

Judy T. Lasley v. U.S. Government Accountability Office

Docket No. 08-02

Date of Decision: May 28, 2009

Cite as: Lasley v. GAO, No. 08-02 (5/28/09)

Before: Steven H. Svartz, Administrative Judge

Headnotes:

Adverse Inference

Age Discrimination

Evidence

Performance Appraisal System and Procedures

Performance Ratings

Pretext for Discrimination

Prima Facie Case

Race Discrimination

DECISION

Judy T. Lasley (Petitioner), through the PAB Office of General Counsel, filed a Petition on April 21, 2008 alleging that the U.S. Government Accountability Office (GAO or the Agency or Respondent) discriminated against her on the bases of race and age, retaliated against her for her involvement in protected equal employment opportunity (EEO) activity, and committed other prohibited personnel practices in: (1) issuing her an unsatisfactory performance appraisal in April 2003; (2) not selecting her for promotion in April 2003; (3) not giving her a performance award in August 2003; and (4) issuing her an unsatisfactory performance appraisal in December 2003.¹

A five-day hearing was conducted from October 27 through October 31, 2008. Both parties filed their post-hearing briefs on January 23, 2009 and responsive briefs on February 20, 2009.

¹ The Petition contains 19 counts, all of which are set forth in the Appendix to this Decision, which follows the Notice of appeal rights.

I. STATEMENT OF FACTS

A. Background

Ms. Lasley is an African-American female who was born in 1948. Respondent's Answer (Resp. Ans.) Unnumbered ¶5;² Respondent's Exhibit (Resp. Ex.) 13 at 1. She started working at GAO in 1986 as a GS-4 Management Assistant Co-Op Student. Transcript (Tr.) 208. After she graduated from college in 1988, she worked at GAO as a GS-7 Evaluator. Tr. 209-10. She was promoted to the GS-9 level in 1989. Tr. 211-12.

After GAO converted to a broad banded system in 1989, Ms. Lasley was designated as a Band 1D (Developmental) Evaluator (now called Analyst). Tr. 212. In 1991, she was promoted to a Band 1F (Full Performance) Evaluator. Resp. Ans. Unnumbered ¶5. She applied for promotion to Band II in 1993, 1996, 1997, and 2001 but was not selected. Resp. Ans. ¶2; Tr. 214. In 1993, 1996, and 1997 she was placed on the list of Best-Qualified candidates for promotion, and in 2001 she was on the referral list (based upon the small number of applicants). Resp. Ans. ¶2.

At the time of her non-selection in 2001 and at all subsequent times relevant to this case, Ms. Lasley worked on GAO's Acquisition and Sourcing Management (ASM) team as a Band IF Analyst. Resp. Ans. Unnumbered ¶6; Resp. Ex. 11 at 1. The ASM team was established in 2001 and was headed by then-Managing Director Jack Brock. Tr. 898. Mr. Brock supervised several SESers and served as the selecting official for promotions to the Band II positions in ASM. Tr. 899-900, 907.

At some point after not having been selected for promotion in 2001, Ms. Lasley complained to GAO management about the lack of African-American Analysts and managers in ASM and the negative effect of ASM performance appraisal and promotion practices on African-Americans. Resp. Ans. Unnumbered ¶7; Tr. 217-19, 228-30, 283. Specifically, she discussed her various concerns at times with Mr. Brock and with Ronald Stroman, who was then the Managing Director of GAO's Office of Opportunity and Inclusiveness (O&I).³ *Id.* In February 2002, Ms. Lasley participated in a GAO Panel on Race Relations, which was sponsored by the GAO Chapter of Blacks in Government (BIG).⁴ Petitioner's Exhibit (Pet. Ex.) 225.

² References to paragraphs in the Petition or Answer that are numbered are referenced simply by ¶ number. References to introductory paragraphs that are not numbered are indicated by "Unnumbered" ¶ number.

³ Ms. Lasley testified that she did not know when she had the conversation with Mr. Brock about the lack of diversity in ASM management. Tr. 444-45. She also testified that she spoke with Mr. Brock and Mr. Stroman about her concerns at the end of the FY 2001 performance cycle. Tr. 228. She further noted that she "probably" began expressing her concern about the lack of diversity in ASM management with both individuals in 2001. Tr. 229. She also testified that she spoke with Mr. Stroman about the treatment of African-Americans in ASM sometime after the FY 2002 performance cycle, and had previously raised her concerns with Mr. Brock. Tr. 217-18. She further testified that she spoke to Mr. Stroman after not being promoted in 2002 and that he then talked to Mr. Brock. Tr. 283-84.

⁴ Ms. Lasley was a member of the BIG Committee that organized the panel. Pet. Ex. 225 at 32.

B. January 1, 2002 - September 30, 2002 Engagements and Performance Appraisal

From January 1, 2002 through September 30, 2002, Ms. Lasley's Designated Performance Manager (DPM) was Michelle Mackin, who was a Band III Assistant Director in ASM.⁵ Pet. Ex. 125; Resp. Ex. 12. During that period, Ms. Lasley worked on several engagements, including the Postal Service Office Supply Contract engagement. Tr. 1005-06. Ms. Mackin served as the Assistant Director on that engagement. Tr. 1004.

On April 4, 2002, Ms. Mackin and Ms. Lasley signed an Individual Development Plan (IDP) that Ms. Lasley had developed for the period April 15, 2002, through September 30, 2002. The IDP identified the competencies in which Ms. Lasley wanted to improve and the training that she wanted to take. Pet. Ex. 115.⁶

With respect to Ms. Lasley's performance on the Postal Service Office Supply Contract engagement, Ms. Mackin testified that Ms. Lasley "had difficulty understanding the data we were obtaining from the Postal Service, difficulty analyzing the data, and some fundamental misunderstandings of what the data was. Her interview write-ups were not very well done and they weren't timely." Tr. 1006-07. Ms. Mackin also testified that she communicated her concerns to Ms. Lasley, formally and informally, "many a time." Tr. 1007.

In early September 2002, before preparing the performance appraisal for Ms. Lasley, Ms. Mackin told Ms. Lasley that her performance on the Postal Service Office Supply Contract engagement was "below expectations" in the Thinking Critically component. Tr. 1010. Ms. Lasley was defensive about that and blamed Penny Berrier (a Band II Senior Analyst in ASM in Boston who served as the Analyst in Charge (AIC) on that engagement) for the difficulties she was having in getting the work done. *Id.*

Also before preparing the rating, Ms. Mackin talked with Barbara Haynes, an Assistant Director who had worked with Ms. Lasley at the beginning of the January-September 2002 rating period on another assignment. Tr. 1012. Ms. Haynes told Ms. Mackin that Ms. Lasley's work was poor on the "quick look work."⁷ *Id.* Ms. Haynes also told Ms. Mackin that she had not given Ms.

⁵ DPMs are responsible for preparing the performance appraisals of employees assigned to them. Resp. Ex. 3 at 8.

⁶ GAO requires Analysts to earn a certain number of continuing professional education (CPE) credits in each two-year period. Resp. Ex. 28 at 3, 5. GAO does not limit the amount of training Analysts may take. Tr. 975. During calendar year 2002, Ms. Lasley took 14 training courses, earning 63 CPE credits. Resp. Ex. 25 at 13. Ms. Lasley did not identify any training courses that she requested to take but was denied or was not given authorization to take during this period.

⁷ Ms. Mackin defined a "quick look" assignment as an overview, that normally results in a two page report to Congress on a specific Defense Department weapon system, "just basic descriptive cost schedule and performance information. There are probably 70 DoD systems that we look at annually, and there are many, many Analysts involved in this, and they're all compiled into one report." Tr. 1055. Ms. Lasley explained that in a "quick look," "you looked at the budget where the program was and the acquisition process." Tr. 268.

Lasley any feedback on her performance on that assignment, which lasted three to four months of the rating period.⁸ *Id.*

Ms. Mackin rated Ms. Lasley's performance for that period as "exceeds expectations" in one competency (Collaborating with Others) and as "meets expectations" in eight competencies (Achieving Results, Maintaining Client and Customer Focus, Thinking Critically, Improving Professional Competence, Presenting Information Orally, Presenting Information in Writing, Facilitating and Implementing Change, and Representing GAO). Pet. Ex. 125.

Ms. Mackin met with Ms. Lasley in mid-October 2002 to give her feedback and discuss the appraisal. During the meeting, Ms. Lasley acknowledged that Ms. Mackin had previously told her that she was performing below expectations in the Thinking Critically competency, and asked Ms. Mackin why that was not reflected in the rating. Tr. 263-64, 1011-12. Ms. Mackin advised Ms. Lasley that in light of the absence of feedback from Ms. Haynes, it would not have been fair to rate her "below expectations" in Thinking Critically for the entire rating period. Tr. 264, 1012; *see* Tr. 443-44, 450-51, 457.

C. Fiscal Year (FY) 2003

In FY 2003, a new performance appraisal system for Analysts called the "Competency Based Performance System" (CBPS) took effect. Tr. 631, 642. John Needham was the Project Director during the development and validation of the CBPS. *Id.* at 631-32. In late October 2002, Mr. Needham joined ASM as a Band III Assistant Director. *Id.* at 632.

Mr. Needham served as the DPM for Ms. Lasley and several other Analysts for FY 2003. Tr. 639-40; Resp. Ex. 18 at 1. During November 2002, he met individually with each Analyst whose rating he would later prepare, including Ms. Lasley, to set their expectations. Tr. 641-42. He explained the performance standards under the new CBPS and discussed how the standards had changed from those under the previous performance management system. Tr. 642. In so doing, he specifically explained that the new system was focused more on results than simply following policies and procedures, and he told the Analysts that "there was a considerable raising of the bar in terms of what was expected for performance." Tr. 642-44.

1. Small Business Size Standard Engagement

In FY 2003, Ms. Lasley continued to work on the Postal Service Supply Contract engagement and also worked on, among others, the Small Business Size Standard engagement. Pet. Ex. 127; *see* Tr. 232, 304, 333-36, 649-50. For the Small Business Size Standard engagement, Dave Cooper was the Director, Mr. Needham was the Assistant Director, Russ Reiter was the AIC,⁹ and Ms. Lasley was the Analyst. Tr. 649.

⁸ The record contains no explanation as to why Ms. Haynes did not give Petitioner any feedback on her performance on that assignment.

⁹ As the AIC, Mr. Reiter's role was to help conceptualize the overall approach to the work, to provide direction to staff on the engagement, and to oversee the administrative paperwork and required documentation for the project. Tr. 651.

For this engagement, Ms. Lasley was assigned to set up some of the entrance conferences,¹⁰ schedule meetings with trade associations, develop interview questions, and assist Mr. Reiter with database analysis. Tr. 649-50. Mr. Needham testified that his initial observation of Ms. Lasley's performance was that Ms. Lasley did not participate much in team meetings and did not generate ideas or approaches that the team might consider. Tr. 651-52.

In early to mid-January 2003, Mr. Cooper called Mr. Needham to tell him that GAO might be asked to provide testimony to a Congressional committee on the engagement. Tr. 648. Mr. Needham looked in the electronic Document Management (DM) system to review what work papers had been generated by the team and saw that Ms. Lasley had created only a few of the approximately 100 work papers. Tr. 655-56.

In reviewing DM, Mr. Needham also realized that Ms. Lasley had not prepared an interview write-up¹¹ of a December 4, 2002 meeting until January 3, 2003. Tr. 656. He also saw that Ms. Lasley had not prepared an interview write-up of a January 3, 2003 meeting until January 13, 2003, and that she had not completed another interview write-up until nine days after the interview. Tr. 657. Mr. Needham saw these delays as a “red flag” with respect to Ms. Lasley’s performance.¹² *Id.*

On January 22, 2003, Mr. Needham called Ms. Lasley to tell her that she needed to complete the write-ups of additional interviews that the engagement team had conducted the previous week. Tr. 658-59.¹³ The following day, Mr. Needham sent Ms. Lasley an email asking about the status of the write-ups. *Id.* Ms. Lasley responded that the write-ups were in the DM system. Tr. 659. Mr. Needham checked and saw that two of the write-ups had been created the previous night and that a third one was added to the system later. *Id.* When Ms. Lasley came to Mr. Needham’s office to discuss the matter, he explained the importance of timely interview write-ups, especially in light of the possibility of Congressional testimony. *Id.*

¹⁰ An entrance conference is a meeting that GAO holds at the start of an engagement with officials from the agency whose program is being examined. Tr. 647, 649-50.

¹¹ An interview write-up is a written summary that is prepared after a meeting with agency officials in order to document the information obtained at the meeting. Tr. 653-54.

¹² At the time, the standard practice at GAO was to write up summaries within 48 to 72 hours of an interview or meeting, absent extenuating circumstances. Tr. 657. Oral information is reduced to writing as quickly as possible in order to ensure the quality and accuracy of the evidence. Tr. 657-58. The length of time between an interview and the date of the write-up is viewed as an indicator of the quality of the work. Tr. 658.

¹³ Also in January 2003, Ms. Lasley developed an IDP for the period January 31, 2003, through January 2004, identifying which competencies she wanted to work on and what training she wanted to take. Pet. Ex. 126. Mr. Needham, her DPM for that fiscal year, approved the plan. Tr. 704. During calendar year 2003, Ms. Lasley took 16 training courses, earning 67 CPE credits. Resp. Ex. 25 at 13-14. Ms. Lasley did not identify any training courses that she requested but was denied or was not given authorization to take during this period.

Subsequently, during a meeting of the engagement team, the team discussed a proposed rule by the General Services Administration that all contractors would be required to certify their small business status once a year. Tr. 677, 782-83. During that meeting, Mr. Needham stated that the issue of yearly certification was “a key issue” in their engagement. Tr. 677. It was clear when the engagement team met with officials of the trade associations that this issue was of great concern to the contractors. *Id.* This issue was part of the work that had been assigned to Ms. Lasley. *Id.*

When Ms. Lasley subsequently prepared an analysis of the trade association meetings, she did not provide any assessment or analysis of the proposed rule. Tr. 782-83. Instead, she mentioned the proposed rule only at the end of the document, even though it is standard GAO writing practice to lead with the important points followed by discussion of those points. Tr. 678, 783. Mr. Needham gave Ms. Lasley feedback on the document she had prepared, instructing her to “put it in a findings format” and shift the order of material. Tr. 318-19, 672. Ultimately, the 1-year certification issue was dropped from the engagement because Ms. Lasley had not developed it. Tr. 677, 815-16.

During February 2003, Mr. Needham attended Mr. Brock’s monthly meeting with ASM Directors and Assistant Directors to review the status of engagements, client and staffing issues, and other matters. Tr. 667. Mr. Brock, Mr. Cooper, Mr. Needham, and probably Mr. Woods¹⁴ remained behind after the conclusion of the meeting, and Mr. Needham was asked for his assessment of the eight Analysts for whom he served as DPM. Tr. 667-68. Mr. Needham advised Mr. Brock that he was seeing performance issues with regard to Ms. Lasley. Tr. 668. Specifically, Mr. Needham described how Ms. Lasley did not participate in meetings, that she was late in terms of the write-ups, and that he did not see any real analytical thought in the documents she prepared. Tr. 668-69. Mr. Brock told Mr. Needham to be prepared to talk to Ms. Lasley about these issues at the mid-point feedback review. Tr. 668.

2. Spring 2003 Out-of-Cycle Appraisal and Promotion Opportunity

In March 2003, GAO announced four mid-cycle ASM promotion opportunities to Band II in headquarters. Resp. Ans. ¶1; Resp. Ex. 8. Ms. Lasley applied for a promotion. Resp. Ans. ¶¶2, 10. As part of her application, she prepared an Achievement Statement, which included her self-description as a strong advocate for civil rights and referred to her activities on behalf of BIG. Resp. Ans. ¶3; *see* Pet. Ex. 127.

Mr. Needham planned to hold a mid-point feedback session with Ms. Lasley in late March 2003. Tr. 670. Shortly before the feedback session, Harold Howard, ASM’s Human Capital Manager, told Mr. Needham that Ms. Lasley was applying for promotion and that Mr. Needham therefore needed to prepare an out-of-cycle appraisal for Ms. Lasley as part of the promotion process. *Id.*

In preparing this out-of-cycle appraisal, Mr. Needham reviewed Ms. Lasley's work products, considered a self-assessment that Ms. Lasley had prepared as part of her Achievement Statement, and obtained input from other individuals. Tr. 837, 839-40. Specifically, he obtained input from

¹⁴ Mr. Needham testified that he “would assume Bill Woods was there because he was the other director . . . in the group.” Tr. 668.

Ms. Mackin, who had worked with Ms. Lasley during the start of the rating period on the Postal Service Office Supply Contract engagement (Tr. 673-74; Tr. 1015); from Ms. Berrier, the AIC in Boston who had worked with Ms. Lasley on that engagement (Resp. Ans. ¶¶6); and from Mr. Reiter, who told Mr. Needham (Tr. 670, 834) that he was spending a great deal of time working with Ms. Lasley and helping her do her work (Tr. 671).¹⁵

Mr. Needham also discussed the rating with Director Allen Li,¹⁶ who reviewed the rating to ensure that Mr. Needham was properly applying the performance standards and that the appraisal was supported. Tr. 675.

Mr. Needham rated Ms. Lasley as "exceeds expectations" in one competency (Collaborating with Others), as "meets expectations" in seven competencies (Achieving Results, Maintaining Client and Customer Focus, Improving Professional Competence, Presenting Information Orally, Presenting Information in Writing, Facilitating and Implementing Change, and Representing GAO), and as "below expectations" in one competency (Thinking Critically). Resp. Ex. 5, Resp. Ans. ¶¶4, 5.

With respect to the "below expectations" rating in Thinking Critically, the appraisal stated the following:

Ms. Lasley has not analyzed various types of information to identify the full scope of issues or draw logical conclusions. In one product, a key issue that had been discussed in team meetings on the problems associated with a proposed one-year certification rule was only mentioned in the last sentence of her summary and was not developed. Following written feedback on 2/27, she revised the summary to meet the expectation of using a findings format. In a recent summary on SBA's and DOD's databases, there was also no analysis or conclusions. In addition, she is not proactive in gathering information from routine sources. For example, she was assigned the responsibility to identify information about contractors, who were identified as not having met the small business size standards. Ms. Lasley was shown one database, FPDS, which she could use to identify companies' D&B numbers. From this database, she identified only 15 companies. She did not identify other sources until asked to do so.

Resp. Ex. 5 at 2.

On April 9, 2003, Mr. Needham and Mr. Reiter met with Ms. Lasley to discuss her out-of-cycle performance rating. Tr. 680-82; Resp. Ex. 6 at 1. Mr. Needham discussed his reasoning for the rating and reviewed the specific performance deficiencies in Ms. Lasley's work. Tr. 680-82; Resp. Ex. 6 at 1. Ms. Lasley did not provide any comments in the optional employee comments section of the appraisal. Resp. Ex. 5.

¹⁵ Mr. Needham, Ms. Mackin, Ms. Berrier, and Mr. Reiter are Caucasian. Resp. Ans. ¶¶6, 7, 8; Resp. Ex. 17. Messrs. Needham and Reiter as well as Ms. Mackin were over 40 at the relevant times, while Ms. Berrier was under the age of 40. Resp. Exs. 17, 18.

¹⁶ Mr. Li was a 55-year old Asian-American at the time. Resp. Ans. ¶20.

Shortly after Mr. Needham and Mr. Reiter met with Ms. Lasley to discuss her performance rating, Mr. Reiter wrote a memorandum to document what happened in the meeting. Tr. 680-81; Resp. Ex. 6. That memorandum stated as follows:

On April [sic] 9, 2003, John Needham and I discussed with Judy Lasley her performance rating for the period 10/01/2002 to 3/31/2003. . . . We discussed each of the competencies. Overall, Ms. Lasley was informed that she is enjoyable to work with and it was noticed that she was always willing to do what she was asked to do. . . . However, she was counseled that “Thinking Critically” is one area that she needed improvement or additional opportunities to show improvement is [sic] this competency. *Based upon the work that has been completed as of March 31, we felt that Ms. Lasley was not meeting expectations in this area.* For example, we explained to Ms. Lasley that we did [not] believe¹⁷ that she proactively gathered information or effectively analyzed data that she gathered in performing a number of assigned tasks.

Resp. Ex. 6 (emphasis added); Tr. 809-21.

For the Spring 2003 promotion cycle, eight ASM Band I Analysts, including Ms. Lasley, applied for promotion to Band II. Resp. Ex. 13 at 1. The application packages normally would have contained the applicants' performance appraisals for the period January 1, 2002 - September 30, 2002, and for the period October 1, 2002 - March 31, 2003. Resp. Ex. 9 at 11.¹⁸

Mr. Brock, the selecting official, had most recently selected Band I Analysts for promotion to Band II in Fall 2002. Not everyone who had applied at that time was promoted. Tr. 907-08. Since the BQ panel, comprised of ASM's Directors, had just met shortly before the Spring 2003 promotion cycle, Mr. Brock met with each ASM Director individually and inquired whether any Band I Analyst should be added to, or, in the case of Band I Analysts who had previously made the BQ list but had not been selected for promotion, removed from the previous BQ list. Tr. 907-08. Ms. Lasley had not made the BQ list in Fall 2002. Tr. 281-82. When Mr. Brock met with Mr. Cooper—the Director for whom Ms. Lasley was working in the Fall of 2002—to ask him whether any Band I Analyst should be added to or removed from the previous BQ list, Mr. Cooper did not identify Ms. Lasley as an employee who should be added to the BQ list. Tr. 909-10. Ms. Lasley's name was not added to the BQ list. Tr. 908, 910.

Mr. Brock reviewed the submitted applications and considered the candidates' performance and potential to perform at the next higher Band level as indicated by their ratings and whether they had previously made the BQ list. Tr. 908-09. He determined that Ms. Lasley did not meet his basic criteria due to her insufficient performance as reflected in the “below expectations” rating

¹⁷ During the hearing, Mr. Needham testified that the word “not” had been inadvertently omitted from Mr. Reiter's memorandum reflecting the meeting between Mr. Needham, Mr. Reiter and Ms. Lasley. Tr. 817-18.

¹⁸ As discussed below, GAO was unable to locate the application packages in preparation for the hearing in this matter and they are not part of the record. There was no testimony or evidence suggesting that the application packages had not contained the relevant performance appraisals.

she had received on her out-of-cycle appraisal. Tr. 909. Mr. Cooper also did not support her for promotion. Tr. 910.

After interviewing the candidates on the BQ list, Mr. Brock selected four employees for promotion. Tr. 912; Resp. Ex. 13. All four of the selected employees were Caucasian and under the age of 40. Resp. Ex. 13. The performance ratings for the four selected employees were substantially better than those of Ms. Lasley. Resp. Exs. 11, 12.

Mr. Brock notified Petitioner in April 2003 that she had not been selected. Resp. Ans. ¶10. Shortly thereafter, she contacted an O&I counselor about her non-selection. Resp. Ans. ¶12.

On June 25, 2003, Ms. Lasley filed a formal complaint alleging discrimination on the bases of race and age with regard to her out-of-cycle rating and lack of promotion to Band II. *Id.*; Pet. Ex. 401.

3. Second Postal Service Contracting Engagement

During the second half of FY 2003, Ms. Lasley worked on a second engagement concerning Postal Service Contracting. Tr. 682-83. Mr. Needham was not assigned to that engagement, but as Ms. Lasley's DPM he knew of her performance through discussions with the managers on that engagement and with Ms. Lasley herself. Tr. 683-84. Staff on the engagement included Ms. Mackin, as the Assistant Director; Paul Greeley, as the AIC; Mr. Reiter, as a Senior Analyst; and Ms. Lasley, as an Analyst. Tr. 683, 1016. Mr. Needham confirmed that Mr. Greeley had set Ms. Lasley's expectations and was giving her feedback on her performance. Tr. 684, 868-69.

As the engagement progressed, Mr. Needham and Mr. Greeley had numerous conversations about Ms. Lasley's performance, and more specifically about what feedback Mr. Greeley was providing to make sure that Ms. Lasley understood what improvements were needed. Tr. 688-89. Mr. Greeley confirmed that he was giving Ms. Lasley feedback, and showed Mr. Needham examples of written feedback he had given her. Tr. 878-83.

According to Ms. Mackin, Ms. Lasley had difficulty understanding and analyzing the data provided by the Postal Service, and had difficulty doing simple, straightforward tasks. Tr. 1016-17. For example, in preparing a notification letter,¹⁹ Ms. Lasley omitted one of the four objectives of the engagement. Resp. Ex. 22 at 1-2, 11-13; Tr. 1021-22. Despite the fact that Mr. Greeley had brought this error to Ms. Lasley's attention, she subsequently repeated the error in the internal paperwork that is routinely prepared when a new job is started. Resp. Ex. 22 at 2; Tr. 1023. In preparing two interview write-ups, Ms. Lasley failed to follow standard GAO procedure of cross-referencing to documents mentioned during the interview, and did not accurately document information provided during the interviews. Resp. Ex. 22 at 28-32; Tr. 1024.

¹⁹ A notification letter is a letter that is sent to inform an agency of a new engagement in which one of its programs will be evaluated.

4. August 2003 Awards Ceremony

In August 2003, ASM management hosted an event to give awards to certain staff members for their work on various engagements, including two on which Ms. Lasley had worked. Resp. Ans. ¶13; Resp. Ex. 15 at 3-6.²⁰ In determining which staff to nominate for awards, Mr. Cooper discussed the matter with Mr. Needham. Tr. 685. Mr. Needham informed Mr. Cooper that Ms. Lasley's contributions on the Small Business Size Standards engagement did not warrant an award. Specifically, he noted that out of over 300 work papers prepared during that engagement, Ms. Lasley had created only eight. Tr. 686. In addition, Mr. Needham was concerned that GAO would be sending a mixed signal to Ms. Lasley by giving her an award after having just given her a "below expectations" rating on her performance appraisal. Tr. 685.

Seven individuals on the Small Business Size Standard engagement received awards. Resp. Ex. 15 at 5. Of these seven, four were Caucasians over the age of 40; one was Caucasian and under 40; one was Hispanic and over 40; the age and race of the seventh individual are not known. *Id.*; Resp. Ex. 17. Three employees on this engagement, including Ms. Lasley, did not receive awards. Tr. 685. The two employees other than Ms. Lasley who did not receive awards were both Caucasian. Tr. 685; Resp. Ex. 17 at 1. One employee was over the age of 40 and the other was not. Resp. Ex. 17.

Three individuals on the Postal Service Office Supply Contract engagement received awards.²¹ Resp. Ex. 15 at 4. Eleven employees on this engagement, including Ms. Lasley, did not receive awards. Of the 10 employees besides Ms. Lasley who did not receive awards, seven were Caucasian, two were African-American, and one was Hispanic. Resp. Ex. 17 at 1. Three of the employees were under the age of 40 and seven were over the age of 40. Resp. Ex. 17.

In late August 2003, after Ms. Lasley did not receive an award, she amended her June 25 complaint to allege that GAO's failure to give her an award was the result of discrimination on the bases of race and age, and constituted reprisal because of her prior protected activity. Resp. Ans. ¶15.

5. Events in September 2003

By letter dated September 17, 2003, the GAO Chapter of BIG notified Mr. Brock that Ms. Lasley had been selected to receive a distinguished service award based on her years of service,

²⁰ In 2001 and 2002, Mr. Brock had previously recognized Ms. Lasley's contributions to ASM. Pet. Exs. 314, 316, 317. Specifically, on July 27, 2001, Mr. Brock sent Ms. Lasley a letter expressing his appreciation for her facilitating the indexing and referencing of a report and gave her a cash award. Pet. Ex. 317. On September 4, 2001, Mr. Brock sent her a letter expressing his appreciation for her efforts in assimilating new hires into ASM and gave her a time off award. Pet. Ex. 316. On July 25, 2002, Mr. Brock sent Ms. Lasley a letter expressing his appreciation for her participation on the ASM Community Team and gave her a spot award. Pet. Ex. 314.

²¹ This was the first of the two Postal Service Contracting engagements on which Ms. Lasley had worked.

involvement and participation in BIG. Resp. Ans. ¶18. Also, in September 2003, O&I notified Mr. Brock of its investigation of the allegations in Ms. Lasley's complaint. Resp. Ans. ¶19.

6. End of FY 2003 Performance Appraisal

At the end of FY 2003, Mr. Needham received input from Ms. Mackin and Mr. Greeley about Ms. Lasley's performance during the second half of the fiscal year. Tr. 688, 1017-18. He reviewed examples of Ms. Lasley's work products from Mr. Greeley. Tr. 869. Since one performance issue identified by Mr. Greeley involved contact that Ms. Lasley had made with staff from the Physical Infrastructure (PI) team in Dallas, Mr. Needham also called that staff to confirm the information that Mr. Greeley had provided him. Tr. 876.

In addition, Mr. Needham consulted with Mr. Li, the reviewer for the end-of-fiscal-year appraisal. Tr. 689-90. Mr. Needham described to him Ms. Lasley's performance deficiencies, and showed him Mr. Greeley's supporting documentation of the deficiencies. Tr. 690-91. After Mr. Needham prepared the rating and narrative, Mr. Li reviewed and approved it. *Id.*

Mr. Needham rated Ms. Lasley's performance for the period from April 1, 2003, through September 30, 2003 as "meets expectations" in six competencies (Maintaining Client and Customer Focus, Improving Professional Competence, Presenting Information Orally, Presenting Information in Writing, Facilitating and Implementing Change, and Representing GAO), "exceeds expectations" in one competency (Collaborating With Others), and "below expectations" in two competencies (Achieving Results and Thinking Critically). Resp. Ex. 19. Mr. Needham based his "exceeds expectations" rating in the Collaborating With Others competency, in part, on Ms. Lasley's work on behalf of BIG. Resp. Ex. 19 at 4-5.

With respect to the "below expectations" rating in Achieving Results, the appraisal stated the following:

Ms. Lasley assisted on a number of tasks during this period; her major responsibilities were on the Postal Service Contracting job. She prepared the job start paperwork, gathered data, conducted interviews, and did analysis on the small business objective. She conducts her interviews effectively. Early on in the job the AIC identified areas where she needed to improve the quality of her work products. These included keeping him informed of significant matters such as job paperwork, completion of interviews, and availability of key postal service information in GAO work papers from the now completed office supplies contract audit of the Postal Service. A second was the quality of her written work. The AIC pointed out areas where information was not clear or complete and suggested that she self-review her written work before release. He cited the entrance letter she prepared with only 3 or [sic] of the four objectives listed, this same error was contained in the job starts paperwork. Following this feedback she was asked by another staff member to contact a Dallas/PI team, which had been in contact with the USPS on the same topic ASM had covered with the IG - the status of corrective actions on a report highlighting problems with the PS's small business/diversity statistics. She provided the PI staff a write-up along with some

related documents, that became key support for PI's report on the status of the corrective actions taken by the Postal Service in response to the IG's report. A PI staff member called the AIC about the interview write-up, a draft that the AIC had not finished reviewing and one Ms. Lasley had not informed him of that the PI Staff had requested. The AIC's review of the draft found a material inaccuracy that the IG retests the database covered by the audit. In response, she told the AIC that she planned to inform him about the inquiry when she had more information on what Dallas was going to do.

Resp. Ex. 19 at 4.

With respect to the “below expectations” rating in Thinking Critically, the appraisal stated the following:

Ms. Lasley's ability to think critically in gathering and analyzing evidence does not consistently meet expectations. On her current assignment on Postal Service Contracting she is responsible for the work on the small business objective. Her supervisor spends far more time reviewing her work than is normal for an experienced band I analyst. Early on in the assignment he counseled her on irrelevant and inaccurate information getting into communications with agency officials, and on the need to improve her written work by corroborating testimonial evidence to Postal Service documents or data. She was also counseled that when an official discusses an important agency policy, she is to reference the applicable section of the policy that is contained in the work papers. Her supervisor has noted improvement in her performance since he provided feedback, but some problems remain. For example, her inconsistency in gathering and considering relevant information to analyze postal service policies was highlighted by her supervisor in her correspondence with a Postal Service official on the use of business size criteria by the Service in categorizing services as small or large. She confused the business size criteria with a dollar limit on the size of highway transportation contracts. These contracts have no dollar limits. She did not respond to her supervisor when asked to clarify whether there were any such contract limits to see if she could identify the error on her own. He later asked her to follow-up on two items, including this issue, but she only responded on the other item. Given her prior experience on two assignments, immediately preceding this job, the Postal Service small business/diversity statistics job and the business size recertification review she should have readily understood the difference and avoided the confusion.

Id.

On December 10, 2003, Mr. Needham met with Ms. Lasley to provide formal feedback on her end-of-fiscal-year rating. Resp. Ex. 19 at 1. Ms. Mackin, Mr. Greeley, and Mr. Woods were also present. Tr. 1019.

Following the meeting, Mr. Greeley, who was planning to retire on January 2, 2004, drafted a memorandum concerning the meeting, as well as specific examples of Ms. Lasley's performance deficiencies. Resp. Ex. 22; Tr. 1019-20. Mr. Greeley attached several of Ms. Lasley's work products to his memorandum. Resp. Ex. 22.

In the employee comments section of the appraisal, Ms. Lasley stated:
This rating is an unfair assessment of my performance and not based on merit.
The AIC, AD and the DPM have deliberately misstated the facts in an effort to further demoralize and retaliate against me for filing an EEOC complaint against ASM and GAO. Due to limited space to comment on my rating, other comments will follow in the complaint.

Resp. Ex. 19 at 2. Ms. Lasley responded to comments in the Achieving Results and Thinking Critically sections, stating, among other things, that "[t]here has never been a material inaccuracy in my work products" and that the rater's statements in the appraisal were "misleading and untrue." *Id.*

Mr. Needham also prepared end-of-fiscal-year appraisals for two other Band I Analysts. Tr. 700; Resp. Exs. 18, 20, 21. Mr. Needham rated one Analyst, a Caucasian female, as "meets expectations" in three competencies, "exceeds expectations" in three competencies, and "role model" in three competencies. Resp. Ex. 21. He rated the other Analyst, an African-American male, as "meets expectations" in six competencies and "exceeds expectations" in three competencies. Resp. Ex. 20.

On January 13, 2004, Ms. Lasley again amended her complaint, alleging that GAO officials had engaged in race and age discrimination, as well as retaliation, as a result of her December 2003 performance appraisal. Resp. Ans. ¶21.

II. CONCLUSIONS OF LAW

A. Legal Standard and Burden of Proof

The race discrimination, age discrimination, and retaliation claims raised by Petitioner are subject to the burden-shifting analysis outlined by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, an employee has the initial burden of establishing a *prima facie* case of discrimination or retaliation by a preponderance of the evidence. *Id.* at 802. Establishing a *prima facie* case is not onerous. *Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

To establish a *prima facie* case of race discrimination under Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. §2000e *et seq.*, an employee must show that: (1) the employee is a member of a protected class; (2) the employee suffered an adverse employment action; and (3) the adverse action gives rise to an inference of discrimination. *See McDonnell Douglas*, 411 U.S. at 402; *Stella v. Mineta*, 284 F.3d 135, 145 (D.C. Cir. 2002).

To establish a *prima facie* case of discrimination under the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. §621 *et seq.*, an employee must show that: (1) the employee belongs to the statutorily protected age group (over 40); (2) the employee was qualified for the position; (3) the employee suffered an adverse employment action; and (4) the employee was disadvantaged in favor of a younger person. *Teneyck v. Omni Shoreham Hotel*, 365 F.3d 1139, 1155 (D.C. Cir. 2004); *Forman v. Small*, 271 F.3d 285, 292 (D.C. Cir. 2001); *see Clarke v. GAO*, PAB Docket No. 05-03 (May 17, 2006) at 25.

To establish a *prima facie* case of unlawful retaliation, an employee must show that: (1) the employee engaged in statutorily protected activity; (2) the employer had knowledge of the activity;²² (3) the employer took an action against the employee, which could have dissuaded a reasonable person from engaging in the protected activity; and (4) a causal connection existed between the protected activity and the negative action or actions. *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006); *Horton v. GAO*, PAB Docket No. 01-09 (Nov. 7, 2003) at 30.

If the employee establishes a *prima facie* case of race or age discrimination or retaliation, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions. *McDonnell Douglas*, 411 U.S. at 802.

If the employer articulates a legitimate, non-discriminatory reason for its actions, the burden shifts back to the employee to prove, by a preponderance of the evidence, that the employer's articulated reason was a pretext for discrimination or retaliation. *See Burdine*, 450 U.S. at 252-53.

The burden of persuasion remains with the employee at all times. *Id.* at 256-58; *see Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 146 (2000).

B. The 2003 Out-of-Cycle Appraisal

Petitioner alleges that GAO discriminated against her based on her race and age, and retaliated against her because of her protected activity, in connection with her 2003 out-of-cycle appraisal. Petition, Counts I-III.

²² The U.S. Court of Appeals for the Federal Circuit considers the employer's knowledge as a separate element of the *prima facie* case. *See, e.g., Haddon v. Executive Residence*, 313 F.3d 1352, 1359 (Fed. Cir. 2002). Other courts consider this element to be part of the requirement to demonstrate a causal connection. *See, e.g., Williams v. W.D. Sports, N.M.*, 497 F.3d 1079, 1091-92 (10th Cir. 2007); *Rochon v. Gonzalez*, 438 F.3d 1211, 1220 (D.C. Cir. 2006); *Carney v. American Univ.*, 151 F.3d 1090, 1095 (D.C. Cir. 1998); *Dey v. Colt Construction & Development*, 28 F.3d 1446, 1458 (7th Cir. 1994); *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163-64 (11th Cir. 1993).

1. Race and Age Discrimination Allegations

a. Prima Facie Case

There is no dispute that, as an African-American who was over 40 years old at all relevant times, Petitioner is a member of a protected class for purposes of her race and age discrimination claims regarding her out-of-cycle appraisal, as well as her other race and age discrimination claims in this case. Further, GAO acknowledges that Ms. Lasley suffered an adverse employment action in the form of the out-of-cycle rating, which led to her non-selection for promotion. Resp. Brief at 26; see, e.g., *Vance v. Chao*, 496 F.Supp. 2d 182, 185 (D.D.C. 2007); *Nails v. England*, 311 F.Supp. 2d 116, 125 (D.D.C. 2004).

The parties disagree as to whether Petitioner has proved that the out-of-cycle rating gave rise to an inference of race or age discrimination. In this regard, GAO asserts that only so-called "comparator" evidence is relevant to proving this element of the *prima facie* case, and further asserts that Ms. Lasley did not submit any comparator evidence; that is, she did not identify any employee who was not a member of a protected class who had similar performance problems, but was treated more favorably. Resp. Brief at 26-27. On the other hand, Petitioner contends that, notwithstanding GAO's insistence on "comparator" evidence, the law is clear that a plaintiff may rely on any evidence giving rise to an inference that the unfavorable treatment at issue was due to illegal discrimination. Pet. Reply Brief at 3.

I need not resolve this dispute because, for purposes of this case, I will assume that the out-of-cycle rating gave rise to an inference of race and age discrimination for purposes of establishing a *prima facie* case. Accordingly, I will assume that Petitioner has established a *prima facie* case of race and age discrimination with respect to the out-of-cycle rating.

b. GAO's Proffered Reason for Petitioner's Out-of-Cycle Rating

Having assumed that Petitioner established a *prima facie* case of race and age discrimination with respect to the out-of-cycle rating, the next question is whether GAO has articulated a legitimate, non-discriminatory reason for rating her as it did on her out-of-cycle appraisal. I find that GAO has done so.

The narrative describing the basis for Ms. Lasley's "below expectations" rating in Thinking Critically in the March 2003 rating specifically identified and described several areas in which her work did not meet expectations. Resp. Ex. 5 at 2. These included the failure to develop a key issue regarding the proposed one-year certification rule, a lack of analysis or conclusions regarding databases, and a failure to be proactive in gathering information from routine sources. *Id.* The appraisal's narrative established that Ms. Lasley had not analyzed various types of information to identify the full scope of issues or draw logical conclusions.

In addition, Mr. Needham's testimony, which I find credible, supports the specific performance deficiencies he noted in the appraisal. See discussion, *infra* at 29-31. Thus, GAO has established a legitimate, non-discriminatory reason—namely, Ms. Lasley's performance reflected in the appraisal—for the rating that Mr. Needham gave her.

c. Petitioner's Pretext Argument

Ms. Lasley presents several arguments to support her claim that GAO's articulated reason for her out-of-cycle rating was pretextual. These are set forth and addressed in turn.

First, Petitioner asserts that the subjectivity inherent in assessing Thinking Critically, coupled with the finding in the April 2008 Ivy Report²³ that one of the greatest gaps in average ratings between African-American and Caucasian Analysts exists with regard to this competency, indicates that GAO's reliance on this competency to lower Ms. Lasley's rating masked discrimination. Pet. Brief at 19. In this regard, Ms. Lasley also contends that the statistical data documenting disparities in ratings contained in the Ivy Report was supported by the testimony of Shirley Jones, President of the GAO chapter of BIG. *Id.*

Many performance appraisals contain elements of subjectivity, and the fact that an appraisal contains some subjectivity is not illegal and does not establish discrimination. *See Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1298 (D.C. Cir. 1998) (“employers may of course take subjective considerations into account in their employment decisions”); *Fischbach v. District of Columbia Dep't of Corrections*, 86 F.3d 1180, 1184 (D.C. Cir. 1996) (inference of discrimination must be supported by evidence that the employer relied upon a “highly subjective” criterion). Petitioner presented no evidence showing that the Thinking Critically competency was unduly subjective or had been improperly validated as part of the new CBPS.

Further, Petitioner has not shown that her ratings were erroneous²⁴ or that similarly situated employees received higher ratings. With respect to the relevant time period, she did not offer any testimony, other than her own, to attempt to show that her ratings were erroneous. An employee cannot establish pretext simply based on the employee's own assessment of his or her performance. *See Hendricks v. Paulson*, 520 F.Supp. 2d 65, 95 (D.D.C. 2007); *Calhoun v. Johnson*, 1999 U.S. Dist. LEXIS 13767 at 10 (D.C. 1999); *Watkins v. Department of Air Force*, 2001 WL 427447 (EEOC Apr. 18, 2001); *Sawyer v. EPA*, 1994 WL 747923 at 3 (EEOC May 12, 1994).

The April 2008 Ivy Report does not support Ms. Lasley's claim that GAO's legitimate reasons regarding the out-of-cycle rating are a pretext for discrimination. *See* Pet. Ex. 426. As noted above, that Report was the product of a project designed to “[c]onduct an independent assessment of the factors influencing the rating average differences between African American and Caucasian Analysts and provide recommendations to address these differences.” *Id.* at 10. The Report found that “[t]he factors that contribute to the average performance ratings disparities between African American and Caucasian Analysts fall into three categories: (1) human capital

²³ The Ivy Report was issued at the conclusion of a GAO-commissioned study, conducted by the Ivy Planning Group as an “independent assessment of the factors influencing the average ratings differences between African American and Caucasian Analysts” between 2002 and 2006. Ivy Final Report at 9.

²⁴ Petitioner claims that there was no “diminution in her work quality prior to the FY 2003 promotion process.” Pet. Brief at 16. In support, she raises three assignments—the USPS Small Minority Women Owned engagement, the Acquisition Assessments engagement, and the Rebaselining Review engagement. *Id.* However, there is no evidence showing that her work on these assignments warranted a higher rating in her performance appraisal.

processes and management practices; (2) GAO's culture; [and] (3) the significance of race." *Id.* at 19.

With respect to the significance of race, the Report found that "[b]etween 2002-2006, African American Analysts' performance ratings on average were less than those of Caucasian Analysts." *Id.* at 38. The Report further stated that "[t]he causes for rating disparities are not clear." *Id.* at 39. In this latter regard, the Report stated that: (1) "[s]tatistical analysis did not determine if there is a disparity between 'actual performance' and 'rated performance' among African American and Caucasian Analysts;" (2) quantitative and qualitative data "did not conclusively measure the impact of subjectivity on the disparity;" and (3) the disparity in performance rating differences "may be influenced by GAO's human capital processes and culture." *Id.* at 39.

Thus, with respect to the reasons for rating disparities, the April 2008 Ivy Report itself specifically states that "[t]he causes for rating disparities are not clear." *Id.* at 39. In this regard, Ms. Jones, who testified about the statistical disparities noted by the Report, acknowledged that the Report did not state that "there is prejudice or racism that is the ultimate cause of the disparities." Tr. 183 (Report makes no findings of racism or prejudice). Rather, while the Report clearly states that there have been differences in ratings between African-Americans and Caucasians, it does not make a finding that these differences are attributable to racism or to any other particular factor. *See id.* at 193.

The Ivy Report similarly contains no proof regarding Ms. Lasley's performance or her ratings. While an employee may use statistics concerning an employer's employment practices in order to show pretext, "in individual *disparate* treatment cases, statistical evidence is less significant because the ultimate issue is whether the *particular* plaintiff was the victim of an illegitimately motivated employment decision." *Davis v. Ashcroft*, 355 F.Supp. 2d 330, 343 (D.D.C. 2005) (emphases in original) (internal citation omitted). Further, statistical evidence, standing alone, is insufficient to prove an individual claim of disparate treatment. *See, e.g., Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1131-32 (11th Cir. 1984) (statistics alone cannot make a case of individual disparate treatment because "[u]nless the individual plaintiff can point to some specific instance of discrimination, there is no wrong for the court to remedy"); *Taydus v. GAO*, PAB Docket No. 07-03 (Jan. 13, 2009) (Petitioner has the burden of showing that he "specifically and particularly" improperly had his ratings lowered in violation of law, and statistics relating to an entire banded population do not create a disputed factual issue as to a supervisor's individual motivations and actions when rating Petitioner). *See also, Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616-17 (7th Cir. 2000); *Lowery v. Circuit City Stores*, 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999).

In support of her claim that GAO's explanation for its actions is pretextual, Ms. Lasley also asserts that there is an inconsistency in how GAO officials viewed her performance. Pet. Brief at 20. Specifically, Ms. Lasley contends that Mr. Reiter disagreed with the assessment given by Mr. Needham and that this disagreement demonstrates pretext. The record does not support this contention.

In preparing Petitioner's out-of-cycle appraisal for the period October 1, 2002 through March 31, 2003, Mr. Needham met with Mr. Reiter to review Ms. Lasley's performance.²⁵ Tr. 670, 834. While Petitioner notes that Mr. Needham and Mr. Reiter *initially* did not have the same view as to what rating to give Petitioner in the Thinking Critically competency (Pet. Brief at 20), Mr. Needham explained that that was an initial discussion and that no further disagreement was apparent. Tr. 833. Mr. Needham recounted that he and Mr. Reiter discussed that new performance standards were in place, and that "a full performance Band I is going to do a full range of Band I activities. . . . And so, . . . he basically laid out what . . . that performance was. . . . I then made the decision whether or not it met the standards." Tr. 834. In this regard, there is no testimony that Mr. Reiter disagreed with the final rating that Mr. Needham gave Petitioner in this element. Mr. Needham testified, without contradiction, that Mr. Reiter "told the facts and we discussed it," and that after he told Mr. Reiter that he viewed Ms. Lasley's performance in this element as "below expectations," "Mr. Reiter never communicated to me that he disagreed with the assessment."²⁶ Tr. 841.

Moreover, shortly after Mr. Needham and Mr. Reiter met with Ms. Lasley to discuss her mid-cycle performance rating, Mr. Reiter wrote a memorandum documenting what happened in the meeting. Tr. 680-82; Resp. Ex. 6. In that memorandum, Mr. Reiter stated, in relevant part, as follows:

On April [sic] 9, 2003, John Needham and I discussed with Judy Lasley her performance rating for the period 10/01/2002 to 3/31/2003. . . . [S]he was counseled that "Thinking Critically" is one area that she needed improvement or additional opportunities to show improvement in this competency. *Based upon the work that has been completed as of March 31, we felt that Ms. Lasley was not meeting expectations in this area.* For example, we explained to Ms. Lasley that we did [not] believe that she proactively gathered information or effectively analyzed data that she gathered in performing a number of assigned tasks.

Resp. Ex. 6 at 1 (emphasis added); Tr. 809-21.

Thus, while there was, indeed, some initial disagreement between Mr. Needham and Mr. Reiter as to Ms. Lasley's performance in this area, the record reflects that such disagreement no longer existed at the time of the actual mid-cycle appraisal. To the contrary, Mr. Reiter's own memorandum describing the meeting explicitly stated that both he and Mr. Needham "felt that Ms. Lasley was not meeting expectations" in the area of Thinking Critically.²⁷ Resp. Ex. 6 at 1.

²⁵ Mr. Needham also obtained input from Ms. Mackin, who had worked with Ms. Lasley during the start of the rating period on the Postal Service Office Supply engagement and had served as the prior DPM. Tr. 673-74, 1015. In addition, Mr. Needham reviewed Ms. Lasley's work products and considered the self-assessment that she had prepared. Tr. 837, 839-40. As part of the rating process, Mr. Needham met with Mr. Li, who was the reviewer for the rating. Tr. 675, 840-41.

²⁶ Mr. Reiter was not called to testify in this proceeding.

Petitioner also argues that “an inference of age discrimination arises from the fact that long-time Band I employees, such as Petitioner, were being rated against and expected to compete with new employees who were placed into the agency’s Professional Development Program (PDP). . . .” Pet. Brief at 14. Ms. Lasley acknowledges that no documents concerning the PDP were introduced into the record, but asks the Board to take judicial notice of matters found on a PDP website. *Id.* According to Petitioner, she was not provided similar opportunities to advance her professional standing or career at GAO. *Id.* at 15. In this regard, Petitioner asserts that although she spent most of her career at GAO doing Defense and weapons systems analysis (Tr. 212, 230), GAO did not “proactively ensure” that she was given adequate training to perform at a high level in the entirely different area of Acquisitions. Pet. Brief at 15; *see* Tr. 230-32.

GAO contends that Petitioner’s request of the PAB to take judicial notice of particular facts related to the PDP program places GAO at a clear disadvantage. Resp. Reply Brief at 6. According to GAO, the PDP was not raised at any time during the investigation or discovery stages in this matter, and no documents related to the PDP are identified in Petitioner’s four volumes of exhibits. GAO also contends that Petitioner did not seek to elicit information regarding the PDP from any witnesses during the hearing. Respondent asserts that had it known of Petitioner’s PDP argument in advance, it would have presented evidence at the hearing demonstrating that more than 75 employees over the age of 40 have participated in the PDP over the past six years. GAO asks that if the Board entertains Petitioner’s PDP argument, the Board should take judicial notice of this fact and/or give GAO the opportunity to submit an affidavit regarding the number of employees over 40 in the PDP. *Id.* at 6-7.

I will take notice of the facts stated on the PDP website (found on the GAO internal website: <http://info1.gao.gov/pdp>). However, I do not find that these facts support Petitioner’s claim that she was not provided similar opportunities to advance her professional standing or career at GAO.²⁸ The record is clear that Petitioner had ample opportunity to pursue training in any areas of her choosing. Tr. 446, 458, 975-76, 983; *see* Resp. Exs. 25 at 13, 14; 28 at 3, 5; Pet. Exs. 115, 126. Nothing in the record indicates that GAO ever refused any request by Ms. Lasley for any training or other developmental course. To the contrary, the record reflects that all of the training that she sought was approved by GAO, and there is nothing to indicate that GAO limited her training choices. In addition, Petitioner has failed to show the existence of any requirement that GAO should have “proactively ensured” that she had developmental opportunities. Rather, the record is clear that training requests are typically generated by employees and, with respect to Ms. Lasley, none of her requests were ever limited or denied.

Next, Ms. Lasley contends that Mr. Needham failed to mention the Thinking Critically competency as an area needing improvement when he approved Ms. Lasley’s IDP less than three months before rating her as “below expectations” in that competency. Pet. Brief at 20. In this regard, Petitioner also asserts that although Mr. Needham had previously suggested revisions to

²⁷ Petitioner also asserts that Mr. Needham, who was new to ASM, had a sense of distrust from the outset that seems to have marked his involvement with her. Pet. Brief at 21. This claim is unsupported by the record.

²⁸ Accordingly, I need not rule on GAO’s request that the Board take judicial notice and/or give GAO the opportunity to submit an affidavit regarding the number of employees over 40 in the PDP.

her work product, he had not previously expressed to her that he deemed her work inferior in the area of Thinking Critically. *Id.*

Ms. Lasley correctly notes that the record reflects that Mr. Needham did not tell her that her performance needed improvement in the area of Thinking Critically during their discussion on her IDP in January 2003. *Id.* At the time of this discussion, Mr. Needham had been in ASM, and had been Ms. Lasley's DPM, for less than 3 months. Tr. 632, 639. Mr. Needham credibly testified that at that point he had little data on which to assess her performance and that he needed a more solid basis before he determined how Petitioner was performing against the standards and discussed this with her. Tr. 829-31.

Although Mr. Needham had not reached a firm determination at that time as to Ms. Lasley's performance, he also testified that in January 2003 he started getting a "picture of [Ms. Lasley's] performance" and some indications of performance problems in the competencies of Thinking Critically and Achieving Results. Tr. 802. Specifically, Mr. Needham described how he had observed that Ms. Lasley did not participate in meetings, that her interview write-ups were late, and that she did not demonstrate any real analytical thought in the documents she prepared. Tr. 668-69. Mr. Needham testified that in early 2003, during a feedback session, he counseled Ms. Lasley about her performance and shared his observations with her. Tr. 802-03, 829. Mr. Needham also testified that he had given her feedback on different occasions via email, personally, or on written documents with respect to her poor performance. Tr. 681.

During the January 2003 timeframe, Mr. Needham still considered Petitioner's performance to be deficient in Thinking Critically but he had not yet determined that her performance was "below expectations" in that competency. *Id.* Mr. Needham believed Petitioner's performance was improving in Achieving Results and he hoped that her performance would improve similarly in Thinking Critically. *Id.* at 681-82. Mr. Needham's judgment to wait before determining whether Ms. Lasley's performance was at the "below expectations" level was reasonable under the circumstances and does not support an inference of discrimination.

The mid-point feedback session with Ms. Lasley occurred at the end of March 2003. Tr. 670. Mr. Needham did not anticipate having to prepare an out-of-cycle appraisal for Ms. Lasley, and he told her at the mid-point feedback session that he would have preferred not doing a rating at that time. Tr. 669, 681. However, as a result of her decision to apply for promotion, GAO policy required that Mr. Needham prepare an appraisal. Tr. 669-70; Resp. Ex. 8 at 1. Accordingly, before the meeting, Mr. Needham reviewed Petitioner's performance up to that time against the standards and concluded that she should receive a "below expectations" in Thinking Critically and a "meets expectations" in Achieving Results. Tr. 670-79.

Ms. Lasley asserts that the out-of-cycle rating was a "total surprise." Pet. Brief at 20. The record suggests that it should not have been. Petitioner had received feedback expressing concerns with her performance from Mr. Needham before the mid-cycle feedback session and had received similar feedback earlier from Ms. Mackin. Ms. Mackin, who was Ms. Lasley's DPM during fiscal year 2002, met with Ms. Lasley in early September 2002 and told her that her performance on the Postal Service Office Supply Contract engagement was "below expectations" in the Thinking Critically competency. Tr. 1010. Ms. Mackin met with Ms.

Lasley again in October 2002 to give feedback, at which time Ms. Lasley acknowledged that Ms. Mackin had previously told her that she was performing “below expectations” in the Thinking Critically competency. Tr. 1011-12.

Thus, as early as September and October 2002, Ms. Lasley had been informed that her performance in the "Thinking Critically" competency was considered deficient.²⁹ In short, the record supports the conclusion that the feedback from Mr. Needham and Ms. Mackin should have alerted Ms. Lasley prior to the out-of-cycle rating that ASM managers had concerns with her performance with respect to the Thinking Critically competency.

Additionally, Ms. Lasley claims that evidence of the pretextual nature of GAO's defense is reflected in the fact that GAO identified her as a key contributor to two reports arising from the Postal Service engagements and had entrusted her to give an oral briefing to Congressional staff, for which she had been complimented by Penny Berrier, AIC on the project. Pet. Brief at 20. However, GAO points out, without refutation, that any employee who is assigned to an engagement and performs work on that engagement is identified as a key contributor. Resp. Reply Brief at 14. GAO correctly notes that no correlation has been shown in the record between any particular level of performance and being identified in a GAO report as a key contributor.³⁰ *Id.*

Further, Ms. Lasley asserts that in the fiscal year following the time period of the out-of-cycle rating, she was assigned to an engagement led by Leon Gill, an African-American, who testified that he would have rated her as "meets or exceeds" on her contributions to that assignment. He further testified that GAO officials called him more frequently about Ms. Lasley than other staff members on the engagement and seemed to be looking for more from Ms. Lasley than from the other staff members. Tr. 517, 518-19; *see* Tr. 339-43.

Mr. Gill's testimony is of limited weight with respect to the evaluation of Ms. Lasley's performance at issue, since, as he acknowledged, he did not work with Ms. Lasley during the period in question and had no role in her performance assessment for mid-cycle or FY 2003. Tr. 569. In addition, Ms. Lasley's performance during other years does not demonstrate that she performed at that same level during the rating period in question, or that she deserved a higher rating than the one Mr. Needham gave her. *See, e.g., Sawyer*, 1994 WL 747923 at 4 (appellant failed to establish inference of discrimination because she failed to show that her performance had remained at the same high level of proficiency as it had in previous years when she received higher ratings).

Accordingly, Ms. Lasley has not shown that GAO's articulated reason is a pretext for discrimination.

²⁹ In addition, Ms. Lasley and the other Analysts had been advised by Mr. Needham in November 2002 that under the new CBPS “there was a considerable raising of the bar in terms of what was expected for performance.” Tr. 643.

³⁰ In any event, the fact that Ms. Lasley was complimented on an oral briefing would appear to be more relevant to a Presenting Information Orally element than it is to the Critically Thinking element that is at issue here.

2. Retaliation Allegation and Out-of-Cycle Rating

Ms. Lasley alleges that her discussions with Mr. Brock and Mr. Stroman prior to the out-of-cycle rating constitute protected activity with respect to that rating. Pet. Brief at 25. In these discussions, Petitioner raised concerns to GAO management about the lack of African-American Analysts and managers in ASM and the negative effect of performance appraisal and promotion practices in ASM on African-Americans. Resp. Ans. Unnumbered ¶7. I find that the testimony establishes that these discussions involved "opposing alleged discriminatory treatment" by GAO and, as such, constitute protected activity for purposes of the retaliation claim. *See Ray v. Hendersen*, 217 F.3d 1234, 1240 & n.3 (9th Cir. 2000).

However, in order to prove retaliation, Petitioner must establish as part of her *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. *See, e.g., Robinson v. Potter*, 453 F.3d 990, 994 (8th Cir. 2006). 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. *Lauren W. v. DeFlaminis*, 480 F.3d 259, 267 (3^d Cir. 2007); *see Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503-04 (3d Cir. 1997). 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. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir. 2000).

In her testimony, Petitioner did not specifically recall when Mr. Brock became aware of her discussions with Mr. Stroman, as well as when her direct discussions with Mr. Brock in which she raised her concerns took place.³¹ The record does not contain sufficient indicia of nexus based on timing alone to establish this prong of the requisite proof of retaliation. *See, e.g., Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (3-month delay insufficient to infer causality); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-75 (7th Cir. 1992) (4-month delay insufficient); *Gustave-Schmidt v. Chao*, 360 F.Supp. 2d 105, 118-19 (D.D.C. 2004) (3-month window is the "outer limit" of the "temporal requirement in a retaliation case"). *See also Clark County Sch. Dist. v. Breedon*, 532 U.S. 268, 273-74 (2001) ("cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie* case uniformly hold that the temporal proximity must be 'very close';" 20 months suggests no causality at all).

Regardless of the temporal proximity in this case, there is no evidence in the record that Mr. Needham, the management official who prepared and signed the out-of-cycle rating, was aware of Petitioner's discussions with Messrs. Stroman and Brock before he finalized the rating.

On this record, therefore, I find that Ms. Lasley's discussions with Mr. Brock and Mr. Stroman do not establish a *prima facie* case of unlawful retaliation with respect to the out-of-cycle appraisal.³²

³¹ *See* n.3, *supra*.

³² Even if the contrary were true, as discussed below, the Agency's explanation for its actions is sufficient to overcome any inference based on the timing of the complaints to management.

Ms. Lasley also asserts that her participation in activities with the GAO chapter of BIG shortly before the out-of-cycle rating constitutes protected activity. *See* Pet. Br. at 27. Unlike her discussions with Mr. Brock and Mr. Stroman, the record shows that Mr. Needham was aware of these activities, as a result of the Achievement Statement that Ms. Lasley submitted to him for his use in preparing her rating, and that Ms. Lasley's activities occurred close in time to her rating. In her Achievement Statement, submitted at the 2003 mid-cycle review, Ms. Lasley set forth her activities on behalf of BIG in coordinating a panel on race relations and wrote that she was “a strong advocate for civil rights.” Resp. Ex. 5 at 3.

Even if such activity constitutes protected activity for purposes of proving retaliation,³³ there is no evidence that Mr. Needham displayed any hostility or animus towards Ms. Lasley because of her claimed protected activity that would demonstrate a “pattern of antagonism coupled with timing” to establish a causal link. *See, Lauren W., supra*, 480 F.3d at 267. To the contrary, Mr. Needham cited Ms. Lasley’s BIG activity favorably to support the “exceeds expectations” rating that he gave her in the Collaborating With Others competency in her 2003 end-of-fiscal-year rating. Resp. Ex. 19 at 4-5.

In these circumstances, I find that Petitioner has not established a *prima facie* case of retaliation with regard to the out-of-cycle appraisal.

Moreover, regardless of whether Petitioner has established a *prima facie* case of retaliation with regard to the out-of-cycle appraisal, the record establishes that GAO set forth a legitimate, non-discriminatory reason for its appraisal—her work performance. As discussed above, the appraisal, supported by credible testimony, reflected the deficiencies in Ms. Lasley's performance during the relevant period.

In order to rebut this legitimate, non-discriminatory reason for the out-of-cycle appraisal, Petitioner would have to establish that GAO's reasons were pretextual. Ms. Lasley makes no specific argument in this regard, but alleges in general with respect to all of the contested actions that the arguments contained in her post-hearing brief regarding the discrimination claims establish a “mosaic of actionable retaliation.” Pet. Brief at 28. According to Petitioner, such a “mosaic” includes the following types of evidence: (1) evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer’s stated reason for its actions is pretextual. Pet. Brief at 28 (*citing Kohler v. Department of Navy*, 108 MSPR 510, 515 (2008)).

However, Petitioner has failed to establish any of these types of evidence. As such, Ms. Lasley has not established that GAO's stated reason for its out-of-cycle rating was pretextual.

C. Spring 2003 Non-Selection for Promotion

Ms. Lasley alleges that GAO discriminated against her based on her race and age, and retaliated against her because of her protected activity when it did not select her for promotion during the Spring of 2003. Petition, Counts IV, V, & VI.

³³ *See, e.g., Pool v. VanRheen*, 297 F.3d 899, 910-11 (9th Cir. 2002).

1. GAO's Failure to Maintain Required Documents

Once a complaint is filed in a "failure to promote" case, the GAO Records Management Program requires GAO to maintain all relevant records concerning the selection process for the position in question until the final disposition of the complaint. *See* GAO Order 0410.1 (Mar. 2, 2004). GAO concedes that the application packages and merit selection files for the Spring 2003 Band II promotions in ASM should have been maintained. Tr. 91. However, GAO was unable to produce these documents.

Ms. Lasley requests that an adverse inference be drawn from GAO's admitted failure to maintain documents relevant to this case.³⁴ Specifically, she asserts that the PAB

should infer that the merit selection packages from the April 2003 promotion process would have shown [Ms. Lasley] to be comparably qualified for promotion into one of the four vacant Band II positions in ASM as others who applied and/or were selected and placed into the two subsequently filled positions. Such an inference is appropriate even if the misplacement and/or destruction of the merit selection information was inadvertent, and there is no evidence that GAO officials acted in bad faith. *See Cosentine v. Chertoff*, 2006 WL 2387915 (EEOC Appeal No. 07A40114) (Aug. 9, 2006).

Pet. Brief at 10 n.9.

GAO asserts that no adverse inference is warranted. According to GAO, "[t]he clear majority of Courts of Appeals that have considered whether to impose an adverse inference against a party that fails to produce relevant documents have found that an adverse inference is appropriate only where the record evidence suggests the party against whom the adverse inference is sought intentionally destroyed the documents in question." Resp. Brief at 51-52.

GAO further states that a

minority of courts . . . are willing to impose an adverse inference against a party who loses or otherwise does not produce documents due to negligence [where] the party seeking the inference must offer some evidence that the missing records would support that party's claim.

³⁴ Ms. Lasley does not allege that GAO's inability to produce these documents is the result of bad faith or intentional destruction of the documents. Petitioner had filed a Motion *in Limine* (Oct. 10, 2008) seeking an order precluding GAO from proffering any evidence regarding the application packages of selectees and the merit selection file for the process here at issue. Alternatively, Petitioner asked for an adverse inference from the Agency's failure to produce the application packages and merit selection file. Motion at 6. The testimony relating to the application packages was allowed; ruling on the adverse inference question was deferred. Tr. 21.

Id. at 53.³⁵ The Agency contends that, even if the minority rule were applied, no adverse inference is warranted in the circumstances of this case because Petitioner "has produced no evidence that the application files contain any information that would support her claim that she should have been promoted . . . [other than] the non-production itself." *Id.* at 55.

There is no doubt that GAO should have maintained the records in question and that its failure to produce them deprives the PAB of relevant material in this proceeding.³⁶ It also deprived Petitioner of material that may have been relevant to her case. Nonetheless, while not condoning GAO's failure to maintain the records, I conclude that no adverse inference is warranted in the circumstances presented. Even assuming, without deciding, that an adverse inference may be warranted in some circumstances where the failure to produce documents is not the result of bad faith or intentional destruction of documents, I agree with GAO that Ms. Lasley has not presented evidence to demonstrate that the missing documents in this case contained any information that would support her claim that she should have been promoted to Band II in the Spring of 2003.³⁷

Accordingly, in the absence of such evidence as is required under the minority view—*i.e.*, a showing that the missing information would have benefited Petitioner—I will deny Petitioner's request for an adverse inference that the merit selection packages from the April 2003 promotion process would have shown Ms. Lasley to be comparably qualified for promotion into one of the four vacant Band II positions in ASM as others who applied and/or were selected and placed into the two subsequently filled positions. *See Chappell-Johnson v. Bair*, 574 F.Supp. 2d 87, 98 (D.D.C. 2008); *Mitchell v. Fishbein*, 2007 U.S. Dist LEXIS 91751 at 7 (S.D.N.Y.); *Cortes v. Peter Pan Bus Lines*, 455 F.Supp. 2d 100, 103 (D.Conn. 2006).³⁸

³⁵ GAO notes that the Federal Circuit has not decided whether inadvertent destruction or loss of documents may support the imposition of an adverse inference against a party. Resp. Brief at 52 n.15; *see Jandreau v. Nicholson*, 492 F.3d 1372, 1376 (Fed. Cir. 2007).

³⁶ In light of the circumstances of this case, GAO is strongly encouraged to reiterate to appropriate officials the importance of the requirement in the GAO Records Management Program that GAO maintain all relevant records concerning the selection process for positions until the final disposition of any complaint that relates to the selection process.

³⁷ As noted, the missing documents are the application packages and merit selection files for the Spring 2003 Band II promotions in ASM. However, the record does contain a chart of the FY 2003 out-of-cycle ratings for the ASM promotion applicants and selectees (Resp. Ex. 11), as well as the individual FY 2002 appraisals for the ASM promotion applicants and selectees (Resp. Ex. 12). The merit selection file would normally include the panel's ranked list of candidates, which is missing in this case. *See* Resp. Ex. 9 at Ch. 2 ¶11 (Merit Selection Plan for Analyst and Specialist Positions, Mar. 31, 2003).

³⁸ Ms. Lasley attempts to distinguish *Chappell-Johnson v. Bair*, in which the court declined to make an adverse inference where the plaintiff offered no other evidence to support her claim that the employer's reason for not selecting her for promotion was discriminatory. However, for the reasons stated herein, I reject Petitioner's assertions that her ratings and non-promotion were the result of unlawful discrimination.

2. Prima Facie Case with Respect to Mid-Cycle Non-Selection

To make out a *prima facie* case of race or age discrimination, in the context of a non-selection, Ms. Lasley must show that: (1) she is a member of a protected group; (2) she was qualified for the promotion; (3) she did not receive the promotion; and (4) the position was ultimately filled by an individual outside of the protected group, or the employer continued to seek applicants from among those having plaintiff's qualifications. See, e.g., *Johnson v. Nordstrom, Inc.*, 260 F.3d 727, 732 (7th Cir. 2001) (race discrimination); *Barber v. CSX Distribution Servs.*, 68 F.3d 694, 698 (3rd Cir. 1995) (age discrimination); *Carter v. Pena*, 14 F.Supp. 2d 1, 5 (D.D.C. 1997) (race and age discrimination).

Ms. Lasley met the basic eligibility requirements to apply for promotion to Band II. However, her "below expectations" rating in the competency of Thinking Critically indicated that she had not satisfactorily performed her job duties at the Band I level during that appraisal period. Resp. Ex. 5. Accordingly, Petitioner cannot establish a *prima facie* case based on age and race discrimination because she was not qualified for promotion to Band II. See Resp. Ex. 9, Merit Selection Plan, Ch. 2 ¶8 (candidates rated as to how well they would meet expectations at next higher level). While Ms. Lasley argued that she had made the Best Qualified list in previous promotion cycles, that fact does not establish that she was performing adequately at the time of the Spring 2003 promotion process.³⁹

3. GAO's Reason for Non-Selection for Promotion

Even assuming, *arguendo*, that Ms. Lasley had established a *prima facie* case of discrimination regarding her non-selection for promotion to Band II during the Spring 2003 cycle, GAO has articulated a legitimate, non-discriminatory reason for not selecting her. Mr. Brock considered Ms. Lasley's performance and potential to perform at the Band II level and he decided not to promote her based on her performance, as reflected in her performance ratings and his knowledge of her performance, both directly and as conveyed to him by the ASM Directors. As noted above, Ms. Lasley's performance ratings were significantly lower than each of the four Band I Analysts selected for promotion in ASM. See Resp. Exs. 11, 12; Tr. 912. It is reasonable to conclude that a Band I Analyst who is not meeting expectations at the Band I level does not have the potential to perform successfully at the Band II level. Moreover, Respondent's evidence shows that Petitioner's average overall rating was the lowest of all applicants. See Resp. Ex. 11. Thus, even if Ms. Lasley had received a "meets expectations" in the Thinking Critically competency, her performance rating would still have been substantially lower than the employees who were selected for promotion.

4. Petitioner's Pretext Argument as to GAO's Articulated Reason for her Non-Selection

Petitioner has failed to prove that Respondent's articulated nondiscriminatory reason for not selecting her is a pretext for discrimination. An employee cannot establish that an employer's qualifications-based reason for promoting another employee was pretextual unless the evidence

³⁹ For the reasons stated above with respect to the out-of-cycle rating that led to Ms. Lasley's non-selection, Ms. Lasley likewise cannot establish a *prima facie* case that her non-selection was retaliatory.

shows that the “qualifications gap” between the selectee and the employee is “great enough to be inherently indicative of discrimination.” *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006). In this regard, Ms. Lasley has not identified any selectee who was less qualified than she. All selectees were well-qualified and had notably higher ratings than Ms. Lasley. Resp. Exs. 5, 11, 12; Tr. 912-15.

Petitioner has not demonstrated that Mr. Brock’s stated reasons for her non-selection are untrue. Her personal disagreement with his assessment of her qualifications does not establish that Mr. Brock acted with a discriminatory motive. In fact, as noted above, the evidence shows that Mr. Brock commended Ms. Lasley for her performance on several occasions. Pet. Exs. 314, 316, 317. Mr. Brock’s recognition of Ms. Lasley’s positive contributions to ASM counters the argument that he retaliated against her for having raised diversity issues with him in the past.

D. Petitioner’s Non-Receipt of an Award

Petitioner alleges that GAO discriminated against her based on her race and retaliated against her because of her protected activity when she did not receive an award in August 2003 for her work on two ASM engagements. Petition, Counts VII & VIII.

1. Prima facie Case with respect to August 2003 Awards

The denial of an award may constitute an adverse employment action. *See, e.g., Brown v. Gates*, 2009 EEO PUB LEXIS 295 (Feb. 25, 2009). With respect to whether the denial of an award gives rise to an inference of discrimination, Ms. Lasley has not shown that any similarly situated non-protected employees were treated more favorably. *See, e.g., id.; Horton v. GAO*, PAB Docket No. 01-09 (Nov. 7, 2003). In this regard, the record contains no evidence that any of the employees who received an award had also performed poorly on the engagements.

As noted above in connection with the out-of-cycle performance assessment, I need not resolve the issue here of whether “comparator” evidence is required because even assuming a *prima facie* case is established, I find that the Agency did not discriminate with respect to the August 2003 awards, as set forth below.

Petitioner has also failed to establish that GAO retaliated against her when it decided not to give her an award. Ms. Lasley engaged in statutorily protected activity when she filed a complaint with O&I on June 25, 2003 over her out-of-cycle rating and non-selection for promotion. *See* Pet. Ex. 401. However, Petitioner presented no evidence that Mr. Cooper, who determined which employees would receive awards, played a direct role in either challenged action or that Mr. Cooper even knew that Ms. Lasley had filed a complaint of discrimination. Nor did Petitioner present evidence to show that he was aware of any other alleged protected activity in which she claims to have engaged.

Therefore, Petitioner has failed to produce evidence that the responsible management official—Mr. Cooper—was aware of protected activity in which she engaged prior to his decision not to give her an award. Mr. Cooper’s lack of knowledge of the alleged protected activity prevents any inference of causality. *See Baqir v. Principi*, 434 F.3d 733, 747 (4th Cir. 2006), *cert. denied*,

549 U.S. 1051; *Mitchell v. Baldrige*, 759 F.2d at 80, 86 (D.C. Cir. 1985) (causal connection component of *prima facie* case may be established by showing that employer had knowledge of protected activity, and that adverse personnel action took place shortly thereafter). In sum, Petitioner has failed to make a *prima facie* case that GAO retaliated against her when she failed to receive an award.

2. GAO's Articulated Reason for Award Decisions

Even assuming that Petitioner had established a *prima facie* case of discrimination and/or retaliation, GAO has presented a legitimate, non-discriminatory reason for not giving her an award—her poor performance on the two engagements for which several other employees received awards. Ms. Mackin, the Assistant Director on the Postal Service Office Supply Contract engagement, testified credibly that Ms. Lasley “had difficulty understanding the data we were obtaining from the Postal Service, difficulty analyzing the data, and some fundamental misunderstandings of what the data was. Her interview write-ups were not very well done and they weren’t timely.” Tr. 1006-07. Ms. Mackin further testified that Petitioner’s “performance was affecting our ability to get done what we needed to get done.” Tr. 1008.

The record in this case also reflects deficiencies in Ms. Lasley’s performance on the Small Business Size Standards engagement. Her out-of-cycle performance appraisal, which was based in large part on her performance during this engagement, sets forth certain deficiencies. Resp. Ex. 5. Mr. Needham testified that Ms. Lasley did not participate much in team meetings regarding this engagement, nor did she contribute ideas or approaches to the engagement that the team might consider. Tr. 651-52. Mr. Needham also testified that Ms. Lasley created only a few workpapers for the engagement, that she did not complete interview summaries in a timely manner, and that her failure to develop a critical issue led to its exclusion from the testimony and final report. Tr. 656-58, 678, 782-83, 813-15.

Mr. Cooper, who decided which employees received awards, was told by Ms. Mackin and Mr. Needham that Ms. Lasley’s performance did not merit an award. Tr. 386. Mr. Needham also told Mr. Cooper that Ms. Lasley would receive a "mixed signal" if she were given an award after having recently received a poor performance rating. Tr. 685.

3. Petitioner's Argument as to Pretext Concerning 2003 Awards

Ms. Lasley has not shown that GAO’s articulated legitimate, non-discriminatory reason for not granting her an award is pretextual. Of the three individuals assigned to the Small Business Standards engagement who did not receive an award, two were Caucasian. *See* Tr. 685-87; *see* Resp. Ex. 17. Similarly, the majority of employees assigned to the Postal Service Office Supply Contract engagement who did not receive awards were Caucasian. Resp. Exs. 15, 17. This evidence supports a conclusion that GAO’s decision not to give an award to Ms. Lasley did not involve racial considerations.

E. 2003 End-Of-Fiscal-Year Rating

Ms. Lasley alleges that GAO discriminated against her based on her race and age, and retaliated against her because of her protected activity when it rated her at the end-of-fiscal-year 2003. Petition, Counts XV-XVI.

1. Prima Facie Case with respect to 2003 End-of-Fiscal-Year Rating

The parties disagree over whether Ms. Lasley's end-of-fiscal-year performance appraisal constitutes an adverse employment action for purposes of her race and age discrimination claims. While admittedly having a pay-for-performance system, GAO contends that Petitioner presented no evidence as to what pay increase, if any, she received following her end-of-fiscal-year rating, or what pay increase she believes she should have received. Additionally, GAO asserts that Ms. Lasley did not present any evidence or allege that her end-of-fiscal-year rating prevented her from being promoted. Resp. Brief at 37.

On the other hand, Ms. Lasley acknowledges that a negative rating, standing alone, may not be actionable under Title VII or the ADEA, but contends that a performance rating that affects an employee's salary or grade may support a discrimination claim. Petitioner asserts that under the GAO pay for performance system in existence in FY 2003, ratings directly affect pay, and further asserts that evidence concerning the extent of that effect is not relevant to establishing the second element of the *prima facie* case. Pet. Brief at 9.

For purposes of this claim, I will assume that the end-of-fiscal-year rating affected Ms. Lasley's pay under GAO's pay for performance system and constitutes an adverse employment action. Further, as with respect to the out-of-cycle rating, I will also assume that the end-of-fiscal-year rating gave rise to an inference of race and age discrimination for purposes of establishing a *prima facie* case.

As to Petitioner's retaliation claim, GAO concedes that "a negative performance evaluation may constitute an adverse action" under the retaliation standard enunciated in *Burlington Northern v. White*. See also *Vance v. Chao*, 496 F.Supp. 2d 182, 185 (D.D.C. 2007). Resp. Brief at 37 n.11. Moreover, GAO acknowledges that as of September 2003, deciding officials were aware that Ms. Lasley had filed a complaint of discrimination with O&I. *Id.* at 37. Accordingly, GAO does not dispute that her complaint qualifies as a "protected activity" under Title VII. As such, I will assume that Ms. Lasley has established a *prima facie* case of retaliation with respect to the end-of-fiscal-year rating.

2. GAO's Proffered Explanation for Petitioner's 2003 End-of-Fiscal-Year Rating

GAO asserts that it has provided a legitimate non-discriminatory reason for Ms. Lasley's end-of-fiscal year rating; namely, her poor performance. I agree.

Mr. Needham, who prepared the rating, and Ms. Mackin, who provided input into the rating about Ms. Lasley's performance, both testified credibly about the problems with Ms. Lasley's work. The reasons for Petitioner's rating are set forth in the narrative to the rating, and contain

detailed descriptions of specific work products reflective of her poor performance. Resp. Ex. 19 at 4-5. For example, Ms. Lasley was rated “below expectations” in the competency of Achieving Results due in part to the poor quality of her written work and her failure to keep her AIC informed about important information relating to the engagement. *Id.* at 4. She was rated “below expectations” in the competency of Thinking Critically due in part to her inconsistency in gathering and considering relevant information which led to an error in correspondence with an official from the Postal Service. *Id.*

3. Petitioner’s Pretext Argument as to 2003 Fiscal Year Rating

Petitioner has failed to prove that GAO's reasons for the end-of-fiscal year rating are a pretext for discrimination or retaliation. She has not established that the stated examples of her poor performance were untrue, or that her performance merited a higher rating. In addition, Ms. Lasley did not show that any employees with similar deficiencies received higher ratings. In the comments she submitted to her rating, she merely expressed disagreement with management’s assessment of her performance and offered several self-serving statements. Resp. Ex. 19 at 2. However, these statements do not refute the accuracy of management’s assessment. *See Hendriks v. Paulson*, 520 F.Supp. 2d 65, 95 (D.D.C. 2007) (plaintiff cannot establish pretext based only on her subjective assessment of her own performance).

With respect to her retaliation claim, shortly before her end-of-fiscal-year rating, Ms. Lasley had gone to O&I to file (and, subsequently, to amend) an EEO complaint over her out-of-cycle rating, non-selection, and non-receipt of an award. Pet. Exs. 401-404. Also, in the employee comments section of the appraisal, Petitioner asserted that GAO managers "deliberately misstated the facts in an effort to further demoralize and retaliate against [her] for filing an EEOC complaint against ASM and GAO." Resp. Ex. 19 at 2. Thus, it is clear that Mr. Needham was aware of her protected activity.

However, there is no evidence to suggest any animus or hostility on the part of Mr. Needham, or that it affected his assessment of her performance in any way. Mr. Needham’s credible testimony that the rating was performance-based stands unrefuted.

F. Claim as to Training, Mentoring, and Job Performance Feedback

Petitioner alleges that GAO discriminated against her based on her race and age, and retaliated against her, by failing to provide her with training, mentoring, and job performance feedback during the Fiscal Year 2003 rating period. Petition, Counts IX, X and XI.

The denial of a training or mentoring opportunity, without more, does not constitute an adverse employment action. *See Sewell v. Chao*, 532 F.Supp. 2d 126, 136-37 (D.D.C. 2008) (plaintiff offered no evidence to support argument that denial of training presented barrier to successful work performance) (*quoting Edwards v. EPA*, 456 F. Supp. 2d 72, 86 (D.D.C. 2006) (“[T]o be adverse, the denial of a travel or training opportunity must have a discernible, as opposed to a speculative, effect on the terms, conditions, or privileges of one’s employment”)); *Powell v. Castaneda*, 247 F.R.D. 179, 183-84 (D.D.C. 2007).

To the extent that Petitioner contends that her alleged failure to receive training, mentoring, and job feedback affected her promotion prospects, she has failed to support such a claim. Even assuming, *arguendo*, that the lack of training, feedback or mentoring constitutes an adverse employment action, the record demonstrates that Ms. Lasley received such training, feedback, and opportunities for mentoring. As noted above, Petitioner took 14 training courses in calendar year 2002, earning 63 CPE credits (Resp. Ex. 25 at 13), and took 16 training courses during calendar year 2003, earning 67 CPE credits. *Id.* at 13-14.

Ms. Lasley testified that she met GAO's training requirements "[e]very year." Tr. 446. Additionally, she testified that, during the rating period October 1, 2002 through March 31, 2003, she "attend[ed] training classes to enhance my knowledge base . . . [i]n contracting work, . . . because that was a new area to me." Tr. 314. Ms. Lasley further testified as to the training regarding the new competency-based performance system "that everyone took." Tr. 358.

Petitioner has produced no evidence that anyone at GAO denied her training or discouraged her from seeking and obtaining training. The record shows that she received considerable training, consistent with GAO requirements, and that among the training courses that she took was at least one that was intended to familiarize herself with a new area of work. Tr. 314. Moreover, there is no evidence that Ms. Lasley was discouraged or precluded from taking any additional training to familiarize herself with new areas of work. Accordingly, the record does not support a contention that Ms. Lasley was denied opportunities to take training.

The record also fails to support Ms. Lasley's claims that she was denied mentoring and feedback regarding her performance. To the contrary, the record shows that there were many times during 2002 and 2003 that Ms. Lasley received feedback and mentoring regarding her job performance. Mr. Needham testified that in January 2003, he discussed with Petitioner the fact that she was not entering interview summaries into the DM system in a timely fashion, and he explained the importance of such summaries being produced quickly. Tr. 658-59. He encouraged her to seek professional growth opportunities that would help her improve her performance. Tr. 827-28. Ms. Mackin also served as a mentor to Ms. Lasley. Tr. 1037. Ms. Lasley had approached Ms. Mackin for advice and coaching many times, and they discussed communication issues between Petitioner and Ms. Berrier as well as the importance of Ms. Lasley getting her work done timely and accurately. Tr. 1037-38.

In fact, Ms. Lasley testified at length regarding a "feedback session" she had with Paul Greeley, the AIC on the second Postal Service Contracting engagement, on August 26, 2003. Tr. 390. According to Ms. Lasley's testimony, Mr. Greeley told her during this meeting that she was failing to keep him apprised of the work she was doing on the engagement. Tr. 391-92. Ms. Lasley also testified that during this meeting Mr. Greeley advised her that her performance was not adequate in the Collaborating With Others competency, and that she needed more supervision. Tr. 394. Subsequent to that session, Ms. Lasley's performance appraisal of September 30, 2009 reflects an "exceeds expectations" rating in Collaborating With Others and the narrative contains several specific examples in support of that rating. Resp. Ex. 19 at 1, 4.

Accordingly, the record does not support Ms. Lasley's claim that she did not receive feedback and mentoring.

For these reasons, Petitioner's claims that GAO discriminated against her based on her race and age by denying her training, mentoring, and performance feedback lack merit.

G. The Prohibited Personnel Practice Claims

Petitioner claims that GAO committed various prohibited personnel practices (PPPs) in violation of 5 U.S.C. §2302(b). These claims are described and addressed below.

1. 5 U.S.C. §§ 2302(b)(1)(A)-(B)

Petitioner alleges that GAO committed PPPs by failing to treat her in a fair and equitable manner due to her race and age in connection with her out-of-cycle appraisal and her application for promotion. Petition, Counts XII (5 U.S.C. §§ 2302(b)(1)(A) (race)) and XIII (5 U.S.C. §§2302(b)(1)(B) (age)). She also alleges that GAO committed a PPP by failing to grant her an award on the basis of race, in violation of 5 U.S.C. §§2302(b)(1)(A). Count XVII.

These claims are analyzed under the discrimination and retaliation standards discussed previously. *See Lutes v. Goldin*, 62 F.Supp. 2d 118 (D.D.C. 1999) (*citing Brown v. GSA*, 425 U.S. 820 (1976)). Having determined that Ms. Lasley failed to establish discrimination or retaliation with respect to these matters, I find that her related PPP claims are similarly without merit.

2. 5 U.S.C. §2302(b)(4)

Petitioner alleges that GAO violated 5 U.S.C. § 2302(b)(4) by willfully obstructing her right to compete for promotion to Band II on a fair and equitable basis during the Spring 2003 promotion cycle. Petition, Count XIV.⁴⁰

Section 2302(b)(4) states that it is a prohibited personnel practice for an agency to “deceive or willfully obstruct any person with respect to such person’s right to compete for employment.” The Merit Systems Protection Board (MSPB) has held that deliberately lowering an employee’s performance appraisal with the goal of reducing the employee’s chances of being referred for a promotion would be willful obstruction of the applicant’s right to compete under section 2302(b)(4). *Special Counsel v. Hoban*, 1984 MSPB LEXIS 1730, at 40-41 (June 19, 1984), *aff’d* 24 MSPR 154 (1984).

The record contains no evidence that Ms. Lasley was deceived or willfully obstructed with respect to her right to compete for a Band II position. Specifically, Petitioner has not presented any evidence to show that Mr. Needham deliberately lowered her out-of-cycle performance appraisal with the goal of reducing her chances of being referred for a promotion to Band II. In the absence of any evidence that GAO deceived Ms. Lasley or willfully obstructed her right to compete for promotion to Band II, Petitioner’s claim that GAO violated 5 U.S.C. §2302(b)(4) must be rejected.

⁴⁰ Ms. Lasley does not specifically address this claim in her post-hearing brief or her reply brief.

3. 5 U.S.C. §2302(b)(6)

Petitioner also alleges that GAO's consideration of non-merit factors, including her race, age, and protected activities, granted an unauthorized privilege or advantage to other Band I Analysts who were not of her race, or age, and who had not engaged in protected activities, and thereby violated 5 U.S.C. §2302(b)(6). Petition, Count XV.⁴¹

Section 2302(b)(6) provides that it is a PPP to “grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.” The MSPB has held that in order to violate this statute, an agency must take deliberate acts in order to promote or injure the job prospects of a particular employee or applicant. *Special Counsel v. Byrd*, 59 MSPR 561, 570 (1993); *Baum v. Department of Treasury*, 14 MSPR 392, 395 (1983), *aff'd*, 727 F.2d 1117 (Fed. Cir. 1983) (Table).

The record contains no evidence that GAO took any deliberate acts in order to promote or injure the job prospects of either Ms. Lasley or any other applicant for promotion. As such, Ms. Lasley's claim that any other employee received an unauthorized preference or advantage is unsupported and must be denied.

4. 5 U.S.C. §2302(b)(9)

Petitioner alleges that her out-of-cycle and end-of-fiscal-year appraisals were in retaliation for her engaging in protected activities, which constitutes a violation of 5 U.S.C. §2302(b)(9). Petition, Count XVI. She also alleges that GAO failed to give her an award in August 2003 because she engaged in protected activities, and this failure also violates 5 U.S.C. §2302(b)(9). Petition, Count XVIII.

Section 2302(b)(9) provides that it is a prohibited personnel practice to:

- [T]ake or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—
- (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;
- (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);
- (C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law;
- or
- (D) for refusing to obey an order that would require the individual to violate a law.

To prevail on an allegation of retaliation under 5 U.S.C. § 2302(b)(9), Petitioner must demonstrate by a preponderance of the evidence that (1) she engaged in protected activity; (2) she was subsequently treated adversely; (3) the accused individual knew of the protected

⁴¹ Ms. Lasley does not specifically address this claim in her post-hearing brief or her reply brief.

activity; and (4) there is a genuine nexus between the protected activity and the personnel action. *Pernell v. GAO*, PAB Docket No. 01-03 at 12 (3/13/03), *aff'd*, 82 Fed.Appx. 680 (Fed. Cir. 2003) (citing *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986)); *McMillan v. Department of the Army*, 84 MSPR 476, 483 (1999); *Jaramillo v. Department of the Army*, 81 MSPR 469 ¶27 (1999); *Malphurs v. GAO*, 2 PAB 147, 150 (1992)). With respect to the last factor, Ms. Lasley must establish that the protected activity was a “significant factor” in the personnel decision at issue. *Id.* (citing *Special Counsel v. Costello*, 75 MSPR 562, 610 (1997)).

I determined above that Petitioner’s out-of-cycle and end-of-fiscal-year appraisals, as well as her non-receipt of an award in August 2003, were not taken in retaliation for her engaging in protected activity. Having so found, I similarly conclude that GAO's actions in this regard did not violate 5 U.S.C. § 2302(b)(9).

5. 5 U.S.C. §2302(b)(12)

Count XIX of the Petition alleges as follows:

GAO’s negative conduct toward and treatment of the Petitioner, including its negative and inaccurate Fiscal Year 2003 assessments of her job performance, and failure to promote her to Band II, were based upon non-merit factors, including her race, age and protected activities, and thus violated Federal non-discrimination laws and GAO Order 2335.8 (Merit Selection Plan for Analyst and Specialist Positions), which implement or directly concern merit system principles regarding fair and open competition, fair and equitable treatment in all aspects of personnel management, and protection of employees against arbitrary action and personal favoritism within the meaning of 5 U.S.C. § 2302(b)(12).

This Count is predicated on the discrimination and retaliation claims that have previously been addressed and rejected. As such, this Count is similarly without merit.

III. **CONCLUSION**

In sum, I find that Petitioner has failed to prove by a preponderance of the evidence that GAO discriminated against her on the basis of her race or her age, retaliated against her because of protected EEO activity, or committed any prohibited personnel practices, with respect to the allegations contained in the Petition. Accordingly, the Petition is dismissed.

SO ORDERED.