Consolidated Docket Nos. 04-17365, 04-17458, 05-16961 & 05-16784

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID P. ADAM *et al.,*

Appellants/Plaintiffs,

v.

GAIL A. NORTON, SECRETARY,
U.S. DEPARTMENT OF THE INTERIOR,

Appellee/Defendant.

On Appeal from the United States District Court

For the Northern District of California

Case No. C 98-02094 CW

The Honorable CLAUDIA WILKEN, District Judge

APPELLANT'S OPENING BRIEF

Mary Dryovage
Katharina Arnhold
Law Offices of Mary Dryovage
600 Harrison Street, Suite 120
San Francisco, CA 94107
Telephone: (415) 593-0095
Fax: (415) 593-0096

Thomas W. Osborne

AARP Foundation Litigation
601 E. Street, N.W.
Washington, D.C. 20049
Telephone: (202) 434-2060
Fax: (202) 434-6424

Attorneys for Plaintiffs-Appellants

ORAL ARGUMENT REQUESTED

May 1, 2006

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES v

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES PRESENTED 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

A. APPELLANTS WERE ALL RIF'D ON OCTOBER 15, 1995. . . . 4

B. DIRECTOR EATON WAS HIRED TO IMPLEMENT THE "VISION REPORT" AND SOLVE THE PROBLEM OF AN AGING WORKFORCE. 5

C. THE RIF PROCESS TARGETED OLDER EMPLOYEES. 8

D. RIF RULES WERE CHANGED TO FAVOR YOUNGER EMPLOYEES. 11

E. DEFENDANT'S STATED JUSTIFICATION FOR THE RIF WAS SHORTAGE OF FUNDS AND REORGANIZATION. . 12

F. DOCUMENTS SHOWING THE MOTIVE FOR SELECTIONS WERE SHREDDED. 13

G. REASONABLE FEES AND COSTS WERE AWARDED TO THE ATTORNEYS FOR CROSS- PLAINTIFFS CALZIA AND WRUCKE WITHOUT OBJECTION 14

ARGUMENT 14

I. DESPITE THE DISTRICT COURT'S CONCLUSION

THAT THE RIF, WHICH ADVERSELY AFFECTED ALL APPELLANTS, WAS MOTIVATED BY AGE BIAS, IT ERRONEOUSLY REQUIRED EACH INDIVIDUAL APPELLANT TO PROVIDE DIRECT EVIDENCE OF DISCRIMINATION TO ESTABLISH LIABILITY UNDER THE ADEA. 14

A. STANDARD OF REVIEW. 14

B. THE DISTRICT COURT CONCLUDED THAT APPELLANTS PRESENTED DIRECT EVIDENCE OF AGE DISCRIMINATION. 15

II. THE DISTRICT COURT ERRED BY FAILING TO CONSIDER RELEVANT EVIDENCE OF PRETEXT, BASED ON THE GRANTING OF SUMMARY JUDGMENT ON THE "CIVIL SERVICE" CLAIMS. 20

A. STANDARD OF REVIEW 20

B. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT ON APPELLANTS' CIVIL SERVICE CLAIMS RESULTED IN RECORD REVIEW OF THE MSPB EVIDENCE, RATHER THAN THE PROPER *DE NOVO* REVIEW OF THE APPELLANTS' DISCRIMINATION CLAIMS. 21

1. Decision Makers Whom the Court Found to Harbor Age Based Discrimination Played a Direct Role in the RIF 24

2. Director Eaton Admitted He Was Hired to Change the USGS and Bring Younger People Into Leadership Positions. 25

3. Director Eaton met Weekly to Discuss RIF Plans with Dave Russ who had Principal Responsibility over the RIF as it Evolved 26

4. The Fact That Transition Team Member, Jill McCarthy, Who Co-authored its Age-Biased "Vision Report", Became RIF Coordinator for the Western Region and Coordinated all Aspects of the RIF Contradicts the District Court's Conclusion that Age-Based Animus Played No Role in the RIF 27

5. Director Eaton Hired a Chief Geologist who Voiced No Objection to Targeting Older Employees under the Planned RIF 29

6. Director Eaton Used Ageist Jokes and Posters to Convey How He Intended to Change the USGS 31

7. Cartoons Ridiculing Older Employees Were Used by the USGS And Approved by Management at the time of the RIF 32

III. THE DISTRICT COURT ERRED BY FAILING TO CONSIDER STATISTICAL EVIDENCE OF AGE DISCRIMINATION OFFERED TO ESTABLISH APPELLANTS' DISPARATE TREATMENT AND DISPARATE IMPACT CLAIMS. 33

A. STANDARD OF REVIEW 33

B. THE DISTRICT COURT FAILED TO EVALUATE PROPERLY STATISTICAL EVIDENCE IN SUPPORT OF APPELLANTS' DISPARATE TREATMENT AND ADVERSE IMPACT CLAIMS. 34

1. Statistical Evidence of Age Discrimination is Relevant to Prove Both Disparate Treatment and Disparate Impact Claims. 35

2. Overwhelming Evidence Established that Age Was A Factor in the RIF of Appellants. 36

3. The District Court's Order Dismissing Appellants' Disparate Impact Claims is Inconsistent with *Smith v. City of Jackson* 37

IV. THE DISTRICT COURT ERRED BY GRANTING THE MOTION FOR SUMMARY JUDGMENT OF APPELLANTS IYER AND KING RACE/NATIONAL ORIGIN AND RETALIATION CLAIMS WHEN THERE WERE DISPUTED ISSUES OF FACT. 39

A. STANDARD OF REVIEW 39

B. THE APPELLEE FAILED TO ESTABLISH THE ABSENCE OF DISPUTED ISSUES OF MATERIAL FACT REGARDING THE RACE/NATIONAL ORIGIN AND RETALIATION CLAIMS. 40

1. Appellants Presented Facts Supporting A *Prima Facie* Case of Race/National Origin Discrimination and Retaliation . . . 40

2. The District Court Erred in Ruling that Appellants Did Not Present Sufficient Evidence that the RIF Was a Pretext for Race/National Origin Discrimination and Retaliation. 41

V. THE ORDER ADOPTING THE SPECIAL MASTER'S RECOMMENDATION RE: AWARD OF FEES AND COSTS TO CROSS-PLAINTIFFS CANNOT BE CHALLENGED WHEN NO OBJECTIONS WERE FILED WITH THE DISTRICT COURT. . . . 43

A. STANDARD OF REVIEW 43

B. APPELLEE NORTON IS PRECLUDED FROM APPEALING THE ORDER ADOPTING THE SPECIAL MASTER'S RECOMMENDATIONS 44

CONCLUSION 47

STATEMENT OF RELATED CASES 48

CERTIFICATE OF COMPLIANCE 49

APPENDIX I - STATUS OF PLAINTIFFS ON OCTOBER 14, 1995

TABLE OF AUTHORITIES

CASES PAGE

Burlington N. R.R. Co. v. Dep't of Revenue, 934 F.2d 1064 (9th Cir. 1991) 3

Burrell v. Star Nursery, Inc., 170 F.3d 952 (9th Cir. 1999) 40

Celotex Corp. v. Catrett, 477 U.S 317 (1986) 39

Chuang v. Univ. of Cal. Davis, 225 F.3d 1115 (9th Cir. 2000) 39

Cobell v. Norton, 237 F. Supp. 2d 71 (2000), 240 F.3d 1081,
(DC Cir. 2001); 29 FRD 5 (DDC 2005) 43,45, 46

Cook v. Boorstin, 763 F.2d 1462, (DC Cir. 1985) 34

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) 17, 18, 19

DePascale v. Dep't of the Air Force, 59 M.S.P.R. 186 (1993) 23

Davis v. Califano, 613 F.2d 957 (DC Cir. 1979) 35

*E.E.O.C. v. Hacienda Hotel,*881 F.2d 1504 (9th Cir. 1989) 40

E.E.O.C. v. Recruit U.S.A., Inc., 939 F.2d 746 (9th Cir. 1991) 35

Enlow v. Salem-Keizer Yellow Cab. Co., 371 F.3d 645
(9th Cir. 2004) *cert. denied*, 125 S. Ct. 1837 (2005) 16, 19

Estades-Negroni v. Assoc. Corp. Of N. Am., 345 F.3d 25 (1st Cir. 2003) 18

Fang v. United States, 140 F.3d 1238 (9th Cir. 1992) 14, 33

Gen. Elec. v. Joiner, 522 U.S. 136 (1997) 43

Griffin v. Dep't of the Navy, 64 M.S.P.R. 561 (1994) 23

Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) 34

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 19

Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir. 2004) . . . 18

IBT v. United States, 431 U.S. 324 (1977) 34, 37

In re United States Dep't of Defense, 848 F.2d 232 (D.C. Cir. 1988) 34, 37

Jordan v. Clark, 847 F.2d 1368 (9th Cir. 1988) 40

Lagerstrom v. Mineta, 2006 U.S. Dist. LEXIS 1224 (D. Kan, Jan. 13, 2006) . . . 21

Lander v. Hodel, 48 Fair Empl. Prac. Cas. (BNA) 1250 (D.D.C. 1988) 40

Lockhart v. Westinghouse Credit Corp., 879 F.2d 43 (3d Cir. 1989) 30

Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1986) 39

Lyons v. England, Secretary of the Navy, 307 F.3d 1093
(9th Cir. 2002) 39

Maddox v. Univ. of Tennessee, 62 F.3d 843 (6th Cir. 1995) 40

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 17

Morales v. Merit Sys. Prot. Bd., 932 F. 2d 800 (9th Cir. 1991) 20

Pottenger v. Potlach Corp. 329 F.3d 740 (9th Cir. 2003) 35, 38

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 17, 18

Pullman- Standard v. Swint, 456 U.S. 273 (1982) 14

Rachid v. Jack in the Box, Inc., 376 F.3d. 305 (5th Cir. 2004) 18

Ruggles v. Cal. Polytechnic State Univ., 797 F.2d 782
(9th Cir. 1986) 40

Ryder v. Westinghouse Elec. Corp., 128 F.3d 128 (3d Cir. 1997) 30

Sanders v. Arneson Prod., Inc., 91 F.3d 1351 (9th Cir. 1996) 40

Schroeder v. Dep't of Transp.,
60 M.S.P.R. 566 (1994) 22

Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406
(9th Cir. 1996) 39

Sloan v. West, 140 F.3d 1255 (9th Cir. 1998) 20, 21

Smith v. City of Jackson, 544 U.S. 228 (2005) 35, 37, 38

Stone v. City & County of San Francisco, 968 F.2d 850 (9th Cir. 1992) . . . 44, 45

Teamsters v. *United States,* 431 U. S. 324, 335-336, n. 15 (1977) 37

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111(1985) 17

Troutt v. Colorado Western Ins. Co., 246 F.3d 1150, 1156 (9th Cir. 2001) 33

Walton v. McDonnell Douglas Corp., 167 F.3d 423 (9th Cir. 1999) 16

Warren v. City of Carlsbad, 58 F3d 439 (9th Cir. 1995) 39

Watson v. Fort Worth Bank and Trust,, 487 U. S. 977, at 994 (1988) 37

Western Airlines, Inc. v. Criswell, 472 U.S. 111, 122 (1985) 38

United States v. Female Juvenile (Wendy G.),
255 F.3d 761 (9th Cir. 2001) 14, 33

Yartzoff v. Thomas, 809 F.2d 1371 (9th Cir. 1987) 40

Yates v. Merit Sys. Protection Bd., 145 F.3d 1480 (Fed.Cir. 1998) 20

Zivkovic v. Southern Ca. Edison Co. , 302 F3d 1080 (9th Cir. 2002) 34

STATUTES AND REGULATIONS

28 U.S.C. §1291(2005) 1

28 U.S.C. §1331 (2005) 1

28 U.S.C. §1343 (2005) 1

Age Discrimination in Employment Act (ADEA),

29 U.S.C. §633(a) *et seq*. 1, 18, 21

29 U.S.C. 623(a). 21

Civil Service Reform Act of 1978, as amended,

5 U.S.C. § 1214(c) (1995) 20

5 U.S.C. § 7703(b)(1995) 1

5 U.S.C. § 7703(c)(1995) 20

Merit Systems Protection Board Regulations,

5 C.F.R. § 351.201(a)(1995) 21

5 C.F.R. §351.403(a)(1) (1995) 9

5 C.F.R. §351.501(a) (1995) 8

5 C.F.R. § 351.505 (1995) 13

5 C.F.R. §351.701(1995) 9

Federal Rules of Civil Procedure

Rule 53(e)(2006) 45

Rule 53(g)(2006) 43, 44, 45

Rule 55(a)(2)(2006) 43

Rule 56(c)(2006) 37

Federal Rules of Appellate Procedure

Rule 4(a)(3) 2

Title VII of the Civil Rights Act of 1964, as amended,

42 U.S.C. § 2000e-3(a) *et seq*. 1, 17, 18, 40

LEGISLATIVE HISTORY

Legislative History of Amendments to ADEA,

118 Conf. Rec. 7744 (1972) 22
119 Cong. Rec. 2648 (1973) 22

TREATISES, AND MISCELLANEOUS SOURCES

Elizabeth M. Heidbreder, National Council on Aging's Institute of Industrial Gerontology, "Cancelled Careers: the Impact of Reduction-in-force Policies on Middle-aged Federal Employees" III (Comm. Print 1972) 22

Keith R. Fentonmiller, "The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims", *American University Law Rev*., June 1998, p. 7 22

STATEMENT OF JURISDICTION

Plaintiffs-Appellants *David P. Adam, Lanford Adami, Bela Csejtey, Alice S. Davis, James L. Drinkwater, Arthur B. Ford, Arthur Grantz, Chi-Yu King, H. Mahadeva Iyer, Stephen L. Lewis, Allan Lindh, and A. Thomas Ovenshine,* were senior scientists employed by the U.S. Geological Survey Geologic Division of the U.S. Department of Interior until a reduction-in-force (RIF) conducted on October 15, 1995 abolished the jobs of 37% of the workforce in the Geologic Division. The District Court had subject matter jurisdiction over this employment discrimination action pursuant to 28 U.S.C. §1331 (federal question) and 28 U.S.C. §1343 (civil rights), Age Discrimination in Employment (hereafter "ADEA"), 29 U.S.C. 633(a), Title VII of the Civil Rights Act of 1964, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*., and the Civil Service Reform Act, 5 U.S.C. §7703(b), which authorized the District Court to review *de novo* "mixed case" decisions of the Merit Systems Protection Board.

This court has jurisdiction to hear the appeal pursuant to 28 U.S.C. §1291. Findings of Fact and Conclusions of Law were filed on June 22, 2004. ER at 01194 - 1245, Docket No. 351 (hereafter "Findings").[1] The District Court's final judgment was entered in favor of appellants James P. Calzia and Chester T. Wrucke and dismissed the claims of appellants *David P. Adam, Lanford Adami, Bela Csejtey, Alice S. Davis, James L. Drinkwater, Arthur B. Ford, Arthur Grantz, Chi-Yu King, H. Mahadeva Iyer, Stephen L. Lewis, Allan Lindh, and A.*

---

[1] Citations to the Excerpts of Record are referred to as "ER", followed by the page number and line numbers, and where appropriate, the docket number, and exhibit number. Citations to the MSPB Administrative Record, Docket No. 55, are referred to as "AR" and citations to the trial transcript, Docket Nos. 322-330, are referred to as "TR". The Findings of Fact and Conclusions of Law of the District Court issued on June 22, 2004, Docket No. 251, are designated as "Findings" and are found on pages 01194-01244 of the Excerpts of Record.

Thomas Ovenshine on September 30, 2004. Docket No. 363. Appellants appealed the judgment pursuant to 28 U.S.C. §1291. Appellants filed their notice of appeal on November 30, 2004. ER at 01285, Docket No. 379. Appellees filed a cross-appeal regarding the merits on December 9, 2004 and an appeal of the order adopting special master's recommendation re: plaintiffs' motion for attorneys' fees and costs. ER at 01287, Docket No. 385 and ER at 01405, Docket No. 411. Appellants filed a cross-appeal regarding the fee award on October 11, 2005. ER at 01407, Docket No. 413. The court *sua sponte* consolidated plaintiffs' appeal nos. 04-17365 and 05-16961 with defendant's appeal nos. 04-17458 and 05-16784 on November 3, 2005. The appeals are timely pursuant to Fed. R. of App. P. 4(a)(3).

STATEMENT OF THE ISSUES PRESENTED

The appeal raises the following issues:

1. Did the District Court commit error by concluding that although there was direct evidence that the RIF was motivated by age discrimination, appellant/ cross-appellants were required to provide additional direct evidence of age-based discriminatory bias, although the requirement was satisfied by Calzia and Wrucke ?

2. Did the District Court err by failing to provide *de novo* review to appellants' discrimination claims in granting summary judgment on the "Civil Service" claims and failing to consider circumstantial and pretext evidence?

3. Did the District Court err by failing to consider properly statistical evidence of age discrimination offered to establish Appellants' disparate treatment and disparate impact claims?

4. Did the District Court err in granting summary judgment on Dr. Iyer and Dr. King's race/national origin and retaliation claims?

5. Can the appellee/defendant challenge the District Court's order

adopting the special master's report and ordering payment of attorneys fees and costs, without having objected to the special master's report?

STATEMENT OF THE CASE

Appellants Adam et al. each filed a timely Merit Systems Protection Board ("MSPB") appeal on or about November 10, 1995.Their positions were among the approximately 550 positions (37% of the workforce in the Geologic Division) eliminated by the USGS on October 14, 1995. They exhausted their administrative remedies by participating in a protracted administrative hearing, which began on December 2, 1996. The record in the consolidated appeals was closed on November 14, 1997. The first final MSPB administrative decision (David P. Adam) was issued on March 20, 1998, and became final on April 24, 1998. Docket No. 55, ER at 00087. It provided for a right to sue within 30 days of the final decision.

Appellants filed a timely complaint in District Court on May 22, 1998. Docket No. 1. The government filed their answer on July 21, 1998. Docket No. 3. By order filed February 11, 1999, the District Court granted leave to amend the complaint. Docket No. 34. The First Amended Complaint was entered on February 11, 1999. ER at 00001-00025, Docket No. 35. The Answer to the First Amended Complaint was filed on March 3, 1999. ER at 00026- 00071, Docket No. 40. The MSPB Administrative Record was filed on May 7, 1999. Docket No. 55.

The District Court granted the government's motion for partial summary judgment on the civil service claims, on May 17, 2001 . ER at 00174-00207, Docket No. 131. The District Court granted in part and denied in part the government's second motion for summary judgment on the age discrimination claims on May 31, 2002. ER at 00214-00237, Docket No. 153. The District Court issued a third order, granting in part and denying in part Defendant's Motion for Summary Judgment, on June 5, 2003. ER at 001041-001044, Docket No. 277. A

bench trial was held from July 1, 2003 through July 9, 2003. ER at 01127-01192, Docket No. 322 - 330. On June 22, 2004, the court ordered supplemental briefing on damages for Cross-Appellants Calzia and Wrucke. Docket No. 350. Judgment was entered on September 30, 2004 for Cross-Appellants Calzia and Wrucke. Docket No. 363. The District Court appointed Sonya Smallets as special master on January 25, 2005. Docket No. 398. The special master's report and recommendation was filed on June 14, 2005. ER at 03187, Docket No. 403. Fees and costs were awarded to for Cross-Appellants Calzia and Wrucke on July 12, 2005. ER at 01402, Docket No. 407. No objections to the report were filed.

STATEMENT OF FACTS

The USGS Geologic Division conducted a reduction-in-force (hereafter "RIF") of 37% of its workforce on October 15, 1995 The fourteen named appellants/cross-appellants in this case were part of a group of 541 geologists who were separated from federal service or downgraded in this RIF in which 350 permanent employees and 191 non-permanent employees were separated and 119 employees were demoted and 124 were reassigned. ER at 00072, Docket No. 55, General RIF Information, US Geological Survey- Geologic Division [AR 18410]

A. APPELLANTS WERE RIF'D ON OCTOBER 15, 1995.

Appellants were each over 40 years old at the time of the RIF, were qualified for their positions, and suffered an adverse employment action as a result of the RIF. Appellants' job title/series/grade, tenure subgroup (all were full-time, all but Wrucke were non-veterans), date of birth, service computation date and adjusted service computation date, as of October 14, 1995, are shown in Appendix I. A complete record of each appellant's credentials, work history, discriminatory actions, and damages was before the District Court. ER at 1249-1258. Docket No. 55; Docket Nos. 205-223; 228-234. The MSPB administrative record and the trial record contains detailed facts concerning each appellant's claims.

B. DIRECTOR EATON WAS HIRED TO IMPLEMENT THE "VISION REPORT" AND SOLVE THE PROBLEM OF AN AGING WORKFORCE.

On November 15, 1993, the U.S. Geological Survey published a report entitled "The United States Geological Survey: A Vision for the 21st Century" [hereafter "Vision Report"], which was disseminated to virtually every USGS manager and employee. ER at 01075 - 01114, Pl. Ex. 7. This report "represent[s] the beginning of what must be a long-term commitment to change." Under the heading "Recruitment", the Report states:

> This discussion presupposes that a plan will be developed to allow for **the hiring of new, young workers**. Some segments of the USGS currently are suffering from an **aging, high-grade workforce** that has limited the organization's financial flexibility and restricted the influx of new ideas and talents. **An aging workforce is a critical problem** that must be addressed earnestly and creatively before any strategic recruitment plan can be implemented.

Id. p. 10. Subsequently, on March 15, 1994, Ben Morgan, the USGS Chief Geologist, wrote a memorandum to the USGS Director Gordon Eaton, which addressed the need of the Geologic Division to "reduce its workforce by approximately 380 people and salary costs of approximately $30 million by the end of Fiscal Year 1995." ER at 00663-00667, Memo from Ben Morgan Memo, dated March 15, 1994. Mr. Morgan stated that:

> At the completion of the window for early retirement, about January 15, 1995, a complete reassessment of RIF requirements should be made based on retirement figures. If at that time it is necessary to proceed, I am proposing that the RIF be spread geographically across the Division, and **that it be targeted for the professional/technical categories especially in the GS12-15 grades**.... Throughout the process, steps will have to be taken **to avoid a disparate impact** of a RIF on women and minorities, many of whom have been employed in recent years and would be vulnerable under current RIF regulations **because of lack of seniority.**

ER at 00666, Memo from Ben Morgan, dated March 15, 1994, p. 4 (Emphasis supplied). Notably absent from the memo is any mention of a disparate impact on older workers. Ben Morgan sent the Office Chiefs of the Geologic Division a memo re: formation of a RIF planning team, dated June 27, 1994, which stated:

> As part of the planning process the Director [Gordon Eaton] is asking for a second buyout period for this fall and early winter so that we can achieve a further reduction in staff.

ER at 00668.

From the beginning of his incumbency as Director of the U.S. Geological Survey in March 1994, Gordon Eaton let it be known in talks to employee assemblies and in private conversations that it was time for older employees of the Geologic Division to retire. Approximately 405 USGS employees accepted early retirement by March 1995. ER 00032:6-7, Answer to First Amended Complaint.

Defendant/Appellee stipulated that Dr. Eaton made a joke about getting rid of the dinosaurs during a speech he made on March 25, 1994, to the USGS scientists in Denver, Colorado:

> **The transition team**, as those of you who may have spoken with it, **was by and large of the next generation** behind Dallas [Peck] and me. A bright-eyed, eager, intensely intelligent, intensely concerned about the future. They fanned out at some stage in this process as small teams and they visited in a number of different places and along the way they heard some things from members of the Geologic Division which sounded to them like **intransigency** and an **unwillingness to change** even an unwillingness in fact to embrace it, and while that clearly is not true for the whole Geologic Division I would have to argue that some of the people that I know and love the most that are of **my generation** within the organization may have been the very ones that said the things that lead them to pose the question **"What is the difference between Jurassic Park and the Geologic Division in the Geological Survey?"** And you've probably heard the answer. The answer is **"One is an amusement park filled with dinosaurs and the other is a movie." So! Those of you in my**

generation in the Geologic Division, take that!"

(Emphasis supplied). Docket No. 321, Pl. Ex. 6 at 40, Director Eaton's March 25, 1994 speech. Dr. Eaton used the same dinosaur joke in speeches to USGS employees in in Reston VA on March 28, 1994. During this first visit to each of the three USGS Regions, Director Eaton repeated that it was time for older workers in the Division to retire. ER 01067, Docket No. 321, P. Exhibit 4, see e.g. P. Exhibits 5 and 6. In Menlo Park, CA, he did not tell the dinosaur joke. However, he described a poster of a bewildered-looking dinosaur given to him by Bill Normark, Assistant Chief Geologist for the Western Region, which was captioned: "Which is scarier, change or extinction". ER 01067, stipulated transcript of videotape of Eaton's March 23, 1994, Pl. Ex. 4 at 13; see also Docket No. 55, Eaton's testimony, page 70:10-15 [AR 13110].

Eaton interviewed Dr. David Scholl for the Chief Geologist position by Eaton in March 1995. ER at 01192-01193, Scholl, TR 1083. During this interview, Eaton told him that executing the RIF would be a prime responsibility of the Chief Geologist. ER at 00265-00268, Scholl declaration, p. 2-4. In his conversations with Eaton, Dr. Scholl discussed with Eaton his plans to target the higher grade (i.e. senior) people in the RIF and the serious institutional damage his plans would have on the vision of acquiring funding support from outside sources. ER 00266-00268; ER at 01192-01193.

Director Eaton's attitude that the older employees should leave the USGS is also documented in numerous private conversations. [2] Eaton asked Dr. Ovenshine

---

[2] When Eaton first met Dr. George Gryc, the Representative for the Western Region of the Geologic Division in 1994, Eaton told him that he thought it was time for someone younger to take on those duties and replaced him shortly thereafter with a younger geologist. ER 00260, Gryc Declaration, p. 2. On July 29, 1994, Director Gordon Eaton and George Plafker had a discussion about the plan to force employees to retire to free up money to hire younger people. ER at

to chair an *ad hoc* committee to figure out how to encourage the voluntary retirement of senior employees. ("I asked Tom Ovenshine to think about what we might do to make more attractive the possibility of retirements...") ER at 00801, Eaton, TR 826:13-15. See also, ER Ovenshine Declaration at 4:8-17. However, the RIF was planned because insufficient older employees took the buyouts.

On August 14, 1995, Dr. Grantz and Marsha Grantz were on their way into the USGS to pick up the Specific RIF Notice and were met by Dean Anderson, head of personnel for the Western Region of the USGS, and told that the reason for the RIF was "age". Grantz, TR 1338- 1940.[3]

C. THE RIF PROCESS TARGETED OLDER EMPLOYEES.

The RIF process used by the USGS in this case is governed by the federal RIF regulations. 5 C.F.R. Part 351. ER at 01208, Findings at 15. The process of selecting which employees to RIF began in late 1994, when all employees were asked to update their position descriptions. ER at 00669, Def. Ex. 1021, Memo from Acting Chief Geologist John Filson Re: Updating of Position Descriptions, dated March 9, 1995. ER at 01210, Findings at 17.[4]

The regulations required defendant to establish "competitive levels"

00254-256, Plafker Declaration, p.1-3. The declarations of Drrs. Gryc and Plafker were submitted in opposition to defendant's third motion for summary judgment.

[3] This testimony was corroborated by his wife, who worked with Mr. Anderson from 1987 to 1997. Declaration of Mrs. Grantz, ER at 01002-1004.

[4] Younger employees were coached to make their Position Description very narrow and specific, to avoid being displaced in the RIF, whereas many of the appellants were told to make their Position Description generic. For example, duties were taken out of Alice Davis' position description, in order to block her retreat to a position encumbered by a younger employee. The use of the minutiae of a scientist's current projects to restrict the CLCs to a single scientist was outcome determinative.

consisting of all positions which are "in the same grade (or occupation level) and classification series, and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that any agency may reassign the incumbent of one position to any of the other positions without undue interruption. 5 C.F.R. §351.403(a)(1) (1995). ER 01208, Findings at 15. The USGS created "unique competitive level codes" [5] to target specific positions for retention or elimination in Round I (the Competitive Level Process) and then used the position descriptions in Round II (the Bump and Retreat Process) to exclude the Appellants from other positions. ER 01211, Findings at 18.

5 C.F.R. §351.501(a) requires "competing employees shall be classified on a retention register on the basis of their tenure of employment, veteran preference, length of service, and performance." Employees who are released from their competitive level in a RIF may bump or retreat into another position. 5 C.F.R. §351.701. The Adjusted Service Computation Date (ASCD) is used to rank employees for bump or retreat purposes. With a bump, an employee in a higher ranked tenure group or subgroup can displaced someone in a lower tenure group or subgroup, if that employee is qualified to perform the job within a normal training period. [6] ER 01209, Findings at 16. With a retreat, an employee with an

---

[5] Defendant also devised a hair splitting use of the concept of "essentially identical" which violates existing federal law and regulations. The USGS instructed both Round I and Round II SMEs that the essential identicality of each positions was a "two-way street". If the PD of either the "retreator" or "retreatee" contained a single duty that was not in the comparison PD, it was determined to be not "essentially identical".

[6] For example, Dr. Chester Wrucke, (DOB 1927) who was a Veteran (Tenure Subgroup 1A) with an ASCD of 07/14/36 would have been at the top of the GS-14 Geologist 1350 RIF retention register, if one had been properly constructed. The Geologist Series 1350 with his specialty and subspecialty were all in competitive level "AA" prior to March 1995. Dr. Wrucke would have been

earlier ASCD can displace an employee who holds a job that the retreating employee previously held. Id.

However, as a result of this newly devised procedure used by defendant involving the creation of unique competitive level codes, the retention register for 97% (over 90%, according to defendant) of the scientist positions contained only one person in the competitive level. ER at 00034:15-18, Answer to First Amended Complaint. As a result, the staffing plans were mere lists of "unique" one-person competitive levels, which allowed specific individuals, rather than functions, to be selected for retention. PODs were created by McCarthy to circumvent the bump and retreat rights. (McCarthy TR 1471:18-23) PODs, or ad-hoc groupings of scientific sub-specialties, were used rather than the competitive level codes defined by the federal regulations; scientists were prevented from being considered for positions outside their "POD" but for which they were obviously qualified. For example, there was no POD for Marine work, so the positions which Marine Branch employees, such as Alice Davis, Art Grantz and Steven Lewis were entitled to be considered were spread over a number of PODs. McCarthy was in charge of those assignments and made sure that she was given the Project Chief work which Dr. Lewis was eligible to retreat to. Because this position was placed into a POD which Dr. Lewis was not assigned, she was able to block him from the position he would have retreated to had the process been done in accordance with the regulations. The government's statistical expert testified that he had never

---

the last to be reached for release had proper CLCs been used to group people with similar duties. Similarly, Art Ford, who was at the top of AA for GS-15 Geologist 1350 prior to the changes in early 1995, would have been the last employee to be released. Appellee argues that the Geologist 1350 positions were "unique", in spite of the long history of these Geologists performing the same tasks, using the same tools, co-authoring research papers and conducting field studies in many geographic locations together.

heard of a "POD" before this case. Palmer TR 546:4-9

The USGS modified the RIF regulations to prohibit or disallow "bumping" within the same tenure and subgroup. ER at 00034:15-18, Answer to First Amended Complaint. Newer USGS employees may have been RIF'd if bumping occurred within employee subgroups. *Id.* at 00031:2-3. Most of the employees who were RIF'd would not have been RIFd but for the unique CLCs because their adjusted service computation date (ASCD) was superior to "essentially identical" geologist positions that survived.

All employees in the Geologic Division in Menlo Park were invited to attend a Briefing on General Reduction in Force on March 23, 1995.John Filson, Acting Chief Geologist, Judy George and Sandy Sherman of the Office of Personnel were the speakers. ER at 01188-1189, Ramseyer, TR 894:11. A USGS flier that featured a Gary Larson cartoon that ridiculed older workers was on the walls that day at eight or nine USGS buildings in Menlo Park and at Deer Creek in Palo Alto, California, and was not removed by Cynthia Ramseyer, who worked in Normark's office. ER at 01115 P. Ex. 9, Larson Cartoon Flier. The flier featuring the Gary Larson cartoon was captioned "You gotta help me, Mom . . . This assignment is due tomorrow, and ***Gramps doesn't understand the new tricks***." The District Court held "[w]hile Ramseyer testified that she chose this particular cartoon because the RIF meant that 'everybody was having to learn something nobody knew anything about' and that it was not her intention to make fun of older employees, Ramseyer TR 893. The Court is skeptical of this explanation, given the cartoon's clear reference to older people." ER at 01207, Findings at 14:22-27.

D. RIF RULES WERE CHANGED TO FAVOR YOUNGER EMPLOYEES.

The policy for the reduction in force was set forth in a memo dated June 19,

1995 from Chief Geologist Patrick Leahy. ER 01116-01121, Def. Ex. 1033, Leahy Memo to Personnel Officer re: Ground Rules for Reduction in Force. Leahy states:

> Allowing bumping within subgroups would expand bumping rights for most Division employees. This would have both positive and negative impacts. A premium would be placed on seniority as a retention factor. For instance, Tenure Group IB employees could bump into positions for which they are qualified up to three grades lower than their present position and that are held by other Tenure Group IB employees with less service. Employees with least seniority would be most vulnerable to downgrading or separation. As a result, the remaining staff would include most of our ***highly experienced senior*** scientists, **but many of the younger, more recently trained staff would be lost.** The extended assignment rights would also result in an increase in the number of staff who would be bumped to lower-graded positions. . . .
> **The decision not to extend bumping rights to include within-subgroup bumping was made acknowledging that it denies senior staff an advantage that we could have granted them**.

(Emphasis supplied). *Id.* at 01120. Based on the anti-older worker statements made by the USGS upper management, the upcoming RIF was widely recognized as an opportunity to target older employees, including women, minority group members, and whistleblowers. "This organization was going to get **one chance to clean house** and this was the time to do it". (Emphasis supplied). ER at 0032:18-21, Answer to First Amended Complaint, referring to David Oppenheimer e-mail, August 15, 1995, p. 3.

E. DEFENDANT'S STATED JUSTIFICATION FOR THE RIF WAS SHORTAGE OF FUNDS AND REORGANIZATION.

Each of the plaintiffs was given a Specific RIF Notice, in mid-August 1995 which states "This reduction is necessitated solely due to shortage of funds and reorganization of the Geologic Division". E.g. Pl. Ex. 429, Specific RIF Notice

from Dean Anderson to James P. Calzia, dated August 11, 1995. The government's witnesses dodged questions regarding the nature of the reorganization. Despite the above-quoted language in the RIF notice, Eaton claimed that the RIF and the reorganization were completely unrelated. Eaton 829:19-830:1. Dick Poore admitted that he prepared a chart showing how the RIF and reorganization were to occur during the same March - June 1995 time period. See Plaintiffs Ex. 45. Leahy waffled on whether the reorganization was (or was not) related to the financial situation. Compare Leahy TR 164:23-165:2 with Leahy TR 185:2-6.

F. DOCUMENTS SHOWING THE MOTIVE FOR SELECTIONS WERE SHREDDED.

5 C.F.R. §351.505 (1995) provides that "each agency shall preserve intact all registers and records relating to an employee for at least one year from the date the employee is issued a specific notice." However, USGS personnel destroyed all of the notes taken during the Round I and Round II discussions by placing them in a shredder at the end of each day. ER 0037:3-4, 8-10, Answer to First Amended Complaint. Dean Anderson, head of the USGS Personnel Office in Palo Alto testified that he told the Subject Matter Experts (SME's) who were deciding who to RIF to leave their notes in the meeting rooms and that at the end of the day someone from the Personnel Office would collect and destroy them. ER at 00705-00707, Deposition of Dean Anderson, September 16, 1996. He modified his testimony at the MSPB hearing and testified that there were only "post-it" sticky notes which were put through the shredder. ER at 00708 - 00713, MSPB transcript, 211:3-212:24. This is contradicted by Randy Koski, one of the SMEs, who testified that the notes were on "lined tablet paper". ER at 06027-06028, MSPB transcript, 161:11-162:17. A memorandum by William Normark, then Assistant Chief Geologist for the Western Region and the ranking Geologic

Division Official, dated September 29, 1995, states that "informal notes" taken by SMEs during evaluation panels "were destroyed at the end of each day." Robert Tilling, who was a leader of the Round I SME Panel, testified that notes were collected and destroyed. Appellants tried to find out why bumps and retreats were denied to them, only to discover that the documents they needed to investigate the matter had been destroyed.

G. REASONABLE FEES AND COSTS WERE AWARDED TO THE ATTORNEYS FOR CROSS- PLAINTIFFS CALZIA AND WRUCKE WITHOUT OBJECTION.

On July 12, 2005, the District Court issued an order adopting the Special Master's Recommendation Re: Plaintiffs' Motion for Attorneys Fees and Costs, finding "[n]o objections to the report were filed". ER 01402, Docket No. 407. The Defendant was ordered to pay $427,250.46 in fees and $77,796.96 in expenses to attorney Mary Dryovage, on behalf of herself and her associates and $7,331.49 in fees and $8,905.98 in expenses to attorney Tom Osborne.

ARGUMENT

I. DESPITE THE DISTRICT COURT'S CONCLUSION THAT THE RIF, WHICH ADVERSELY AFFECTED ALL APPELLANTS, WAS MOTIVATED BY AGE BIAS, IT ERRONEOUSLY REQUIRED EACH INDIVIDUAL APPELLANT TO PROVIDE DIRECT EVIDENCE OF DISCRIMINATION TO ESTABLISH LIABILITY UNDER THE ADEA.

A. STANDARD OF REVIEW

The District Court's conclusions of law are reviewed under the *de novo* standards. *Fang v. United States*, 140 F.3d 1238, 1241 (9th Cir. 1992). Mixed questions of law and fact are generally reviewed *de novo*. *See United States v. Female Juvenile (Wendy G.),* 255 F.3d 761, 765 (9th Cir. 2001). A mixed question of law and fact occurs when the historical facts are established, the rule of law is

undisputed, and the issue is whether the facts satisfy the legal rule. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). The *de novo* standard applies to this case.

B. THE DISTRICT COURT FOUND THAT THE RIF WAS MOTIVATED BY AGE DISCRIMINATION.

In its Findings of Fact the District Court stated:

> "In 1993 . . . the USGS prepared for the appointment of a new Director by creating a Transition Team composed of employees of all Divisions of the USGS that was charged with preparing a report discussing the future of the USGS. [ER 01146, Docket No. 327] McCarthy TR 1443-45. That report, entitled 'A Vision for the 21st Century,' discussed the USGS's need to reorient itself from simply 'surveying the Nation's lands and assessing the quantity of mineral, energy, and water resources' to 'integrating analyses of the Earth's environment, hazards, and resources to assure sustained global health, welfare, and prosperity." [ER 01075, Docket No. 321, Pl. Exh. 7 at 2]

ER 01194-01196, Findings at 2-3. The Court went on to find that "in a section entitled 'Recruitment,' the Transition Team described the existence of an 'aging workforce' as a 'critical problem' faced by the USGS." In particular the Court quotes the Report:

> This discussion [on recruitment] presupposes that a plan will be developed to allow for the hiring of new, young workers. Some segments of the USGS currently are suffering from an aging, high-grade workforce that has limited the organization's financial flexibility and restricted the influx of new ideas and talents. An aging workforce is a critical problem that must be addressed earnestly and creatively before any strategic recruitment plan can be implemented." Pl. Ex. 7 at 10.

ER 01196, Findings, at 3. With regard to this section, the Court concluded:

> The Transition Team report thus expresses the USGS's legitimate

> concern that too many of its employees were highly experienced scientists and too few of its employees were less experienced scientists and technical support staff. **However, the Transition Team Report goes beyond this legitimate concern to explicitly express concern with the age of the USGS's workers.** Pl. Ex. At 10 **("[s]ome segments of the USGS currently are suffering from an aging, high-grade workforce"; "[a]n aging workforce is a critical problem"). Nor can the Transition Team's report's references to age be considered to be merely a proxy for experience, because the Transition Team report discusses age and experience as separate characteristics.** Pl. Ex. 7 at 10. ("a healthy distribution of age, grade, and skills"; "an aging, high-grade workforce"). **Thus the Transition Team's Report strongly suggests that many USGS managers and employees were aware that the USGS, and particularly the Geologic Division, had an aging workforce and believed that this had negative implications for the future of the USGS. Further, the Transition Team report was relied upon by USGS management in planning change**. Eaton TR 809.

(Emphasis supplied). ER 01196-01197, Findings at 3-4.

The importance of these findings and conclusions is two-fold. First, the evidence of age discrimination cited and relied on by the District Court fits the classic definition of direct evidence that this Court articulated in *Walton v. McDonnell Douglas Corp.*, 167 F. 3d 423 (9th Cir. 1999). In that case this Court stated that direct evidence is "evidence of conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged discriminatory attitude. . . sufficient to permit the fact finder to infer that that attitude was more likely than not a motivating factor in the employer's decision." *Id*. at 426. Surely the explicit statements cited by the District Court that "[s]ome segments of the USGS currently are suffering from an aging, high-grade workforce" and "[a]n aging workforce is a critical problem" come well within this definition.

The importance of the District Court's citation of direct evidence is that this Court has held that when direct evidence of age discrimination is established, the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) court does not apply. *Enlow v. Salem-Keizer Yellow Cab. Co., Inc.*, 371 F.3d 645, 650 (9th Cir. 2004), *aff'd in part and vacated in part*, 389 F.3d 802 (9th Cir. 2004), citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination."). Nevertheless, the District Court analyzed this case pursuant to *McDonnell Douglas* and concluded that since only Appellants Calzia and Wrucke had presented a *prima facie* case and additional direct evidence of age bias on the part of their branch chief, only those two appellants had established liability under the ADEA.

Second, although the District Court cited both legitimate and illegitimate motives of defendant for the RIF, the court failed to apply to these facts the mixed motives analysis prescribed by this Court in *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002), *aff'd sub. nom. Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Supreme Court affirmed this court's decision rejecting the analysis that many lower courts had applied to mixed motive cases based on what has been called Justice O'Connor's "controlling concurrence" in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). As this Court explained in *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002), *aff'd sub. nom. Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the *Price Waterhouse* plurality concluded that "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the

plaintiff's gender into consideration." In her concurring opinion in that case, Justice O'Connor stated that shifting the burden of persuasion to the defendant in this manner could be triggered only "by direct evidence that an illegitimate factor played substantial role in a particular employment decision." 490 U.S. at 275. Congress responded to the *Price Waterhouse* decision by amending Title VII in the Civil Rights Act of 1991to provide that a defendant could not avoid liability by proving the "same decision" defense, but could merely limit plaintiff's relief. 42 U.S.C. § 2000e-2(m). The ADEA was not similarly amended.

As pointed out in this Court's *Costa* decision, after *Price Waterhouse* and the 1991 Civil Rights Act, many courts cited Justice O'Connor's concurrence in requiring direct evidence of discrimination to invoke shifting the burden to the defendant and engaged in a lively debate as to the meaning of direct evidence. 299 F.3d at 849-851. Refusing to be drawn into this "quagmire," *id*. at 851, this Court in *Costa* concluded that it should "return to the language of [Title VII], which imposes no special requirement and does not reference 'direct evidence.'" 299 F. 3d at 853. This Court went on to hold that "the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial that a protected characteristic played 'a motivating factor.'" *Id*. The Supreme Court unanimously agreed, holding that "direct evidence is not required." *Desert Palace, Inc. v. Costa*, 539 U.S. at 92.

While this court has not addressed the question of whether the Supreme Court's *Desert Palace* analysis applies to ADEA, other courts have held that it does. In *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305 (5th Cir. 2004), the Fifth Circuit compared the statutory language of Title VII and the ADEA and concluded:

> Given that the language of the relevant provision of the ADEA is similarly silent as to the heightened direct

> evidence standard, and the presence of heightened pleading requirements in other statutes, we hold that direct evidence of discrimination is not necessary to receive a mixed-motives analysis for an ADEA claim.

376 F.3d at 311. *Accord Estades-Negroni v. Assoc. Corp. Of N. Am.*, 345 F.3d 25, 31 (1st Cir. 2003). Although the Fourth Circuit in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284-85 (4th Cir. 2004), assumed without deciding that *Desert Palace* does not apply to ADEA claims based on the absence from the ADEA of an explicit mixed motives provision like the one in Title VII, nevertheless given this Court's reasoning in *Costa* it should conclude that the mixed motives analysis applies to ADEA claims, such as those at issue in this case. Assuming that *Desert Palace* applies, even if this Court does not consider the statements cited by the District Court to be direct evidence, it is nevertheless almost overwhelming circumstantial evidence of discrimination that under *Desert Palace* triggers defendant's burden to prove same decision defense.

Additionally, as pointed out above, the District Court importantly found that (1) "the Transition Team's report's references to age [cannot] be considered to be merely a proxy for experience, because the Transition Team report discusses age and experience as separate characteristics" and (2) "the Transition Team report was relied upon by USGS management in planning change." In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993), the Supreme Court rejected reliance on proxies for age, such as pension status, even if that proxy is correlated with age, holding that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." Here, however, the District Court's findings compel the conclusion that appellants have satisfied the requirement of *Hazen Paper* that an employee must show that age "actually played a role in [the employer's decisionmaking] process and had a

determinative influence on the outcome." 507 U.S. at 610. Those findings also compel the conclusion that age was a "motivating factor" in the RIF decisions. Thus, based on those findings, defendant failed to comply with the ADEA because "[t]hat law requires the employer to ignore an employee's age." 507 U.S. at 612.

Although defendant has maintained that the RIF was based on financial and personnel considerations, as Judge Ferguson pointed out in this Court's *Enlow* decision, "[a]ntidiscrimination law would mean nothing if an employer could justify a facially discriminatory action by invoking its bottom line." 371 F.3d at 658 (Ferguson, Circuit Judge, concurring in part and dissenting in part).

II. THE DISTRICT COURT ERRED BY FAILING TO CONSIDER RELEVANT EVIDENCE OF PRETEXT, BASED ON THE GRANTING OF SUMMARY JUDGMENT ON THE "CIVIL SERVICE" CLAIMS.

A. STANDARD OF REVIEW

In deciding mixed motive cases, the District Court must review MSPB decisions on discrimination cases *de novo*. *See* 5 U.S.C. § 7703(c).[7] *Sloan v.*

---

[7] 5 U.S.C. §7703(c) of the Civil Service Reform Act provides:

[T]he court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be -
(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(2) obtained without procedures required by law, rule, or regulation having been followed; or
(3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial *de novo* by the reviewing court.

5 U.S.C. 1214 (c) provides for:

(1) Judicial review of any final order or decision of the Board

West, 140 F.3d 1255 (9th Cir. 1998) 140 F.3d at 1260; *Morales v. MSPB*, 932 F. 2d at 802. District Courts must review MSPB's determination of issues other than discrimination based on the administrative record, under a deferential standard of review. *See* 5 U.S.C. § 7703(c); *Yates v. Merit System Protection Board*, 145 F.3d 1480, 1482 (Fed. Cir. 1998); *Sloan,* 140 F.3d at 1260 & n.16.

B. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT ON APPELLANTS' CIVIL SERVICE CLAIMS RESULTED IN RECORD REVIEW OF THE MSPB EVIDENCE, RATHER THAN THE PROPER *DE NOVO* REVIEW OF THE APPELLANTS' DISCRIMINATION CLAIMS.

The District Court granted a summary judgment on appellants' appeal of the MSPB decisions on their civil service claims, which resulted in the failure of the court to review the evidence of discrimination presented to the MSPB *de novo.* ER 00174-00205, Docket No. 131, Order Granting Motion for Partial Summary Judgement, May 17, 2001. The District Court erred by treating this case not as a mixed motive case, but as a bifurcated case. By affirming the MSPB decision under a deferential standard of review, the District Court has compounded the errors of the MSPB. Consequently, the discriminating factors revealed by appellants' evidence that defendant/appellee violated the RIF regulations were never addressed, weighed or analyzed. Appellants never asserted that the Agency had merely indulged in procedural RIF irregularities or that their substantive rights were violated by mere misapplication of the RIF regulations. They claimed that

---

under this section may be obtained by any employee, former employee, or applicant for employment adversely affected by such order or decision.
(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under Sec. 7703(b).

the RIF was shown to be discriminatory from its inception and that the asserted justification was pretextual.[8]

Throughout his decision, the MSPB Administrative Judge Philip Arnaudo re-cast Appellants' claims and the Appellee's assertions into a 'substantive rights' mode and analysis. ER 00087-00124 (AR 17779-17816). In an introductory section of his initial decision, entitled "Appellate Procedures and **Limited Consolidated Processing** Based on Common Claims" (Emphasis added), the Administrative Judge acknowledged that Appellants' age discrimination issues were before him, stating "5) the agency engaged in prohibited personnel practices of discrimination" ER 00089. He also reiterated appellants' assertion that the

---

[8] 29 U.S.C. 633a, the section of the ADEA which applies to federal employees, has been held to be broader than Section 623(a), based on the legislative history. *Lagerstrom v. Mineta*, 2006 U.S. Dist. LEXIS 1224 (D. Kan, Jan. 13, 2006). Senator Bentsen recognized that facially neutral reduction-in-force programs had drastic consequences for older workers when he introduced Senate Bill 3318 to subject the federal, state and local governments to the requirements of the ADEA on March 9, 1972. As a result of recent government reductions in force ("RIF") orders issued by federal agencies at that time, older employees were "transferred repeatedly, denied their right to 'bump' employees with less experience, or subject to veiled hints that their usefulness [was] at an end." 118 Conf. Rec. 7744-5 (1972) (statement of Sen. Bentsen), discussed in Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 Am U. L. Rev. 1971, 1085 (1998). See also 119 Cong. Rec. 2648 (1972), citing a study completed Elizabeth M. Heidbreder of the National Council on Aging's Institute of Industrial Gerontology, entitled "*Cancelled Careers, the Impact of Reduction-in-Force Policies on Middle-Aged Federal Employees III"*. (Comm. Print 1972) Heidbreder found that agencies arbitrarily and artificially determined competitive areas and job assignments where senior employees could "bump" or "retreat" to during a RIF, resulting in an adverse impact on older federal workers. *Id*. at 1. ("while employees with considerable Federal service have job protection in that if their jobs are abolished they are supposed to be able to 'bump' other employees in similar jobs with less seniority or 'retreat' to a lesser graded position, there are always ways for overzealous supervisors to circumvent rules or harass subordinates.")

reason for "the RIF was to purge whistle blowers, to eliminate older scientists, veterans, women and people of color" ER 00088. The MSPB Administrative Judge also quoted the Agency's denials that it discriminated/ reprised against appellants. ER 00090. In spite of the fact that the issues were before him, he did not examine evidence of the decision-makers' ageist animus and did not weigh the ample direct and circumstantial evidence of Agency's discriminatory motives and actions. Instead, he ruled that the "the reasons for the RIF were bona fide" (ER 00090) and that there was a "bona fide reorganization" (AR 17790) with "bona fide positions"(ER 00099) and that the Agency had used a "good faith . . . process" (ER 00100).

The MSPB Administrative Judge erred in finding that this mixed motive case could be bifurcated. He relied on *Schroeder v. Dep't of Trans.*, 60 M.S.P.R. 566, 570-71 (1994), a case in which the RIF's shortage of funds reason was questioned under 5 C.F.R. §351.201(a) and the employee's substantive rights were violated by improper application of the RIF regulations. However, here Appellants argued that the RIF was a sham because the USGS's articulated reasons changed over time and were a pretext for age discrimination against older staff members. The MSPB decision ignored critical evidence about the discriminatory statements and actions by USGS Director Eaton. Additionally, despite certain arguably "facially neutral" procedures, there was wholesale elimination of fair consideration for bump and retreat rights.

The MSPB Administrative Judge failed to analyze the Agency's reorganization based on the discrimination claims. The MSPB Judge mistakenly relied on *DePascale v. Dep't of the Air Force,* 59 M.S.P.R. 186, 189 (1993) concerning a reorganization where the exact duties were re-distributed to others who were retained, was still considered to be a *bona fide* reorganization. Here, appellants claim that the reorganization and RIF redistributed the functions and

positions as a part of its age-biased discriminatory policy to eliminate older employees in favor of younger employees. For example, the staffing plans were not neutrally devised and the position descriptions readily identified the incumbents, thereby targeting older employees in the earliest stages of the reorganization.

Similarly, MSPB Administrative Judge mistakenly relied on *Griffin v. Dep't of the Navy*, 64 M.S.P.R. 561, 563 (1994), where a return of an employee from a temporary position to a permanent position was found to be proper classification for RIF bumping rights purposes. In this case, older scientists who had previously served as managers were being targeted and removed from consideration for "management positions". Again, the MSPB Administrative Judge analyzed only the procedural aspects of the issues, ignoring the common discrimination claims which encompassed the age-biased skew and impact of all of management's decisions in formulating the plans for the reorganization and RIF. By artificially bifurcating the issues, as the MSPB Administrative Judge did here, and then applying the wrong law, appellants were denied a consideration of their common discrimination claims.

1. <u>Decision Makers Whom the Court Found to Harbor Age Based Discriminatory Animus Played a Direct Role in the RIF</u>

The evidence contradicts the District Court's conclusion that Dr. Eaton and the committee that wrote the Transition Team Report did not play "any role" in deciding whether the Appellants would be separated during the RIF or were entitled to bump or retreat. ER at 01239, Findings at 46. Instead, unrefuted evidence established that Director Eaton and Transition Team Member McCarthy played major roles in the RIF structuring and in decisions affecting each of the appellants. Management carried out the RIF to achieve Director Eaton's stated discriminatory goal of solving the "critical problem" of USGS "aging workforce."

Director Eaton met with David Russ, who had principal RIF responsibility, on a weekly basis during the planning stages of the RIF. Jill McCarthy, a Transition Team Member who participated in writing the "Vision Report" which the District Court found to be direct evidence of "Division wide age-based discriminatory animus", became the RIF Coordinator for the Western Region. In her role as RIF Coordinator, liaison and contact person, McCarthy made decisions affecting all issues beginning with the creation of PODs and the bump and retreat rights which affected all RIF'd appellants.

2. Director Eaton Admitted He Was Hired to Change the USGS and Bring Younger People Into Leadership Positions.

Director Eaton testified that the Secretary of Interior wanted a Director of the USGS who "would effect change". ER 01166:9-14, Eaton, TR 790, ER 01178-01179, 813-814. He explained that Secretary Babbitt hired him to address "**an inadequate development of leadership among the young people** to move forward into positions of responsibility" by explaining "in order to assure a future for the organization, you have to develop new leadership and bring in people **that have new and different skills than the existing workforce**. (Emphasis added). ER 01179:5-20. Babbitt created the Transition Team to prepare a report for the new USGS Director. ER 01167:4-15; McCarthy, TR 1444. When he was first hired on March 15, 1994, Eaton was told about the Transition Team and given a copy of the "Vision Report" which he relied on in planning change. ER 01175, Eaton, TR 807. See also Eaton, TR 809:12-810:24. Babbitt had weekly meetings with Dr. Eaton. ER 01178, Eaton, TR 813-814.

Eaton met with the Transition Team after he was hired, and then immediately went to the three major USGS centers to gain support for the plan: Menlo Park, CA (March 23, 1994), Denver, CO (March 25, 1994) and headquarters in Reston, VA (March 28, 1994). *Id.* ER 01167, Eaton, TR 791:16-

20. Each speech is nearly identical, and included many concepts set forth in the "Vision Report". ER 01067, P. Trial Ex. 4 and Ex. 5 and 6. McCarthy testified that the Transition Team identified the inability to recruit employees as a problem, "especially [in] the Geologic Division." ER 01146, McCarthy TR 1448:16-18. When Director Eaton was asked at trial whether he agreed with the statement in the "Vision Report" that "an aging workforce is a critical problem that must be addressed earnestly and creatively before any strategic recruitment plan can be implemented" he explained:

> What they were referring to was the fact that people had been in place a long time. There were new people coming out of graduate schools with Ph.D's with new skills and new ideas. And they felt it was important to infuse the organization. We could have done that at a better time. But the budget for the Geologic Division was so prohibitive at that time of any new hiring that, in fact, it was wasn't occurring.

ER 01177, Eaton, TR 812:2-15. Eaton admitted that he authorized the RIF. ER 01165, Eaton, TR 785:12-15.

3. <u>Director Eaton met Weekly to Discuss RIF Plans with Dave Russ who had Principal Respsonsibility over the RIF as it Evolved,</u>

Although Eaton claimed he was not involved in the day-to-day implementation of the RIF and had no regular meetings with the Personnel Office or the RIF Coordinators, these statements are at odds with his testimony that he was hired to change the agency and bring younger people into leadership positions *Id.* and that he met weekly with Dave Russ, Associate Chief Geologist, to discuss and be updated on the RIF planning during the critical months of March to June 1995, when decisions were made on how the RIF should be structured and developed. ER 01180-01183, Eaton, TR 822: 6-11, 823:24-824:11, 835:21-836:9. As Associate Chief Geologist who had served under three Chief Geologists, Director Eaton explained that he discussed the RIF with Russ because Russ had

the "continuity" and "consequently had the principal responsibility [over the RIF] as this evolved." *Id.* Eaton, TR 835:21-836:9.

4. The Fact That Transition Team Member, Jill McCarthy, Who Co-authored its Age-Biased "Vision Report", Became RIF Coordinator for the Western Region and Coordinated all Aspects of the RIF Contradicts the District Court's Conclusion that Age-Based Animus Played No Role in the RIF

The Court concluded that the wide-spread age-based animus of the Geologic Division played no role in the RIF because the "committee that wrote the Transition Team report" was not involved in playing "any role in deciding whether the appellants" were affected by the RIF. ER 01194, Findings at 46. The Court, however, cites no evidence in support of this statement, and ignored all evidence before it when it reached this conclusion.

Unrefuted evidence established that Jill McCarthy, who was previously a member of the Transition Team and who co-authored the age-biased "Vision Report" was appointed as the RIF Coordinator for the Western Region, and developed the POD's for Menlo Park. ER 01114, P. Ex. 7, (authors of Report listed on last page); ER 01146-01161, McCarthy TR 1442:21-1443:1; 1443:22-25;1444:1-3. In her trial testimony, she stated that she developed the POD categories for Menlo Park, assigned the Western Region research scientists to POD's, and reviewed her decisions with Branch chiefs who knew the positions and the scientists who encumbered them. *Id.* McCarthy, TR 1453:19-1455:18; 1456:6-1457:23; 1466:19-1468:7. McCarthy also testified at trial, that she recommended individuals to be Subject Matter Experts ("SME") and she set up the training session that preceded the bump and retreat process. *Id.* McCarthy, TR 1452:20-25, 1454:3-1455:18. Importantly, she admitted that she was involved in overturning the only bump decision in the Western Region, when it affected her friend and co-worker. *Id.* McCarthy, TR 1477:6-1480:6.

Further, in her MSPB testimony, Jill McCarthy speaks about her participation in the Transition Team, her writing the Transition Team report, and the fact that the report was presented to "Gordie" Eaton, the new Director. ER 00076, McCarthy AR 5913-14. She recounts that she was then selected by Pat Leahy to be the Western Region RIF Coordinator in 1995. ER 0075, McCarthy AR 5905, and that she had the duties of drafting the new POD groupings by looking at each position description in Menlo Park. ER 0078, 0079, McCarthy AR 5925, 5928. She enumerates her extensive responsibility as RIF Coordinator:

> Initially I met with Bill Cannon and my counterparts from the other two regions to discuss the POD process as well as how we were going to deal with the SME panels. I did a lot of coordinating of pulling people together, calling meetings, and I – at the training session with the SME's and – branch chiefs, branch reps, I discussed the POD system and, obviously, I implemented the first part of that. And if questions arose really either from the employees who were – had concerns over aspects of the RIF, or through the people in the bump retreat process, I was the contact.

ER 00080-00081, McCarthy AR 5961-62.

She discussed POD assignments with the Branch Chiefs who gave her input because they were more knowledgeable about the actual jobs. ER 00081-00082, McCarthy AR 5962-63. She participated in overturning the only bumping action in the Division which was changed in Round II. ER 00083-00086, McCarthy AR 5968-69, 5972, 5977). Given the undisputed evidence of the importance and extensiveness of RIF Coordinator McCarthy's responsibilities, the District Court's conclusion that members of the Transition Team [i.e. McCarthy], who instilled an age-based discriminatory culture in the Division, played no role in the RIF decisions, is reversible error. This is at odds with the District Court findings of fact to the contrary that the Transition Team members' report stated that "many USGS managers and employees were aware that the USGS, and particularly the

Geologic Division, had an aging workforce and believed that this had negative implications for the future of the USGS." ER at 01196-01197, Findings at 3-4. The District Court concluded that the Division was permeated with age-biased discriminatory animus but held that this was a substantial factor in finding discrimination for only two of the fourteen. The Court cannot find, on the one hand, that the Division-wide animus was so pervasive that it found for two appellants, and then turn around and state that the same animus played no role with regard to the other 12 appellants who were in the same Division and were equally affected.

McCarthy, the same person who wrote the Transition Team's Report (the report found to be a substantial factor in showing discriminatory motive), was later appointed to implement and oversee the RIF and was the "contact" person for all aspects of the RIF including the "bump and retreat process." ER 0008–00081, McCarthy AR 5961-62. Thus, there is no support for the District Court's finding that Dr. Eaton and McCarthy did not play a critical role in the process affecting individuals.

5. <u>Director Eaton Hired a Chief Geologist who Voiced no Objection to Targeting Older Employees under the Planned RIF</u>

Director Eaton's denials of involvement in the RIF and the denials of RIF decision makers [9] of conscious consideration of age are unavailing. They are predictable self-serving statements, coming years later in the context of litigation.

---

[9] A full discussion of the illegal motives of the decision makers and ageist attitudes is not possible, given the space limitations. It is clear that it was in the self interest of the USGS managers, both young and old, to get with the program announced by Eaton in his All-Hands speech. Arthur Schultz, the former Associate Branch Chief under John Sutter, testified that Docket No. 326 none of the managers involved in the RIF or the SME were themselves RIF'd. Schultz, TR 1141:9-13.

Gordon Eaton invited David Scholl, who worked at the USGS from 1958 until he retired in 1995 to interview for the position as Chief Geologist in March 1995. ER 01192, Scholl TR 1083. During the interview, Scholl and Eaton discussed whether the RIF was really necessary. Eaton told him that he believed that they could go after the senior people. ER 01192- 01193, Scholl, TR 1084:-1085:4. During the interview, Scholl objected to Eaton's plan to go after senior people. *Id*. Patrick Leahy was also interviewed by Eaton in March 1995. ER 01187-01188, Leahy, TR 183:22-23; 184:7-9. During the interview, Eaton discussed the upcoming RIF with him as well. *Id.* Leahy, TR 184:10-15. There is no evidence that Leahy voiced concern about RIF'ing senior people. Scholl was rejected and Leahy was hired for the Chief Geologist position, a position that had the final responsibility over the RIF's structure and implementation. The preponderance of the evidence shows that Director Eaton hired Leahy as Chief Geologist with the purpose of overseeing the RIF, and rejected other candidates, namely David Scholl, who told Eaton that he had problems implementing a RIF that targeted older employees.

Because of Eaton's position, it was virtually impossible for lower management officials to ignore his comments and not be influenced by them. As already stated above "When a major company executive speaks, 'everybody listens' in the corporate hierarchy, and when an executive's comments prove to be disadvantageous to a company's subsequent litigation posture, it can not compartmentalize this executive as if he had nothing more to do with company policy than the janitor or watchman." *Lockhart v. Westinghouse Credit Corp***.**, 879 F.2d 43, 54 (3d Cir. 1989). Moreover, "[i]f the [factfinder] were to believe that these comments accurately reflected a then existing managerial attitude toward older workers …, this evidence would make the existence of an improper motive for [appellants'] termination more probable." *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 133 (3d Cir. 1997).

6. Director Eaton Used Ageist Jokes and Posters to Convey How He Intended to Change the USGS

Director Eaton admitted that Bill Normark gave him a poster of a bewildered looking dinosaur, with the caption "Which is Scarier, Change or Extinction?" ER 01168:10-25, 001172:11-23, Eaton, TR 793, 800. He testified at trial that this poster "reflected very well what I wanted to say about the need for change." ER 01169:1-5, Eaton, TR 794. Eaton also testified at trial that when he told the dinosaur riddle during his Denver and Reston speeches, which he learned from the Transition Team, he was not referring to the older scientists at the USGS, but rather "I was referring to those people who had worked in the Geologic Division in the Geological Survey in the time I worked". ER 01169- 01170, 01173, Eaton, TR 794:17-795:2-9, 802:21-25). Eaton, who was 66 years old at the time, shook his finger at the audience and said "so those of you in my generation, take that." ER 01173, Eaton, TR 802:9-10.

Eaton testified that he did not tell this dinosaur joke in Menlo Park because "I thought it was not appropriate" explaining that "the transition team was essentially making a criticism of Menlo Park." ER 01170, Eaton TR 795:10-16. Yet, when he told this joke to the Denver USGS employees, Eaton bragged, "it drew sustained laughter and applause." ER 01171, Eaton TR 796:1. See ER 01067-01071, Pl. Ex. 4, Transcription of Video of Eaton's Denver Speech given on March 25, 1994.

When the nearly-exact same speech was given in Reston, VA, including the dinosaur joke, Mitchell Reynolds observed the reaction of the senior scientists who heard this remark:

> We almost simultaneously looked at one another, and eyebrows were raised. . . . a gentleman three persons down appeared to be very angry and upset. . . .After the meeting, everyone left – left the hall. There were clusters of – of the senior geologists in the hall, many of which

> were discussing – if we went among them, were discussing the words of the director and discussing them in shock, discussing them in dismay and discussing them in concern.

ER 01129-01130, Reynolds, TR 312:12-313:12. Even management officials took note of the age bias of the speech. Deputy Director Schultz testified about the impact of the Eaton speech on USGS employees who were "very concerned that they would lose their jobs". ER 001141-001143, Schultz, TR 1144:24-1145:5. His interpretation was that Eaton's talk expressed a desire to force out the senior scientists; "the old-fashioned Survey is you give a Ph.D his money, he goes and does his research, and he's left alone for twenty years to write one paper. This was going to change." *Id*. (Schultz 1146:9-19). Eaton's ageist attitudes show an age bias.

7. <u>Cartoons Ridiculing Older Employees Were Used by the USGS And Approved by Management at the Time of the RIF</u>

The invitation to attend the March 25, 1995 briefing regarding the upcoming RIF is also evidence that the implementation of the RIF was biased against older employees. ("You gotta help me, Mom. This assignment is due tomorrow and Gramps doesn't understand the new tricks.") ER 01188, Ramseyer, TR 894:18; ER 01115, P. Ex. 9, RIF flier with Larson cartoon.

The choice of this cartoon is consistent with the ageist stereotyping that the older employees deserve to be forced out because of their perceived reluctance to adjust to changes in the work place. There is no evidence that management ordered the cartoon removed. Ms. Ramsseyer admitted that her boss, Normark, who provided the dinosaur poster to Director Eaton, *supra*, would have seen the flier, and at no time was she told to take the fliers down, nor was she criticized for selecting the ageist Larson cartoon. ER 01189, Ramseyer, TR 895:6-17.

Eaton testified at the MSPB that the Larson flier was offensive, but he also

testified at trial that he would **not** have taken steps to have the Cartoon removed. "All sorts of humor appeared on bulletin boards on – in all three major centers, all intended as humor." ER 00678-702, Eaton MSPB at 5-93; Eaton, TR at 804:7-18.

Reynolds testified there was a picture of a dinosaur stating "Eaton out for GS-14's, -15's"; there was a dramatic picture of an employee with a target on his back that quoted the Morgan memorandum re: targeting GS-12 to GS-15 grades. ER 01131, Reynolds, TR 322:3-14, referring to ER 00666, Morgan memo.

The signals from the top of the agency governed the actions of the managers during the RIF process. Charles W. Naeser, Program Coordinator for the Office of Regional Geology prior to the RIF, had a direct role in creating the staffing plan for Regional Geology. ER 01134, Reynolds, TR 425:16-426:10. Naeser came into Mitchell Reynolds office and said "it's time that scientists with 30 years service and over – over 50 years old get the message that it's time to — time to leave." *Id.* ER 01135:7-10, Reynolds, TR 426. Reynolds was over 50 years of age at the time. *Id.* ER 01135 :12-13, Reynolds, TR 426, Schultz, Deputy Director in the Office of Regional Geology, told Reynolds that the RIF was directed toward the senior employees. ER 01137:23-01138:3-7, Reynolds, TR 428-429. In the fall of 1994, Nancy Milton, Eastern Regional Geologist told the Chief of Laboratory Facilities that "since he was well advanced in age that he might consider retiring rather than facing what was coming ahead." ER 01136:3-18, 01137:8-22, Reynolds, TR 427, 428.

III. THE DISTRICT COURT ERRED BY FAILING TO CONSIDER STATISTICAL EVIDENCE OF AGE DISCRIMINATION OFFERED TO ESTABLISH APPELLANTS' DISPARATE TREATMENT AND DISPARATE IMPACT CLAIMS.

A. STANDARD OF REVIEW

The District Court's findings of law are reviewed under the *de novo*

standards. *Fang*, 140 F.3d at 1241. Mixed questions of law and fact are generally reviewed *de novo*. *United States v. Female Juvenile (Wendy G.*), 255 F.3d at 765. The District Court's findings of fact following a bench trial are reviewed for clear error. *Troutt v. Colorado Western Ins. Co.*, 246 F.3d 1150, 1156 (9th Cir. 2001).

B. THE DISTRICT COURT FAILED TO EVALUATE PROPERLY STATISTICAL EVIDENCE IN SUPPORT OF APPELLANTS' DISPARATE TREATMENT AND ADVERSE IMPACT CLAIMS.

The District Court erred by failing to state its conclusions regarding the statistical evidence which supported Appellants' disparate impact and disparate treatment claims. ER at 01242-01243, Findings at 49-50. Both parties presented statistical experts at trial and the scope of admissible testimony was the subject of extensive briefing both before and after trial. See Docket Nos. 192, 193, 238, 240, 241, 242, 246, 247, 249, 251, 257, 258, 292, 293, 294, 331, 332, 333, 334, and 335.[10]

The trial judge's findings must resolve conflicting testimony. *Zivkovic v. Southern California Edison Co.* 302 F3d 1080 (9th Cir. 2002). The District Court erred by failing to resolve conflicting testimony between the appellants/plaintiffs' statistical expert, William Lepowsky and defendant/appellee's statistical expert, Dr. Palmer which was necessary to rule on plaintiffs' disparate impact claims. ER 01242-01243, pages 49-50. The District Court erred by failing to find that the statistical evidence shows a significant disparate impact on a protected class or

---

[10] The statistical evidence in this case was presented by Appellants' statistical expert Dr. Paul Switzer to the Administrative Judge at the MSPB. At trial, Appellants' Statistical Expert William Lepowsky was limited to supporting the opinions given by Dr. Switzer during the MSPB hearing and as a rebuttal witness. ER 01032-01037, Order Granting in Part and Denying in Part Defendant's Motion to Strike Plaintiffs' Designation of William L. Lepowsky as a Rebuttal Statistical Expert.

group. ER 01241, page 48.

Whether the statistics establish that the RIF was not affected by age is important evidence of intentional discrimination under the disparate treatment theory in addition to the disparate impact theory. In *Cook v. Boorstin,* 763 F.2d 1462, (D.C. Cir 1985), citing *IBT v. United States*, 431 U.S. 324, 336 (1977) and *Hazelwood Sch. Dist. v. . United States*, 433 U.S. 299 (1977), the D.C. Circuit found that the individual plaintiff with a disparate treatment claim could rely on evidence of employer-wide discrimination tending to demonstrate a "pattern and practice" of racial discrimination. Furthermore, a disparate treatment plaintiff may employ statistics concerning the employment practices of defendant to rebut explanatory defenses as pretextual. *Id.* The District Court also erred by failing to make findings which explain the essential subsidiary facts necessary to support its conclusions, i.e. the effect of statistical evidence which supported Appellants' disparate treatment and pretext claims.

1. Statistical Evidence of Age Discrimination is Relevant to Prove Both Disparate Treatment and Disparate Impact Claims.

The Supreme Court in *Smith v. City of Jackson*, 544 U.S. 288 (2005) held that the disparate impact theory was available under the ADEA, resolving the conflict in circuit law. However, Ninth Circuit law and many other Circuits, have long held that statistical evidence is admissible for the purpose of proving pretext and discriminatory intent. *E.E.O.C. v. Recruit U.S.A., Inc.*, 939 F.2d 746, 755 (9th Cir. 1991)("Evidence of past business practices may reveal that the unlawful conduct was part of a larger pattern of discrimination", and citing additional cases); *Pottenger v. Potlach Corp.*, 329 F.3d 740, 749 (9th Cir. 2003) (Statistical evidence is relevant to establish that a RIF was discriminatory under both the disparate impact theory and disparate treatment theory); *Davis v. Califano,* 613

F.2d 957, 962, n. 35 (D.C. Cir.,1979) ("to the extent that language in those decisions suggests that statistical proof might establish a *prima facie* case in a class action only, we reject that position.").

2. Overwhelming Statistical Evidence Established that Age Was A Factor in the RIF of Appellants.

During the MSPB hearing, Dr. Switzer presented statistical evidence showing that the chance that the RIF was not affected by age discrimination was very small (1/1,000,000 or one in one million). At the trial, Appellant's expert statistician, Mr. William Lepowsky, was permitted to present his analysis that Dr. Switzer's analysis was correct, as well as to present evidence criticizing appellee's expert's methodology and conclusions.[11]

Mr. Lepowsky and Dr. Switzer tested the null hypothesis that the age of an individual did not affect the probability that the individual would be RIF'd. Each analysis yielded a P-value that expressed the probability that the observed data (RIF results by age groups) could have arisen by chance alone from an unbiased process. For the nationwide permanent staff, 351 of 1853 employees were RIF'd, and the P-value for this analysis is 6:10,000. For the professional staff, nationwide, the figures were 209 out of 1199 RIF'd, and the P-value was 1,000,000. ER 001134, ER 01134, P. Exhibit 314, Switzer's Amended Sur-rebuttal Report and Docket No. 324, Lepowsky TR 477. In Menlo Park, 61 of the 335 permanent professional staff, were RIF'd, the P-value was 4:10,000. Docket No.

---

[11] Dr. Palmer, appellee's statistical expert, was only given data regarding employees in the Western Region, but not the workforce data for the Eastern and Central Region. Dr. Switzer was given the entire USGS workforce RIF data by Dr. Samaranayake, the government's rebuttal expert witness at the MSPB hearing. Although Dr. Palmer was provided a complete set of data following the trial and time to review the trial transcript, he declined the opportunity to provide addition testimony to rebut Mr. Lepowsky's analysis.

324, Lepowsky TR 475-476. [12] Lepowsky testified that the fact that the p-values are extremely small is strong evidence that the observed relationship between age and the probability of being RIF'd is not mere happenstance. Mr. Lepowsky translated the p-value of Dr. Switzer's calculations to 4.75 standard deviations, using a one-tailed test, (or 4.89 standard deviations, using a two-tailed test). Docket No. 321, Pl. Ex. 786. The District Court erred by failing to make findings regarding the overwhelming statistical evidence that age was a factor in the RIF.

3. <u>The District Court's Order Dismissing Appellants' Disparate Impact Claims is Inconsistent with *Smith v. City of Jackson*</u>

After judgment was issued, the Supreme Court decided *Smith v. City of Jackson*, *supra. Smith* found that the disparate impact theory was available under the ADEA and announced a different test than that used by the District Court in this case.

> [D]isparate impact [claims] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . . . (quoting *Teamsters* v. *United States,* 431 U. S. 324, 335-336, n. 15 (1977))". *Id*. It is, accordingly, in cases involving disparate impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was reasonable. Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion.

Id. at __ (p. 10 of slip op). However, the petitioners in *Smith* failed to "identify the

---

[12] P-values of less than 5% are accepted as demonstrating statistical significance. The court did not need to determine which test is more appropriate, because using either a one-tailed or two tailed test, the results demonstrate that age was a factor in the RIF, well over the threshold value of 1.96 standard deviations.

specific employment practices that are allegedly responsible for any observed statistical disparities . . ." (emphasis supplied) (quoting *Watson v. Fort Worth Bank and Trust,,* 487 U. S. 977, at 994 (1988)). *Id.* at __ (p. 12 of slip op).

In this case, the District Court found that "the USGS proffered evidence establishing that the Geologic Division needed to conduct a RIF in order to reduce its salary obligations." ER at 01243, Findings at 50**.** However, defendant's asserted justification "shortage of funds" was shown to be a pretext, as discussed, *supra.* The number of employees who took the three early retirement packages prior to March 1995 exceeded the numerical goals. Defendant's testified that Congress reduced the anticipated 20% cut in budget to 2-3% in June 1995.

The District Court correctly found that "[p]laintiffs identify the RIF as a whole as the specific employment practice that had a disparate impact on older workers. The Ninth Circuit has held that a RIF may be such a specific employment practice. *Pottenger,* at 749." ER 01242, Findings at 49. Under *Smith*, the District Court erred in requiring appellants to "identify any other course of action that Defendant could have taken that would have reduced the Geologic Division's salary obligations enough to generate the operating funds that it needed to meet its programmatic goals". ER 01241-01243, Findings at 48-50. In this case, plaintiffs did identify the specific employment practices that were responsible for the observed statistical disparity. Moreover, they established a discriminatory motive, as discussed above.

To establish the affirmative defense of a bona fide occupational qualification (BFOQ) defense, the employer is required to demonstrate that the business interest being served by the requirement is reasonably necessary to the essence of the employer's business. Second, the employer must demonstrate either 1) that all or substantially all members of the excluded class cannot satisfy the employer's legitimate business interest, or 2) that some members of the excluded

class cannot satisfy the business interest. *Western Airlines, Inc. v. Criswell*, 472 U.S. 111, 122 (1985). Defendant did not raise a BROQ defense in the court below.

IV. THE DISTRICT COURT ERRED BY GRANTING THE MOTION FOR SUMMARY JUDGMENT OF APPELLANTS IYER AND KING RACE/NATIONAL ORIGIN AND RETALIATION CLAIMS WHEN THERE WERE DISPUTED ISSUES OF FACT.

A. STANDARD OF REVIEW

An appeal from a District Court's grant of summary judgment is reviewed *de novo*. *Lyons v. England,* 307 F.3d at 1103 (9th Cir. 2002). Summary judgment is proper when the evidence, when viewed in the light most favorable to the nonmoving party, indicates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323. A genuine issue of material fact is raised when the employee points to facts showing the employer's explanation is not credible, from which a fact finder could infer a retaliatory or discriminatory motive despite defendant's denial. *Warren v. City of Carlsbad*, 58 F3d 439 (9th Cir. 1995)*,* 58 F.3d at 443; *Clements*, 69 F.3d at 334-335.

Generally, "the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment," *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1124 (9th Cir. 2000), because "the ultimate question is one that can only be resolved through a searching inquiry - one that is most appropriately conducted by a factfinder, upon a full record." *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996). Under *Lowe v. City of Monrovia,* 775 F.2d 998 (9th Cir. 1986) "when a plaintiff does not rely exclusively on the presumption but seeks to establish a prima facie case through the submission of action evidence, very little such

evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive ... may suffice to raise a question that can only be resolved by a factfinder." 775 F.3d at 1009 (9th Cir. 1986).

B. THE APPELLEE FAILED TO ESTABLISH THE ABSENCE OF DISPUTED ISSUES OF MATERIAL FACT REGARDING THE RACE/NATIONAL ORIGIN AND RETALIATION CLAIMS.

1. Appellants Presented Facts Supporting A *Prima Facie* Case of Race/National Origin Discrimination and Retaliation.

A *prima facie* of race/national origin discrimination under Title VII of the Civil Rights Act may be established without direct evidence, by showing that 1) Appellants are members of a protected group, based on their race/national origin, 2) they are qualified for their positions; 3) they suffered an adverse employment action; and 4) a causal connection existed between the appellants' race/national origin and the adverse action taken by the employer. *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1353 (9th Cir. 1996); *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 846 n.2 (6th Cir. 1995).

Appellants King and Iyer established a *prima facie* case of retaliation under the participation clause by showing that: (1) they were engaging in activity protected by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-3(a), 2) the employer was aware of their participation in the protected activity; (3) the employer took adverse employment action against them based on their activity; and 4) a causal connection existed between the appellants' protected activity and the adverse action taken by the employer. *E.E.O.C. v. Hacienda Hotel,* 881 F.2d 1504, 1513 (9th Cir. 1989) overruled on other grounds, *Burrell v. Star Nursery, Inc.*, 170 f.3d 952 (9th Cir. 1999); *Lander v. Hodel*, 48 Fair Empl Aprac. Cas. (BNA) 1259 (D. D.C. 1988) ; *Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir. 1988); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987); *Ruggles v. Cal.*

Polytechnic State Univ., 696 F.2d 782, 784 (9th Cir. 1986).

There is no dispute that Dr. H. Mahadeva Iyer, GS-15, who was born in India and Dr. Chi-Yu King, GS-14, who was born in China, both world-renown Geophysicists, established the first three prongs of the test for discrimination and retaliation.

2. The District Court Erred in Ruling that Appellants Did Not Present Sufficient Evidence that the RIF Was a Pretext for Race/National Origin Discrimination and Retaliation.

The District Court found that "[a]lthough Plaintiffs have established a prima facie case, they have not come forward with evidence to show that the RIF was a pretext for national origin discrimination. The evidence supporting Plaintiffs' age discrimination claims is not probative of national origin discrimination and Plaintiffs have not presented evidence from which a trier of fact could choose to disbelieve Defendant's legitimate, non-discriminatory explanation for their separation". ER 00235:6-10, Docket No. 153. Thus, the question is whether sufficient evidence to establish a disputed issue of fact regarding the motive for RIF'ing them was presented to the District Court.

Evidence that their age plus race/national origin and/or retaliation was a factor in the decision to RIF them was presented to the court below, including the entire administrative record. ER 00889-00911, ER 00937- 00964, Docket Nos. 231and 233 and ER 00235, Docket No. 153. There is no question that the USGS eliminated the positions of Dr. King and Dr. Iyer. They were replaced by employees who were not a member of their protected group. The government disputed whether justification for releasing Dr. King and Dr. Iyer was a pretext for age discrimination as well as race/national origin and retaliation.

Dr. Mooney, their Branch Chief and his superiors were aware of their protected activity on behalf of themselves and other minority scientists. They and

other minority scientists were treated differently than employees that were not born in other countries. Hostility to foreign-born scientists and discriminatory animus was displayed at the USGS; this impacted funding to proposed projects of minority scientists, including Dr. Iyer and Dr. King.

Dr. Iyer was repeatedly harassed by Chief of the Branch of Seismology Walter Mooney concerning various functions he performed as Assistant Branch Chief. Dr. Mooney issued derogatory memos and displayed anger and other unprofessional emotions to him and other staff. In another instance, Dr. Iyer was invited by the Indian government to serve on an advisory committee following the Latur earthquake of 1993 that killed 10,000 people in India. His participation had been approved by higher levels at the USGS, as the government of India had agreed in advance to pay all travel expenses. As a matter of courtesy, Dr. Iyer wrote to Walter Mooney to request permission to use official time to travel to India for an advisory committee meeting in December. Mooney denied him permission to go unless he could raise money for his salary! It turned out that Mooney wanted to pressure Dr. Iyer to raise money, because Mooney had not brought in money to cover the cost of Mooney's own salary. Dr. Mooney also made comments to other colleagues that Dr. Iyer should retire. On March 24, 1995, Mooney wrote a memo to Dr. Iyer containing threats that if he did not elect to retire, his failure to publish articles in the prior six years would be a factor in "other important administrative actions to be taken this year." The fact that Dr. Iyer had been performing administrative duties as the Assistant Branch Chief from 1992-1994 during that time period and that many articles were written but not yet published was ignored.

In November, 1994, Appellants Iyer and King raised complaints regarding what they perceived as racial bias in job assignments, funding and promotions of minority scientists. Subsequent to a further meeting on this topic, they made

further complaints regarding the fact that the proposal-review-panel system lacked minority representation, minority promotions were slow relative to that of majority scientists, and minority scientists were under-represented on the annual performance evaluation panels. National origin discrimination and their complaints about it were motivating factors in the decision to eliminate their positions and failure to reassign them to other jobs for which they were qualified by virtue of their educational and professional background and experience. Complaints about the discriminatory treatment of minority scientists in the Branch of Seismology made by Dr. King and Dr. Iyer were acknowledged to be valid; the duties in their position descriptions were on the Five Year Plan; yet they were cut out of the staffing plan and not considered for bump or retreat to positions for which they qualified.

The race/national origin and retaliation claims of Dr. King and Dr. Iyer should be remanded for trial, because Appellants presented sufficient evidence of discrimination to survive a motion for summary judgment.

V. THE ORDER ADOPTING THE SPECIAL MASTER'S RECOMMENDATION RE: AWARD OF FEES AND COSTS TO CROSS-PLAINTIFFS CANNOT BE CHALLENGED WHEN NO OBJECTIONS WERE FILED WITH THE DISTRICT COURT.

A. STANDARD OF REVIEW

Failure to timely object to a master's report limits or precludes appellate review. *Stone v. City & County of San Francisco*, 968 F2d 850, 858 (9th Cir. 1992). Fed. R. Civ. P. 53(g)(2) provides that either party may, within 20 days, file written objections to the report. In this case, there were no objections filed. If an objection had been raised, the District Court's decision to adopt the Special Master's Report would be reviewed under an abuse of discretion standard. *Gen. Elec. v. Joiner*, 522 U.S. 136, 139 (1997); *Cobell v. Norton*, 237 F. Supp. 2d 71,

83 (2000). In that case, the District Court must decide *de novo* all objections to findings of fact made or recommended by a special master. *See* Fed. R. Civ. P. 53(g)(2). The District Court's order appointing special master is reviewed under an abuse of discretion standard. *Burlington N. R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1071 (9th Cir. 1991) .

B. APPELLEE NORTON IS PRECLUDED FROM APPEALING THE ORDER ADOPTING THE SPECIAL MASTER'S RECOMMENDATIONS.

Fed.R.Civ.P. 53(a) authorizes the District Court to appoint a special master "to hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by (i) some exceptional condition, or (ii) the need to perform an accounting or resolve a difficult computation of damages." "Rule 53 itself clearly envisions considerable discretion in the District Court in deciding when an 'exceptional condition' exists . . . ." *In re United States Dep't of Defense*, 848 F.2d 232, 236 (D.C. Cir. 1988).

After obtaining full relief, cross-appellees Calzia and Wrucke filed a motion for reasonable attorneys fees and costs, which was supported by detailed time and billing records, as well as declarations from Mary Dryovage, Thomas Osborne, Edward Passman, Brad Yamauchi, Richard Pearl, Dolly M. Gee, and Marilyn Mika Spencer. Docket Nos. 367-375. The District Court appointed Sonya Smallets as special master to make recommendations regarding the plaintiffs motion for attorneys fees and costs. Docket No. 378, Order dated November 22, 2004.

Appellee opposed the appointment of Ms. Smallets as special master. Docket No. 380. Plaintiffs/Cross-Appellees filed a response, pointing out that Ms. Smallets had been the clerk to Judge Wilken until a few months prior to the appointment and prior to clerking for the District Court, she was a clerk for the

Court of Appeals for the Ninth Circuit. Docket No. 386. Thereafter, the court issued an order appointing her as special master. Docket No. 395, Order dated January 11, 2005. A declaration disclosing no grounds for disqualification was filed by Ms. Smallets on January 20, 2005. Docket No 397.

On June 14, 2005, the Report and Recommendation of the Special Master was filed, together with the declaration of Ms. Smallets. ER 03187. Defendant was ordered to pay $5,692.50 to Ms. Smallets in connection with her duties as special master. Docket No. 405. Nothing in the record suggests that the court abused its discretion in appointing Ms. Smallets as the special master over the attorney fee motion.

None of the parties filed objections to the Report and Recommendation of the Special Master within 20 days. On July 12, 2005, the District Court issued an order adopting the report. ER 01402, Docket No. 407. Appellee was ordered to pay $427,250.46 in fees and $77,796.96 in costs to Mary Dryovage and $7,331.49 in fees and $8,905.98 in costs to Thomas Osborne. Defendant-Appellee failed to file a motion for reconsideration or otherwise object to the award granting fees and costs to plaintiffs' counsel. Defendant-Appellee filed a notice of appeal on September 13, 2005. Docket No. 411, Notice of Appeal Appellate Docket No. 05-16784.

No docketing statement was filed by Defendant-Appellee and it is not known what issues they intend to raise in their appeal regarding the fees and costs. Cross-appellees filed a cross-appeal to preserve their rights to fully argue issues raised by Appellee. ER 01405, Docket No. 413, Notice of Cross-Appeal, Docket No. 05-16961.

The 2003 amendments to Fed. R. Civ. P. 53(g)(2)expanded the amount of time that either party may file written objections to the special masters report from

10 days to 20 days. In this case, there were no objections filed within 20 days. No motion for reconsideration or other objection was filed by Defendant-Appellee.

Appellate review of the special master's report is precluded due to the failure to timely object. *Stone v. City & County of San Francisco*, 968 F2d 850, 858 (9th Cir. 1992). In *Stone*, the Ninth Circuit held that when the special master's progress reports were filed in accordance with Rule 53(e)(1) of the Federal Rules of Civil Procedure, the special master submitted drafts of the reports to the parties so that they could correct any factual errors, and the defendant has never objected to any of these findings, defendant has waived its right to object.

Defendant-appellee should not be permitted to challenge the special masters' recommendations or the court's decision to adopt them. It should be noted that the Department of Interior has a history of scorched earth litigation tactics. In *Cobell v. Norton*, 29 FRD 5 (D.D.C. 2005), a class action involving serious technical defects in the Indian Trust Fund, Judge Royce C. Lamberth noted that "[a]t times, it seems that the parties, particularly Interior, lose sight of what this case is really about. The case is nearly a decade old, the docket sheet contains over 3000 entries, and the issues are such that the parties are engaged in perpetual, heated litigation on several fronts simultaneously. [Factual background summarized in *Cobell v. Norton*, 240 F.3d 1081, 1086-94 (D.C. Cir. 2001)]. He also noted that Norton challenged plaintiffs' Interim Fee Petition on every conceivable front. *Cobell v. Norton*, 2005 U.S. Dist. LEXIS 34605 (D.D.C. Dec. 19, 2005) Likewise, in that case, Norton also raised numerous issues concerning the appointment and duties of two special masters, all of which were found to be largely without merit. *Cobell v. Norton*, 237 F. Supp. 2d 71 (D.D.C. 2000). Norton should not be permitted to use the seemingly limitless litigation resources to advance appellate issues which were not raised before the District Court in this

case.

CONCLUSION

For all the foregoing reasons, this Court should reverse the District Court's findings and conclusions regarding the requirement that each appellant show direct evidence of age discrimination. The grant of summary judgment of Dr. Iyer and Dr. King's race/national origin and retaliation claims should be reversed and remanded for trial. The order adopting the special master's recommendations re: reasonable attorneys fees and costs should not be disturbed.

Dated: May 1, 2006

____

Mary Dryovage
Katharina Arnhold
Law Offices of Mary Dryovage

Dated: May 1, 2006

____

Thomas Osborne,
AARP Foundation Litigation

Attorneys for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

The undersigned counsel for the plaintiffs-appellants *David Adam, et al.* is aware that *Cochrane et al. v. Norton*, Case No. 03-16860, is related to the above-captioned case.

Dated: May 1, 2006

____

Mary Dryovage
Katharina Arnhold
Law Offices of Mary Dryovage

Dated: May 1, 2006

____

Thomas Osborne,
AARP Foundation Litigation

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B), F.R.A.P., the undersigned certifies that this brief complies with the attached order of Peter L. Shaw, Appellate Commissioner, filed April 3, 2006. It was produced in Word Perfect 11 and contains words and lines, exclusive of the cover, table of contents and authorities, corporate disclosures statement and certificates of compliance and service.

Dated: May 1, 2006

____

Mary Dryovage
Katharina Arnhold
Law Offices of Mary Dryovage

Dated: May 1, 2006

____

Thomas Osborne,
AARP Foundation Litigation

Attorneys for Plaintiffs-Appellants

Docket No. 04-17365

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID P. ADAM *et al.,*

Appellants/Plaintiffs,

v.

GAIL A. NORTON, SECRETARY,
U.S. DEPARTMENT OF THE INTERIOR,

Appellee/Defendant.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing APPELLANT'S OPENING BRIEF this 2nd day of May 2006 on counsel for the parties by depositing two copies in the U.S. Mail, first class postage prepaid, prior to 5:00 p.m. on May 2, 2006, addressed to them as follows:

Steven Saltiel
Assistant U.S Attorney
450 Golden Gate Avenue
10th Floor, Box 36055
San Francisco, CA 94102

Dated: May 2, 2006

____
Mary Dryovage
Attorney for Plaintiffs-Appellants

APPENDIX I - STATUS OF PLAINTIFFS ON OCTOBER 14, 1995

Plaintiff	Job Title	Tenure	DOB	SCD	ASCD
David Adam	Geologist 1350 GS 14	I-B	5/18/41	6/20/71	3/2/41
Lanford Adami	Chemist 1320 GS 12	I-B	2/9/35	4/21/61	4/22/49
James Calzia[13]	Geologist 1350 GS12	I-B	9/7/47	11/6/73	11/6/61
Bela Csetjey	Geologist 1350 GS14	I-B	1/6/34	7/13/51	5/13/51
Alice Davis	Geologist 1350 GS13	I-B	8/25/42	3/25/82	3/25/66
James Drinkwater	Geologist 1350 GS11	I-B	10/8/51	10/2/79	10/2/66
Arthur B. Ford	Geologist 1350 ST15	I-B	9/4/32	7/26/29	7/26/49
Arthur Grantz	Geologist 1350 ST16	I-B	11/09/27	7/26/97	7/26/29
H. M. Iyer	Geophysicist 1313 GS15	I-B	6/21/31	9/24/97	9/24/52
Chi-yu King	Geophysicist 1313 GS14	I-B	8/13/34	9/16/59	9/13/43
Steven D. Lewis	Geophysicist 1313 GS14	I-B	1/21/50	1/18/86	1/18/68
Allan G. Lindh	Geophysicist 1313 GS15	I-B	3/18/43	12/14/73	11/24/54
Dennis Mann[14]	Geophysicist 1313 GS12	I-B	4/25/50	12/06/75	12/06/61
Tom Ovenshine	Geologist 1350 GS15	I-B	3/25/36	3/8/65	3/8/49
Chester T. Wrucke	Geologist 1350 GS14	I-A	10/24/27	7/14/51	7/14/36

[13] The court held that Cross-Appellants Calzia and Wrucke established age discrimination. Their cases are on review in the cross-appeal.

[14] Dennis Mann settled his MSPB Appeal on March 5, 1997, and was retroactively reinstated to a lower graded GS-09 position, retroactive to the date of the RIF. He sought injunctive relief regarding on-going harassment and retaliation.