has the Agency articulated a reasonable nondiscriminatory explanation for its treatment of Petitioner? And (5) has Petitioner proven that GAO's explanation is a ruse or subterfuge employed to disguise unlawful discrimination?

1. Prima Facie Case

I find that Petitioner has met the first three prongs of this paradigm to establish his *prima facie* case. As an African-American, Petitioner belongs to a protected group under Title VII. Moreover, his written reprimand constitutes an adverse employment action, in my view. It is listed as a form of discipline in Respondent's Order 2751.1, which defines it as more severe than an admonishment. Ch. 1, ¶4.g. Written reprimands remain in an employee's official personnel file for a minimum of one and a maximum of three years, and are considered an aggravating factor should the employee be found to have engaged in future misconduct.¹⁸ Ch. 2, ¶2. Accordingly, I find that Petitioner suffered an actionable event in the workplace by virtue of the written reprimand. *See David L. Anderson v. Postmaster General*, EEOC Hearing No. 443A60002X, 2007 EEOPUB LEXIS 2391, n.2 (May 17, 2007) (While finding no discrimination, EEOC noted that it "has long held that a Letter of Warning does constitute an adverse action"); *see also Denise E. Winn v. Postmaster General*, EEOC Appeal No. 0120092098, 2009 EEOPUB LEXIS 2625 (Oct. 5, 2009) (where EEOC found a letter of warning to be actionable).

I also find that the circumstances under which Petitioner was reprimanded are such to reach the lower threshold of establishing a *McDonnell-Douglas prima facie* inference of discrimination. Petitioner was involved in a verbal dispute with Wendy Smythe, a Caucasian employee. Tr. 69-78, 220-22; Resp. Ex. 2 at 1-2. GAO considered Ms. Smythe to have contributed to the scene that resulted in Petitioner's reprimand. Tr. 225-26, 233-34; Resp. Ex. 2 at 3. However, Petitioner was the only one who was formally disciplined. *See* Tr. 337-38.

¹⁸ Although no evidence in this regard was presented at the hearing, it is a fair assumption that an employee's official personnel file is consulted regarding many personnel decisions such as promotion, assignment, salary increases, and performance evaluation. As a result, receiving a written reprimand would not be insignificant.

2. GAO's Explanation

I now must determine whether the Agency has articulated a reasonable and nondiscriminatory explanation for reprimanding Petitioner, but not his Caucasian antagonist.

There is no dispute that in a private setting Petitioner told Ms. Smythe "If you ever do that to me again your ass is mine." Shortly thereafter, Petitioner repeated that remark again to Ms. Smythe, while outside of her office and in the presence of other employees. This created a "buzz" or "chatter" in the Huntsville Office. It also resulted in the intervention by a Headquarters official that very day, followed by his on site visit the following week to deal with the contretemps. Subsequently, Respondent sent Mr. Stroman, its Managing Director of the Office of Opportunity and Inclusiveness, to investigate this incident, as well as two other allegations involving Petitioner that had subsequently come to the Agency's attention. Mr. Stroman's Report found those latter two incidents to be unsubstantiated. However, he concluded that Petitioner's statements to Ms. Smythe could be considered threatening; but, in any event, they represented unprofessional conduct. GAO, therefore, proposed Petitioner's two-day suspension, but ultimately reduced his penalty to a written reprimand.

I find that Respondent has articulated a reasonable and nondiscriminatory explanation for issuing a written reprimand to Petitioner grounded on its finding that he had engaged in unprofessional conduct that was also possibly threatening.

3. Pretext Issue

Petitioner submits that Respondent's motivation is impugned, based upon the statements of Managing Director Paul Francis: because Mr. Francis, who had first dealt with the matter, initially stated that the matter had been resolved and it required no further action. However, this is tempered by Mr. Francis' testimony that he had lacked the full context that later-acquired information, and the Stroman Report, provided to him.¹⁹ Tr. 230-31.

Petitioner's remaining pretext claims are that similarly situated employees, not of his racial group, were undisciplined for their comparable offenses. We look first to his antagonist, Wendy Smythe. When GAO disciplined Petitioner, its undisputed information was that Petitioner had uttered the objectionable remarks to her, when alone, and again in front of other employees. During the Stroman inquiry, Ms. Smythe denied²⁰ Petitioner's assertion that she shook her finger in his face, thereby precipitating his angry response. In any event, I am unable to find Petitioner and Ms. Smythe to be similarly situated. Ms. Smythe's initial role in talking to personnel from another agency about Petitioner reflects negatively on her judgment. Petitioner's "yelling and

¹⁹ I do not give much weight to Petitioner's reliance on the fact that Mr. Francis was told by other GAO officials to propose Petitioner's discipline. He was the responsible ASM Manager, and obviously the logical person to perform that task.

²⁰ I have found, *supra*, that Ms. Smythe did wave her finger in Petitioner's face, because the Agency did not present Ms. Smythe as a witness at the hearing. GAO was not in a position readily to discredit her version of that fact when it disciplined Petitioner.

inappropriate language,” however, were found to be unprofessional conduct and possibly threatening by the Stroman Report. Regarding Ms. Smythe’s actions toward Petitioner, the Stroman Report described her behavior as “inappropriate and *perhaps* unprofessional.” Resp. Ex. 2 at 3 (emphasis added). Clearly, Ms. Smythe’s comments were not threatening nor did she make her statements in front of her co-workers. It was only after Petitioner threatened her that she moved into the hallway. Even Petitioner testified that Ms. Smythe said “did you hear what he said? He threatened me.” Tr. 74-75. Instead of backing off at that point or denying that he was threatening her, he repeated his statement for everyone to hear. Petitioner also admits that he himself felt threatened at that point and responded to the threat – “I’m the one that felt threatened at that time, that’s why I said it again...” Tr. 78. Petitioner clearly overreacted to Ms. Smythe’s actions and the situation, and even admitted that he had acted inappropriately. Tr. 79, 82, 222. Their actions simply are not comparable.

Further, while there was no formal disciplinary action taken against Ms. Smythe, Mr. Francis admonished her orally by telling her that her actions toward Petitioner were not acceptable. According to Petitioner, Mr. Francis advised them that any further problems would be reflected on their performance appraisals. Tr. 81-83. While Petitioner places emphasis on the fact that Mr. Francis stated that previous discussions with Petitioner regarding comments he made were not “disciplinary counseling,” Mr. Francis clearly considered them to be informal counseling discussions since his proposal letter expressly considered that Petitioner had a history of making inappropriate comments. Resp. Ex. 5 at 2. Petitioner did not deny that these discussions with Mr. Francis had occurred. There is no evidence that Mr. Francis ever had to discuss with, counsel, or even “advise” Ms. Smythe regarding her behavior prior to this incident.

Petitioner also points to a contemporary event where one employee drew an indignant reaction from a co-worker by throwing a banana peel in his trash basket. While that engendered a response from the annoyed co-worker, no threats²¹ were uttered, no scene created, and the two had lunch together later that day. Again, this is not a comparable situation.

Finally, there is the early morning birthday party where a large-sized black brassiere was placed among the decorations at the birthday female co-worker’s work cubicle. The testimony and record do not establish clearly the perpetrator’s identity. However, once Petitioner spoke to a particular individual, the inappropriate ornament was removed almost immediately. Significantly, the birthday female thought it was funny and not inappropriate, although another woman was offended. In my view, this situation does not rise to a level comparable to that for which Petitioner was disciplined. That puerile joke does not equate to Petitioner’s outburst or threat.

Based on the foregoing, I conclude that Petitioner has not met his burden of establishing that Respondent’s explanation for his reprimand is pretextual. Accordingly, Petitioner has not met his burden of establishing race discrimination by a preponderance of the evidence.

²¹ While Petitioner testified to his non-firsthand knowledge that the co-worker uttered a threat, such is not supported by the testimony of the recipient of the alleged threat, as set forth *supra*.

D. Retaliation Claim

Generally, in order to prove retaliation, Petitioner must establish as part of his *prima facie* case that the employer was aware of the protected activity and that a causal connection exists between the protected activity and an adverse employment action. *Lasley v. GAO*, PAB Docket No. 08-02, slip. op. at 33 (5/28/09), *aff'd* 1/20/10. Proof of the requisite causal connection requires either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action; or (2) a pattern of antagonism coupled with timing to establish a causal link. *Id.* (citations omitted). In the absence of that proof a plaintiff must show that from the “evidence gleaned from the record as a whole” the trier of fact should infer causation. *Id.* The adverse action should be material enough that it could dissuade a reasonable employee from engaging in protected EEO activity such as filing a discrimination complaint, otherwise participating in the EEO process, or opposing discriminatory employer practices. *See Burlington Northern & Santa Fe Railroad Co. v. White*, 548 U.S. 53, 68 (2006); *Taylor v. Solis*, 571 F.3d 1313, 1320 (D.C. Cir. 2009).

Respondent contends that Petitioner’s advocacy on behalf of an African-American summer intern applicant does not constitute protected EEO activity, although Petitioner’s representations that his Huntsville Office lacked diversity were well known to local and Headquarters management. In any event, this argument is foreclosed by Respondent’s Answer to Petitioner’s Amended Petition, which admits the following quoted first two sentences in Factual Allegation No. 1: “In or about April, 2007 Petitioner objected to ASM’s decision not to interview a qualified African-American female applicant for its summer intern program. *Petitioner expressed his concerns about this allegedly discriminatory hiring practice to GAO Field Director Denise Hunter*, who thereafter arranged to have the individual interviewed.” [Emphasis added.]²²

Petitioner complained about the handling of Tiffany Atkins’ application for a Huntsville summer intern position to the Comptroller General as late as May 2007. Tr. 54. He received his proposed suspension letter in October 2007. While five months can be considered outside the range of “an unusually suggestive temporal proximity,” the five months coupled with other actions by Respondent, *e.g.* having O&I conduct an investigation regarding Petitioner’s actions, can be sufficient to create the causal link necessary to establish a *prima facie* case. *See Lasley v. GAO*, PAB Docket No. 08-02, slip. op. at 33.

However, GAO articulated a legitimate nondiscriminatory reason for its actions and Petitioner failed to prove his ultimate burden that the Agency retaliated against him for his opposing its hiring practices. Petitioner presented no evidence that GAO in any way expressed its disapproval of his advocacy on behalf of the African-American applicant or, in general, for greater diversity at the Huntsville Office. For example, Petitioner testified that an EEO official, knowledgeable about the hiring of the African-American summer intern, warned him to protect

²² Even absent GAO’s concession on this point, I would find Petitioner’s advocacy on behalf of that African-American applicant to involve “opposing alleged discriminatory treatment” by the Agency and, as such, constituting protected activity for purposes of the retaliation claim. *Lasley v. GAO*, PAB Docket No. 08-02, slip. op. at 32.

the intern because her hiring was contentious. However, that EEO official did not corroborate Petitioner's testimony. Additional Finding of Fact, ¶5, *supra*. In fact, both Mr. Francis and Ms. Schinasi credibly testified that they appreciated Petitioner's work in trying to diversify the Huntsville Office. Mr. Francis testified that he thought Petitioner's concerns were "valid" and that Petitioner was a "principle [*sic*] passionate type of person genuinely concerned about these issues," and that Petitioner's actions did not anger him. Tr. 254-55. Ms. Schinasi testified that she was "glad to hear from [Petitioner]" regarding the lack of diversity in the Huntsville Office and that Petitioner had "called to encourage me to pay attention to that, and to provide information that he thought might be helpful to me as we went through our recruiting process." Tr. 341. She further stated that she was "supportive of what he was trying to do and his goals for that office." Tr. 341.

Petitioner also failed to prove that he was treated differently from any similarly situated comparator employee who may or may not have engaged in protected EEO activity. There is no evidence regarding whether Ms. Smythe engaged in protected EEO activity. Even assuming that she had not engaged in protected activity, as discussed *supra*, she was not similarly situated to Petitioner because his actions were considered to be more severe than Ms. Smythe's.

Accordingly, Petitioner has failed to show that he was retaliated against for his protected activity since he could not show that GAO's legitimate nondiscriminatory reason was pretext for its actions.

III. MOTION FOR REIMBURSEMENT OF TRAVEL EXPENSES

On April 15, 2009, the PAB/OGC filed a Petition under 4 C.F.R. §28.155 requesting the Board to issue a policy statement regarding the payment of travel expenses for a PAB/OGC witness to attend a hearing. On February 18, 2010, the Board issued a Decision stating this was an issue arising from a pending case, and the matter should be addressed by means of a motion in that case. *PAB/OGC v. GAO*, PAB Docket No. 09-03 (2/18/10). The Board allowed Petitioner twenty days from that Decision to file a motion in the instant case requesting reimbursement of his travel expenses to attend the hearing in this case. Petitioner filed his Motion for Reimbursement of Travel Expenses on March 3, 2010. The Agency timely filed its Opposition on March 16, 2010.

In his Motion, Petitioner advances that the payment of his travel expenses is authorized by 4 C.F.R. §28.26(d), which provides that "[w]hen the General Counsel is the petitioner or is representing the petitioner, the General Counsel shall pay the witness fees and arrange for the travel and per diem expenses that are required by paragraph (c) of this section." Paragraph (c) specifically governs the payment of fees and expenses of non-Federal employee witnesses. Petitioner's Motion (Pet. Mot.) at 2.

Petitioner additionally submits that the payment of his travel expenses is consistent with the practices of the Executive branch Office of Special Counsel and the Federal Labor Relations Authority, "which pay travel expenses for their witnesses to [attend] hearings regardless of their current employment or complainant/charging party status." Pet. Mot. at 2.

Petitioner would distinguish earlier Comptroller General decisions denying travel reimbursement to *pro se* or privately represented former employee parties to an agency administrative proceeding, essentially, upon the basis that the PAB/OGC is operating in a prosecutorial role in presenting its case to the PAB. Pet. Mot. at 3.

Respondent counters that 31 U.S.C. §1301(a) prescribes that an agency may use its funds only for purposes authorized by law. Respondent's Opposition to Petitioner's Motion for Reimbursement of Travel Expenses (Resp. Opp.) at 2. Respondent then argues that the payment of Petitioner's travel and per diem expenses is not authorized by law because he is a party to this administrative litigation. In this regard, Respondent relies upon the *Matter of: Gracie Mittelsted – Expenses of Travel to Attend Merit Systems Protection Board Hearing*, B-212292 (Oct. 12, 1984).²³ Resp. Opp. at 2-3. Respondent points out that no statute has been identified that authorizes such payments to a non-employee party-litigant, and that the relevant PAB regulations authorizing witness fees, travel and per diem expenses for non-Federal employee witnesses do not extend to a party-litigant. Resp. Opp. at 3. Finally, Respondent contends that Petitioner has not established that analogous authorities (Office of Special Counsel and the Federal Labor Relations Authority) possess authority to pay such expenses for non-employee party-litigants; or that they have in fact done so. Resp. Opp. at 5-6.

Respondent does acknowledge that under applicable authorities a non-employee litigant could receive travel and per diem expenses for successfully presenting his/her case in winning a Back Pay Act remedy retroactively placing him or her in Federal employment status at the time period of his/her administrative hearing. Resp. Opp. at 3. I note that such a remedy was neither sought nor granted in this matter.

GAO Order 0300.1 (8/19/09)²⁴ governs Temporary Duty Travel “for all individuals traveling under GAO authorization.” Ch. 1, ¶1. It prescribes travel and transportation entitlements and allowances for all U.S. Government Accountability employees, interviewees, consultants, or experts, whether serving on a full- or part-time basis, at any level of compensation, in accordance with 41 C.F.R. Chapter 301, Federal Travel Regulation (FTR). By its terms, this authority extends only to non-employees who are employment applicants. The reference to consultants and experts applies to personnel employed intermittently and paid on a daily when-actually-employed (WAE) basis. See FTR §301-1.2. The FTR also includes under the definition of “employee” an “individual serving without pay or at \$1 a year (also referred to as an ‘invitational traveler’).” *Id.* The Glossary to GAO's Order 0300.1 contains the definition of “invitational travel” as “authorized travel of individuals either not employed or employed . . . intermittently in government service as consultants or experts.” Order 0300.1, Appendix 1. There is nothing in the GAO Order or the FTR that connects this provision to the situation presented in the case at hand—*i.e.*, to a non-employee party-litigant.

²³ As stated above, Petitioner would distinguish the case because the *Mittelsted* party was not represented by a Federal official, such as the PAB/OGC, seeking to enforce, in essence, a Federally protected right.

²⁴ The prior version of this Order had similar applicability, except that it did not specifically provide for interviewees. See Interim Order 0300.1, Ch. 1 ¶1 (6/1/94).

I am not persuaded that cited authorities and/or the PAB/OGC's prosecutorial-type role in this matter authorize the payment of Petitioner's sought after travel and per diem expenses. In this regard, although presenting some appeal, the Petitioner's arguments are simply *ipse dixit*. Petitioner has provided no real authority for his argument, that by analogy, the Office of Special Counsel and the Federal Labor Relations Authority pay for party-litigant's expenses in these circumstances. Even if Petitioner had presented such proof it would only constitute evidence of practice, rather than that of legal authority.

I am faced with the compelling logic of the *Mittelsted* decision, *supra*, which plainly establishes that a non-government employee party-litigant, even when a former employee, is not eligible for travel and per diem expenses in these circumstances. I am unable to accept Petitioner's invitation to interpret the term "witness," in the aforementioned governing regulations, so broadly as to encompass a party-litigant. To do so would ignore the party-litigant's self-interest in the proceeding and would result in an incongruity under the regulations: the party-litigant would pay him/herself witness and travel fees and then seek to recoup those costs from the Agency if successful in the litigation. The correct scenario, as advanced by the Respondent, is that the party-litigant, if successful, seeks those expenses under a Back Pay Act remedy. Such does not encompass the Petitioner's situation.

While there is little in case law addressing this situation, the Merit Systems Protection Board (MSPB) in *dicta* reiterated the prohibition against paying travel and per diem expenses to an unsuccessful party litigant, in a 1999 decision. The MSPB stated in pertinent part:

Under 5 C.F.R. §1201.33(a), federal agencies are required to make employees available in Board proceedings when the judge orders them to do so. The regulation provides that, when they are appearing at a Board hearing, "Federal employee witnesses will be in official duty status (i.e., entitled to pay and benefits including travel and per diem, where appropriate)." The Board has construed this regulation as applying to currently employed appellants who appear as witnesses in their appeals. *White v. Social Security Admin.*, 76 M.S.P.R. 447, 467 n.12 (1997), *aff'd*, 152 F.3d 948 (Fed Cir. 1998) (Table). In addition, the Comptroller General has ruled that an employee appellant is in official duty status when attending the hearing in his appeal and is therefore entitled to travel expenses and per diem allowance under the Travel Expenses Act, 5 U.S.C. §§ 5702 & 5704. *See* 31 Comp. Gen. 346 (1952); *Gracie Mittelsted*, No. B-212292, 1984 WL 46740. *See also Bureau of Alcohol, Tobacco, & Firearms v. FLRA*, 464 U.S. 89, 106-07, 104 S.Ct. 439, 78 L.Ed.2d 195 (1983). However, as noted above, the Act does not apply to the appellant because he is not employed by a covered agency. *See* 5 U.S.C. § 5701.

Holliman v. United States Postal Service, 82 M.S.P.R. 355, 363 (1999).

Accordingly, Petitioner's Motion for Reimbursement of Travel Expenses is denied.

CONCLUSION

Based upon the foregoing, and the record as a whole, I find that Petitioner has not proven by a preponderance of the evidence that he suffered unlawful race discrimination or retaliation. I also find that Petitioner has not provided sufficient legal basis for reimbursement of his travel expenses to attend the hearing in this matter.

SO ORDERED.