

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**FILED**

DAVID P. ADAM, et. al.,

JUN 22 2004

No. C 98-2094 CW

Plaintiffs,

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND

FINDINGS OF FACT  
AND CONCLUSIONS  
OF LAW

v.

GALE NORTON, Secretary of the United  
States Department of the Interior,

Defendant.

Plaintiffs David Adam, Lanford Adami, James Calzia, Bela Csejtey, Alicé Davis, James Drinkwater, Arthur Ford, Arthur Grantz, Hariharaiyer Mahadeva Iyer, Chi-Yu King, Stephen Lewis, Allan Lindh, Alexander Thomas Ovenshine, and Chester Wrucke were employed by the United States Department of Interior, in the Geologic Division of the United States Geological Survey (USGS). In 1995, the Geologic Division of the USGS conducted a reduction in force (RIF). As a result of the RIF, Plaintiffs Adam, Adami, Calzia, Csejtey, Davis, Drinkwater, Ford, Grantz, Iyer, King, Lewis, Ovenshine, and Wrucke were separated from the Survey and Plaintiff Lindh was demoted. Following proceedings before the Merit Systems Protection Board and several motions for summary judgment in this Court, this case proceeded to trial on all of these Plaintiffs' claims that the adverse actions taken against them were the result of discrimination based on their age and Plaintiff Iyer and King's claims that they were retaliated against. The Court now enters its findings of fact and conclusions of law with respect to these claims.

## FINDINGS OF FACT

## I. Structure of the Geologic Division

The Geologic Division of the USGS is responsible for conducting research in the earth sciences. Def. Ex. 7 at 5. At the time of the RIF, the Geologic Division of the USGS was organized into five offices. Each office was managed by an Office Chief and contained several branches, each managed by a Branch Chief. However, the work of the Geologic Division was funded through appropriations earmarked for ten different science programs. Filson TR 846. As relevant here, the Office of Energy and Marine Ecology was responsible for implementing the work funded by the National Marine and Coastal Geology Program; the Office of Regional Geology was responsible for implementing the work funded by the National Cooperative Geologic Mapping Program; the Office of Earthquakes, Volcanoes, and Engineering was responsible for implementing the work funded by the Earthquake Hazards Reduction Program; the Office of Mineral Resources was responsible for implementing the work funded by the National Mineral Resource Surveys Program; and all of the Offices shared responsibility for implementing the work funded by the Global Change and Climate History Program.

## II. The Transition Team

In 1993, following the change in presidential administration, from that of President George Bush to President William Clinton, 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

1 of the USGS. McCarthy TR 1443-45. That report, entitled "A Vision  
2 for the 21st Century," discussed the USGS's need to reorient itself  
3 from simply "surveying the Nation's lands and assessing the  
4 quantity of mineral, energy, and water resources" to conducting  
5 "integrated analyses of the Earth's environment, hazards, and  
6 resources to assure sustained global health, welfare, and  
7 prosperity." Pl. Ex. 7 at 2. In a section entitled "Recruitment,"  
8 the Transition Team described the existence of an "aging workforce"  
9 as a "critical problem" faced by the USGS. More specifically, the  
10 Transition Team report stated:

11 Recruitment follows from staffing requirements that are  
12 consistent with the Bureau staffing plan. Well planned  
13 and effective recruitment results in identification of  
14 the best and brightest candidates for placement in  
15 positions, whether recruited from within or outside the  
16 current workforce. Proper recruiting ensures the merging  
17 of new and vital talents required to maintain a healthy  
18 distribution of age, grade, and skills. Potential  
19 sources of high quality candidates should be identified  
20 before the need exists. Such proactive recruiting is  
21 critical when opportunities for hiring are minimal.

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

22 Pl. Ex. 7 at 10.

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

15 III. Appointment of Dr. Gordon Eaton

16 Dr. Gordon Eaton was appointed Director of the USGS in March,  
17 1994. Eaton TR 785. He was sixty-five years old at the time.  
18 Eaton TR 802. He was selected for this position by the then  
19 Secretary of the Department of the Interior, Bruce Babbitt. Eaton  
20 TR 788-91. Dr. Eaton reported that, during the interview process,  
21 Secretary Babbitt explained that he was looking for a Director who  
22 was willing and able to affect change within the USGS to make it  
23 more responsive to national needs and social concerns. Eaton TR  
24 790. According to Dr. Eaton, Secretary Babbitt also expressed his  
25 concern that there had been "inadequate development of leadership  
26 among the young people to move forward into positions of  
27 responsibility." Eaton TR 814.

## 1 IV. Dr. Eaton's Speeches

2 After his appointment in March, 1994, Dr. Eaton immediately  
3 went to the three major centers of the Geologic Division -- Menlo  
4 Park, Denver, and Reston -- to "address the troops." Eaton TR 791.  
5 He spoke on a number of topics, including the need for change.  
6 Eaton TR 792. In his speech in Menlo Park, on March 23, 1994, Dr.  
7 Eaton used a poster that was handed to him by Bill Normark, the  
8 Geologic Division's principal representative in Menlo Park. The  
9 poster depicted a bewildered-looking dinosaur captioned, "Which is  
10 scarier, change or extinction?" Pl. Ex. 4 at 13. Dr. Eaton also  
11 described the dinosaur poster in his speech in Denver on March 15,  
12 1994. Pl. Ex. 7 at 3. In his speech in Reston on March 28, 1994,  
13 Dr. Eaton repeated a riddle he said he heard from members of the  
14 Transition Team. The riddle asked, "What is the difference between  
15 Jurassic Park and the Geological Division of the Geologic Survey?"  
16 The answer was, "One is an amusement park filled with dinosaurs and  
17 the other is a movie." Pl. Ex. 6 at 40.

18 Dr. Eaton testified that he used the poster because it  
19 reflected what he wanted to say about the need for change within  
20 the organization: "that failure to change would ultimately lead to  
21 nonexistence." Eaton TR 793-94. Dr. Eaton similarly testified  
22 that he told the riddle because the Transition Team had found that  
23 there was resistance to even the idea of change. Eaton TR 795-96.  
24 Dr. Eaton testified that he did not intend to ridicule older  
25 scientists, Eaton TR 796, and that he used the dinosaur image to  
26 refer to "people of any age who were unresponsive to change," Eaton  
27 TR 819. Dr. Eaton's testimony that his use of dinosaur imagery to

1 describe those he considered resistant to change was not related to  
2 his perception regarding the age group of such people is belied by  
3 the text of his speeches. Dr. Eaton led up to the dinosaur joke by  
4 describing the Transition Team as composed of people of the  
5 "generation" behind him and by stating that most of the people that  
6 they had found who were resistant to the idea of change were of Dr.  
7 Eaton's "generation." Pl. Ex. 6 at 39-40. After telling the joke,  
8 Dr. Eaton concluded, "So those of you in my generation in the  
9 Geology Division, take that." Pl. Ex. 6 at 40. Further, in his  
10 speech in Denver, Dr. Eaton lamented the lack of diversity in age  
11 in the Geologic Division, particularly the lack of "bright new  
12 young active minds." Pl. Ex. 7 at 45. Dr. Eaton explicitly tied  
13 this concern to the rules governing RIFs, which he described as  
14 having the undesirable effect of depriving of their jobs those most  
15 recently hired, including women, minorities, and the young. Pl.  
16 Ex. 7 at 45-46. Therefore, the Court finds that Dr. Eaton  
17 associated resistance to change in the Geologic Division with older  
18 workers and the ability for change with the ability to hire new,  
19 younger workers.

20 V. Program Plans

21 On February 1, 1995, Dr. John Filson, who served as Acting  
22 Chief Geologist of the Geologic Division from November 1, 1994  
23 until March 31, 1995, Filson TR 840, sent a memo to the Geologic  
24 Division Office Chiefs instructing them to form Program Councils  
25 and to have the Program Councils develop program plans that  
26 identified the program's goals for the next five fiscal years,  
27 Filson TR 842-44; Def. Ex. 1005. Dr. Filson sent this memo because  
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1 he believed that the lack of long-term planning was a weakness of  
2 the Geologic Division, and that the Geologic Division needed a  
3 greater understanding of its long-term goals. Filson TR 843-44.

4 The program plan of the National Marine and Coastal Geology  
5 Program defined the purpose of the Program as "to describe marine  
6 and coastal geologic systems, to understand the fundamental  
7 processes that create, modify and maintain them, and to develop  
8 predictive models that provide understanding of natural systems,  
9 the effects of [people's] activities on them, and a capability to  
10 predict future change. Def. Ex. 1010 at AR 15628. The program  
11 plan identified four categories of research: (1) Environmental  
12 Quality and Preservation, or research that addresses the geologic  
13 issues which influence the long-term quality and preservation of  
14 marine environments; (2) Natural Hazards and Public Safety, or  
15 research conducted to better understand the frequency and  
16 distribution of catastrophic events, including coastal and  
17 nearshore erosion and offshore earthquakes and landslides, and the  
18 geologic processes affecting such events; (3) Natural Resources, or  
19 research aimed at providing an understanding of the distribution of  
20 geologic resources, including energy, marine mineral, and water  
21 resources, in the marine and coastal realms and of the processes  
22 that control the composition, origin, and availability of such  
23 resources; and (4) Information and Technology, or activities that  
24 provide reconnaissance sea-floor mapping as well as information  
25 management and dissemination services. Def. Ex. 1010 at AR 15624-  
26 25. The program plan reflected a recent shift in emphasis toward a  
27 greater focus on environmental and hazards studies and away from  
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1 resource studies, as well as a greater emphasis on investigations  
2 in shallower water, the upper one kilometer of the sea floor, and  
3 regions offshore of major metropolitan areas. Def. Ex. 1010 at AR  
4 15636.

5 The program plan of the National Cooperative Geologic Mapping  
6 Program identified the objective of the program as ensuring that  
7 the "nation will continue to have the geological maps it needs to  
8 protect the health of our citizens and promote economic growth."  
9 Def. Ex. 1012 at AR 15581. The program plan called for the Mapping  
10 Program to focus its efforts on approximately fifteen different  
11 priority mapping projects, chosen because they would help support  
12 the goals of one or more other Geologic Division programs. Def.  
13 Ex. 1012 at AR 15592. The program plan also called for the  
14 creation of a National Geochronology Support Team and a National  
15 Paleontology Support Team to provide geochronologic and  
16 paleontologic support to the mapping projects. Def. Ex. 1012 at  
17 15592. This represented a change from the past practice of the  
18 Mapping Program, which had been to fund approximately 150 projects  
19 each staffed with only one or two scientists. Def. Ex. 1012 at AR  
20 15592.

21 The program plan of the Earthquake Hazards Reduction Program  
22 defined the objective of the program as "provid[ing] a firm  
23 understanding of the likelihood and potential effects of moderate-  
24 to-large earthquakes in densely-populated regions" in order to  
25 assist in efforts to mitigate the effects on the social and  
26 economic well-being of the country. Def. Ex. 1014 at AR 15506.  
27 More specifically, the goals of the program were to "understand  
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1 what happens at the earthquake source by determining how faults  
 2 break and radiate seismic energy," "evaluate where future  
 3 earthquakes are likely to occur, how big they could be, how often  
 4 they may recur, and when the next earthquake may strike a  
 5 particular region," "predict what the effects of an earthquake in a  
 6 specific region will be in terms of faulting, ground motion,  
 7 landslides, sea waves (tsunamis), building losses, and other  
 8 physical changes," and "stimulate the use of research results,  
 9 including transferral of specific information to engineering  
 10 practitioners, land-use planners, State and local officials,  
 11 emergency preparedness agencies, industry and the general public in  
 12 formats that can be understood by the nonscientist." Def. Ex. 1014  
 13 at AR 15506. The program plan reflected an increased emphasis on  
 14 conducting hazard assessments, particularly in urban environments,  
 15 creating hazard maps that delineated regions of relative seismic  
 16 risk, and conducting real-time analysis of earthquake data. Weaver  
 17 TR 1154; Mooney TR 1405. The program plan de-emphasized short-term  
 18 earthquake prediction, the study of volcano-related seismic  
 19 activity, and the collection of data regarding strong ground  
 20 motion. Weaver TR 1154; Mooney TR 1405.

21 The program plan of the National Mineral Resource Surveys  
 22 Program defined the program's objective as providing "current,  
 23 accurate, unbiased information on the location, quality, and  
 24 quantity of mineral resources, and on the environmental  
 25 consequences of their development" in order to allow federal and  
 26 State agencies, industry, and the general public to "make informed  
 27 decisions concerning land stewardship, mitigation, and mineral  
 28

1 supply." Def. Ex. 1007 at AR 15818. The program plan identified  
2 four subprograms: (1) Assessments, involving research to "provide  
3 information on known mineral deposits, predict the probable  
4 location and quantity of undiscovered mineral deposits, and  
5 anticipate the kinds of environmental effects that could result  
6 from minerals development"; (2) Mitigation Studies, involving  
7 research to "provide information to assist governmental efforts to  
8 identify hazards on inactive or abandoned mine lands on public  
9 lands, to determine their impact on humans and the environment, and  
10 to formulate solutions to mitigate their impact"; (3) Resource  
11 Investigations, involving research to discover new mineral  
12 deposits, especially research into "new mineral-deposit concepts"  
13 and "new regions of mineral-resource potential"; and  
14 (4) Information and Technology Transfer, involving developing and  
15 distributing mineral resources databases and improving capabilities  
16 to interpret data through scientific visualization techniques.  
17 Def. Ex. 1007 at AR 15815-19. Under the program plan, although  
18 Assessments remained the core focus of the program, a decreasing  
19 percentage of effort would be devoted to them. Def. Ex. 1007 at AR  
20 15815. The percentage of effort devoted to Resource Investigations  
21 would decrease significantly, while the percentage of effort  
22 devoted to Information and Technology transfer would increase  
23 slightly and that devoted to Mitigation Studies would increase  
24 significantly. Def. Ex. 1007 at AR 15815.

25 The program plan of the Global Change and Climate History  
26 Program defined the objective of the program as contributing to the  
27 effort to identify and predict changes in the Earth's climate that  
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1 are related to human activities. Def. Ex. 1011 at AR 15606. The  
2 program plan identified three areas of research, (1) Climate  
3 History, or "characterizing and understanding past and present  
4 natural variability of Earth's climate and environment," (2) Carbon  
5 Cycle, or "understanding past and current processes at the Earth's  
6 surface that affect or are affected by climate change, with  
7 emphasis on the carbon cycle," and (3) Regional Effects of Change,  
8 or "determining the current and potential effects of climatic and  
9 environmental changes on regions and systems that are especially  
10 sensitive to change." Def. Ex. 1011 at AR 15606, 15611. The  
11 program plan called for Climate History research to continue to be  
12 the focus of the program, but to receive a declining percentage of  
13 effort, while Carbon Cycle and Regional Effects research would  
14 receive an increasing percentage of effort. Def. Ex. 1011 at AR  
15 15611; Poore TR 243-44.

16 VI. Financial Constraints Affecting the Geologic Division

17 At the same time that the USGS as a whole was facing the  
18 challenge of changing its mission to be more responsive to current  
19 national needs, the Geologic Division was facing the additional  
20 challenge of limited financial resources. Russ TR 973. As  
21 explained by Dr. David Russ, who was then the Associate Chief  
22 Geologist and responsible for overseeing the financial activities  
23 of the division, Russ TR 973, during the years proceeding the RIF,  
24 increases in funding for the science programs had not kept pace  
25 with increases in salary commitments, leading to declining  
26 availability of funds for operating expenses, or funds to purchase  
27 the equipment and supplies necessary to conduct the research that  
28

1 was the Geologic Division's mission, Russ TR 986-87; Filson TR 846-  
2 48. By fiscal year (FY) 1995, the percentage of science program  
3 funds available to pay operating expenses had fallen significantly  
4 below the twenty to twenty-five percent necessary for viable  
5 scientific programs, Russ TR 988.

6 More specifically, in the National Marine and Coastal Geology  
7 Program, appropriations increased from thirty million dollars in FY  
8 1991 to thirty-five million dollars in FY 1995. During that same  
9 period, salary costs increased from fifteen million dollars to  
10 twenty-one million dollars, while available operating funds  
11 decreased from 2.7 million dollars to 1.7 million dollars. Russ TR  
12 982-83. During that same period in the National Cooperative  
13 Geologic Mapping Program, overall appropriations increased from  
14 nineteen million dollars to twenty-two million dollars, but  
15 salaries increased from eleven million dollars to fifteen million  
16 dollars. This resulted in a decrease of available operating funds  
17 from two million dollars to six hundred seventy-two thousand  
18 dollars. Russ TR 982. In the Earthquake Hazards Reduction  
19 Program, overall appropriations increased from thirty-five million  
20 dollars in FY 1991 to just over forty-nine million for FY 1995,  
21 largely as a result of special funds appropriated in response to  
22 the Loma Prieta Earthquake. However, during that same period,  
23 salaries increased from 15.5 million dollars to twenty seven  
24 million dollars, and available operating funds decreased from 3.3  
25 million dollars to less than five hundred thousand dollars. Russ  
26 TR 976-77. In the National Mineral Resource Surveys Program,  
27 overall appropriations dropped from 46.4 million dollars in FY 1991

1 to 44.8 million dollars in FY 1995, and salary costs for the same  
2 period increased from 29 million dollars to 34 million dollars.  
3 Operating funds available for research in this program decreased  
4 from four million dollars to zero. Russ TR 983. In the Global  
5 Change and Climate History Program, the overall appropriations were  
6 about 9.7 million dollars in FY 1991, shifted modestly, but were  
7 again about 9.7 million in FY 1995. During that same period,  
8 however, salaries increased from 5.4 million dollars to more than  
9 6.8 million dollars. Russ TR 982.

10 VII. Decision to Conduct RIF

11 As early as 1994, then Chief Geologist Ben Morgan expressed  
12 his belief that the Geologic Division needed to conduct a RIF to  
13 reduce the Division's salary commitments. Eaton TR 809, 785; Def.  
14 Ex. 1002. However, before deciding to implement a RIF, the  
15 Geologic Division took other steps to attempt to reduce salary  
16 costs. Russ TR 987. The Geologic Division reduced its hiring, did  
17 not renew certain non-permanent appointments, and offered financial  
18 incentives for employees to end their employment. Russ TR 987;  
19 Filson TR 849. However, these measures did not reduce the Geologic  
20 Division's salary commitments enough to allow the Geologic Division  
21 to spend enough of its budget on operating expenses. Russ TR 988-  
22 91. Also, in early 1995, the Geologic Division was told by the  
23 House Appropriations Committee that it should expect to experience  
24 a significant reduction in its budget. Russ TR 989-90; Filson TR  
25 857. Therefore, in early spring 1995, Dr. Eaton made the decision  
26 to go forward with the RIF. Eaton TR 827, 831.

VIII. Announcement of Decision to Conduct RIF

In accordance with Dr. Eaton's decision to go forward with the RIF, on March 9, 1995, then Acting Chief Geologist Filson issued a "General Notice of Workforce Reduction" to "inform all Geologic Division employees that significant workforce reductions must be expected." Def. Ex. 1022. The Notice explained that the RIF was necessary because the funding for division programs had "remained practically constant since 1991" limiting the availability of operating funds necessary to "carry out program commitments." Def. Ex. 1022.

Filson conducted several briefings in Menlo Park, California on March 23 and March 24, 1995 in order to answer questions about the RIF. Prior to the scheduled briefings, Cynthia Ramseyer, secretary to the Assistant Chief Geologist for the Western Region, created and distributed a flyer notifying staff of the time, place, location, and topic of the meeting. Ramseyer TR 892; Pl. Ex. 9. Consistent with her practice of including a Gary Larson cartoon on such documents to catch people's attention, Ramseyer included a Gary Larson cartoon on this flyer. Ramseyer TR 892-93. The cartoon showed a dog saying to his mother, "You gotta help me, Mom . . . This assignment is due tomorrow, and Gramps doesn't understand the new tricks." Pl. Ex. 9. While 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.

1 However, there is no evidence that Ramseyer played any role in the  
2 RIF itself. Ramseyer TR 893.

3 IX. Regulations Governing the RIF

4 Because the USGS is a federal government agency, the Geologic  
5 Division's RIF was governed by federal regulations. 5 C.F.R. Part  
6 351. The regulations then applicable required the Geologic  
7 Division to establish "competitive levels" consisting of all  
8 positions which are "in the same grade (or occupation level) and  
9 classification series, and which are similar enough in duties,  
10 qualification requirements, pay schedules, and working conditions  
11 so that any agency may reassign the incumbent of one position to  
12 any of the other positions in the level without undue  
13 interruption." 5 C.F.R. § 351.403(a)(1) (1995, as modified by 60  
14 F.R. 3055); Palmer TR 503. "Undue interruption" is defined as "a  
15 degree of interruption that would prevent the completion of  
16 required work by the employee 90 days after the employee has been  
17 placed in a different position." 5 C.F.R. § 351.203 (1995, as  
18 modified by 60 F.R. 3055); Collins TR 959. "Competitive level  
19 determinations are based on each employee's official position, not  
20 the employee's personal qualifications." 5 C.F.R. § 351.403(a)(2)  
21 (1995, as modified by 60 F.R. 3055); Collins TR 924.

22 The then-applicable regulations required the Geologic Division  
23 to establish a retention register for each competitive level. 5  
24 C.F.R. § 351.404(a). The retention register lists the employees  
25 within the competitive level, ranked by retention factors. Palmer  
26 TR 503. The first retention factor is tenure group. Career  
27 employees are classified higher than career conditional employees  
28

1 who are classified higher than temporary and term employees.  
2 Palmer TR 503-04. The second factor is veteran status, in which  
3 veterans within each tenure group are classified higher than non-  
4 veterans within the same tenure group. Palmer TR 504. The third  
5 factor is the adjusted service computation date (ASCD), that is,  
6 years of service adjusted for the three most recent performance  
7 appraisals. The earlier the ASCD, the higher ranked the employee.  
8 Palmer TR 504. If a position within a competitive level is  
9 abolished, employees with the lowest retention standing are  
10 released first. 5 C.F.R. § 351.601 (1995) ("Each agency shall  
11 select competing employees for release from a competitive level  
12 under this part in the inverse order of retention standing,  
13 beginning with the employee with the lowest retention standing on  
14 the retention register.").

15 Employees who are released from their competitive level in a  
16 RIF may have an assignment right to displace another employee  
17 through a bump or retreat. Palmer TR 504-05; see 5 C.F.R.  
18 § 351.701 (1995, as modified by 60 F.R. 3055). With a bump, an  
19 employee in a higher ranked tenure group or subgroup can displace  
20 someone in a lower tenure group or subgroup, if that employee is  
21 qualified to perform the job within a normal training period. For  
22 example, a career veteran can displace a career non-veteran if the  
23 former is qualified. Palmer TR 504; Collins TR 928-929. With a  
24 retreat, an employee with an earlier ASCD can displace an employee  
25 in the same tenure group and subgroup who holds a job that the  
26 retreating employee previously held. Palmer TR 505; Collins TR  
27 932-933.



1 X. Revision of Employees' Position Descriptions and Personnel  
2 Records

3 In preparing for a RIF, an agency should allow employees an  
4 opportunity to review and update their personnel folders to ensure  
5 that the retention factors are correct. Collins TR 922-23. In  
6 addition, position descriptions should be updated and accurate  
7 because they will be used to determine competitive levels and  
8 assignment rights. Collins TR 922-23. In accordance with this, on  
9 March 9, 1995, Dr. Filson advised that employees should "begin now  
10 to update their personnel records to reflect all pertinent  
11 experience (paid and unpaid) not already documented in their  
12 official personnel folder." Def. Ex. 1022; Filson TR 850. On the  
13 same date, he also sent a memo to Division managers directing them  
14 to review and update the position descriptions to ensure that the  
15 position descriptions reflected the current duties of the employees  
16 under their supervision. Def. Ex. 1021; Filson TR 851.

17 XI. Revision of Competitive Levels Used in the RIF

18 In order to conduct a RIF, the Geologic Division needed to  
19 ensure that its positions were assigned to appropriate competitive  
20 levels. To address this issue, sometime prior to March, 1995, Dr.  
21 Filson asked John McGurk, the Division Personnel Officer, to  
22 prepare a paper on how competitive levels in the earth sciences  
23 should be established for the purposes of a RIF. Filson TR 853-54.  
24 McGurk concluded that the existing competitive level codes were  
25 probably not workable or effective in a RIF, and that new  
26 competitive levels should be developed based on position  
27 descriptions. Filson TR 854-55; Def. Ex. 0123. McGurk recommended

1 that each research position in the Division be placed in a separate  
2 competitive level. Filson TR 854-55. Dr. Filson rejected McGurk's  
3 recommendation because it did not seem credible that no scientist  
4 in the Division was qualified to perform the work of any other  
5 scientist. Filson TR 855. He instead recommended that competitive  
6 levels be determined based on management review and scientific  
7 certification. Filson TR 855-56; Def. Ex. 1023.

8 Based on Dr. Filson's recommendation, the Division established  
9 peer panels of subject matter experts (SMEs) to review the  
10 competitive levels assigned to research scientist and technical  
11 positions.<sup>1</sup> Tilling TR 1178. The peer panel reviewing competitive  
12 levels for the Western Region of the Geologic Division was  
13 comprised of seven research scientists, each with a different area  
14 of expertise. Tilling TR 1178-81. Using descriptors abstracted  
15 from position descriptions, or full position descriptions if it  
16 felt that the descriptors were not informative enough, the peer  
17 panel compared positions to determine if they were unique or  
18 interchangeable. Tilling TR 1181-83. In determining whether two  
19 positions were interchangeable, the peer panel considered whether a  
20 person could move into the other job, and vice versa, without undue  
21 interruption (i.e., without losing any speed on the project work in  
22 ninety days). Tilling TR 1182. The SMEs did not consider or  
23 discuss the ages of the incumbents of the positions. Tilling TR  
24 1183. After the peer panel's deliberations, only a few positions

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25  
26 <sup>1</sup> Peer panels have traditionally been used in the Geologic  
27 Division to evaluate a number of decisions, including project  
28 funding and promotions. Tilling TR 1180.

1 were placed in common competitive levels. Tilling TR 1189-90.  
2 This result was not surprising because research scientists,  
3 especially in the higher grades, define their own jobs and become  
4 experts in a given field or geologic province or technique, causing  
5 each research scientist to have a unique position description.  
6 Tilling TR 1190.

7 XII. Creation of Unpopulated Staffing Plans

8 During the spring of 1995, the Program Councils were  
9 instructed to develop staffing plans for their respective programs.  
10 Field TR 1052-53 (National Marine and Coastal Geology Program);  
11 Sutter TR 1095 (National Cooperative Geologic Mapping Program);  
12 Weaver TR 1151 (Earthquake Hazards Reduction Program); Worl AR  
13 35452 (National Mineral Resource Surveys Program); Poore TR 244  
14 (Global Change and Climate History Program). The Program Councils  
15 developed the staffing plans by using the program priorities as  
16 defined in the program plans to determine what positions were  
17 needed to conduct the prioritized projects. Field TR 1053-54  
18 (National Marine and Coastal Geology Program); Sutter TR 1096-97  
19 (National Cooperative Geologic Mapping Program); Weaver TR 155-56  
20 (Earthquake Hazards Reduction Program); Worl AR 35452-55 (National  
21 Mineral Resource Surveys Program); Poore TR 244 (Global Change and  
22 Climate History Program). The Program Councils were instructed to  
23 develop staffing plans that met certain fiscal constraints, with  
24 most of the Program Councils developing multiple versions of the  
25 staffing plans at differing funding levels. Field TR 1053  
26 (National Marine and Coastal Geology Program); Sutter TR 1098  
27 (National Cooperative Geologic Mapping Program); Weaver TR 1156  
28

(Earthquake Hazards Reduction Program); Worl AR 35452 (National Mineral Resource Surveys Program); Poore TR 244-45 (Global Change and Climate History Program). The staffing plans were unpopulated, in that they listed positions, not individuals. Field TR 1052-53 (National Marine and Coastal Geology Program); Sutter TR 1097 (National Cooperative Geologic Mapping Program); Weaver TR 1155 (Earthquake Hazards Reduction Program); Worl AR 35452-55 (National Mineral Resource Surveys Program); Poore TR 244-45 (Global Change and Climate History Program).

XIII. Review and Revision of Staffing Plans

In the late spring of 1995, then Chief Geologist Dr. P. Patrick Leahy appointed a committee to review the program plans and the staffing plans to ensure that the staffing plans were consistent with the program plans and that the staffing plans met the needs of the Geologic Division as a whole. Leahy TR 165-67. The committee was led by Tom Fouch, the Acting Regional Assistant Chief Geologist, and included approximately twenty members, the majority of whom were scientists. Leahy TR 165-66. The Fouch Committee reviewed the staffing plans and made recommendations, Def. Ex. 1016, which were presented to the Office Chiefs for evaluation and accommodation. Leahy TR 167-68. One of the concerns expressed by the Fouch Committee was that the Geologic Division had been too "program centric" in developing the staffing plans. Leahy TR 170. As a result, Dr. Leahy, the Office Chiefs, and a few others met at the Summerfield Suites hotel in May, 1995 to review the list of the positions that were slated to be abolished to see if those positions could be supported by multiple

1 programs and thus retained. Leahy TR 169-71. At this meeting,  
2 some positions were placed back on the staffing plans, in order to  
3 ensure that the staffing plans incorporated positions with needed  
4 capabilities. Leahy TR 170-72.

5 XIV. Creation of Populated Staffing Plans

6 Geologic Division managers then populated the staffing plans  
7 by comparing the positions listed on the unpopulated staffing plans  
8 with the position descriptions of the Geologic Division's  
9 employees. Field TR 1055-56 (National Marine and Coastal Geology  
10 Program); Sutter TR 1099 (National Cooperative Geologic Mapping  
11 Program); Weaver TR 1155-56 (Earthquake Hazards Reduction Program);  
12 Worl AR 35456-57 (National Mineral Resource Surveys Program); Poore  
13 TR 245-46 (Global Change and Climate History Program). There is no  
14 evidence that these managers discussed employees' ages in  
15 populating the staffing plans. Field TR 1056-57 (National Marine  
16 and Coastal Geology Program); Sutter TR 1100 (National Cooperative  
17 Geologic Mapping Program); Weaver TR 1157 (Earthquake Hazards  
18 Reduction Program); Poore TR 246 (Global Change and Climate History  
19 Program).

20 XV. Scope of Assignment Rights

21 After the staffing plans were populated and the employees  
22 whose positions were not placed on the staffing plans were released  
23 from their competitive levels, the Geologic Division was required  
24 to evaluate the assignment rights of those employees before  
25 releasing them from employment. Before doing so, the Geologic  
26 Division had to make certain decisions regarding the scope of those  
27 assignment rights. Those decisions were articulated in a memo  
28

1 issued by Dr. Leahy on June 19, 1995 entitled "Ground Rules for  
2 Reduction-in-Force." Def. Ex. 1033; Leahy TR 178-79. In making  
3 those decisions, Dr. Leahy attempted to balance the goals of giving  
4 employees the maximum benefits possible under the applicable  
5 regulations and avoiding disruption of the Division's programs.  
6 Leahy TR 179-80.

7 Among the choices Dr. Leahy made was to disallow intra-tenure  
8 group bumping. As he explained:

9 In general, bumping rights permit employees to  
10 displace employees only in a lower tenure group  
11 or subgroup. At their discretion, agencies can  
12 establish ground rules that permit employees to  
13 bump to other positions within their own tenure  
14 subgroup if they are qualified for the position  
and have greater length of service than the  
incumbent. The Geologic Division will not  
extend assignment rights beyond those required  
by law and regulation.

15 Def. Ex. 1033 at AR 17376. Dr. Leahy made this choice for two  
16 reasons. First, because most employees in the Division are in the  
17 same tenure group as career, non-veteran employees, allowing intra-  
18 tenure group bumping would create hundreds of displacements and  
19 downgrades, causing a major disruption in the Division's ability to  
20 meet its programmatic responsibilities. Second, if bumping rights  
21 were expanded, grade and salary retention benefits would force the  
22 Division to abolish more positions in order to achieve the desired  
23 savings. Def. Ex. 1033 at AR 17378; Leahy TR 181-83. Dr. Leahy  
24 was aware that expanding bumping rights would advantage the  
25 Division's "highly experienced senior scientists" at the expense of  
26 "younger, more recently trained staff." Def. Ex. 1033 at AR 17378.  
27 However, there is no evidence that Dr. Leahy made this decision in  
28

1 order to disadvantage older employees. Leahy TR 181. As Charles  
2 Collins, Defendant's expert on federal RIFs, explained, allowing  
3 intra-tenure group bumping, or "administrative assignment rights,"  
4 is an expensive proposition. Collins TR 934. Allowing  
5 administrative assignment rights results in multiple displacements  
6 where otherwise there would be just one, increasing disruption to  
7 the agency. Collins TR 934-38. Further, allowing administrative  
8 assignment rights also hinders an agency's ability to reduce salary  
9 costs, because increased bumping rights translates to more  
10 employees with grade retention and salary retention rights.  
11 Collins TR 940-41.

#### 12 XVI. Evaluation of Assignment Rights

13 The assignment rights of employees were evaluated by an SME  
14 panel. The SMEs were GS-14 and GS-15 scientists, chosen for their  
15 broad range of expertise and because they were highly respected,  
16 had "quite a bit of integrity," and would not be easily swayed by  
17 the Branch Chiefs. McCarthy TR 1453. The SMEs who evaluated the  
18 Plaintiffs' assignment rights included Robert Christiansen, sixty  
19 years old at the time of the RIF; Carl Wentworth, fifty-nine years  
20 old; William Ellsworth, forty-eight years old; Charles Bacon,  
21 forty-eight years old; Randolph Koski, forty-nine years old; and  
22 Floyd Gray, forty-three years old. Christiansen TR 1233; Wentworth  
23 TR 1254; Ellsworth TR 1265, 1287; Bacon TR 1290; Koski TR 1380,  
24 1385-86; Gray TR 1203-04.

25 To assist the SMEs in identifying potential bumps or retreats,  
26 the RIF Coordinators developed a system of "pods." McCarthy TR  
27 1454. A pod is a grouping of positions that fall within a range of  
28

1 geologic or geophysical expertise. McCarthy TR 1453-54; Def. Ex.  
2 1035. With assistance from two classification specialists from the  
3 Personnel Office, Dr. Jill McCarthy, RIF Coordinator for the  
4 Western Region, assigned to pods all research positions and  
5 specialized technical positions in Menlo Park. Administrative,  
6 non-specialized technical, and non-specialized technician positions  
7 were not assigned pods. McCarthy TR 1455-56. The pod assignments  
8 were then reviewed by the Branch Chiefs or their representatives,  
9 who made recommendations for changes, some of which were adopted.  
10 McCarthy TR 1456-57.

11 To evaluate potential retreats, the SMEs compared the released  
12 employee's former position descriptions with current position  
13 descriptions to determine whether the jobs were essentially  
14 identical. If a released employee's former position description  
15 was missing or vague, they looked at his or her Professional  
16 Technical Record (PTR) or Work Plans. Wentworth TR 1255-1256;  
17 Ellsworth TR 1268; Bacon TR 1292-1293. To evaluate bumps, they  
18 looked at the released employee's PTR to determine whether the  
19 employee was qualified to perform a job without undue interruption.  
20 Wentworth TR 1254, 1256; Ellsworth TR 1266, 1268-1269; Bacon TR  
21 1293. The SMEs consulted with the Branch Chiefs when they needed  
22 clarification about the requirements of a particular position.  
23 Field TR 1072; Mooney TR 1420-1421. The Branch Chiefs did not,  
24 however, have the power to veto a bump or retreat. Wentworth TR  
25 1257. There is no evidence that any of the SMEs considered or  
26 discussed the age of employees when they evaluated assignment  
27 rights. Gray TR 1205; Christiansen TR 1234; Wentworth TR 1254-55;



1 Ellsworth TR 1267; Bacon TR 1291-1292; Koski TR 1389.

2 XVII. Add Back of Positions

3       The Program Councils had been instructed to assume when  
4 developing staffing plans that there would be a significant  
5 reduction in funding, on the order of ten to twenty percent lower  
6 than the previous fiscal year. Leahy TR 173. This assumption was  
7 based on guidance that the USGS had received from the House  
8 Appropriations Committee. Russ TR 989-90. However, in the summer  
9 of 1995, it began to appear that the USGS's budget would actually  
10 be cut by only two or three percent. Leahy TR 174. While the  
11 Geologic Division proceeded with the RIF because this improvement  
12 in the budget outlook was not sufficient to address the problem of  
13 insufficient operating expenses, Leahy TR 174-75, this smaller than  
14 anticipated reduction allowed the Division to add some positions  
15 back onto the staffing plans in July, 1995. Leahy TR 175. To  
16 determine which positions should be added back to the staffing  
17 plan, Dr. Leahy asked each of the Office Chiefs to submit a  
18 prioritized list of proposed add-backs. Leahy TR 175. The  
19 Division Policy Council then made the final decisions. Leahy TR  
20 175. In deciding whether to add a position back, the Division  
21 Policy Council considered whether there was a long term need for  
22 the position; whether the position encompassed critical skills;  
23 whether the position would serve the needs of an emerging area;  
24 whether the position would have adequate support staff; and whether  
25 the workforce was flexible enough to face future budget issues.  
26 Leahy TR 176-77. There is no evidence that age was considered or  
27 discussed by the Division Policy Council. Leahy TR 177.

28

## 1 XVIII. Effect of the RIF on Older Workers

2 Older workers were more likely to have been negatively  
3 affected by the RIF than younger workers. Pl. Ex. 313 at 21; Def.  
4 Ex. 1235 at 13. However, without more, this does not suggest that  
5 age played a causal role in determining which employees were  
6 affected by the RIF, because it does not account for other factors  
7 that may have influenced which employees were affected by the RIF.  
8 Palmer TR 502; Def. Ex. 1236 at 5-7; Def. Ex. 1235 at 9. Such  
9 factors include the employee's grade and performance history,  
10 Lepowsky TR 461-63, as well as the type of work performed by the  
11 employee, Palmer TR 509, 530; Def. Ex. 1236 at 6; Def. Ex. 1235 at  
12 9. Plaintiffs presented evidence that, even after the employees'  
13 grade and performance are taken into account, older workers are  
14 more likely to have been negatively affected by the RIF than  
15 younger workers. Lepowsky TR 465, 467-68. However, Plaintiffs  
16 presented no evidence that took into account the effect on RIF  
17 outcomes of the type of work an employee performed. Lepowsky TR  
18 487-88. It is not reasonable to believe that the Geologic Division  
19 was indifferent to the type of work being performed in deciding  
20 which positions to retain following the RIF. Palmer 509, 530; Def.  
21 Ex. 1236 at 6; Def. Ex. 1235 at 9. Therefore, an analysis of the  
22 RIF that fails to take such information into account does not  
23 provide any meaningful evidence from which it could be inferred  
24 that age played a causal role in determining which employees were  
25  
26  
27  
28

1 affected by the RIF.<sup>2</sup>

2 XIX. RIF Experience of the Individual Plaintiffs

3 A. National Marine and Coastal Geology Program

4 1. Alicé Davis

5 Plaintiff Alicé Davis was fifty-three years old at the time of  
6 the RIF. Def. Ex. 1238. Davis was employed as a GS-13 Geologist  
7 in the Branch of Pacific Marine Geology in the Office of Energy and  
8 Marine Geology. Pl. Ex. 469. Her research focused on the geologic  
9 framework, particularly volcanic processes, that surrounded the  
10 formation of minerals on the ocean floor. Davis TR 897. Such  
11 areas of research, including framework geology, tectonic and deep  
12 sea mineral studies, and deep sea studies were de-emphasized in the  
13 National Marine and Coastal Geology Program plan. Field TR 1050.  
14 Further, Davis admits that Dr. Field was favoring sedimentological  
15 and coastal work in creating the staffing plan, Davis TR 911, 916,  
16 as opposed to the volcanic and deep sea work that was her area of  
17 focus, Davis TR 897. As a result of these factors, Davis's  
18 position was not included on the staffing plan. There is no  
19 evidence that Davis's position was not included on the staffing

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21  
22 <sup>2</sup> Defendant introduced evidence suggesting that once the type  
23 of work being performed is taken into account, by considering the  
24 pods to which the employees were assigned, age did not have a  
25 statistically significant effect on the probability that an  
26 employee was negatively impacted by the RIF. Def. Ex. 1235 at 14-  
27 15. However, the statistical technique used by Defendant's expert  
in reaching this result gives undue weight to the RIF experience of  
non-scientists and disproportionately excludes from the analysis  
the RIF experience of scientists. Pl. Ex. 313 at 21-32. For this  
reason, the Court does not rely upon the opinion of Defendant's  
expert to find that age did not play a role in the RIF; the Court  
merely finds that Plaintiffs did not prove that it did.

1 plan because of her age.<sup>3</sup> Field TR 1056.

2 Davis's assignment rights were evaluated by SMEs Floyd Gray  
3 and Charles Bacon. There is no evidence that Davis's age was  
4 considered in determining her assignment rights. Gray TR 1208;  
5 Bacon TR 1294. Indeed, Davis testified that she knows both Gray  
6 and Dr. Bacon, that she thinks they did the best they could, and  
7 that she does not think either would have considered her age.  
8 Davis TR 913. However, Davis does claim that the SMEs lacked the  
9 information needed to make such evaluations, because Geologic  
10 Division managers arranged to have position descriptions modified  
11 in order to prevent particular employees from being RIFed. Davis's  
12 supervisor, Randolph Koski, instructed her to remove work that she  
13 had done previously from her position description, because the  
14 description should be limited to present job duties. Davis TR 903;  
15 Koski TR 1380-81. However, Koski instructed a different employee,  
16 Jane Reid, to include in her position description job duties that  
17 she was not presently performing, but that he intended her to  
18 perform in the future. Koski TR 1382-83. The inclusion of these  
19 additional job duties that Reid had not yet begun to perform  
20 prevented Davis from being able to retreat into Reid's position.  
21 Koski TR 1384-85; Davis TR 901. However, there is no evidence that

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22  
23 <sup>3</sup> Dennis Mann testified that, at Branch meetings prior to the  
24 RIF, Dr. Field stated that the RIF was going to give him  
25 opportunities to create vacancies that in the future he could fill  
26 with young Ph.D.s. Mann TR 716. Dr. Field denied making such a  
27 statement. Field TR 1060. Mann's testimony is not credible. Mann  
28 did not make this claim in a declaration previously submitted to  
the Court. Mann TR 726. Plaintiffs' attorney never questioned Dr.  
Field about such a statement. Field TR 1060. Moreover, although  
Mann believes that Davis attended these meetings, Mann TR 726, she  
did not recall Dr. Field making such a statement, Davis TR 912.

1 Koski gave this advice to protect Reid from being RIF'd because she  
2 was younger than Davis; rather, the evidence suggests that Koski  
3 sought to ensure that the project's future needs would be met and  
4 to minimize potential disruption to his project.

5           2.     Stephen Lewis

6           Plaintiff Stephen Lewis was forty-five years old at the time  
7 of the RIF. Def. Ex. 1238. Dr. Lewis was employed as a GS-14  
8 Geophysicist in the Branch of Pacific Marine Geology in the Office  
9 of Energy and Marine Geology. Pl. Ex. 561. Dr. Lewis's research  
10 focused on "the crustal structure, geophysics, structural geology,  
11 stratigraphy, regional tectonics, and earthquake hazards of the  
12 continental margins of the western United States, Alaska, and the  
13 western and southern Pacific Ocean." Pl. Ex. 561 at AR 29521.  
14 This type of research was included in the National Marine and  
15 Coastal Geology Program's program plan. Def. Ex. 1010 at AR 15657-  
16 61. However, as Dr. Field explained, Dr. Lewis's position was not  
17 included on the staffing plan because there were not enough  
18 positions on the staffing plan to house all the employees in the  
19 program. Field TR 1056. There is no evidence that Dr. Lewis's age  
20 was a factor in this decision. Field TR 1056. Indeed, at the MSPB  
21 hearing, Dr. Lewis claimed that his position was abolished because  
22 he made a whistleblowing complaint, and because he had  
23 disagreements with Dr. Field over a proposal to move the Branch to  
24 Santa Cruz, California from Menlo Park, California and over the use  
25 of large ships in the branch. Lewis TR 697-698. Further, there  
26 is no evidence that Dr. Lewis's age was considered when his  
27 assignment rights were evaluated. Wentworth TR 1259.

1 B. National Cooperative Geologic Mapping Program

2 1. Lanford Adami

3 Plaintiff Lanford Adami was sixty years old at the time of the  
4 RIF. Def. Ex. 1238. Adami was employed as a GS-12 Chemist  
5 assigned to the Branch of Isotope Geology in the Office of Regional  
6 Geology. Pl. Ex. 419. Adami's position was in a unique  
7 competitive level even before the USGS established new competitive  
8 levels. Adami TR 649. His duties involved supporting the research  
9 of other scientists by managing a stable isotope lab. Adami TR  
10 648, 639-40. In 1994, the lab that he managed was consolidated  
11 with a lab supported by the Water Resources Division due to lack of  
12 funds. Adami TR 648. Adami's position was not included on the  
13 National Cooperative Geologic Mapping Program's staffing plan  
14 because it was not a high priority. Sutter TR 1100-01. In fact,  
15 after Adami was RIF'd, the lab ceased to function. Adami TR 648.  
16 There is no evidence that Adami's age was a factor in this  
17 decision. Sutter TR 1100.

18 Adami's assignment rights were evaluated by SMEs Floyd Gray  
19 and Robert Christiansen. There is no evidence that they considered  
20 Adami's age when assessing his assignment rights. Gray TR 1207;  
21 Christiansen TR 1237. However, Adami asserts that he should have  
22 been allowed to bump into a GS-9 physical science technician  
23 position held by Jame Saburomaru. Adami TR 643. The SME panel  
24 never considered whether Adami was entitled to bump into this  
25 position, because it was added back onto the staffing plan after  
26 Adami's assignment rights were evaluated. Christiansen TR 1239-40.  
27 Regardless of whether this procedure complied with the applicable  
28

1 RIF regulations, there is no evidence that the SMEs' failure to  
2 consider Adami for this position was because of his age.

3 C. Earthquake Hazards Reduction Program

4 1. Allan Lindh

5 Plaintiff Allan Lindh was fifty-two years old at the time of  
6 the RIF. Def. Ex. 1238. Dr. Lindh was employed as a GS-15  
7 Geophysicist in the Branch of Seismology in the Office of  
8 Earthquakes, Volcanoes, and Engineering. Pl. Ex. 568. His  
9 research focused on the statistical prediction of earthquakes  
10 within the San Andreas fault system. Pl. Ex. 568 at AR 30652.  
11 Because earthquake prediction was an area that the Earthquake  
12 Hazards Reduction Program was de-emphasizing, this position was not  
13 needed to meet the program's goals. Weaver TR 1160-61. Dr. Lindh  
14 acknowledged as much in a draft letter that he wrote to be sent to  
15 the journal Science, in which he lamented the Geologic Division's  
16 retreat from any serious commitment to earthquake prediction  
17 research. Lindh TR 273-75. Consistent with the Earthquake Hazards  
18 Reduction Program's decision to de-emphasize earthquake prediction,  
19 Dr. Mooney recommended that the Program Council not include Dr.  
20 Lindh's position on the staffing plan. Mooney TR 1409-10. There  
21 is no evidence that Dr. Mooney's recommendation was based on Dr.  
22 Lindh's age. Mooney TR 1411. Dr. Mooney's recommendation was  
23 initially followed, but then the Branch Chief of Western Regional  
24 Geology, Jack Hillhouse, recommended that Dr. Lindh be restored to  
25 the staffing plan because it did not seem fair not to place a  
26 former Branch Chief on the staffing plan. Mooney TR 1411.  
27 Concerned that this staffing decision was based on emotional rather  
28

1 than programmatic reasons, Dr. Mooney called Craig Weaver, the  
2 Acting Chair of the Program Council, Weaver TR 1148, and requested  
3 that the decision be reversed. Mooney TR 1411-12. Dr. Mooney  
4 explained to Dr. Weaver that placing Dr. Lindh on the staffing plan  
5 meant losing an electrical engineer, Frederick Fisher. Mooney TR  
6 1412. Because the program needed the skills of an electrical  
7 engineer, Dr. Mooney asked Dr. Weaver to place Fisher on the  
8 staffing plan instead of Dr. Lindh. Mooney TR 1412. There is no  
9 evidence that Dr. Mooney's request to substitute Fisher for Dr.  
10 Lindh was based on Dr. Lindh's age. Mooney TR 1412.

11 A panel of SMEs that included William Ellsworth evaluated Dr.  
12 Lindh's assignment rights. Ellsworth TR 1269. The SMEs found that  
13 Dr. Lindh was eligible to bump to a GS-12 position. Ellsworth TR  
14 1275. Dr. Mooney concurred with their decision. Ellsworth TR  
15 1276. There is no evidence that there was any discussion or  
16 consideration of Dr. Lindh's age in determining his assignment  
17 rights. Ellsworth TR 1269. Dr. Lindh served as a GS-12  
18 Operational Geophysicist for the remainder of his career with the  
19 USGS. Lindh TR 144.

20 2. H. Mahadeva Iyer

21 Plaintiff H. Mahadeva Iyer was sixty-four years old at the  
22 time of the RIF. Def. Ex. 1238. Dr. Iyer was employed as a GS-15  
23 Geophysicist in the Branch of Seismology in the Office of  
24 Earthquakes, Volcanoes, and Engineering. Pl. Ex. 532. His  
25 expertise was in seismic studies of geothermal and volcanic  
26 systems. Mooney TR 1415. Dr. Iyer's position was not placed on  
27 the Earthquake Hazards Reduction Program's staffing plan because  
28



1 his research was not focused on earthquake-related hazards. Mooney  
2 TR 1415-16. In fact, prior to the RIF, Dr. Iyer did not have  
3 funding for his research. Mooney TR 1416-17. Instead, he was  
4 performing administrative duties, and his salary was paid from  
5 Branch Assessments, which were in limited supply. Mooney TR 1418-  
6 19. As a result of these factors, and possibly as a result of  
7 personal conflicts with his Branch Chief Dr. Mooney, Dr. Iyer's  
8 position was not included on the staffing plan. Mooney TR 1415-19;  
9 Iyer TR 96. There is no evidence that Dr. Iyer's position was not  
10 included on the staffing plan because of his age, Mooney TR 1416,  
11 nor is there any evidence that his age was considered during the  
12 bump and retreat evaluation process, Ellsworth TR 1269-70.

13 In November, 1994, Dr. Iyer was among a group of four  
14 scientists (including Plaintiff Chi-Yu King) who complained to the  
15 Office Chief about the Geologic Division's failure to fund the  
16 research projects of minority scientists. Iyer TR 88-89. As a  
17 result of their complaint, a meeting was held and recommendations  
18 were drafted and placed in a memo. Dr. Mooney joined in that memo.  
19 Iyer TR 89, 98. While Dr. Mooney was aware of the scientists'  
20 complaint regarding the Geologic Division's failure to fund the  
21 research projects of minority scientists, there is no evidence that  
22 he considered this complaint when he made staffing recommendations.  
23 Mooney TR 1417. While SME Ellsworth was not aware of the memo at  
24 the time he evaluated Dr. Iyer's assignment rights, as a former  
25 Branch Chief, Dr. Ellsworth was aware that Dr. Iyer was vocal in  
26 his support of minority or under-represented groups. Ellsworth TR  
27 1270. However, there is no evidence that Dr. Ellsworth considered

28

1 those activities in evaluating Dr. Iyer's assignment rights.  
2 Ellsworth TR 1271.

3 3. Chi-Yu King

4 Plaintiff Chi-Yu King was sixty-one years old at the time of  
5 the RIF. Def. Ex. 1238. Dr. King was employed as a GS-14  
6 Geophysicist in the Branch of Earthquake, Geology and Geophysics in  
7 the Office of Earthquakes, Volcanoes, and Engineering. Pl. Ex.  
8 551. Dr. King's expertise was in geochemical, hydrological, and  
9 mechanical approaches to earthquake prediction. King TR 128. At  
10 the time of the RIF, his research focused on monitoring radon gas  
11 emanations along active faults with the goal of catching a  
12 premonitory signal of an imminent earthquake. Mooney TR 1414.  
13 While Dr. King's approach was highly valued in Japan, the former  
14 U.S.S.R., and Europe, it was not highly valued by the Geologic  
15 Division, as indicated by the fact that Dr. King had had difficulty  
16 obtaining funding for his research. King TR 128-29. Dr. King's  
17 position was not included on the Earthquake Hazards Reduction  
18 Program's staffing plan because the program was de-emphasizing  
19 earthquake prediction. Mooney TR 1415; Weaver TR 1162. The two  
20 other geophysicists who were involved in some aspect of geochemical  
21 or hydrological earthquake prediction were also RIFed. King TR  
22 129-30. There is no evidence that Dr. King's age was a factor in  
23 the decision not to include his position on the staffing plan.  
24 Mooney TR 1415; Weaver TR 1162. Nor is there any evidence that Dr.  
25 King's age was considered when he was evaluated for potential bumps  
26 and retreats. Wentworth TR 1258-59.

## 1 D. National Mineral Resource Surveys Program

## 2 1. James Calzia

3 Plaintiff James Calzia was forty-eight years old at the time  
4 of the RIF. Def. Ex. 1238. Dr. Calzia was employed as a GS-12  
5 Geologist in the Branch of Western Mineral Resources in the Office  
6 of Mineral Resources. Pl. Ex. 430. At the time of the RIF, he was  
7 the project chief of two projects, one conducting a mineral  
8 assessment in the San Bernardino National Forest and the other  
9 conducting a mineral assessment in the Barstow area. Calzia TR  
10 1356; Pl. Ex. 430 at AR 20166. Defendant argues that Dr. Calzia  
11 was terminated because both of these projects were scheduled to end  
12 in FY 1995, a fact that Dr. Calzia admitted, Calzia TR 1373.  
13 However, Ronald Worl, Branch Chief of the Branch of Western Mineral  
14 Resources and Dr. Calzia's supervisor, admitted that decisions  
15 regarding which positions to place on the staffing plan were made  
16 on the basis of the skills reflected in the position descriptions,  
17 not on the basis of the projects on which a particular person was  
18 working. MSPB Testimony of Ron Worl at AR 1335. As Dr. Worl  
19 explained, it made sense to focus on skills rather than projects,  
20 because that enabled the Office of Mineral Resources to retain  
21 people with the skills necessary to do the work regardless of which  
22 short-term project they were assigned to. MSPB Testimony of Ron  
23 Worl at AR 1335. Further, it is clear from Dr. Calzia's position  
24 description that the skills involved in conducting mineral  
25 assessments in the San Bernardino National Forest and the Barstow  
26 area were applicable to conducting such assessments in other  
27 geographic areas. Pl. Ex. 430. Thus, Defendant's explanation for

1 the decision to terminate Dr. Calzia is not persuasive.

2       There is also credible evidence that Dr. Worl attempted to  
3 protect younger workers from being negatively impacted by the RIF.  
4 Dr. Worl admitted that he called a meeting of the younger members  
5 of the Branch of Western Mineral Resources to give them advice  
6 about how to avoid the upcoming RIF. MSPB Testimony of Ron Worl at  
7 AR 1301. While Dr. Worl contends that he gave such advice to all  
8 members of the Branch, he does not dispute that he was particularly  
9 concerned with trying to make sure that the younger members of the  
10 Branch received and followed this advice. MSPB Testimony of Ron  
11 Worl at AR 1300-01. Thus, considering the evidence that  
12 Defendant's stated legitimate non-discriminatory reason for RIFing  
13 Dr. Calzia is not credible, that Dr. Worl displayed age-based  
14 discriminatory animus, and that the Geologic Division at the time  
15 of the RIF was tainted by age-based discriminatory animus, the  
16 Court finds that it is more probable than not that Dr. Calzia's age  
17 was a substantial factor in his termination.

18               2.     Chester Wrucke

19       Plaintiff Chester Wrucke was sixty-seven years old at the time  
20 of the RIF. Def. Ex. 1238. Dr. Wrucke was employed as a GS-14  
21 Geologist in the Branch of Western Mineral Resources in the Office  
22 of Mineral Resources. Wrucke TR 592. His area of expertise was  
23 determining mineral resource potential. Wrucke TR 591. At the  
24 time of the RIF, he was working on a number of different projects,  
25 including the Tenabo quadrangle study, the Barstow area mineral  
26 resource assessment, the Denali National Park Mapping Project, a  
27 quadrangle study in Arizona, and the San Bernardino National Forest

28

1 mineral resource assessment. Wrucke TR 595-96. Defendant argues  
2 that Dr. Wrucke was terminated because these projects were not on  
3 the National Mineral Resource Surveys program plan. However, as  
4 discussed above, Ronald Worl, Branch Chief of the Branch of Western  
5 Mineral Resources and Dr. Wrucke's supervisor, admitted that  
6 decisions regarding which positions to place on the staffing plan  
7 were made on the basis of the skills reflected in the position  
8 descriptions, not on the basis of the projects on which a  
9 particular person was working. MSPB Testimony of Ron Worl at AR  
10 1335. Thus, Defendant's explanation for the decision to terminate  
11 Dr. Wrucke is not persuasive. Further, as discussed above, there  
12 is credible evidence that Dr. Worl attempted to protect younger  
13 workers from being negatively impacted by the RIF. Thus,  
14 considering the evidence that Defendant's stated legitimate non-  
15 discriminatory reason for RIFing Dr. Wrucke is not credible, that  
16 Dr. Worl displayed age-based discriminatory animus, and that the  
17 Geologic Division at the time of the RIF was tainted by age-based  
18 discriminatory animus, the Court finds that it is more probable  
19 than not that Dr. Wrucke's age was a substantial factor in his  
20 termination.

21 3. Bela Csejtey

22 Plaintiff Bela Csejtey was sixty-one years old at the time of  
23 the RIF. Def. Ex. 1238. Dr. Csejtey was employed as a GS-14  
24 Geologist in the Branch of Alaskan Geology in the Office of Mineral  
25 Resources. Pl. Ex. 461. At the time of the RIF, he was project  
26 chief of the Denali National Park Mapping Project, the primary  
27 objective of which was to produce a geologic map of the McKinley  
28

1 Quadrangle. Csejtey TR 285-86. Defendant asserts that Dr. Csejtey  
2 was RIFed because this project was not on the program plan.  
3 Consistent with this contention, David Carter, Branch Chief of the  
4 Branch of Alaskan Geology and Dr. Csejtey's supervisor, testified  
5 that he was informed that he could not place Dr. Csejtey on the  
6 staffing plan of the National Mineral Resource Surveys program  
7 because Dr. Csejtey's research did not fall within the mandate of  
8 that program. MSPB Testimony of David Carter at AR 13925; see also  
9 Csejtey TR 288. However, as Dr. Carter was appalled to discover,  
10 the National Mineral Resource Surveys Program funded this project  
11 the very next year. MSPB Testimony of David Carter at AR 13927.  
12 Further, the project was staffed by younger employees. Ford TR  
13 626-27. This could suggest that the Geologic Division's decision  
14 not to fund this project in FY 1995 was a pretext for  
15 discrimination. However, in the absence of any additional  
16 information, it is not possible to determine that it is more  
17 probable than not that age, as opposed to a change in plans or even  
18 bureaucratic error, was the reason for this decision. Further,  
19 there is no evidence that the SME panel considered Dr. Csejtey's  
20 age in determining that he was not entitled to bump or retreat into  
21 any other positions. Wentworth TR 1257.

22 4. Arthur Ford

23 Plaintiff Arthur Ford was sixty-three years old at the time of  
24 the RIF. Def. Ex. 1238. Dr. Ford was employed as a GS-15  
25 Geologist in the Branch of Alaskan Geology in the Office of Mineral  
26 Resources. Pl. Ex. 487. At the time of the RIF, Dr. Ford was  
27 working on Denali National Park Mapping Project and a mineral  
28

1 assessment project in southeastern Alaska. Ford TR 625; MSPB  
2 Testimony of David Carter at AR 13928-29. As discussed above, Dr.  
3 Carter could not place the Denali National Park Mapping Project on  
4 the staffing plan because this research did not fit within the  
5 mandate of the National Mineral Resource Surveys Program. MSPB  
6 Testimony of David Carter at AR 13925. While the mineral  
7 assessment project in southeastern Alaska did fit within the  
8 mandate of the National Mineral Resource Surveys Program, the  
9 Program Council had decided to de-emphasize work in southeastern  
10 Alaska because the research vessel that had supported the work had  
11 been sold several years previously and most of the research that  
12 could be conducted based on the previously collected data had been  
13 completed. MSPB Testimony of David Carter at AR 13928-29. In  
14 addition, Dr. Ford was a member of the Branch of Alaskan Geology  
15 who was based in Menlo Park at a time when the Branch favored staff  
16 in Anchorage. Csejtey TR 302; MSPB Testimony of David Carter at AR  
17 13924. For all these reasons, Dr. Ford's position was not included  
18 in the National Mineral Resource Surveys program staffing plan.  
19 There is no evidence that his age was considered by the SMEs who  
20 evaluated his assignment rights. Wentworth TR 1257.

21 5. James Drinkwater

22 James Drinkwater was forty-four years old at the time of the  
23 RIF. Def. Ex. 1238. Drinkwater was employed as a GS-11 Geologist  
24 in the Branch of Alaskan Geology in the Office of Mineral  
25 Resources. Pl. Ex. 479. His research involved framework geologic  
26 studies related to mineral resources, appraisals, or land use,  
27 primarily in southeastern Alaska. Drinkwater TR 730-31. Because,  
28

1 as discussed above, the National Mineral Resource Surveys program  
2 was de-emphasizing work in southeastern Alaska, MSPB Testimony of  
3 David Carter at AR 13928-29, Drinkwater's position was not included  
4 on the staffing plan. There is no evidence that his age was  
5 considered by the SMEs who evaluated his assignment rights. Gray  
6 TR 1209; Bacon TR 1294.

7           6.    A. Thomas Ovenshine

8           Plaintiff A. Thomas Ovenshine was fifty-nine years old at the  
9 time of the RIF. Def. Ex. 1238. Dr. Ovenshine was employed as a  
10 GS-15 Geologist in the Branch of Resource Analysis in the Office of  
11 Mineral Resources. Pl. Ex. 617. His position involved serving "as  
12 an advisor on mineral policy issues relating to the Mineral  
13 Resource Surveys Program (MRSP) and as a representative of the MRSP  
14 to international organizations." Pl. Ex. 617; Ovenshine TR 57.  
15 Dr. Ovenshine's position was not abolished in the RIF. Ovenshine  
16 TR 57. Rather, he was displaced through a bump by David Piper, an  
17 older employee who had a veteran's preference. Ovenshine TR 58.  
18 There is no evidence that the SME panel that found Dr. Piper  
19 qualified to bump into Dr. Ovenshine's position considered either  
20 Dr. Piper's age or Dr. Ovenshine's age, Gray TR 1208, nor is there  
21 any evidence that the SME panel that evaluated Dr. Ovenshine's  
22 assignment rights considered his age, Bacon TR 1295.

23           7.    Arthur Grantz

24           Plaintiff Arthur Grantz was sixty-seven years old at the time  
25 of the RIF. Def. Ex. 1238. Dr. Grantz was employed as a GS-16  
26 Geologist in the Branch of Alaskan Geology in the Office of Mineral  
27 Resources. Pl. Ex. 496. Before the RIF, he was working on a  
28



1 climate history of the Arctic Ocean. Pl. Ex. 496. Although he was  
2 in the Branch of Alaskan Geology, Dr. Grantz's research was  
3 principally funded by the Global Change and Climate History Program  
4 and the National Marine and Coastal Geology Program. Pl. Ex. 496.  
5 Dr. Grantz's supervisor in the Branch of Alaskan Geology, David  
6 Carter, was not able to fit Dr. Grantz's position into the program  
7 plan of the National Mineral Resource Surveys Program. MSPB  
8 Testimony of David Carter at AR 13924. Dr. Carter believed that  
9 Dr. Grantz's research was important to the Geologic Division, and  
10 that his position should have continued to be funded by the Global  
11 Change and Climate History Program and/or the National Marine and  
12 Coastal Geology Program. MSPB Testimony of David Carter at AR  
13 13925. However, Dr. Field explained that the National Marine and  
14 Coastal Geology Program did not consider placing Dr. Grantz on that  
15 program's staffing plan because Dr. Grantz was not housed  
16 administratively in the Branch of Pacific Marine Geology and thus  
17 the branch did not have his position description. Field TR 1056-  
18 57. There is no evidence that Dr. Grantz's position was not funded  
19 by the National Marine and Coastal Geology Program because of his  
20 age. Field TR 1057. Rather, it appears that Dr. Grantz was RIFed  
21 because of a failure of coordination and cooperation on the part of  
22 the different programs and branches of which he was a part.  
23 Further, there is no evidence that Dr. Grantz's age was considered  
24 when his assignment rights were evaluated. Bacon TR 1294-95.

25 E. Global Change and Climate History Program.

26 1. David Adam

27 Plaintiff David Adam was fifty-four years old at the time of  
28

1 the RIF. Def. Ex. 1238. Dr. Adam was employed as a GS-14  
2 Geologist in the Branch of Paleontology and Stratigraphy. Pl. Ex.  
3 389. His position was funded by the Global Change and Climate  
4 History Program. Adam TR 35. Dr. Adam worked as "a geologist and  
5 palynologist conducting basic research in paleontology and  
6 stratigraphy specializing in the climate history of the upper  
7 Cenozoic." Pl. Ex. 389 at AR 18246. At the time of the RIF, his  
8 research was concentrated in the Klamath Basin. Adam TR 35. To  
9 support his research and that of others in the Geologic Division,  
10 he had designed a state-of-the-art pollen extraction laboratory  
11 with a refrigerated core storage unit that was set to be completed  
12 in the fall of 1995. Adam TR 35-36. The Global Change and Climate  
13 History Program's program plan included conducting research to  
14 develop climate records in Western North America, as Dr. Adam did.  
15 Poore TR 253. However, the Global Change and Climate History  
16 Program's staffing plan did not have enough positions for all of  
17 the people conducting such research, particularly because the  
18 program plan de-emphasized climate history. Poore TR 253, 244.  
19 Further, the Program Council decided to use the long-term core  
20 storage facility in Denver, rather than the one in Menlo Park,  
21 because the one in Denver had a permanent staff, facilities for  
22 core preparation and photography, a database, and areas for  
23 visiting scientists, and because the Program Council was not  
24 convinced that any potential scientific benefits of refrigerating  
25 cores were worth the added expense. Poore TR 252, 248.  
26 Considering these factors, the Program Council decided not to  
27 include a palynology position in Menlo Park on the staffing plan.

1 There is no evidence that Dr. Adam's age was a factor in this  
2 decision. Poore TR 246. Further, there is no evidence that Dr.  
3 Adam's age was a factor in the SME panel's conclusion that he was  
4 not entitled to bump or retreat into any other positions.  
5 Christiansen TR 1233, 1237.

6 CONCLUSIONS OF LAW

7 I. Age Discrimination

8 The Age Discrimination in Employment Act (ADEA), 29 U.S.C.  
9 § 621 et seq., makes it "unlawful for an employer . . . to  
10 discharge any individual [who is at least forty years of age] . . .  
11 because of such individual's age." 29 U.S.C. § 623(a), 631 (a).  
12 This prohibition against age discrimination protects employees of  
13 federal agencies. 29 U.S.C. § 633a(a) (providing that personnel  
14 actions affecting such employees "shall be made free of any  
15 discrimination based on age"). "When challenging an adverse  
16 employment action under the ADEA, an employee may proceed under two  
17 theories of liability: disparate treatment or disparate impact."  
18 Coleman v. Quaker Oats Co., 232 F.3d 1271, 1291 (9th Cir. 2000).  
19

20 A. Disparate Treatment

21 A disparate treatment claim challenges an employer's treatment  
22 of "some people less favorably than others because of their race,  
23 color, religion, or other protected characteristics." Hazen Paper  
24 Co. v. Biggins, 507 U.S. 604, 609 (1993).  
25

26 To establish a violation of the ADEA under the disparate  
27 treatment theory of liability, an employee must first establish a  
28

1 prima facie case of age discrimination. Coleman, 232 F.3d at 1280-  
2 81. To do so, an employee must show that: (1) at the time of an  
3 adverse employment action, he or she was forty years of age or  
4 older; (2) some adverse employment action was taken against him or  
5 her; (3) at the time of the adverse employment action, he or she  
6 was satisfactorily performing his or her job; and (4) the adverse  
7 employment action occurred under circumstances giving rise to an  
8 inference of discrimination, such as by showing that "the employer  
9 had a continuing need for [his or her] skills and services in that  
10 [his or her] various duties were still being performed." Id. at  
11 1281 (internal quotation marks omitted).

12  
13 If an employee establishes such a prima facie case, the burden  
14 then shifts to the employer to articulate a legitimate, non-  
15 discriminatory reason for its employment decision. Id. Once an  
16 employer articulates such a reason, the employee must demonstrate  
17 that the articulated reason is a pretext for discrimination "either  
18 directly by persuading the court that a discriminatory reason more  
19 likely than not motivated the employer or indirectly by showing  
20 that the employer's proffered explanation is unworthy of credence."  
21 Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).  
22 The employee's evidence must be "both specific and substantial to  
23 overcome the legitimate reasons" articulated by the employer.  
24 Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 659  
25 (9th Cir. 2002) (emphasis in original). The ultimate burden of  
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1 proof remains always on the employee to show that the employer  
2 intentionally discriminated against him or her because of his or  
3 her age. Coleman, 232 F.3d at 1281.

4       Here, Plaintiffs contend that they were subjected to an  
5 adverse employment action during the RIF because of their age.  
6 Each Plaintiff has established a prima facie case of age  
7 discrimination: (1) each Plaintiff was forty years of age or older  
8 at the time of the RIF; (2) each Plaintiff was separated or demoted  
9 from his or her position during the RIF; (3) each Plaintiff was  
10 satisfactorily performing his or her job at the time of the RIF;  
11 and (4) the adverse employment action occurred under circumstances  
12 giving rise to an inference of discrimination, namely within the  
13 context of an agency culture in which both management and employees  
14 had expressed age-based discriminatory animus. Defendant has  
15 articulated a legitimate, non-discriminatory reason for its  
16 decision to terminate or demote each Plaintiff, namely its decision  
17 to conduct a RIF in order to address the Geologic Division's  
18 budgetary problems. See Coleman, 232 F.3d at 1282 ("A RIF is a  
19 legitimate nondiscriminatory reason for laying off an employee.").  
20 Plaintiffs argue that the RIF was a mere pretext for  
21 discrimination, in that the Geologic Division did not need to  
22 conduct a RIF, and that even if a RIF was necessary, Plaintiffs  
23 were targeted in the RIF because of their age. Further, Plaintiffs  
24 claim that the Transition Team report, Dr. Eaton's speeches, and  
25  
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1 the "old dog" cartoon on the RIF meeting notice all demonstrate  
2 that age-based discrimination motivated Plaintiffs' termination or  
3 demotion.

4 Plaintiffs have introduced evidence that the Geologic  
5 Division's culture, at the time of the RIF, was tainted with age-  
6 based discriminatory animus. This animus was evident in the  
7 Transition Team report, Dr. Eaton's speeches, and the "old dog"  
8 cartoon on the RIF meeting notice. Further, this animus was fairly  
9 widespread, as evidenced by the Transition Team report, which  
10 relied upon input received from approximately a third of the USGS's  
11 workforce. However, evidence of a culture of age-based  
12 discriminatory animus is not sufficient to establish that any  
13 particular Plaintiff was adversely impacted during the RIF because  
14 of his or her age. Dr. Eaton, the committee that wrote the  
15 Transition Team report, and the creator of the "old dog" cartoon  
16 RIF meeting notice did not play any role in deciding whether any of  
17 the Plaintiffs would be separated during the RIF or whether any of  
18 the Plaintiffs was entitled to bump or retreat into a different  
19 position. The separation decisions were made primarily by the  
20 relevant Branch Chiefs, and the bump and retreat decisions were  
21 made by a panel of SMEs.

24 In the case of all of the Plaintiffs except Calzia and Wrucke,  
25 there is no evidence that the relevant decision makers were acting  
26 in accordance with an age-based discriminatory animus. Further,  
27  
28

1 the evidence demonstrates that Defendant had legitimate, non-  
2 discriminatory, programmatic reasons for separating or demoting all  
3 of the Plaintiffs other than Calzia and Wrucke. Therefore, the  
4 Court finds in favor of Defendant on the disparate treatment  
5 claims of Plaintiffs Adam, Adami, Csejtey, Davis, Drinkwater, Ford,  
6 Grantz, Iyer, King, Lewis, Lindh, and Ovenshine.

7  
8 However, with respect to Plaintiffs Calzia and Wrucke, there  
9 is evidence that the actions of the relevant decision maker, Ron  
10 Worl, were tainted with age-based discriminatory animus, in that  
11 Worl acted to protect younger workers from the RIF. Further,  
12 Defendant's explanation for the decisions to terminate Plaintiffs  
13 Calzia and Wrucke are not worthy of credence. Based on this  
14 evidence, viewed in combination with the evidence of the existence  
15 of a culture of age-based discriminatory animus in the Geologic  
16 Division, the Court finds in favor of Plaintiffs Calzia and Wrucke  
17 on their disparate treatment claims.

18 B. Disparate Impact

19  
20 "A disparate impact claim challenges 'employment practices  
21 that are facially neutral in their treatment of different groups  
22 but that in fact fall more harshly on one group than another and  
23 cannot be justified by business necessity.'" Pottenger v. Potlach  
24 Corp., 329 F.3d 740, 749 (9th Cir. 2003) (quoting Int'l Bd. of  
25 Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)). "[T]he  
26 necessary premise of the disparate impact approach is that some  
27  
28

1 employment practices, adopted without a deliberately discriminatory  
2 motive, may in operation be functionally equivalent to intentional  
3 discrimination." Watson v. Fort Worth Bank & Trust, 487 U.S. 977,  
4 987 (1988).

5 To establish a violation of the ADEA under the disparate  
6 impact theory of liability, an employee must first establish a  
7 prima facie case of discrimination by "(1) show[ing] a significant  
8 disparate impact on a protected class or group; (2) identify[ing]  
9 the specific employment practices or selection criteria at issue;  
10 and (3) show[ing] a causal relationship between the challenged  
11 practices or criteria and the disparate impact." Hemmings v.  
12 Tidyman's, Inc., 285 F.3d 1174, 1190 (9th Cir. 2002).

14 If an employee establishes such a prima facie case, the burden  
15 then shifts to the employer who may either demonstrate that no  
16 statistical disparity exists or may "produce evidence that its  
17 disparate employment practices are based on legitimate business  
18 reasons, such as job-relatedness or business necessity." Rose v.  
19 Wells Fargo & Co., 902 F.2d 1417, 1424 (9th Cir. 1990). Once the  
20 employer does so, then the employee must show that another  
21 employment practice would serve the employer's legitimate interests  
22 without having a similar undesirable discriminatory effect. Id.  
23 To prevail on their disparate impact claim, Plaintiffs must  
24 "isolate[e] and identify[] the specific employment practices that  
25 are allegedly responsible for any observed statistical  
26  
27  
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1 disparities." Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642,  
2 656 (1989) (quoting Watson, 487 U.S. at 994). Here, Plaintiffs  
3 identify the RIF as a whole as the specific employment practice  
4 that had a disparate impact on older workers. The Ninth Circuit  
5 has held that a RIF may be such a specific employment practice.  
6 Pottenger, 329 F.3d at 749. However, the Supreme Court has made  
7 clear that an employee cannot "make out a case of disparate impact  
8 simply by showing that, 'at the bottom line,' there is . . .  
9 imbalance in the work force." Wards Cove, 490 U.S. at 657.  
10 Rather, the employee must "demonstrate that it is the application  
11 of a specific or particular employment practice that has created  
12 the disparate impact under attack." Id.; see also 42 U.S.C.  
13 § 2000e-2(k)(1)(B)(i) (requiring that the plaintiff demonstrate  
14 that "a particular employment practice causes a disparate impact"  
15 unless the plaintiff "can demonstrate to the court that the  
16 elements of [the defendant's] decisionmaking process are not  
17 capable of separation for analysis"). Under the circumstances  
18 presented here, Plaintiffs cannot meet their obligation to isolate  
19 and identify the specific employment practice responsible for the  
20 disparate impact by pointing to the RIF as a whole, because  
21 Defendant's decisionmaking process during the RIF can be separated  
22 into different elements. In fact, Plaintiffs did so in their  
23 opposition to Defendant's motion for summary judgment, identifying  
24 the use of more narrow competitive level codes and the refusal to  
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1 expand assignment rights as specific employment practices that had  
2 a disparate impact on older workers.

3 Further, even if Plaintiffs were entitled to proceed on their  
4 theory that the RIF as a whole had a disparate impact, Plaintiffs  
5 would still not prevail. If it is the RIF as a whole that is  
6 alleged to have had a disparate impact, then Defendant can rebut  
7 Plaintiffs' disparate impact claim by demonstrating a legitimate  
8 business reason for conducting the RIF. Defendant has done so  
9 here, by proffering evidence establishing that the Geologic  
10 Division needed to conduct a RIF in order to reduce its salary  
11 obligations. Plaintiffs have not identified any other course of  
12 action that Defendant could have taken that would have reduced the  
13 Geologic Division's salary obligations enough to generate the  
14 operating funds that it needed to meet its programmatic goals.  
15 Therefore, the Court finds in favor of Defendant on Plaintiffs'  
16 disparate impact claims.  
17

18 II. Retaliation  
19

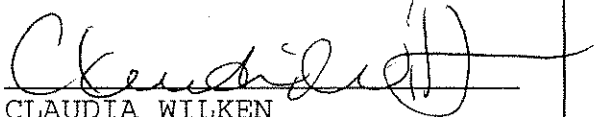
20 The ADEA also makes it "unlawful for an employer to  
21 discriminate" an employee because the employee "has opposed any  
22 practice made unlawful by [the ADEA]" or "has made a charge,  
23 testified, assisted, or participated in any manner in an  
24 investigation, proceeding, or litigation under [the ADEA]." 29  
25 U.S.C. § 623(d). "To make out a claim of retaliation [under this  
26 section], an employee must establish three things: first, that he  
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1 [or she] engaged in statutorily protected activity; second, that he  
2 [or she] was discharged or suffered some other adverse employment  
3 decision; and third, that there is a causal connection between the  
4 two." O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 763  
5 (9th Cir. 1996).

6 Plaintiffs Iyer and King engaged in statutorily protected  
7 conduct by signing a memo complaining about the Geologic Division's  
8 failure to fund the research projects of minority scientists.  
9 Further, Plaintiffs Iyer and King suffered an adverse employment  
10 action, in that they were separated from their positions during the  
11 RIF. However, there is no evidence suggesting a causal connection  
12 between their protected activity and their termination. Therefore,  
13 the Court finds in favor of Defendant on Plaintiffs Iyer and King's  
14 retaliation claims.  
15

16 IT IS SO ORDERED.

17 Dated: JUN 22 2004

18   
19 CLAUDIA WILKEN  
20 United States District Judge

21 Copies mailed to counsel  
22 as noted on the following page  
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25  
26  
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United States District Court  
for the  
Northern District of California

\* \* CERTIFICATE OF SERVICE \* \*

Case Number:4:98-cv-02094

Adam

vs

Babbitt

---

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 6-22-04, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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BY: \_\_\_\_\_

Deputy Clerk