OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

STEVEN PATTERSON,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case Number: 08-AC-48 (RP)**
	)	
OFFICE OF THE ARCHITECT OF THE CAPITOL,	)	
	)	
Appellee.	)	
	)	

Before the Board of Directors: Barbara L. Camens, Chair; Alan V. Friedman; Roberta L. Holzwarth; Susan S. Robfogel; Barbara Childs Wallace, Members

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors ("Board") pursuant to a petition for review filed by Steven Patterson ("Patterson" or "Appellant"), an employee of the Office of the Architect of the Capitol ("AOC" or "Appellee"). Patterson seeks review of the Hearing Officer's decision granting AOC's motion for summary judgment pursuant to Section 5.03(d) of the Procedural Rules of the Office of Compliance ("OOC").

I. Background

Steven Patterson ("Patterson" or "Appellant") is employed by the Office of the Architect of the Capitol as a Woodcrafter at the Senate Office Building. In September 2006, Patterson applied for a vacant non-supervisory position in the Wood Crafting Division at the AOC. After he was advised that he had not been selected for the position, Patterson filed numerous written grievances with supervisors and managers at various levels of the AOC hierarchy including, ultimately, the Acting Architect. In each of the grievances, Patterson alleged that he had been denied full consideration for the vacant position because the AOC had disregarded certain applicable procedural rules in the selection process. In addition, Patterson orally complained to his supervisor that the selection process could be used in the future to discriminate against people in protected classes.

On April 6, 2007, Patterson filed a request for counseling with the Office of Compliance ("OOC").[1] Subsequently, on May 18, 2007, the Acting Architect issued a final decision denying Patterson's formal grievance appeal.[2] On May 21, 2007, the OOC referred Patterson back to the AOC's internal process for potential resolution of his claim. Patterson thereafter contacted the AOC Equal Employment Opportunity and Conciliation Programs division ("EEO/CP") to request participation in the procedures in that office. By letter dated July 17, 2007, the AOC advised Patterson that he could not avail himself of the EEO/CP process because an AOC Order provides that employees may elect to seek resolution of a matter under either the AOC grievance process or the EEO/CP procedures, but not both. As Patterson had already pursued his complaint through the AOC grievance process, AOC policy precluded his use of the EEO/CP process. Patterson thereafter returned to the OOC process and, on September 26, 2007, the OOC issued a notice designating the end of the counseling period in *Patterson I*. On October 11, Patterson filed a request for mediation.

In addition to pursuing his complaints through the OOC procedures, on September 13, 2007, Patterson met with the AOC Inspector General ("IG") to request an investigation of his grievances.[3] On November 7, 2007, the IG suspended his investigation of Patterson's complaints because the matter was in mediation at the OOC.[4]

On February 25, 2008, the OOC issued a notice indicating that the mediation period in *Patterson I* had concluded. On July 21, 2008, Patterson filed his amended complaint in *Patterson I* alleging, in essence, that he was denied full and fair consideration of his formal and informal grievances in retaliation for his complaints about the selection process and his contention that the AOC would be engaging in unlawfully discriminatory employment practices if the same selection procedures were applied to a member of a protected class. In addition, Patterson alleged that the AOC's pattern of decisions regarding his grievances resulted in a hostile work environment. On August 18, 2008, the hearing officer granted the AOC's motion for summary judgment in *Patterson I*. The hearing officer concluded that Patterson failed to establish a prima facie case of retaliation or a hostile work environment, as he failed to demonstrate that he had engaged in any protected activity, i.e., that he had opposed any discriminatory action against either himself or any member of a protected class. Patterson subsequently filed a petition for review of the hearing officer's decision. On April 21, 2009, the Board issued a decision affirming the hearing officer's grant of summary judgment. Specifically, the Board affirmed the

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[1] The OOC proceeding initiated by that request for counseling hereinafter will be referred to as "*Patterson I*."

[2] Patterson received the decision/letter on May 29, 2007. In addition to denying Patterson's grievance appeal, the letter indicated that Patterson's complaint did not appear to merit an independent investigation by the AOC Inspector General ("IG"), as had been requested by Patterson. Nevertheless, the letter advised Patterson that he could contact the IG's office for information about requesting an investigation.

[3] In a subsequent letter to the IG, Patterson claimed that an investigation was warranted because both the AOC's deviations from the normal selection procedures, and its inadequate response to Patterson's complaints about the selection process, evidenced "gross mismanagement and fraud and abuse."

[4] Attached as an exhibit to Appellant's opposition to the AOC's motion for summary judgment is an email authored by AOC Inspector General Art McIntye, stating:

> I was just informed by Kevin Mulshine that he was notified by the Office of Compliance that Steven Patterson [sic] case was actively being mediated which I was unaware of. I was under the impression that the case was over with Stephen Ayers [sic] letter. Therefore, I am suspending my inquiry under the circumstances. The review and audit of career staffing procedures and application will be conducted AOC-wide later this year during FY 2008.

hearing officer's conclusion that Patterson failed to demonstrate that he had engaged in any protected activity, as he could not have reasonably believed that he was opposing any practice made unlawful by the CAA: He did not protest discrimination against any identified member of a protected class and, moreover, he merely speculated that a discrimination claim might have arisen if the AOC had applied the vacancy selection procedures to members of a protected class. Thus, Patterson could not establish either a claim for retaliation or a claim of a hostile work environment.

During the same period of time in which Patterson pursued his retaliation claims in *Patterson I*, he initiated the instant proceeding. On May 2, 2008, Patterson filed a request for counseling in this case. Following the OOC's issuance of an end-of-counseling notice on June 3, 2008, Patterson requested mediation. On October 21, 2008, following the conclusion of the mediation period, Patterson timely filed a formal complaint alleging that the AOC retaliated against him for participating in the *Patterson I* proceedings by suspending the IG investigation of his complaints regarding the selection process violations (Count 1) and suspending the IG investigation of his allegations of the misallocation of funds, mismanagement, abuse, and fraud (Count 2). In addition, the complaint alleges that a pattern of decisions by the AOC, including the foregoing actions, as well as the AOC's denial of access to its EEO/CP procedures, created a retaliatory hostile work environment (Count 3).

The AOC filed a motion for summary judgment asserting that: (1) Patterson waived any claim he may have had with respect to the OOC's referral of his complaints to the AOC internal grievance processes pursuant to Procedural Rule 2.03(m) because he chose to return to the OOC process at the conclusion of the referral period; (2) Patterson is collaterally estopped from relitigating the issue of whether his complaints about the selection process alleged discrimination sufficient to demonstrate that he engaged in protected activity under the CAA; (3) Patterson cannot establish a prima facie case of retaliation because he has not engaged in any protected activity; (4) any claim that Patterson may have had regarding the AOC's denial of access to the EEO/CP procedures is time-barred; and (5) there is insufficient evidence to support a claim of a hostile work environment.

On December 22, 2008, Hearing Officer Susan Winfield issued a Memorandum Opinion and Order in which she granted the AOC's motion for summary judgment on all three counts of the complaint. As an initial matter, the Hearing Officer concluded that, as to the retaliation counts of the complaint (Counts 1 & 2), the doctrine of collateral estoppel precluded Patterson from litigating the issue of his alleged protected activity (i.e., whether he was opposing or protesting discrimination by virtue of his allegations in *Patterson I*); according to the Hearing Officer, this precise issue had been litigated, and resolved against Patterson, in the *Patterson I* Board decision affirming the Hearing Officer's grant of summary judgment. The Hearing Officer further concluded that, even if Patterson were not collaterally estopped from relitigating this issue, he would not be able to establish that he had engaged in protected activity; that is, Patterson could not demonstrate that he had objectively and in good faith opposed discrimination in filing a complaint alleging that the AOC retaliated against him for complaining that the AOC might have engaged in discrimination if it had applied the promotion selection procedures to a member of a protected class. Accordingly, the Hearing Officer determined that summary judgment was proper as to Counts 1 and 2 of the complaint.

Further, the Hearing Officer concluded that summary judgment was appropriate as to Count 2 of the complaint for several additional reasons. Specifically, the Hearing Officer concluded that, as misallocation of funds, mismanagement, abuse, and fraud are not practices made unlawful by the CAA, Patterson's initiation of an IG investigation on those bases could not constitute protected activity under Section 207 of the CAA. Additionally, for similar reasons, the Hearing Officer concluded that the IG's suspension of his investigation of Patterson's claims of misallocation of funds, mismanagement, abuse, and fraud could not constitute an adverse action for purposes of a retaliation claim under the CAA.

Turning to Count 3 of the complaint, the Hearing Officer determined that, as Patterson could not establish a prima facie case of any discrimination, he necessarily could not establish a hostile work environment claim. The Hearing Officer further concluded that, in any event, the "grievance anomalies" about which Patterson complained could not reasonably be found to constitute the severe or pervasive discriminatory intimidation, ridicule, and insult required for a finding of a hostile work environment.

Finally, the Hearing Officer concluded that Patterson waived any claim he may have had with respect to the AOC's denial of access to the EEO/CP procedures – following the OOC's referral of his claims in *Patterson I* back to the AOC's internal grievance process pursuant to Rule 2.03(m) – because, upon receipt of the end-of-counseling notification from the OOC, he requested mediation, and did not register any objection to the AOC's treatment of his claims under the Rule 2.03(m) process. In addition, according to the Hearing Officer, any claim that Patterson may have had regarding the AOC's denial of access to the EEO/CP process is time-barred, as the CAA requires an employee to file a request for counseling no later than 180 days after the date of the alleged violation. As Patterson was notified of the AOC's denial of access to the EEO/CP procedures on July 17, 2007, but did not file a request for counseling in the instant case until May 2, 2008, he is precluded from challenging that denial.

Patterson filed a Notice of Petition for Review on January 21, 2009 and, following an extension of time granted by the OOC, he filed a supporting brief on February 24, 2009. The AOC filed a timely Brief in Opposition to Patterson's Petition for Review on April 2, 2009.

II. Standard of Review

The Board's standard of review for appeals from a hearing officer's decision requires the Board to set aside a decision if it determines the decision to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with the law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. § 1406(c).

Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to summary judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Eastham v. U.S. Capitol Police Board*, 06-CP-41(RP)(Feb. 25, 2008). The Board reviews a hearing officer's grant of summary judgment *de novo. See Eastham.*

III. Analysis

The Board has considered the Hearing Officer's decision, the parties' briefs, and the record in this proceeding. For the reasons that follow, the Board affirms the Hearing Officer's grant of summary judgment in part, and reverses in part, and remands this case to the Hearing Officer for further proceedings consistent with this opinion.

A. Retaliation Claims

To establish a claim for retaliation under the CAA, an employee is required, under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), to demonstrate that: (1) he engaged in activity protected by Section 207(a) of the CAA; (2) the employing office took action against him that is "reasonably likely to deter" protected activity; and (3) a causal connection existed between the two. *See Duncan v. Office of the Architect of the Capitol*, 02-AC-59(RP)(Sept. 16, 2006), *aff'd*, 541 F.3d 1377 (Fed. Cir. 2008); *Britton v. Office of the Architect of the Capitol*, 02-AC-20(CV, RP)(May 23, 2005). If the employee so demonstrates, the employing office thereafter is required to rebut the presumption of retaliation by articulating a legitimate non-discriminatory reason for its actions. *See Britton.*

Section 207 of the CAA provides:

> It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter.

2 U.S.C. § 1317(a). As is apparent from its plain language, the anti-retaliation provision of the CAA – which is similar to the anti-retaliation provision of Title VII, *see* 42 U.S.C. § 2000e-3(a)[5] – prohibits an employing office from discriminating or retaliating against an employee because he has *opposed a practice made unlawful* by the CAA *or* because he has *initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a proceeding* under the CAA. That is, like its Title VII counterpart, Section 207 contains both an "opposition clause" and a "participation clause."[6]

[5] Section 2000e-3(a) provides, in relevant part: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." The Board recognizes a distinction between Title VII claims of retaliation and CAA Section 207 claims of retaliation and notes that Section 207(a) extends protection against retaliation for opposing any practice made unlawful by the CAA, not just those claims which arise under the CAA's Title VII provisions, and that Section 207(a) also expands the notion of retaliation to include intimidation. *Solomon v. Office of the Architect of the Capitol*, 02-AC-62(RP) (December 7, 2005); *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP)(May 23, 2005).

[6] *Accord Crawford v. Metropolitan Government of Nashville and Davidson, Tenn.*, 129 S. Ct. 846, 850 (2009) (recognizing existence of distinct "opposition" and "participation" clauses in anti-retaliation provision of Title VII).

As discussed above, the Hearing Officer concluded that Appellant cannot establish a claim for retaliation in this proceeding because he cannot demonstrate that he engaged in protected activity. According to the Hearing Officer, Appellant is collaterally estopped [7] from litigating whether he engaged in protected activity because the conduct on which he relies is, fundamentally, the same as the conduct that was deemed insufficient to constitute protected activity in *Patterson I*. Further, according to the Hearing Officer, even if Appellant were not collaterally estopped from litigating the issue, he could not demonstrate that he engaged in protected activity because, as in *Patterson I*, he would not be able to show that he was objectively in good faith opposing any discrimination when he alleged that the promotion selection process might have been discriminatory if it had been applied to members of a protected class.

We conclude that the Hearing Officer failed to properly recognize a distinction between the two separate (opposition and participation) clauses contained within Section 207 and/or misperceived the nature of the conduct on which Appellant relies in support of his retaliation claims in this proceeding. As both the complaint and Appellant's brief in this proceeding make plain, Appellant alleges that utilization of the OOC dispute-resolution process in *Patterson I*, i.e., his participation in OOC proceedings, constitutes protected activity pursuant to Section 207 of the CAA.[8] In this regard, Appellant alleges conduct that is manifestly distinct from the purported protected activity in *Patterson I*. Indeed, whereas Appellant's allegations in *Patterson I* were dependent upon the opposition clause of Section 207, his allegations in this proceeding implicate the participation clause. As such, it is evident that Appellant's allegations of protected activity in this case are not identical to those in *Patterson I*, nor were they actually litigated in that earlier proceeding. Under these circumstances, we find that, contrary to the Hearing Officer's conclusion, the doctrine of collateral estoppel does not serve as a bar to Appellant's litigation of the issue of his protected activity in this case.

Accordingly, we must consider whether the conduct alleged by Appellant -- i.e., his participation in counseling and mediation in the *Patterson I* OOC proceeding -- constitutes protected activity within the meaning of Section 207 of the CAA.

In accord with Appellee's contention, the Hearing Officer concluded that Appellant's participation in the *Patterson I* OOC proceedings cannot constitute protected activity because Appellant in those proceedings could not reasonably have believed that he was opposing any discrimination against a member of a protected class. In essence, the Hearing Officer implicitly concluded that an employee's participation in an OOC proceeding that does not state a

[7]The doctrine of collateral estoppel provides that a party may be precluded from litigating a particular issue when: (1) the issue is identical to one decided in an earlier proceeding; (2) the issue was actually litigated in the earlier case; (3) the resolution of the issue was essential to a final judgment in the prior proceeding; and (4) the party to be estopped had a full and fair opportunity to litigate the issue in the prior proceeding. *See Devlin v. Office of the Architect of the Capitol*, 03-AC-19(RP)(Sept. 29, 2004)(citing *Shell Petroleum, Inc. v. U.S.*, 319 F.3d 1334, 1338 (Fed. Cir. 2003), *aff'd*, 173 Fed. Appx. 826 (Fed Cir. 2006); *Kroeger v. United States Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988)).

[8] The complaint alleges that the AOC IG's suspension of the investigations into Patterson's complaints regarding the selection process and alleged mismanagement, fraud, and abuse was "based on Complainant's participation in federally protected activities in *Patterson I* pursuant to Section 401, Section 402 and Section 403 of the CAA and Section 2.03(m) of the Procedural Rules of the Office of Compliance." Complaint ¶ 26; *see also* Complaint ¶ 20.

cognizable claim for relief under the CAA does not constitute protected activity under the participation clause of Section 207. The Hearing Officer's conclusion in this regard thus requires the Board to consider the extent to which the merits of the proceeding in which an employee participates are relevant to the ultimate determination of whether or not the participatory conduct is protected and, more specifically, whether a covered employee's participation in an OOC proceeding that does not allege a cognizable claim under the CAA constitutes protected activity.

Interpretation of the Participation Clause of Section 207

We begin with an examination of the express language of the participation clause in Section 207, as it is well established that the first step in interpreting a statute is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)(citations omitted). In our judgment, the explicit language of the participation clause is not free from ambiguity regarding the issue before the Board: The provision does not directly address the extent to which the merits of the proceeding in which an employee participates are relevant to the determination of whether the participatory conduct is protected. Although the provision contains a qualifying clause – which limits protection to participation in "a hearing or other proceeding *under this chapter*" – this clause is subject to more than one reasonable interpretation. On one hand, this clause reasonably can be construed as implicitly requiring that the proceeding in which an employee participates raise a valid claim pursuant to one of the enumerated statutes that are specifically incorporated into the CAA, i.e., that the proceeding raise a facially cognizable claim of a violation of a substantive provision of the CAA. *Accord Slagle v. County of Clarion*, 435 F.3d 262, 268 (3d Cir. 2006)(holding that, for purposes of Title VII's anti-retaliation provision, a plaintiff must file a facially valid complaint alleging discrimination on the basis of race, color, sex, religion, or national origin to come within the protection of the participation clause, lest the phrase "under this subchapter" be rendered meaningless). Alternatively, this clause reasonably can be construed as providing protection for an employee's mere invocation or use of the statutorily-prescribed processes for seeking redress under the CAA (e.g., counseling, mediation, filing of a complaint), without regard to the substance of the claims for which redress is sought.[9] *Accord Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997)(holding that plaintiff's visit to EEO counselor – even assuming that she discussed "personal" concerns and did not allege discrimination – constituted protected activity for purposes of the participation clause of Title VII, as such conduct clearly constituted participation "in the machinery set up by Title VII"), *cert. denied*, 523 U.S. 1122 (1998).

As we conclude that the plain language of the participation clause of Section 207 is ambiguous, we must attempt to resolve that ambiguity and ascertain the appropriate interpretation of the provision. We are guided in this regard by both the purpose underlying the participation clause, and the broader context provided by the CAA as a whole. *See Robinson*, 519 U.S. at 345-46. As the federal courts have stated in the Title VII context, the primary purpose of the participation

[9] Indeed, as used in the participation clause of Section 207 of the CAA, the words "this chapter" refer to the CAA in its entirety, including those provisions of the statute that set forth the alternative dispute-resolution procedures of the Act (i.e., the remedial mechanisms). *See* note accompanying 2 U.S.C. § 1317.

clause is to "maintain unfettered access to [statutory] remedial mechanisms."[10] *Deravin v. Kerik*, 335 F.3d 195, 204 (2d Cir. 2003)(concluding that, consistent with its underlying purpose, the participation clause of Title VII protects an employee's act of testifying in his own defense during investigations of a female employee's sexual harassment charges against him). *See also Robinson*, 519 U.S. at 346 (similarly describing the purpose of anti-retaliation provisions in general); *Hashimoto*, 118 F.3d at 680 (stating that purpose of Title VII's participation clause is "to protect the employee who utilizes the tools provided by Congress to protect his rights"). Protection of employees' access to the remedial mechanisms through which they may seek redress for violations of the substantive rights afforded them by the CAA and other statutes is equally as important as the substantive rights themselves. Indeed, absent protection of an employee's efforts to enforce his substantive rights, such rights would be largely nominal.

In light of the underlying purpose of the participation clause of Section 207, we conclude that it is appropriate to broadly construe the scope of the clause. *Accord Britton v. Office of the Architect of the Capitol*, 02-AC-20(CV, RP)(May 23, 2005)(adopting broad interpretation of Section 207's prohibited employer conduct). More specifically, we conclude that protection under the participation clause of Section 207 of the CAA extends to participation in a hearing or proceeding under the CAA, without regard to the nature or merits of the claims advanced in that hearing or proceeding. Consequently, in assessing whether an employee has engaged in protected activity within the meaning of the participation clause, we will ordinarily decline to look behind the act of participation itself.[11] *Accord Hashimoto*, 118 F.3d at 680 (holding that District Court erred in looking behind the plaintiff's meeting with an EEO counselor to consider the substance of their discussions; concluding that, even if plaintiff did not allege discrimination but, rather, simply discussed "personal" concerns, her visit to the EEO counselor constituted protected activity); *Bell v. Gonzales*, 398 F. Supp.2d 78, 94-95 (D.D.C. 2005)(holding that plaintiff's consultation with EEO counselor to simply explore the issue of possible disability discrimination constituted protected activity pursuant to the participation clause of Title VII and the Rehabilitation Act).

A broad construction of the participation clause is more consistent with, and best effectuates, the provision's underlying purpose of protecting access to the remedial mechanisms provided by Congress in the CAA. Under a narrow construction of the participation clause, an employee who invokes the CAA's remedial processes in a mistaken belief as to the parameters of the Act's substantive protections would lose protection against potential retaliation from his employing office. Additionally, and perhaps more significantly, other employees who simply provide assistance, testify, or otherwise participate in a proceeding initiated by another employee – and

[10] Given the similar language of the participation clause of Section 207 of the CAA and the participation clause in Title VII, it is reasonable to infer that Congress sought to achieve nearly the same objectives through the two provisions.

[11] Although several courts have further stated that protection is not lost under the participation clause even if the contents of the underlying charge are malicious and defamatory, because there is no assertion in this case that Appellant's underlying claims were malicious or fraudulent, we need not reach the issue. *See Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1312 (6th Cir. 1989); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969), *but see Mattson v. Caterpiller, Inc.*, 359 F.3d 885, 890 (7th Cir. 2004)("*Pettway* does not persuade this Court that employees should receive Title VII protections for filing unreasonable charges in bad faith").

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who may lack knowledge of the particulars of the initiating employee's claims, and bear no responsibility for the employee's failure to state a facially cognizable claim under the CAA – could lawfully be subjected to reprisal for their actions under a narrow construction of the participation clause. In this regard, a narrow construction of the participation clause creates the potential for a chilling effect on employees' exercise of their statutory rights. Indeed, employees who become aware of a "lawful" act of retaliation taken by their employing office against a co-worker who availed himself of the OOC's processes – and who likely would be unaware of the precise nature of the allegations advanced by their co-worker in the OOC proceeding – presumably would be dissuaded from thereafter seeking redress for any potential violation of their rights under the CAA.[12] For these reasons, we are of the view that a broad construction of the participation clause more appropriately gives effect to the provision's purpose of ensuring unfettered access to the remedial mechanisms provided in the CAA.

Application of the Board's Interpretation of the Participation Clause to this Case

As discussed above, Appellant contends that his participation in the counseling and mediation processes in *Patterson I* constitutes protected activity pursuant to the participation clause of Section 207. We agree. The participation clause specifically prohibits an employing office from taking adverse action against an employee because he has "initiated proceedings" or participated "in any manner in a hearing or other proceeding." According to Section 402 of the CAA, an employee initiates a "proceeding" by requesting counseling with the OOC. [13] Therefore, in our view, it logically follows that an employee's participation in any phase of the compulsory dispute-resolution process that succeeds the request for counseling -- including counseling and mediation -- constitutes "participation in a proceeding." Applying this construction of Section 207 to the facts of this case, we find that Appellant "initiated proceedings" when he filed his request for counseling in *Patterson I*, and subsequently "participated in a proceeding" when he participated in counseling and mediation. Accordingly, we conclude that Appellant's actions constitute protected activity within the meaning of the participation clause of Section 207. Thus, we reverse the Hearing Officer's conclusion that Appellant is not able to establish the existence of protected activity for purposes of his retaliation claims (Counts 1 and 2 of the complaint) because he cannot show that he was objectively in good faith opposing any discrimination when he complained that the promotion selection process might have been discriminatory if it had been applied to members of a protected class (i.e., was engaging in protected *oppositional* activity).[14]

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[12] Even assuming that the employees were to be apprised of the fact that their co-worker's retaliation claim failed to allege a facially cognizable claim under the CAA, it is unlikely that they would appreciate such legal niceties and, thus, would continue to be deterred from availing themselves of the remedial mechanisms provided by the CAA.

[13] Section 402 provides, in relevant part: "To commence a proceeding, a covered employee alleging a violation of a law made applicable under part A of subchapter II of this chapter shall request counseling by the Office." 2 U.S.C. §1402(a); *see also* OOC Procedural Rule 2.03(a)("In order to initiate a proceeding under these rules, an employee shall file a written request for counseling with the Office . . . .").

[14] Although this case does not require an interpretation of the opposition clause of Section 207, we correct the Hearing Officer's decision to the extent that it suggests that a finding of protected oppositional activity requires proof that the employee at issue was protesting *actual discrimination.* As Appellant accurately notes, we have interpreted the opposition clause as requiring an employee to show only that he had a reasonable, good faith belief that the conduct he opposed was unlawful; the employee need not demonstrate that the conduct he opposed was *actually* unlawful. *See Patterson v. Office of the Architect of the Capitol*, 07-AC-31(RP)(April 21, 2009); *accord Butler v. Alabama Dept. of Transp.*, 536 F.3d 1209, 1213 (11th Cir. 2008)(interpreting Title VII); *Brannum v.*

Further, with respect specifically to Count 2 of the complaint (alleging retaliation based on the IG's suspension of his investigation regarding Appellant's allegations of misallocation of funds, mismanagement, abuse, and fraud), we disavow the Hearing Officer's additional conclusion that Appellant could not establish "a prima facie case for protected activity, inasmuch as an alleged misallocation of funds and fraud are not activities made unlawful under the CAA." In our judgment, the Hearing Officer misperceived the conduct on which Appellant relies as evidence of his protected activity. Appellant does not assert that his allegations of mismanagement, abuse, and fraud constituted protected activity. Rather, as explained above, Appellant relies on his participation in the *Patterson I* proceedings to establish the requisite protected activity. Accordingly, we reverse the Hearing Officer's conclusion that, for this additional reason, Appellant cannot establish the existence of protected activity for purposes of Count 2 of the complaint.

In addition to concluding that the retaliation claim in Count 2 of the complaint must fail because the conduct alleged by Appellant could not constitute protected activity, the Hearing Officer relatedly concluded that the claim must fail because the alleged *adverse action* – i.e., the IG's suspension of his investigation into Appellant's allegations of mismanagement, abuse, and fraud – "does not fall within the ambit of actions covered by the CAA." Contrary to the Hearing Officer's statement, however, an adverse action need only be conduct that is "reasonably likely to deter a charging party or others from engaging in protected activity." *Britton v. Office of the Architect of the Capitol*, 02-AC-20(CV, RP)(May 23, 2005). Accordingly, we reverse the Hearing Officer's conclusion that Appellant cannot establish the existence of an adverse action for purposes of Count 2 of the complaint. In so doing, however, we emphasize that we are not deciding whether the conduct alleged, in fact, constitutes an adverse action. Indeed, as the AOC did not seek summary judgment on that basis, and the parties accordingly did not address the issue in their pleadings, we decline to make a determination on that issue at this stage of the proceedings.

Having concluded, contrary to the Hearing Officer, that Appellant established the existence of protected activity – the first requisite element of his retaliation claims – we reverse the Hearing Officer's dismissal of Counts 1 and 2 of the complaint and remand this case to the Hearing Officer for further proceedings to determine whether Appellant has established the other elements of his retaliation claims..

B. Hostile Work Environment Claim

In Count 3 of the complaint, Appellant alleges that the AOC created a hostile work environment by virtue of a pattern of retaliatory decisions, including its denial of access to the AOC EEO/CP procedures[15] and its suspension of the IG investigation into Appellant's allegations relating to

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Missouri Dept. of Corrections, 518 F.3d 542, 547 (8th Cir. 2008)(interpreting Title VII); *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006)(interpreting Title VII).

[15] As set forth above, after the OOC in *Patterson I* referred Appellant back to the AOC's internal process for potential resolution of his claim, Appellant contacted the AOC EEO/CP Division to request participation in those procedures. The AOC subsequently advised Appellant that he could not avail himself of the EEO/CP process because an AOC Order provides that employees may elect to seek resolution of a matter under either the AOC

improper selection procedures and mismanagement, abuse, and fraud. As an initial matter, the Hearing Officer concluded that any claim that Appellant may have had regarding the AOC's alleged retaliatory denial of access to its EEO/CP procedures was time-barred. Additionally, she concluded that Appellant had waived any claim in that regard because, upon receipt of the end-of-counseling notification from the OOC, he requested mediation, and did not register any objection to the AOC's treatment of his claims under the Rule 2.03(m) process.[16] The Hearing Officer further concluded that, because Appellant could not establish any prima facie claim of discrimination or retaliation (because he could not establish the requisite protected activity), he necessarily would not be able to substantiate his claim of a hostile work environment. Finally, the Hearing Officer concluded that, in any event, "no reasonable juror could conclude on the undisputed facts presented under the totality of the circumstances, that the few grievance anomalies" that Appellant cited constituted a hostile work environment. Accordingly, the Hearing Officer granted summary judgment with respect to the hostile work environment claim.

For the reasons that follow, we affirm the Hearing Officer's grant of summary judgment solely on the basis that, even assuming that Appellant could establish the retaliatory nature of each of the AOC actions on which he relies to support his hostile work environment claim, the combined effect of those actions could not establish that his workplace was "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21. [17]

To establish a claim of a hostile work environment, an employee is required to establish, prima facie, that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris*, 510 U.S. at 21 (citations and internal quotation marks

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grievance process or the EEO/CP procedures, but not both. Thus, as Appellant had already pursued his complaint through the AOC grievance process, AOC policy precluded his use of the EEO/CP process.

[16] Notably, the Hearing Officer does not reference these conclusions in, or otherwise attempt to link them to, her analysis of Appellant's hostile environment claim. Indeed, her discussion of the timeliness and waiver issues follows, and is independent of, her analysis of Appellant's hostile environment claim. However, as Appellant does not allege that the AOC's denial of access to the EEO/CP process constitutes an independent violation of the CAA, that conduct is relevant only insofar as Appellant alleges it to be a factor contributing to the hostile work environment.

[17] We note that at least one circuit has adopted a modified analytical framework for retaliatory hostile work environment claims, in light of the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006)(which defined an "adverse action" for purposes of a retaliation claim as an action that is "materially adverse"). The Third Circuit has held that a plaintiff may establish a retaliatory hostile work environment by demonstrating merely that a reasonable employee would have found the alleged retaliatory actions to be "materially adverse." *Hare v. Potter*, 220 Fed. Appx. 120, 131-32 (3d Cir. 2007)(citing *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006). However, we need not decide this issue and we will apply the *Harris* analysis under the facts of this case as neither party raised the issue and both parties argued that to support a retaliatory hostile work environment claim, the conduct must be severe or pervasive enough to create both an objectively and subjectively hostile or abusive work environment, *See Khan v. HIP Centralized Lab. Servs., Inc.*, 2007 WL 1011325 at *9 (E.D.N.Y. Mar. 30, 2007); *See also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000)(Because parties did not dispute the issue of whether the *McDonnell Douglas* framework applied to ADEA actions, Court assumed, *arguendo*, that *McDonnell Douglas* was applicable.); *McCullough v. Houston County Texas*, 2008 WL 4613697, n.7 (5th Cir. 2008)(Court applied analysis argued by parties in Title VII retaliation claim).

omitted). See also, *Eastham v. U.S. Capitol Police Board*, 05-CP-55(DA, RP)(May 30, 2007); *Solomon v. Office of the Architect of the Capitol*, 02-AC-62(RP)(Dec. 7, 2005) The conduct on which an employee relies to support a hostile work environment claim must be severe or pervasive enough to create both an objectively and subjectively hostile or abusive work environment. *Id.* The determination as to whether an environment is "hostile" or "abusive" requires an examination of the totality of the circumstances, including factors such as the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Id.* at 23.

As an initial matter, Appellant does not allege that he was subjected to any insults, physical threats, or humiliation as a result of his protected activity. Rather, in support of his hostile work environment claim, Appellant cites only two allegedly retaliatory discrete acts by the AOC: (1) the denial of access to the EEO/CP process, and (2) the IG's suspension of his investigation regarding Appellant's allegations that deviations from the AOC's normal selection procedures, and the allegedly questionable handling of Appellant's complaints about the selection process, evidenced gross mismanagement and fraud and abuse.[18] In our judgment, these two discrete actions, occurring nearly 4 months apart, do not constitute the sort of "pervasive" conduct that the Supreme Court described in *Harris*. *See, e.g., Akonji v. Unity Healthcare*, 517 F.Supp.2d 83, 98-99 (D.D.C. 2007)(concluding that, together with inappropriate comments, five discrete acts of alleged sexual harassment over a two-year period – four of which occurred within three months of one another – were insufficient to be deemed pervasive).

Further, the alleged severity of the AOC's actions is belied by the context in which those actions occurred. Thus, although the Appellant did not have the opportunity to pursue his complaints through the AOC's EEO/CP procedures, the record indicates that the AOC advised him that he could not avail himself of the EEO/CP process because AOC Order 771-2 provides that employees may elect to seek resolution of a matter under either AOC grievance process or the EEO/CP process, but not both. As Appellant already had pursued his complaints through various phases of the AOC grievance process, it was AOC policy, rather than any retaliatory conduct that precluded his use of the EEO/CP process. *See Richardson v. Commission on Human Rights & Opportunities*, 532 F.3d 114 (2d Cir. 2008); cert denied, 130 S. Ct. 56, 175 L. Ed. 2d 232 (U.S. 2009) (Employee's retaliation claims failed because she did not make a prima facie showing that either agreeing to or adhering to the election-of-remedies provision in collective bargaining agreement constituted adverse employment action.) Nor was Appellant completely foreclosed from seeking redress for his grievances. Indeed, Appellant already had pursued his complaints through various phases of the AOC grievance process, culminating in a final appeal to the Acting Architect. Moreover, Appellant was granted a meeting with the AOC IG, to whom he directed a request for an investigation into the alleged selection process violations and the AOC's handling of his complaints regarding the selection process. As noted above, although the IG ultimately suspended his investigation in that regard, the very fact that the IG merely suspended, rather than terminated, his investigation and indicated that he would be

[18] Although Appellant's complaint articulates two separate claims of retaliation, the claims are based on the same allegedly retaliatory adverse action: the IG's Nov. 7, 2007 suspension of an investigation into Appellant's complaints regarding the selection process. See fn. 3, supra. Further, there is no evidence that suggests the existence of more than one IG investigation.

conducting a subsequent investigation is at odds with a finding that the IG's conduct was "severe". Finally, Appellant did not proffer any evidence establishing that the AOC's actions unreasonably interfered with his work performance.

Under these circumstances, we conclude that, even assuming that the AOC took the above-described actions in retaliation for Appellant's protected activity, the actions simply do not rise to the level of severity or pervasiveness necessary to establish an objectively and subjectively hostile or abusive work environment. *See Hussain v. Nicholson*, 435 F.3d 359, 366-67 (D.C. Cir.), cert. denied, 549 U.S. 993 (2006)(concluding that the work environment described by the plaintiff – which was characterized by, inter alia, retaliatory threats of termination, failure to address insubordination by other employees, and poor performance evaluations – was not ideal, but was not such that a reasonable jury could find it "abusive" under the standard articulated in *Harris*). For these reasons, we conclude that Appellant cannot establish that the AOC's actions constituted a hostile work environment, and we affirm the Hearing Officer's grant of summary judgment as to that count of the complaint.[19]

ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(e) of the Office's Procedural Rules, the Board affirms the Hearing Officer's grant of Summary Judgment with respect to the hostile work environment count of the complaint. However, the Board reverses the Hearing Officer's grant of Summary Judgment as to the retaliation counts of the complaint, and remands the matter for further proceedings consistent with this decision.

It is so ORDERED.

Issued, Washington, DC on June 23, 2010

[19] In light of our conclusion in this regard, we find it unnecessary to address the Hearing Officer's conclusions that Appellant's claim regarding the AOC's denial of access to the EEO/CP procedures was waived and time-barred.