Office of Compliance
LA 200, John Adams Building, 110 Second Street, SE
Washington, DC 20540-1999

Francisca Laguna Complainant/Employee	
v.	Case No. 02-AC-54 (CV, FL)
Office of the Architect of the Capital Respondent/Employing Office	

Jeffrey H. Leib, Esquire for Complainant, Francisca Laguna.

Peggy Tyler, Esquire, Office of Employment Counsel, Office of the Architect of the Capital for Respondent Office of the Architect of the Capital.

Decision and Order

This case arises out of a Complaint filed by Francisca Laguna (Complainant). Complainant alleges race and national origin (Hispanic/Mexican) discrimination because of the Respondent's refusal to grant her request of August 4, 2000 to have her position raised two grade levels along with a position title and series change; the subsequent failure to pay her at the level of the two grade increase from that point on; and her reassignment from the Office of the Architect to the Construction Management Division on March 26, 2002. As explained below, I find the complaint without merit and therefore dismiss the complaint.

I. Procedural Background

Complainant filed a request for counseling with the Office of Compliance on August 29, 2002. The issues raised by complainant were not resolved in mediation and

she filed a complaint in the Office of Compliance on April 2, 2003. In lieu of an answer to the complaint, respondent on April 18, 2003, moved to dismiss the complaint because the denial of promotion, having occurred 22 months before counseling was initiated, rendered the complaint untimely and because count three, which concerned a reassignment without loss of pay, failed to state a cause of action. Upon consideration of the motion and the Complainant's response thereto, I denied the Motion to Dismiss because the complaint raised allegations of continuing violation of unequal pay for equal work, thus implicating Bazemore v. Friday, 478 U.S. 385, 395-96. A hearing in the case was conducted on June 18 and 19, 2003. Post-hearing briefs and responsive briefs were filed and carefully considered.

II. Factual Background

Complainant began her employment with the Office of the Architect on October 13, 1996 in a temporary position of Secretary, GG--318 –08, in Respondent's Construction Management Division. Transcript (Tr.) Vol. II 32/12-18.

Architect of the Capital, Alan Hantman, (non-Hispanic) was appointed to his position on February 3, 1997. Tr. Vol. I 51/4-5. Assistant Architect of the Capital, Michael Turnbull (non-Hispanic) was appointed to his position in September 1998. Tr. Vol. I 51/9, 92/7. When Mr. Hantman was appointed to his position, the "immediate office," the area outside of but in close proximity to the offices of the Architect and Assistant Architect, was occupied by two staff assistants classified at GS-301-11 Tr. Vol. I 67/19 – 68/5. One of those positions was held by Ms. Kaye Burke (non-Hispanic) who became acting staff assistant to Mr. Hantman until Ms. Brenda Parada (non-Hispanic) was hired as the permanent staff assistant to Mr. Hantman. Ms Burke

remained as staff assistant to the administrative assistant, Herb Franklin (non-Hispanic) and then additionally for Mr. Turnbull when he became the Assistant Architect. Tr. Vol. I 125/5-11.

In June of 1999, Complainant was temporarily detailed to the position of "Acting Executive Secretary" GS-318-08/09 wherein she was assigned to serve as Secretary to Assistant Architect Michael Turnbull in the immediate office. Tr. Vol. II, 40/1-9, Complainant's Exhibit (C.Ex.) 11. The position to which complainant was detailed was a new position in the office that was created for Mr. Turnbull at the suggestion of Mr. Hector Suarez (Hispanic/Mexican American) who is the Director of the Human Resource Management Division. Mr. Turnbull was seeking someone to provide secretarial help for his needs alone and Mr. Suarez recommended complainant for the job because of her knowledge of construction terminology. Tr. Vol. I 157/11 – 158/12, 158/17-20, Vol. II 11/9 – 12/12, 40/1-9.

Shortly after Complainant's arrival in the inner office, Ms Parada left to assume the newly created position of Office Manager of the Architecture Division and Ms. Burke, once again, became the acting staff assistant to Mr. Hantman while a recruitment action was pending for a permanent replacement. Tr. Vol. I 125/7-11, Vol. II 58/2-8, 58/10-12. Within a few days after Ms. Parada's departure from the inner office, Mr. Suarez met with complainant and Ms. Burke to discuss the division of duties and responsibilities. He instructed them that they were equals and both would be doing work for the Architect, Mr. Hantman. He stressed teamwork. Tr. Vol. II 58/22 - 59/7, Vol. I 126/1-11, 146/9-19, 147/4-9. From that point, complainant provided secretarial services to Mr. Turnbull and assisted in providing support services to Mr. Hantman. Including answering his telephones, maintaining his calendar, scheduling meetings, reading,

distributing, and tracking correspondence, filing, and typing. Tr. Vol. I 134/14 – 135/13, Vol. II 52/5 – 55/16.

In October 1999, complainant was selected through competitive promotion procedures to the position of Executive Secretary, GS-318-9/10 – the position in which she had been performing on a detail assignment. Tr. Vol. II 43/9-22, C.Ex. 5.

Cindy Kramer Corso (non-Hispanic) became staff assistant to Mr. Hantman in November of 1999. The arrangement by which complainant would perform support services for Mr. Hantman as a back up to his staff assistant continued. Tr. Vol. I 32/13 – 33/19. Both Ms. Burke and Ms. Kramer Corso testified that complainant did indeed perform the same duties and responsibilities on MR. Hantman's behalf as those that they performed, albeit to a lesser degree. However, it was also their testimony that they did not perform the full panoply of duties set forth in their position description for staff assistant. Tr. Vol. I 137/4 – 139/5, 27/16-19. Ms. Kramer Corso testified that her primary responsibilities consisted of scheduling Mr. Hantman's calendar, reviewing correspondence that came in for his signature, answering phones and filing documents. She testified that contrary to the statement of duties in the job vacancy announcement, C. Ex. 52, she did not perform special projects as directed by the Architect, or work with the communications officer in developing methods to improve the accuracy, adequacy and timeliness of information and systems for disseminating information, or act as the office manager. Tr. Vol. I 28/9-19. Nor did she attend meetings on Mr. Hantman's behalf. Tr. Vol. I 42/11-19.

Ms Kramer Corso testified that the Architect assigned work to complainant irregularly; sometimes two or three times a week and sometimes two or three times a day and sometimes it could be seven or eight times a day. Tr. Vol. I 44/1 – 45/15. Although

complainant occasionally performed duties for Mr. Hantman and mostly for Mr. Turnbull, Ms. Kramer Corso performed duties only for Mr. Hantman. Both, Ms. Kramer Corso and Ms. Burke described the duties they performed as clerical. Tr. Vol. 137/10-14, 29/5. After only eight months as staff assistant, Ms. Kramer Corso resigned from the position in July 2000 because she felt that she was not being used to her potential and the clerical duties required of her were not the duties enumerated on the vacancy announcement.

During next two months following Ms. Kramer Corso's resignation, complainant continued to provide support services for Mr. Hantman and Mr. Turnbull while recruitment of Ms. Kramer Corso's successor was in process. In September 2000, Ms. Maryann Johnson (non-Hispanic) was hired for the staff assistant position. Ms. Johnson was not called to testify. Tr. Vol. II 60/19 – 61/6. However, complainant testified that she continued to share the duties previously enumerated with Ms. Johnson and Ms. Johnson's successor, Ms. Burke, until her reassignment in March 2002. Complainant was not aware of any other duties performed by Ms. Johnson. Vol. II 112/7-113/6.

In August 2000, complainant requested orally and in writing to Mr. Hantman, Mr. Turnbull and Administrative Assistant Franklin, a noncompetitive promotion to GS-11, a change of title and series grade. Tr. Vol. II 66/11, 67/15, C.Ex. 16. In short, she was asking for a promotion to the staff assistant position. Although the respondent was advertising the position of staff assistant at that time, complainant did not seek the position under competitive promotion procedures because she did not meet the time-in-grade requirements and thus, did not meet all the qualification requirements for the position. Tr. Vol. II 75/12-22.

Unsure of complainant's rights, Mr. Turnbull sought the advice of Mr. Franklin and Mr. Suarez. They discussed the differences between the secretary and staff assistant positions. Tr. Vol. 1. 169/6 – 170/9. In an undated follow-up memo to Messrs. Turnbull and Franklin, Mr. Suarez reaffirmed the accuracy of the classification of her secretarial position and noted that though she filled in to help with some of the Architect's secretarial needs, she was not asked to perform the full range of duties of the staff assistant position. He recommended that complainant be advised that she could request a classification review of her position. Mr. Suarez noted that the basis for complainant's request stemmed from her comparison of her duties with what she saw performed by Ms. Burke and Ms. Linda Hayes (non-Hispanic), who was staff assistant to Mr. Franklin. He expressed his opinion that a classification review of those positions would result in their down grade to secretary at GS –8 or 9 level. He also stated that he would like to have the positions audited to determine their proper classification and thus avoid future equal pay or discrimination issues. He further stated that complainant would be eligible for a career ladder promotion to GS-10 in October and he would begin processing the paperwork if Mr. Turnbull approved. C. Ex. 20, Tr. Vol. II 13/6 – 14/10.

Mr. Turnbull met with complainant in November 2000 at which time Mr. Turnbull advised complainant that he was denying her request for noncompetitive promotion to GS-11 because he believed that the position description described his needs for the position and he was assured by the Human Resources Management Division that the position was accurately classified. He advised her that if she disagreed, she had the right to request a classification audit. Complainant stated that she would "sleep on it.." Tr. Vol. I 170/14-22, 174/3-10, Vol. II 69/3-20, C.Ex. 21. Complainant did not request an audit and did not renew her request for promotion or raise any further concerns. Tr.

Vol. II 14/111-21, C.Ex. 22. Complainant received her career ladder promotion to GS-10 in November 2000. She was also provided a promotion, retroactive from June, 2000, to the GS-9 level. As noted above, Ms. Johnson was selected for the staff assistant position and complainant continued to provide various support services to Mr. Hantman and to her first level supervisor, Mr. Turnbull.

In March 2002, Complainant was told that due to a realignment of functions, she would be reassigned to an Executive Secretary, GS-10 position in the Construction Management Division (CMD). According to the testimonies of the director of CMD, Mr. Gary Vawter (non-Hispanic) and Mr. Turnbull, Mr. Vawter asked about someone to assist him as executive secretary. Vol. II 21/9-14. The CMD was under Mr. Turnbull who determined that he did not need full-time secretarial help any longer and that in view of CMD's greater needs, it was in the best interest of the agency to put somebody with complainant's knowledge in that position. Tr. Vol. I 189/1-9, 189/17 – 190/2. As it turned out there was no existing executive secretary, GS-10 position in the CMD so complainant was provided a position description for Secretary GS-8. Mr. Vawter testified, however that her assignments go beyond the position description and that HRMD has been instructed to develop an updated CMD position description for complainant. Tr. Vol. II 26/18-21, 27/8-1, 28/13-20. Nevertheless, complainant concluded that she had been "constructively demoted" and filed the instant complaint.

III. Analysis

The complaint alleges violations of section 201 of the Congressional Accountability Act of 1995, 2 U.S.C. §1311, which prohibits discrimination as proscribed under Title VII of the Civil Rights Act of 1964 as amended (Title VII) and discriminatory treatment of employees or applicants for employment proscribed under other statutes. Title VII of

the Civil Rights Act of 1964, as amended, Section 701 et seq., 42 U.S.C. § 2000e et seq., prohibits discrimination based on race, color, national origin, sex and religion.

Generally, the adjudication of a complaint of discrimination alleging disparate treatment under Title VII follows a three-step evidentiary analysis. First, the burden is on the complainant to establish a prima facie case of discrimination by a preponderance of the evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 58 L. Ed. 2d 216, 99 S. Ct. 295 (1978); Furnco Construction Corporation v. Waters, 438 U.S. 567, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978). This means that the complainant must present a body of evidence such that, were it not rebutted, the trier of fact could conclude that unlawful discrimination did occur. Teamsters v. U.S., 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). A complainant raises an inference of discrimination by showing that the reasons most commonly given by management to justify a particular employment decision or action do not apply in the complainant's case.

Second, if the complainant meets the burden of presenting a prima facie case, then management has a burden of production to articulate some legitimate, nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). The evidence presented by management need not establish management's actual motivation, but must be sufficient to raise a genuine issue of material fact as to whether management discriminated against the complainant. If management meets this burden of production, the presumption of discrimination raised by the prima facie case is rebutted and drops from the case altogether. Burdine, supra

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Third, in order to prevail, the complainant must show by a preponderance of the evidence that management's stated reason is a pretext for discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989); Burdine, supra; McDonnell Douglas, supra. The complainant may show pretext by evidence that a discriminatory reason more likely than not motivated management, that management's articulated reasons are unworthy of belief, that management has a policy or practice disfavoring the complainant's protected class, that management has discriminated against the complainant in the past, or that management has traditionally reacted improperly to legitimate civil rights activities. McDonnell Douglas, supra

The ultimate burden of showing that management intentionally discriminated against the complainant remains at all times with the complainant. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983); Burdine, supra. A finding of pretext - i.e., a finding of sufficient evidence to disbelieve management's stated reason for its decision - does not necessarily compel a finding of discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511; 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). Proof of pretext is simply one form of circumstantial evidence that is probative of intentional discrimination, and such proof may be quite persuasive. Thus, a complainant's prima facie case, when combined with sufficient evidence to find that management's asserted justification is false, may permit a finding of discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).

This is not to say that such a showing will always be adequate to find discrimination. As the Supreme Court noted in Reeves, there will certainly be instances where, despite such a showing, the record conclusively reveals some other

nondiscriminatory reason for management's decision, or if the complainant presented only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred. Thus, for example, if the circumstances show that management gave a false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent. Reeves, supra (citing Fisher v. Vassar College, 114 F.3d 1332, 1338 (2nd Cir. 1997). Whether a finding of discrimination is appropriate in a particular case will depend on a number of factors, including the strength of the complainant's prima facie case, the probative value of the proof that management's explanation is false, and the strength of other evidence that discrimination did not occur. Reeves, supra

Moreover, the analytical framework in McDonnell Douglas "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco, 438 U.S at 571. Thus, whether or not a complainant has established a prima facie case, where management has provided a legitimate, nondiscriminatory explanation for its action, the factual inquiry must proceed to a decision on the ultimate factual issue in the case - i.e., whether management's actions were discriminatory within the meaning of Title VII. Aikens, supra

The elements of a prima facie case of discrimination are determined by the factual circumstances of the case and the bases of discrimination alleged. McDonnell Douglas, supra, note 13. In order to establish a prima facie case of disparate treatment, a complainant must generally show (1) membership in a protected class, (2) an employment situation comparable to that of other employees not of the same protected class, and (3) treatment that is different than that experienced by those other employees

with respect to the terms, conditions, or benefits of employment. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273; 49 L. Ed. 2d 493, 96 S. Ct. 2574 (1976).

Employees are in comparable employment situations when it is reasonable to believe that they would receive the same treatment in the context of a particular employment decision. See, Lindemann & Grossman, Employment Discrimination Law, 3rd Ed., Chapter 2, pp. 30-33 (1996). In order for comparative employees to be considered similarly situated, all relevant aspects of the complainant's situation must be nearly identical to those of the comparative employees. Thus, in order to be similarly situated, the comparative employees must have dealt with the same supervisor and have been subject to the same standards. Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992).

Even in cases where there are no similarly situated employees, a complainant may be able to establish a prima facie case by showing: (1) membership in a protected class; (2) the occurrence of an adverse employment action; and (3) some evidence of a causal relationship between membership in the protected class and the adverse action. Brown v. Brody, 199 F.3d 446, 452 (D.C. Cir. 1999); Potter v. Goodwill Industries of Cleveland, 518 F.2d 864, (6th Cir. 1975); Leftwich v. United States Steel Corporation, 470 F. Supp. 758 (W.D. Pa. 1979). An adverse action is an employment action that constitutes a significant change in employment status or resulting in a significant change in benefits. Burlington Industries, Inc. v. Ellerth, 524 U.S. at 761 (1998).

Counts I and II of the Complaint

The gravamen of the complaint is that complainant was assigned and required to perform the same "higher graded" duties that were required of the staff assistants from

the onset of her detail and subsequent appointment to the immediate office until her reassignment. For that reason, she requested promotion to the same position and grade of the staff assistants to achieve parity in grade and pay. The denial of the promotion in November 2000, she contends, was because of her race and national origin. In addition, by continuing to assign her the alleged "higher graded" duties the respondent required her to perform equal work for less pay.

The respondent contends that the duties required of complainant were within the parameters of her position description and did not include the full panoply of duties required by the position description for staff assistant, GS-301-11. In short, the two positions were differently classified and complainant received the grade properly assigned to her position. Respondent also contends that the denial of her request for noncompetitive promotion was a discrete employment action and that complainant's failure to seek counseling within 180 days from the denial of her request requires dismissal of her complaint as untimely pursuant to 2 U.S.C. § 1312.

A comparison of the position descriptions for the Secretary, GS-318 –9/10 and the Staff Assistant, GS-301-11/12 supports the respondent's claims. The secretary position requires the incumbent to receive visitors to the office; answer telephones; handle routine inquiries; establish and maintain file of correspondence, documents, pending investigations, etc.; retrieve, obtain and assemble and summarize information from files and documents in the office or other sources for use of the Assistant Architect or the Architect; keeps the Assistant Architect's calendar; schedules appointments; arranges for visitors' passes and parking; reminds the Assistant Architect of the daily and weekly schedule and ensures briefing on matters to be considered in advance; may assist in retrieving information or in completing studies or analyzes to improve the accuracy,

adequacy and timeliness of information and systems for disseminating information to managers throughout the organization. The incumbent may develop new or modified administrative program policies, goals or objectives for clerical and technical support; develop and maintain standard procedures for records management; review existing directives and check with originating offices to determine whether they are necessary, current, or can be consolidated; reviews requests for new or revised forms to determine whether forms are essential or can be simplified; organizes office procedures and practices for simplification, efficiency and economy of operations relating to file maintenance.

The position description provides for incumbent's use of computers and electronic systems to create, copy edit, store, retrieve and print documents of varying types; transmittal of electronic mail and messages and ensuring proper clearances; review of correspondence for appropriate signatures, format, accuracy, etc.; participation with the Assistant Architect with planning and organizing administrative work; maintenance of daily time records and preparation of biweekly time records for transmittal to payroll office; and preparation of travel arrangements, itineraries, travel reports and other documents in connection with travel. Finally, as respondent points out, the position description requires the incumbent also to perform these duties on behalf of the Architect, as necessary (underline added). C. Ex. 15.

All of the duties that complainant claims to have performed on behalf of the Architect are encompassed in the position description of her position. It is true that the position description provides that the duties will be provided on behalf of the Assistant Architect. However, complainant has not presented any evidence that performance of these functions on behalf of the Architect would warrant a higher classification.

Complainant did not present testimony by an expert in position classification, nor did she provide classification standards tending to show that the duties described and required of her would warrant classification at a higher grade. Despite the invitation to her to request a classification audit of her duties, complainant did not do so.

The position description for the Staff Assistant, GS-301-11 contains many duties similar to those described in complainant's position description. These are duties the staff assistants admitted to performing and which both, Ms. Burke and Ms Kramer Corso described as clerical duties. Tr. Vol. I 137/10-14, 29/5.

In addition, however, the position description provides that the staff assistant attends and records minutes of meetings which are later summarized and distributed; checks to ensure commitments made at the meetings are kept and keeps the Architect informed; accomplishes special projects as directed by the Architect; acts as office manager for the Architect's office and ensures the practices, procedures and formats used by the secretaries in subordinate offices are in accordance with the requirements of the Architect; develops new or modified administrative program policies, regulations, goals or objectives for, and provides guidance and assistance to, senior policy staff assistants, secretaries and clerks. As an office manager, the incumbent is expected to devise and install office procedures, practices and correspondence formats to be used by staff assistants, secretaries and clerks throughout the agency. C. Ex. 54.

As respondent contends, the requirements of the staff assistant exceed those of the secretary in many respects. At a minimum, it can be stated that the positions are differently defined and differently classified. Complainant presented no evidence that the position description, as described, is not properly classified. Absent testimony or evidence concerning the position classification, it cannot be determined what duties of

the staff assistant position constitute higher graded duties. Nevertheless, I find that there are duties enumerated on the position description for staff assistant that were not required of complainant and therefore the positions are not the same or substantially similar.

I find no violation of complainant's rights by the refusal to accede to complainant's request for non-competitive promotion. Complainant has not shown by a preponderance of the evidence that she performed the so-called "higher graded" duties of the Staff Assistant, GS-301-11 position and therefore, has not shown that she was aggrieved by the denial of her request for a non-competitive promotion to the position. The evidence presented by complainant was not that she performed "higher graded" duties, but rather, that at least two incumbents of the staff assistant position were not required to perform all of the duties enumerated in their position descriptions. Moreover, as complainant testified, she was not qualified for the position under competitive promotion procedures. Accordingly she was not similarly situated to the incumbents of the staff assistant position and she did not suffer a present harm or loss with respect to a term, condition or privilege of employment for which there is a remedy.

The evidence does suggest that despite the different classifications of the positions, the incumbents of the staff assistant position were not required to perform those duties that distinguish the position from complainant's position. Respondent points out, however, that at all times for which complainant compares her performance with those of Ms. Burke, Ms. Burke was not appointed to the position for the Architect, but was filling in until a permanent appointment could be made. Tr. Vol. I 106/6-22, 107/1-6. The testimony regarding Ms. Kramer Corso is that she had not remained in the position long enough to assume the distinctive duties and responsibilities. Tr. Vol. I

108/17-22, 110/3-10. In addition, Ms Johnson, who did not testify, was known to have attended meetings on the Architect's behalf. Tr. Vol. I 112/11-17.

Despite some evidence that the staff assistants performed substantially similar duties and responsibilities as complainant during a major part of complainant's tenure in the inner office, I find the evidence does not show that complainant was discriminated against because of unequal pay for equal work. The incumbents of the staff assistant position were appointed to the position through competitive processes, met all the qualifications for the positions and were subject to the duties and responsibilities of the position, regardless of whether they were directed to perform them. Thus, they were not similarly situated to the complainant. The two positions are classified differently and thus, provide for pay differences. Complainant received all the pay to which she was entitled for the position to which she was appointed and was required to perform only the duties described for that position. She did not meet all the requirements for appointment to the staff assistant position. Accordingly, complainant would not have been entitled to the pay and benefits of the higher graded position. See, United States v. Testan, 424 U.S. 392, 402 (1976).

Furthermore, to the extent that the evidence shows that the incumbents performed substantially similar duties despite different classifications of their jobs, complainant has failed to present evidence that the disparity in pay was motivated by considerations of race or national origin as opposed to the classification of the two positions by proper application of classification standards.

Count III of the Complaint

Complainant alleges that her reassignment from the secretarial position in the inner office to the secretarial position in the Construction Management Division was a

"constructive demotion" and reassignment to a position of lower status and constituted discrimination because of her race and national origin. Respondent points out that the reassignment resulted in no loss of pay or benefits and no significant loss of employment status.

To prevail in this discrimination complaint, complainant must present evidence that (1) she is a member of a protected class; (2) that an adverse employment action was taken against her; and (3) that the adverse action gives rise to an inference of discrimination. Brown v. Brody, 199 F.3d 446, 452 (D.C. Cir. 1999). In defining an adverse action, the Supreme Court has stated:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

The allegation of constructive discharge is, of course, dependent on showing that the position from which complainant was reassigned warranted classification at a higher grade. See Hogan v. Department of the Navy, 218 F.3d 1361, 1363 (Fed. Cir. 2000). As determined above, complainant has not met her burden of proving entitlement to a higher grade in the previous position. Accordingly the reassignment is a lateral transfer without reduction of pay or benefits. As in this case, the complainant in Pann v. Department of the Navy, 265 F. 3d 1346 (Fed. Cir. 2001) alleged that his reassignment was an impermissible demotion. The court held the reassignment to be a permissible lateral transfer because complainant did not suffer a reduction in grade or basic pay and thus, not an adverse action. Id. at 1349. Where there is no decrease in pay or benefits, complainant must show "an action with materially adverse consequences affecting the terms, conditions, or privileges of employment." Stewart v. Evans, 275 F.3d 1126, 1134 (D.C.

Cir. 2002); Brown v. Brody, supra, 457-58. "The harm suffered may not be subjective, but must constitute an 'objectively tangible harm.'" Bunyon v. Henderson, 206 F. Supp. 2d 28, 30 (D.D.C. 2002) citing Russell v. Principi, 257 F.3d 815, 818 (D.C. Cir. 2001).

In response to this argument, complainant contends that the case law regarding the concept of adverse action that is relied upon by respondent is inapplicable to complaints brought under section 201 of the Congressional Accountability Act. It is complainant's contention that Congress did not intend "the unduly restrictive judicial constructions resulting in 'ultimate/material/ tangible employment actions' affecting the 'terms, condition or benefits of employment' of complainant's employment were the only conduct that could be challenged and that such constructions are unduly restrictive." Complainant's Reply to Respondents Post Hearing Brief (Complainant's Reply Brief) (August 5, 2003), pp.8-9. Complainant cites to no legislative history, but argues that such a conclusion is warranted under the broad language of the statute prohibiting discrimination in "[a]ll personnel actions affecting covered employees." 2 U.S.C. 1311(a). Complainant's Reply Brief, pp. 14-16. Complainant also points to the provision of the statute prohibiting the taking of reprisal against any employee who has engaged in activity protected by the statute, which would likely deter the charging party or others from engaging in protected activity. 2 U.S.C. 1317. In further support, complainant cites to several decisions wherein courts have found relatively harmless actions to be in violation of anti-reprisal provisions of various statutes, including the National Labor Relations Act. Complainant's Reply Brief , pp. 15- 18.

Complainant's arguments are without merit. Absent legislative history supporting her contention, there is no basis for concluding that Congress did not intend that judicial decisions interpreting Title VII in cases brought by the private sector or executive branch

employees are inapplicable to employees covered by the Congressional Accountability Act of 1995. Indeed, such a conclusion would be contrary to the mandate of section 405(h) of the statute, that provides that a hearing officer shall be guided by judicial decisions under the laws made applicable by section 102, which includes Title VII. Additionally, while it is true as complainant argues, that some seemingly minor employment actions have been found to violate the anti-retaliation provisions of various statutes where there is evidence that the employers' motives in taking the actions were retaliatory, those facts are not present in this case. The complaint does not allege that complainant engaged in protected activity prior to filing her complaint and does not allege reprisal as a motive for the reassignment. Nor did complainant present any evidence of protected activity preceding the reassignment. I find the judicial precedents based on anti-reprisal provisions that are cited by complainant are not applicable to this matter. Unlike those cases, complainant has not presented evidence of improper motive. The reassignment of complainant was not an adverse action within the meaning of Title VII as it did not result in loss of pay, benefits or significant change in terms or conditions of employment.

Moreover, in addition to finding that the reassignment did not constitute an adverse action that is actionable under the statute, I find that even assuming complainant had met that threshold requirement, she has failed to show evidence of disparate treatment in effecting the reassignment or that the reassignment was based on considerations of her race or national origin.

IV Conclusion

The Complainant has failed to meet her burden of proving race and/or national origin discrimination with respect to Counts I, II, and III of her complaint. The complaint is dismissed.

It is so **ordered.**

9/9/03
Date

Michael W. Doheny
Hearing Officer

I, the undersigned employee of the Office of Compliance certify that on the date indicated below I served the following *Decision and Order of the Hearing Officer* upon the below named persons, addressed to them at the address indicated.

Peggy Tyler, Esq.
Office of the Architect of the Capitol
Office of Employment Counsel
Ford House Office Building
Room H2-202
Washington, DC 20515

By Facsimile & U.S. Postal Mail

Jeffrey Leib, Esquire
Attorney for Complainant
5104 34th Street, NW
Washington, D.C. 20008

U.S. Postage

Signed in Washington, D.C. this 9th day of September 2003. Kisha L. Harley

Kisha L. Harley
Office of Compliance