JURISDICTION

In this case, plaintiffs-appellants ("appellants") sued defendant-appellee Gale Norton, Secretary of the Interior ("appellee"), asserting various claims under the Age Discrimination in Employment Act ("ADEA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the Civil Service Reform Act ("CSRA"), arising from a reduction in force ("RIF") conducted by the United States Geological Survey ("USGS") in 1995. On November 30, 2004, appellants filed a timely notice of appeal from the district court's September 30, 2004 judgment entered in favor of appellee on the claims of each plaintiff except James Calzia and Chester Wrucke. On December 9, 2004, appellee filed a Notice of Cross-Appeal from that portion of the judgment that awarded Calzia and Wrucke damages. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.[1]

ISSUES PRESENTED

Appellants' opening brief ("AOB") raises the following issues on appeal:

1. Did the district court properly find in favor of appellee on appellants' disparate treatment age discrimination claims after a bench trial? AOB 14-19; 21-

[1]For the purposes of this brief, "appellants" refers to all of the plaintiffs other than Calzia and Wrucke.

33.

2. Did the district court properly find in favor of appellee on appellants' disparate impact age discrimination claims after a bench trial? AOB 33-38.

3. Did the district court properly grant summary judgment to appellee on appellants' claims under the CSRA? AOB 19-24.

4. Did the district court properly grant summary judgment to appellee on the national origin discrimination claims of appellants M. Mahadeva Iyer and Chi-Yu King? AOB 38-42.[2]

5. Did the district court properly find for appellee on the retaliation claims of Iyer and King after a bench trial? AOB 38-42.

Appellee raises the following issue in her cross-appeal:

6. Did the district court properly calculate the damages awarded to Calzia and Wrucke?[3]

STATEMENT OF THE CASE

Each appellant was an employee of the USGS who was either separated or

---

[2]Appellants argue that the district court erred in granting summary judgment on the race, national origin, and retaliation claims of Iyer and King. AOB 38-42. However, the district court dismissed the retaliation claims after trial, not on summary judgment. Appellants' Excerpts of Record ("ER") 1243-1244.

[3]Appellee is not challenging the finding of discrimination in favor of Calzia and Wrucke.

demoted in a RIF conducted in October 1995. Each appellant appealed to the Merit Systems Protection Board ("MSPB"). After a 91-day hearing, MSPB Administrative Judge Philip Arnaudo issued written decisions sustaining the agency's actions in each appeal. ER 5-6.

Appellant David Adam commenced this action on May 22, 1998, seeking judicial review of the MSPB's decision under the CSRA, and alleging discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 633a. CR 1. On February 11, 1999, the district court granted Adam leave to file an amended complaint adding the other appellants. CR 34.

On May 17, 2001, the district court granted appellee's motion for partial summary judgment on appellants' CSRA claims. ER 174-205. In granting partial summary judgment, the district court reviewed the MSPB's determination of issues other than discrimination under the deferential standard of review provided by 5 U.S.C. § 7703(c). ER 179-180. The district court found that each of Judge Arnaudo's decisions was supported by substantial evidence. ER 180-198.

On May 31, 2002, the district court granted in part and denied in part appellee's motion for summary judgment on appellants' discrimination claims. ER 214-236. The district court granted summary judgment to appellee on the national origin claims of Iyer and King. ER 235. The Court concluded that,

although Iyer and King established a prima facie case of national origin discrimination, they presented no evidence from which a trier of fact could choose to disbelieve appellee's legitimate, nondiscriminatory reason for separating them in the RIF. Id.

The district court denied appellee's motion for summary judgment with respect to appellants' age discrimination claims. On the disparate treatment claims, the court found that appellee satisfied her burden of showing a legitimate, nondiscriminatory reason for separating or demoting appellants, but concluded that appellants presented sufficient evidence, in the form of comments from the USGS Director and others, from which a factfinder could infer a discriminatory motive. ER 223-228. On the disparate impact claim, the district court held that a triable issue of fact existed as to whether there was an age-based statistical disparity. ER 229-234.

On March 10, 2003, after the close of discovery, appellee renewed her motion for summary judgment on appellants' age discrimination claims. CR 184. On June 5, 2003, the district court denied appellee's renewed motion. ER 1041-1044.

From July 1, 2003 through July 15, 2003, the district court conducted a bench trial of appellants' age discrimination claims, as well as the retaliation

claims of Iyer and King. On June 22, 2004, the district court issued its findings of fact and conclusions of law. ER 1194-1244. The district court found in favor of appellee on the disparate treatment age discrimination claims of each plaintiff except Calzia and Wrucke. ER 1240. As to Calzia and Wrucke, the district court found that the relevant decision maker was tainted with age-based discriminatory animus, and that appellee's explanation for her decisions was not worthy of credence. Id. While the district court found that each appellant established a prima facie case, it also found that appellee articulated a legitimate, nondiscriminatory reason to terminate or demote each appellant: the USGS conducted a RIF to address its budgetary problems. ER 1238. In analyzing whether the RIF was a pretext for discrimination, the district court found that although appellants introduced evidence that the USGS's culture was "tainted with age-based discriminatory animus," there was no evidence that any relevant decision makers were motivated by such animus. ER 1239. The court also found that appellee had legitimate, programmatic reasons for separating or demoting each of the appellants. ER 1240.

With respect to the disparate impact claims, the district court found that appellants did not establish a prima facie case because they failed to isolate and identify the specific employment practices responsible for a disparate impact. ER

1241-1242. The district court concluded that appellants could not simply point to the RIF as an employment practice because the RIF could be separated into different elements. Id. The district court further concluded that, even if appellants could proceed on the theory that the RIF as a whole had a disparate impact, they could not prevail because appellee demonstrated a legitimate business reason for conducting the RIF, and appellants failed to identify any other course of action that the USGS could have taken to achieve its legitimate goals. ER 1243. The district court also found that appellants did not provide meaningful statistical evidence "from which it could be inferred that age played a causal role in determining which employees were affected by the RIF" because their analysis failed to consider the type of work an employee performed. ER 1219-1220.

Finally, the district court found in favor of appellee on the retaliation claims of Iyer and King. ER 1243-1244. The court found that, although Iyer and King engaged in statutorily protected conduct, there was no evidence of a causal connection between such conduct and their termination. ER 1244.

On June 22, 2004, the district court issued an Order requesting the parties to submit briefs updating the damages calculations for Calzia and Wrucke. SER 691-692. With respect to Wrucke, the court found that the economic model used by appellants' expert was appropriate, but that Wrucke failed to mitigate his damages

by declining a reassignment offered to him in the RIF. Id.

On July 16, 2004, appellants filed a declaration of their economic expert, Thomas C. Thomas, Ph.D., in which he revised his calculation of damages for Calzia and Wrucke. SER 694-717. For Calzia, Thomas calculated a total economic loss of $170,522. SER 697. For Wrucke, Thomas calculated a total economic loss, assuming he would have accepted the reassignment, of $169,714. SER 703. On July 30, 2004, appellee filed a declaration of her economic expert, Jerald Udinsky, Ph.D., that identified errors in Thomas' calculations. SER 718-734. Udinsky calculated a total economic loss for Calzia of $52,726, and a total economic loss for Wrucke of $106,570. SER 726, 732.

On September 30, 2004, the district court issued an Order Awarding Damages. SER 735-736. Adopting Thomas' calculations, the district court found that Calzia was entitled to an award of $171,522 plus pre-judgment interest[4], and that Wrucke was entitled to an award of $169,714 plus pre-judgment interest. On September 30, 2004, the district court entered judgment in favor of Calzia for $171,522 plus pre-judgment interest, in favor of Wrucke for $169,714 plus pre-judgment interest, and dismissing the claims of the appellants. CR 363.

---

[4]The district court inexplicably added $1,000 to Thomas' calculation of Calzia's economic loss.

On July 12, 2005, the district court issued an order adopting the report and recommendation of the special master on Calzia and Wrucke's motion for attorneys' fees. CR 407. Both sides filed notices of appeal from this order. CR 411, 413. Appellee is not pursuing her appeal of the July 12, 2005 order awarding fees and expenses. Calzia and Wrucke are also not challenging the fee award on appeal. AOB 42-45.

STATEMENT OF FACTS

1. Background

The USGS conducts research in the earth sciences. ER 1082. Each of the appellants worked at the USGS Menlo Park, California campus. ER 4-5. 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. The research conducted by the Geologic Division was funded through Congressional appropriations earmarked for ten science "programs." SER 167. The five offices included: (1) Office of Energy & Marine Geology (responsible for the Marine & Coastal Geology Program); (2) Office of Regional Geology (responsible for the National Geologic Mapping Program); (3) Office of International Geology; (4) Office of Earthquakes, Volcanoes & Engineering (responsible for the Earthquake Hazards

Reduction Program); and (5) Office of Mineral Resources (responsible for the Mineral Resource Surveys Program). SER 1195.

On March 9, 1995, Acting Chief Geologist John R. Filson, Ph.D., issued a "General Notice" to inform Geologic Division employees that significant workforce reductions were expected. SER 646-647. In the General Notice, Dr. Filson described the financial conditions of the Division that made the RIF necessary:

> 1. Funding for Division Programs has remained practically constant since 1991.
>
> 2. In recent years program activities and field work within the Division have been restricted because of lack of operating funds.
>
> 3. We are expected to carry out program commitments, not just pay salaries.

Id. Dr. Filson explained that the lack of operating funds – those monies other than salaries that are used to carry out the work of the division – restricted the ability of the Division to fulfill its commitments to Congress. SER 167-169.

David Russ, Ph.D., who as Associate Chief Geologist was responsible for overseeing the financial activities of the Division, testified at trial that the Division's finances in 1995 were "in a very bad state, indeed." SER 222. For

example, in the Earthquake Hazards Program, overall appropriations increased from $35,000,000 for the fiscal year ("FY") 1991 to just over $49,000,000 for FY1995, largely as a result of special funds appropriated in response to the Loma Prieta Earthquake. However, during that same period, fixed costs, particularly salaries, increased such that operating funds available for scientific research dropped "precipitously" from $3,300,000 to less than $500,000. SER 223-224. Similar decreases in operating funds occurred in each of the science programs. SER 229-230. The most dire situation existed in the Mineral Resources Survey Program, where overall appropriations dropped from $46,400,000 in FY1991 to $44,800,000 in FY1995, and salary costs for the same period increased from $29,000,000 to $34,000,000, resulting in a decrease of operating funds available for research from $4,000,000 to zero. SER 230.

Dr. Russ testified that, in order to have a viable scientific program, the Division needed 20% to 25% of its budget available for operating funds. SER 235. Before undertaking a RIF, the USGS tried to improve the financial state of the Geologic Division through reduced hiring, "early outs," and "buyouts." SER 234. These measures did not generate enough savings to avoid a RIF. SER 235-236.

2. Federal RIF Regulations

In conducting the RIF, the USGS was governed by the regulations codified at 5 CFR Part 351. Appellee presented expert testimony to explain the key components of a RIF under these regulations.

The "competitive area" of a RIF is the geographical and organizational unit within which employees are compared with one another. SER 85. In almost all cases it is synonymous with the local commuting area. SER 196.

A "competitive level" contains a group of jobs that are considered interchangeable, i.e., an incumbent can move from one job to another without undue interruption. "Undue interruption" is defined as requiring more than 90 days to perform the job in a satisfactory manner. SER 85,220. Competitive levels are determined by the duties in the position descriptions, not the qualifications of the incumbent. SER 195.

Within a competitive level, people are ranked by retention factors. If a position within a competitive level is abolished, employees with the lowest retention standing are released. The first retention factor is tenure group. The rank order is career employees, followed by career conditional employees, followed by temporary and term employees. The second factor is veteran status, with veterans ranked ahead of non-veterans. The third factor is the adjusted

service computation date ("ASCD") – years of service adjusted for the three most recent performance appraisals. The earlier the ASCD, the higher ranked the employee. SER 85-86.

Employees who are released from their competitive level in a RIF may have a right to displace another employee through a bump or retreat. With a "bump," an employee in a higher ranked tenure group, or veterans, can displace someone in a lower tenure group, or non-veterans, if that employee is qualified to perform the job within a normal training period. For example, a career veteran can displace a career non-veteran if that employee is qualified. SER 86, 199-200. With a "retreat," an employee with an earlier ASCD can displace an employee in the same tenure group who holds a job that the more senior employee previously held. SER 87, 203-204. Bumping and retreating ("assignment rights") can only occur within the competitive area. SER 87, 204.

3. Decisions Made in the RIF

In accordance with the regulations, the USGS carried out the planning and implementation of the RIF in several distinct stages.

(A) Updating of Position Descriptions and Personnel Records

On March 9, 1995, Dr. Filson advised that employees should "begin now to update their personnel records to reflect all pertinent experience (paid and unpaid)

not already documented in their official personnel folder." SER 647, 171. On the same date, he sent a memo to managers directing them to review and update position descriptions to ensure that they reflected current duties. SER 172, 643-644. Allowing employees an opportunity to review and update their personnel folders will ensure that the retention factors used in a RIF are correct. Position descriptions must be accurate because they will be used to determine competitive levels and assignment rights. SER 193-194.

(B) Program Science Plans and Staffing Plans

On February 1, 1995, Dr. Filson instructed the Office Chiefs to form Program Councils for each of the science programs. The Program Councils were charged with developing program plans that identified the program's goals for the next five fiscal years. SER 164, 438. Although a final decision to conduct the RIF had not been made, Dr. Filson felt that program plans were a necessary step in making staffing decisions in a RIF. SER 164-165. Thus, he instructed the Office Chiefs that the program plans "should contain enough specificity to be used as the basis for staffing plans if necessary." SER 438.

(1) Global Change and Climate History Program:

Richard Poore, Ph.D., Program Coordinator for the Global Change and Climate History Program, served on its Program Council and was responsible for

overseeing the development of the staffing plan. He testified that the program was organized into three broad categories of research: (I) Climate History; (ii) Carbon Cycling; and (iii) Regional Effects. The program plan reflected a shift in emphasis towards Carbon Cycling and Regional Effects, and away from Climate History. SER 57-58, 571. In the Spring of 1995, the Program Council developed two unpopulated staffing plans: one assuming a 10% budget cut, and one assuming a 20% cut. In creating the unpopulated staffing plans, the Council started with a clean piece of paper, looked at the program's research priorities, and determined which positions (not individuals) were needed to conduct that research. The Program Council later populated the staffing plan by comparing the positions needed with employees' position descriptions. SER 58-60. The Program Council did not consider or discuss the age of scientists in developing the program plan or the staffing plan. Id.

(2) National Cooperative Geologic Mapping Program:

John Sutter, Ph.D., Acting Office Chief, Office of Regional Geology, was responsible for developing the staffing plan for the National Cooperative Geologic Mapping Program. The National Geologic Mapping Act of 1992 mandated the four components of this program: (I) "Fed Map," mapping by USGS geologists; (ii) "Support Map," paleontology, geochronology, and isotope geology activities

in support of Fed Map; (iii) "State Map," funding of state geological surveys; and (iv) "Ed Map," funding of educational institutions. In 1994, Dr. Sutter determined that the USGS was not in compliance with the Act because Ed Map had not been implemented and State Map was underfunded. He recommended that Ed Map be implemented with 2% of the program's funds, and that State Map funds be increased from 6% to 20%. This reduced the amount of funds available for the staffing plan. SER 262-263, 265-270, 606.

In 1995, the Program Council created a program plan for its federal components (Fed Map and Support Map), and then considered how to staff it. In identifying high priority geologic mapping areas, the Program Council received recommendations from two national forums from outside the agency. The Program Council identified 17 or 18 high priority projects, which were organized into regional teams.[5] Then, the Program Council built an unpopulated staffing plan by identifying the expertise needed for each project. Dr. Sutter, in consultation with the Branch Chiefs, later populated the staffing plan with positions requiring that expertise. Age was never considered. SER 271-276, 594-595.

---

[5]Before the Program Council met, there were over 100 individual projects. SER 273.

(3) Marine & Coastal Geology Program:

Michael Field, Ph.D., was Branch Chief of Pacific Marine Geology. He testified that in 1993 and 1994 the Marine & Coastal Geology Program conducted a strategic review in response to a request from Congress. That review resulted in the submission of a strategic plan to Congress in 1994. The plan identified four basic categories of research: (I) Environmental and Habitat; (ii) Hazards (both Coastal Erosion and Landslide & Submarine Earthquake); (iii) Marine Resources; and (iv) Information & Technology. The plan reflected an increased emphasis in coastal erosion studies, pollution and habitat studies in coastal environments and estuarine environments, and marine and shallow continental shelf studies. Framework geology, tectonic and deep sea minerals, and deep sea studies were de-emphasized. Deep water studies went from about 50% of the program to 25%. SER 248-252, 508. Age was not discussed during the strategic review. Id.

The Program Council for the Marine & Coastal Geology Program developed an unpopulated staffing plan under various funding scenarios, from a 0% cut to a 20% cut. The Program Council used the strategic plan to identify studies they could accomplish, and determined the expertise needed to conduct those studies. The Program Council later populated the staffing plan by comparing the unpopulated plan with employees' position descriptions. SER 256-257. Age was

never discussed during the development of the staffing plan. SER 253-255.

(4) Mineral Resources Program:

The Mineral Resources Program includes the Branches of Alaskan Geology and Western Mineral Resources. SER 410, 424. A program plan was completed in January 1995, and submitted to Congress in the Spring. The priorities were to address relevant societal issues, especially in the area of mineral environmental concerns (referred to in the plan as Mitigation Studies and Mineral-Environmental Assessments). SER 427, 460. The Program Council used the plan to develop unpopulated staffing plans that reflected 10, 20 and 25% cuts, and a 25% reserve for operating funds. SER 428-431. The Office Chief and Branch Chiefs then populated the staffing plan by matching positions with position descriptions. SER 432. The staffing plan was less than half the size it was in FY 1994. Id.

Dr. David Carter, Branch Chief of Alaskan Geology, developed the staffing plan for that branch. SER 410. Dr. Carter chose to maintain diversity in topical and regional expertise, with "critical mass in the Anchorage field office." Positions in Anchorage were favored to save on travel costs.[6] SER 412. Positions

[6]While appellants Bela Csejtey and Arthur Ford both claimed that other employees continued their work, each of those other employees were based in Anchorage. SER 76-77, 125-126. It was obviously more costly to have Menlo Park scientists, such as Csejtey and Ford, conducting field work in Alaska.

that were principally funded by other programs, such as appellant Arthur Grantz's, were not included on the plan. SER 411-412.

(5) Earthquake Hazards Reduction Program:

The National Earthquake Hazards Reduction Program is a multi-agency program dedicated to reducing the losses from earthquakes in the United States. The USGS component of the program was directed by the Office of Earthquakes, Volcanoes & Engineering. SER 281-282. The Program Council met in April and May 1995 to develop the program plan and staffing plan. SER 282-283. The program plan reflected the change in priorities that occurred after the Loma Prieta and Northridge Earthquakes. The program focused on hazard assessments, particularly in urban environments, hazard maps that delineated regions of relative seismic risk, and real-time monitoring results. SER 285-286, 369. The plan de-emphasized short-term earthquake prediction, volcano hazards plan, and strong ground motion data collection. SER 286, 369.

The Program Council populated a staffing plan that reflected the new priorities of the program. SER 288, 371. The Branch Chiefs had the primary role of matching position descriptions with the requirements of the program. SER 287. Age was not considered or discussed when the Council formulated the staffing plan. SER 289, 373.

(C) Review and Revisions of Staffing Plans

On March 31, 1995, after the RIF planning had begun, P. Patrick Leahy, Ph.D., was appointed Chief Geologist. Dr. Leahy appointed a committee to review the program and staffing plans. The committee was led by Tom Fouch, Acting Regional Assistant Chief Geologist, and included approximately 20 non-managerial scientists. The task of the Fouch Committee was to ensure compatibility between the program and staffing plans, and to look for gaps. Dr. Leahy wanted someone other than the Program Councils to look at the plans so they could look across programs. SER 34-36.

The Fouch Committee expressed a concern that the agency was being too "program centric" in developing staffing plans. As a result, a meeting was held in May 1995, at which Dr. Leahy and the Office Chiefs reviewed a list of positions to be abolished to see if they could be supported by multiple programs. Some positions were placed back on staffing plans at this meeting. Those decisions were based on whether there was a need for those capabilities, not age. SER 38-41. An interim staffing plan was released in June 1995. SER 41-42.

When the staffing plans were developed, a 20% reduction from the previous

fiscal year was imposed upon the Program Councils.[7] SER 42. This target was based on guidance from the House Appropriations Committee. SER 237. However, the House's response to the President's proposed budget ultimately reflected a 2 or 3% cut in the USGS budget, rather than 20%, thereby allowing the Division to add some positions back in July 1995.[8] Dr. Leahy asked the Office Chiefs to submit a prioritized list of proposed add-backs. Then he convened a committee – the Division Policy Council -- to make final decisions. In deciding whether to add a position back, the Division Policy Council considered the following: (i) was there a long term need for the position; (ii) did it represent critical skills; (iii) did it serve an emerging area; (iv) did they have adequate support staff; and (v) was the workforce flexible enough to face future budget issues. Age was not considered or discussed by the Division Policy Council. SER 42-46.

(D) Competitive Levels

Sometime prior to March 1995, John Filson asked John McGurk, the

---

[7]For the Earthquake Hazards Reduction Program, a 10% cut was imposed. SER 42.

[8]The USGS proceeded with the RIF, even though the cut in its FY 1996 budget was not as dramatic as expected, because it still had inadequate funds to cover operating expenses. SER 237-238.

Division Personnel Officer, to prepare a paper on how competitive levels in the earth sciences should be established for the purposes of a RIF. McGurk concluded that the existing competitive level codes were not workable in a RIF, and that new competitive levels should be developed based on position descriptions. McGurk recommended that each research position be placed in a separate competitive level. Dr. Filson rejected McGurk's recommendation, and instead recommended that competitive levels be established based on management review and scientific certification. SER 174-177.

Based on Dr. Filson's recommendation, the Division set up peer panels of subject matter experts ("SME") to review competitive levels of research scientist and technical positions. Robert Tilling, Ph.D., 59 years old, served on the panel in the Western Region. Dr. Tilling testified that the peer panel was comprised of seven research scientists, each with a different area of expertise.[9] Using descriptors abstracted from position descriptions, the peer panel compared positions to determine if they were unique or interchangeable. In determining whether two positions were interchangeable, the peer panel considered whether a person could move into the other job, and vice versa, without undue interruption

[9]Peer panels have traditionally been used in the USGS to evaluate a number of decisions, including project funding and promotions. SER 297.

(i.e., without losing any speed on the project in 90 days). The SMEs did not consider or even discuss the ages of the incumbents. Indeed, none of the written materials used by the peer panel contained ages. SER 295-301.

After the peer panel's deliberations, only a small number of positions were placed in common competitive levels. Dr. Tilling testified that he was not surprised by this result because research scientists, especially in the higher grades, define their own jobs and become experts in a specific field or geologic province or technique. SER 307.

(E) Assignment Rights

On June 19, 1995, Dr. Leahy issued a memo entitled "Ground Rules for Reduction-in-Force." Its purpose was to articulate those choices over which the regulations give management flexibility. SER 47-48. Dr. Leahy employed two guiding principles in making these choices: (i) to give employees the maximum benefit possible under the regulations; and (ii) to avoid disruption. Among the choices Dr. Leahy made was to disallow intra-tenure group bumping. He wrote:

> In general, bumping rights permit employees to displace employees only in a lower tenure group or subgroup. At their discretion, agencies can establish ground rules that permit employees to bump to other positions within their own tenure 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.

SER 49; ER 1118. Dr. Leahy made this choice for two reasons. First, since most employees were in tenure group 1B (career, non-veteran), allowing intra-tenure group bumping would create hundreds of displacements and downgrades, causing major disruption of the Division's ability to meet programmatic responsibilities. Second, grade and salary retention benefits would force the USGS to abolish more positions in order to achieve the desired savings. Dr. Leahy articulated these reasons in a note attached to his memo. SER 50-52; ER 1120. It was not Dr. Leahy's intent to create a disadvantage to older employees. SER 50.

Charles Collins, defendant's expert on federal RIFs, testified that allowing intra-tenure group bumping, or "administrative assignment rights," is an expensive proposition. SER 205. Allowing administrative assignment rights results in multiple displacements where there would ordinarily be just one. SER 205-209. It would also hinder an agency's goal of reducing salary costs because more employees will be downgraded, and, in turn, more employees will have grade retention and salary retention. SER 211-212.

Assignment rights of employees were evaluated by a second SME peer panel. In her role as Western Region RIF Coordinator, Jill McCarthy, Ph.D., coordinated the bump and retreat evaluations and recruited the SMEs. She

restricted her search for SMEs to GS-14 and GS-15 scientists, and looked for individuals who had a broad range of expertise, were highly respected, and would stand up to the Branch Chiefs. SER 387, 397-398.

To assist the SMEs in identifying potential bumps or retreats, McCarthy developed a system of "pods." A pod is a grouping of positions that fell within a range of geologic or geophysical expertise. SER 398-399; ER 1121-1123. With assistance from two classification specialists, Dr. McCarthy assigned pods to all Menlo Park research positions. SER 400-402.

SMEs who evaluated the plaintiffs' assignment rights included Robert Christiansen, 60 years old at the time; Carl Wentworth, 59; William Ellsworth, 48; Charles Bacon, 47; Randolph Koski, 49; and Floyd Gray, 43. SER 316, 324, 340, 341, 357, 309. For each released employee, the SMEs were presented with a list of eligible positions, along with the pods assigned to those positions, and suggested pods to search for potential displacements. However, the SMEs did not restrict their search to the suggested pods. SER 325, 334, 343.

To evaluate potential retreats, the SMEs compared the released employee's former position descriptions with current position descriptions to determine whether the jobs were essentially identical. If a released employee's former position description was missing or vague, they looked at his or her Professional

Technical Record ("PTR"), similar to a curriculum vitae. SER 325-326, 334, 343-344. To evaluate bumps, they looked at the released employee's PTR, and sometimes the publications cited therein, to determine whether the employee was qualified to perform a job without undue interruption. SER 324, 326, 332, 334-335, 344. While the SMEs consulted with the Branch Chiefs for clarification, Branch Chiefs did not have power to veto a bump or retreat. SER 327, 384-385. None of the SMEs considered or discussed the age of employees when they evaluated assignment rights. SER 310, 317, 325, 333, 342-343, 366.

4. The Individual Appellants

There was no evidence at trial that the personnel decisions affecting appellants were motivated by age discrimination.

(A) David Adam

David Adam, 54 years old at the time of the RIF, was a level GS-14 Geologist assigned to the Branch of Paleontology and Stratigraphy who specialized in palynology.[10] His position was funded by the Global Change Program. He claims that his position met the needs of the Program because he was the Klamath Basin project chief, and because he maintained a refrigerated core storage unit. SER 2-5. However, there was no position for palynology in Menlo

[10]"GS" refers to the General Schedule of the federal pay scale.

Park on the Global Change staffing plan. The Program Council did decide to keep two career palynology positions in Denver, a term position in Denver, and a career position in Reston. Age was not a consideration in making these decisions. SER 60. The projects that Dr. Adam was involved with, including the Klamath Basin, were scheduled to terminate in 1995. His focus was in climate history, which was de-emphasized in the program plan. SER 57, 64-66. The Program Council also decided to use the long-term storage facility in Denver because it had a permanent staff, facilities for core preparation and photography, a database, and areas for visiting scientists. SER 63.

After he was released from his competitive level, Dr. Adam's assignment rights were evaluated by an SME panel. Robert Christiansen testified that he participated on that panel, and that there was no discussion of Dr. Adam's age when his assignment rights were being considered. SER 320.

(B) Lanford Adami

Lanford Adami, 60, was a GS-12 Chemist assigned to the Branch of Isotope Geology in the Office of Regional Geology. Mr. Adami's position was in a unique competitive level even before the USGS established new competitive levels. SER 131. His duties involved supporting the research of other scientists by managing a stable isotope lab. In 1994, the lab was consolidated with the Water Resources

Division due to lack of funds. After his separation, the lab ceased to function. SER 128-130. The National Geologic Mapping Program Council did not include Mr. Adami's position in the staffing plan because it was not a high priority. His age was not a factor in that decision. SER 276-277. Mr. Adami's assignment rights were evaluated by SMEs Floyd Gray and Robert Christiansen. They did not discuss Mr. Adami's age when they considered his assignment rights. SER 312, 320.

(C) Bela Csejtey, Jr.

Bela Csejtey, 61, was a GS-14 Geologist in the Branch of Alaskan Geology. He was Project Chief of the Denali National Park Mapping Project, the primary objective of which was to produce a geologic map of the McKinley Quadrangle. Dr. Csejtey admitted that the Denali project was not on the science plan, and that the project was discontinued because the Mineral Resources Program could not support it. SER 71-75. Moreover, he was a member of the Branch of Alaskan Geology who was based in Menlo Park at a time when the Branch wanted to keep its staff in Anchorage. SER 76-77, 412. Dr. Csejtey was evaluated for potential bumps and retreats by an SME panel that included Carl Wentworth. His age was not a factor in these evaluations. SER 327.

(D) Alice Davis

Alice Davis, 53, was assigned to the Branch of Pacific Marine Geology as a GS-13 Geologist. Her position involved research in volcanic processes on the ocean floor as it related to mineral deposit formation, and geologic framework surrounding the formation of minerals. SER 182.[11] As discussed above, framework geology, tectonic and deep sea minerals, and deep sea studies were de-emphasized in the Marine and Coastal Geology program plan. SER 248-250. Ms. Davis admitted that Dr. Field was favoring sedimentological and coastal work in creating the staffing plan. SER 185, 188. There was no discussion of Ms. Davis' age when she was omitted from the staffing plan. SER 257.

Ms. Davis's assignment rights were evaluated by SMEs Floyd Gray and Charles Bacon. There was no consideration or discussion by the SMEs of her age. SER 313, 345. Indeed, Ms. Davis testified that she knows both Mr. Gray and Dr. Bacon, that she thinks they did the best they could, and that she does not think either would have considered her age. SER 187.

(E) James Drinkwater

James Drinkwater, 44, was a GS-11 Geologist in the Branch of Alaskan

[11]Like Adami, Davis' position was in a unique competitive level even before competitive levels were reviewed for the RIF. SER 184.

Geology. His job involved framework geologic studies related to mineral resources, appraisals or land use primarily in Southeast Alaska. SER 135-136. Since the Mineral Resources Program was de-emphasizing work in Southeast Alaska, Mr. Drinkwater's position was not included on the staffing plan. SER 416. Like Csejtey and Ford, Drinkwater had the disadvantage of being a member of the Branch of Alaskan Geology based in Menlo Park at a time when the Branch wanted its staff to be located in Anchorage. SER 76-77, 412. His assignment rights were evaluated by Floyd Gray and Charles Bacon. His age was not considered or discussed. SER 314, 345.

(F) Arthur Ford

Arthur Ford, 63, was a GS-15 Geologist in the Branch of Alaskan Geology. While he believes that there is no one in the USGS who knows more about Antarctica than him, there is no mention of Antarctica in either his 1995 position description or the Mineral Resources Program Plan. SER 124, 127, 440-491. Indeed, Dr. Ford admitted that the two projects that are mentioned in his 1995 position description (the Sitka Quadrangle study and the Glacier Peak Wilderness study) were no longer active. SER 126-126a. Just before the RIF, Dr. Ford was assigned to two projects: (i) Southeastern Alaska, and (ii) Denali National Park. Both were discontinued. SER 74-75, 416, 419-420. Moreover, he too was a

member of the Branch of Alaskan Geology who was based in Menlo Park at a time when the Branch favored staff in Anchorage. SER 76-77, 412.

Dr. Ford was evaluated for bump and retreat by a panel of SMEs, including Carl Wentworth. Dr. Ford's age was not considered in the bump and retreat process. SER 327.

(G) Arthur Grantz

Arthur Grantz, 67, was a GS-16 Geologist in the Branch of Alaskan Geology. Before the RIF, he was working on a climate history of the Arctic Ocean. SER 350. Although he was in the Branch of Alaskan Geology, this research was principally funded by the Global Change and Climate History Program and the Marine and Coastal Geology Program. It was not possible to fit his position into the Mineral Resources Program. SER 412. In addition, Dr. Grantz was a Menlo Park scientist in the Branch of Alaskan Geology at a time when the Branch was favoring Anchorage scientists. Id. Dr. Grantz admitted that Carter told Branch members that he was favoring Anchorage over Menlo Park as a matter of policy. SER 351.

Dr. Grantz's assignment rights were evaluated by a panel of SMEs, including Charles Bacon. His age was never considered by the SMEs. SER 345-

346, 349.[12]

(H) H. Mahadeva Iyer

Dr. Iyer, 64, was a GS-15 Geophysicist in the Branch of Seismology. His expertise was in seismic studies of geothermal and volcanic systems. While it may have been appropriate to the Volcano Hazards Program, Dr. Iyer's research was not covered under the Earthquake Hazards Program plan. At the time Dr. Mooney became Branch Chief, Dr. Iyer did not have funding for his research. Instead, he was performing light administrative duties, and his salary was paid from Branch Assessments, which were in limited supply. As a result of these factors, and not his age, Dr. Iyer's position was not included on the staffing plan. SER 379-383. Dr. Iyer was evaluated for possible bumps and retreats by SMEs, including William Ellsworth. His age was not considered. SER 335-336. In fact, at the MSPB Dr. Iyer testified that he believed he was RIF'd because an SME was biased against his *work*. SER 15.

In November 1994, Dr. Iyer was among a group of four scientists (including Chi-Yu King) who complained to the Office Chief about the funding of minority

---

[12]Appellant's cite Grantz' testimony that Personnel Manager Dean Anderson told him that "the reason for the RIF was 'age.'" AOB 8. The district court sustained appellee's hearsay objection to this testimony. SER 353-355. Appellants did not challenge that ruling in their opening brief.

scientists. SER 12. As a result of the memo, a meeting was held and recommendations were drafted and placed in another memo. Dr. Mooney joined in that memo. SER 17. While Dr. Mooney was aware of the scientists' complaint to the Office Chief, he did not consider it when he made staffing recommendations. SER 381. SME William Ellsworth was not aware of the memo at the time he evaluated Dr. Iyer's assignment rights. SER 336-337.

(I) Chi-Yu King

Chi-Yu King, 61, was a GS-14 Geophysicist assigned to the Branch of Earthquake, Geology & Geophysics. He was 61 at the time of the RIF. Dr. King's position involved geochemical, hydrological, and mechanical approaches to earthquake prediction. SER 18, 23. His research involved monitoring radon gas along active faults with the goal of catching a premonitory signal of an imminent earthquake. SER 378. While Dr. King's approach was highly valued in Japan, the former U.S.S.R., and Europe, it was not highly valued at the USGS, and he received minimal funding. The two other Geophysicists who were involved in some aspect of geochemical or hydrological earthquake prediction were also separated. SER 23-25. Dr. King's position was not included on the staffing plan because the program de-emphasized earthquake prediction. His age was not a factor in that decision. SER 294, 379. Nor was Dr. King's age considered when

he was evaluated for potential bumps and retreats. SER 328-329.

(J) Stephen Lewis

Stephen Lewis, 45, was a GS-14 Geophysicist in the Branch of Pacific Marine Geology. Dr. Field testified that the reason Dr. Lewis was left off the staffing plan was the same reason a number of employees were left off: there were more employees than positions. His age was never discussed. SER 257. In fact, at the MSPB, Dr. Lewis claimed that his position was abolished because he made a whistleblowing complaint, and because he had disagreements with Dr. Field over a proposed move to Santa Cruz and the use of large ships in the branch. SER 133-134. Nor was Dr. Lewis's age discussed or considered when the SMEs evaluated his assignment rights. SER 329.

(K) Allan Lindh

Allan Lindh, 52, was a GS-15 Geophysicist in the Branch of Seismology. The focus of his position was the statistical prediction of earthquakes within the San Andreas fault system. Since earthquake prediction was an area that the Earthquake Program was de-emphasizing, this position was not needed to meet the program's goals. SER 292-293.[13]

---

[13]In a draft letter to the Journal Science, Dr. Lindh acknowledged that the USGS was retreating from any serious commitment to earthquake prediction research, and that the program plan did not include earthquake prediction. SER

A panel of SMEs found that Dr. Lindh was eligible to bump to a GS-12 position. Dr. Mooney concurred with their decision. There was never any discussion or consideration of age in determining Dr. Lindh's assignment rights. SER 335, 338-339.

(L) A. Thomas Ovenshine

Dr. Ovenshine, 59, was a GS-15 Geologist in the Branch of Resource Analysis, Office of Mineral Resources. He studied the interaction of land availability and resources to produce prosperity, and had certain representational duties. SER 10. Dr. Ovenshine's position was not abolished in the RIF. He was displaced through a bump by David Piper, an older employee who had a veteran's preference. SER 11. Floyd Gray was on the SME panel that found David Piper qualified to bump into Dr. Ovenshine's position. He testified that there was no discussion of either Piper's age or Ovenshine's age during their deliberations. SER 313. After he was displaced, Dr. Ovenshine was then himself evaluated for potential bumps and retreats by a panel of SMEs, including Charles Bacon. Dr. Ovenshine's age was not considered by that panel. SER 346.

5. Appellant's Evidence of Alleged Discriminatory Animus

Appellants contend that evidence presented at trial established that the RIF

68-69.

was discriminatory. Appellants relied on the following evidence.

(A) USGS Director Gordon Eaton

Despite his lack of participation in individual RIF decisions, appellants placed great weight on the acts and words of USGS Director Gordon Eaton, Ph.D. Dr. Eaton served as the Director of the USGS from March 1994 to September 1997. SER 140. He was 66 years old at the time of the RIF. SER 143-144.

After his appointment in March 1994, Dr. Eaton immediately went to the three major centers – Menlo Park, Denver, and Reston – to "address the troops." He spoke on a number of topics, including the need for change, the need to partner with other agencies, the need to work across division boundaries, and communication. SER 146-147. By this time, Dr. Eaton's own views on the need for change at the USGS were strengthened by the comments of some members of Congress, who saw the agency as unresponsive. SER 147-148. In his speech in Menlo Park, Dr. Eaton used a poster that was handed to him by Bill Normark, the Geologic Division's principal representative in Menlo Park. The poster depicted a bewildered looking dinosaur with the caption: "which is scarier, change or extinction?" Dr. Eaton used the poster because it reflected what he wanted to say about the need for change within the organization: "that failure to change would

ultimately lead to nonexistence." SER 148-149.[14]

In his speech in Denver, Dr. Eaton repeated a riddle he heard from members of the Transition Team:

> Q. What do you recall the riddle being?
>
> A. The riddle was essentially along the lines of what is the difference between the Geologic Division in Menlo Park, California and Jurassic Park?
>
> Q. What was the answer?
>
> A. The correct answer according to them was that one was an amusement park occupied by dinosaurs and the other was a movie.

SER 149-150. He told the joke in Denver, but not Menlo Park, because there is a friendly competition between Denver and Menlo Park. The joke drew sustained laughter and applause. In telling the joke, Dr. Eaton did not intend to ridicule older scientists. He told the joke because the Transition Team had found that there was a resistance in Menlo Park to even the idea of change. SER 150-151. In using the dinosaur image, Dr. Eaton was referring to "people of any age who were unresponsive to the need for change." SER 156-157. Neither Dr. Eaton's comments, nor his views on the need for change in the organization, were

---

[14]Dr. Eaton's view on change was "quite prophetic." Eight months later the newly elected Congress proposed the elimination of the USGS. SER 149.

connected at all to the RIF. SER 158.

Dr. Eaton authorized the RIF after discussions with Chief Geologist Ben Morgan. SER 140. After that, he had no role in the planning or implementation of the RIF. The Personnel Office advised Dr. Eaton that if he were to interfere in any RIF decision, it would "doom the process to failure." He did not meet with Personnel or the RIF Coordinators about the RIF. He had no advance knowledge of who was going to be affected by the RIF. SER 151-152. When appellant Thomas Ovenshine asked Dr. Eaton to intervene on his behalf, he declined by responding that the "whole process could be destroyed or challenged if I personally intervene." SER 11a-11b.

(B) Transition Team Report

After President Clinton's election, the USGS formed a Transition Team to prepare for a new Director. The Team included employees from all the divisions of the Survey. SER 388-390. Before Dr. Eaton was appointed, the Transition Team conducted a review by talking to employees throughout the agency. A number of common themes emerged from the interviews, including a concern over the inability to hire new technicians and scientists. Employees were worried about the effect of this trend on the long-term future of the USGS, and were frustrated that they were unable to pursue emerging scientific areas. SER 391-394.

On November 15, 1993, the Transition Team published a report entitled "A Vision for the 21st Century." SER 396; ER 1074-1114. In a section entitled "Recruitment," the Team attempted to address employees' concerns, particularly within the Geologic Division, that recruitment was constrained due to financial conditions. SER 396. In that section, the Team wrote the following:

> Well planned and effective recruitment results in identification of the best and brightest candidates for placement in positions, whether recruited from within or outside the current workforce. Proper recruiting ensures the merging of new and vital talents required to maintain a healthy distribution of age, grade, and skills. Potential sources of high quality candidates should be identified before the need exists. Such proactive recruiting is critical when opportunities for hiring are minimal.
>
> 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.

ER 1087.

There was no connection between the Transition Team, or its report, and the RIF. The Transition Team did not recommend a RIF. SER 154, 395. Dr. Eaton did not rely on the report when he authorized the RIF. SER 160. Dr. Leahy and

the Geologic Division did not rely on it when implementing the RIF. SER 53-54.

(C) Gary Larson Cartoon in Notice of RIF Briefing

In March 1995, Cynthia Ramseyer, secretary to the Assistant Chief Geologist for the Western Region, created a flyer publicizing a briefing on the RIF. ER 1115. The purpose of the flyer was to notify people of the time, place, location, and topic of the meeting. She, and she alone, chose to include a Gary Larson cartoon on the flyer. SER 179-180. Ms. Ramseyer typically used Gary Larson cartoons to catch people's attention. She chose this particular cartoon, which contained the caption "You gotta help me, Mom . . . This assignment is due tomorrow, and Gramps doesn't understand the new tricks," because with the RIF, "everybody was having to learn something nobody knew anything about." SER 180-181. It was not her intention to make fun of older employees. SER 181.

Ms. Ramseyer played no role in the RIF itself. She had no involvement in personnel decisions, staffing plan decisions, competitive levels, or bumps and retreats. Id.

6. Statistical Analysis of the RIF

Both sides presented expert testimony to address the question of whether the RIF had a disparate impact on older employees. Appellee's expert statistician, Chester Palmer, explained that in order for a statistical analysis of a particular

employment action to be valid, it is necessary to identify the factors, other than the one at interest, likely to affect the outcome. SER 84, 120-121, 659. Identification of "comparably situated" employees for the purposes of analyzing a RIF must include some consideration of the employee's job, since it is unlikely that an employer is indifferent to whether it retains a geologist or a secretary. SER 659.

The evidence admitted at trial demonstrated that financial constraints led to the RIF itself, and that staffing decisions were based on the research needs of each department for the next five years. See supra at 8-10, 13-18. Since staffing decisions were driven by scientific specialty, and some specialities were harder hit than others, the grouping of individuals for analysis should take specialty into consideration. SER 91, 112, 659. Failing to control for scientific specialty could cause a false result for age. SER 662-664.

A statistical evaluation that fails to take a scientist's specialty into consideration, which in effect treats all scientists in the same grade as fungible, ignores the reality of the USGS RIF and cannot reveal trustworthy information about the impact of age on RIF outcomes. This is the analysis that appellants' expert statistician conducted. The only descriptors that appellants used were grade and performance. SER 115-118. Appellants' analysis did not take into account the possibility that scientific specialty, veteran status, or tenure group influenced

RIF outcomes. SER 80-81.

Dr. Palmer conducted two sets of analyses. Like appellants' analyses, his first analysis was not useful in determining whether age discrimination occurred, because it treated all employees as fungible, rather than comparing similarly situated employees. SER 99, 663. However, it did reveal some interesting information regarding the Menlo Park workforce: (1) one quarter of the workforce was adversely affected by the RIF (either downgraded or separated), and (2) the workforce was not young. SER 100-101. Of the 505 permanent employees in Menlo Park, only 90 were under age 40. Id.

Dr. Palmer then performed a second set of analyses which took into account the possibility that scientific specialty had an effect on the likelihood of being adversely affected by the RIF. SER 664-665. For the second set of analyses, Dr. Palmer grouped employees by pod, the scientific specialty code assigned to each research scientist by Dr. McCarthy. ER 1121-23; SER 89, 91-92. Dr. Palmer then assigned to a single group all permanent full-time employees at Menlo Park for whom no pod assignment was listed in the retention register. SER 92. He further subdivided employees by tenure group and veteran status, factors which regulations require a federal employer to consider in a RIF. SER 106. With employees thus divided into groups, Dr. Palmer examined the data to determine

whether age and/or performance had an impact on RIF outcome. The analyses demonstrated that age was not a statistically significant factor in RIF outcome, but that performance was related to RIF outcome to a highly statistically significant degree. SER 106, 108-109.

SUMMARY OF THE ARGUMENT

Appellants failed to present any evidence at trial that the decisionmakers affecting their status in the RIF were motivated by age. That the district court found some evidence of a "culture" of bias does not relieve appellants of their ultimate burden to prove that the personnel decisions affecting them were motivated by age. This Court should therefore affirm the district court's findings in favor of appellee on the disparate treatment age discrimination claims.

The district court properly rejected appellants' disparate impact claims because, despite the fact that the RIF occurred in distinct phases, they failed to isolate and identify specific employment practices that resulted in a disparate impact. Moreover, appellants did not prove a causal connection between disparate results and age because their expert failed to consider the effect of other factors, such as scientific specialty. Appellants also cannot demonstrate that the choices the USGS made to achieve its legitimate goals were unreasonable.

The district court also properly granted summary judgment on appellants'

CSRA claims, and on Iyer and King's national origin discrimination claims. The MSPB's adjudication of appellants' non-discrimination challenges to the RIF was supported by substantial evidence. Iyer and King presented no evidence that any decisions in the RIF were motivated by race or national origin. Nor could they establish at trial that they were separated in retaliation for protected conduct.

In awarding damages to Calzia and Wrucke, the district court accepted the calculations of appellants' expert. The calculation of Calzia's loss was based on an assumption of a promotion that was not supported by evidence. The expert erred in calculating Wrucke's loss because he failed to fully credit what Wrucke would have earned had he accepted a reassignment. This Court should therefore remit the award to the district court to be recalculated.

ARGUMENT

A. Standard of Review

This Court reviews the district court's findings of fact after a bench trial for clear error. Zivkovic v. Southern California Edison Co., 302 F. 3d 1080, 1088 (9th Cir. 2002). This standard is "significantly deferential," and the Court should accept the district court's findings of fact unless it is "left with the definite and firm conviction that a mistake has been committed." Lentini v. California Center for the Arts, Escondido, 370 F. 3d 837, 843 (9th Cir. 2004). The district court's

conclusions of law following a bench trial are reviewed de novo. Id. A grant of summary judgment is reviewed de novo, using the same standard as the district court. Lovell v. Chandler, 303 F. 3d 1039, 1052 (9th Cir. 2002). The district court's computation of damages following a bench trial is reviewed for clear error. Lentini v. California Center for the Arts, Escondido, supra, 370 F. 3d at 843.

B. The District Court Properly Found in Favor of Appellee on Appellants' Disparate Treatment Age Discrimination Claims.

29 U.S.C. § 633a(a) provides that all personnel actions affecting federal employees "shall be made free from any discrimination based on age." An employee establishes a prima facie case of age discrimination by showing that: (1) he was 40 years of age or older; (2) some adverse employment action was taken against him; (3) at the time of the adverse employment action, he was satisfactorily performing his job; and (4) he was replaced by a significantly younger person with equal or inferior qualifications. Coleman v. Quaker Oats Company, 232 F.3d 1271, 1281 (9th Cir. 2000). Where the discharge in question results from a general reduction in workforce, a plaintiff need not show that he was replaced; rather he must show through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination. Coleman v. Quaker Oats Company 232 F.2d at 1281.

If the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the action. Id. Once a defendant provides such a reason, the presumption of discrimination drops from the case, and plaintiff must demonstrate that the articulated reasons are a pretext for discrimination by "either directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

The ultimate burden of proof remains always on the plaintiff to show that the employer intentionally discriminated against him because of his age. Coleman v. Quaker Oats Company, 232 F.3d at 1281. The plaintiff's age must have actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome. Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133, 141 (2000) (citations omitted).

The district court found that age was not a factor in any of the decisions affecting appellants in the RIF. ER 1220-1227, 1230-1236. Appellants do not argue in their opening brief, nor can they show, that this finding is clearly erroneous. Instead, appellants argue that, since the district court found that the Transition Team Report expressed a concern with the age of USGS employees,

appellants were not required to offer proof that the decisions affecting them in the RIF – which was unrelated to the Transition Team Report – were motivated by age discrimination. AOB 14-19. There is no support for this position.

Evidence of allegedly discriminatory comments must be tied to the adverse employment action in order to create an inference of age discrimination. Nidds v. Schindler Elevator Corp., 113 F. 3d 912, 919 (9th Cir. 1997). Accordingly, this Court has consistently rejected attempts to prove age-based discriminatory animus through stray remarks that are not tied to the challenged decision or decisionmaker. See Nidds v. Schindler Elevator Corp., supra, 113 F. 3d at 919 (supervisor's comments about "old timers" not tied directly to plaintiff's layoff); Nesbit v. Pepsico, Inc., 994 F. 2d 703, 705 (9th Cir. 1993) (comment by supervisor that employer didn't "necessarily like grey hair" not tied directly to plaintiff's termination); Merrick v. Farmers Insurance Group, 892 F. 2d 1434, 1438-39 (9th Cir. 1990) (comment that selectee was a "bright, intelligent, knowledgeable young man" was stray remark unrelated to decisional process). *Cf.* Mondero v. Salt River Project, 400 F. 3d 1207, 1212 (9th Cir. 2005) (comments by foreman not evidence of gender bias where there is no evidence that decisionmaker was aware of comment); Vasquez v. County of Los Angeles, 349 F. 3d 634, 640 (9th Cir. 2004) (discriminatory remarks by supervisor not evidence of national origin

discrimination where supervisor not decisionmaker, and no nexus between supervisor's remarks and the challenged employment decisions).

The district court found that the Geologic Division's culture was "tainted with age-based discriminatory animus," relying on evidence of the Transition Team Report, Dr. Eaton's speeches, and the Gary Larson cartoon. ER 1239. The district court correctly noted that neither these items nor their creators played a role in deciding whether any of the appellants would be adversely affected in the RIF. Id. Appellants cannot demonstrate that this finding was clearly erroneous.[15] Since this evidence was not tied to RIF decisions affecting appellants, there was no evidence that those decisions were tainted by age discrimination, and other evidence demonstrated that appellee had legitimate, programmatic reasons for separating or demoting the appellants, the district court properly found in favor of appellee on appellants' disparate treatment claims.

Citing Enlow v. Salem-Keizer Yellow Cab Co., Inc., 389 F. 3d 802 (9th Cir. 2004) ("Enlow"), appellants argue that the district court relied on direct evidence in finding that the Transition Team report expressed a concern about an aging

---

[15]Appellant's argue that Dr. McCarthy, who served on the Transition Team, was involved in the RIF as the RIF Coordinator for the Western Region. AOB 26-29. As RIF Coordinator, Dr. McCarthy did not participate in any decisions, such as those regarding staffing plans or assignment rights, which affected the appellants in the RIF. SER 397.

workforce, and therefore it should not have applied a McDonnell Douglas burden-shifting analysis to appellants' discrimination claims. AOB 16. Enlow does not relieve appellants of their ultimate burden to prove that age "actually motivated" the decisions that affected them in the RIF. Reeves v. Sanderson Plumbing Products, Inc., supra, 530 U.S. at 141.

In Enlow, the employer terminated a 73 year old cab driver after learning that its new liability insurance policy did not cover employees over 70. 389 F. 3d at 810. The district court granted the employer's motion for summary judgment, finding that the plaintiff failed to provide evidence of a discriminatory motive in the decision to terminate him. 389 F. 3d at 811. This Court found that, in opposing the employer's motion for summary judgment, plaintiff presented direct evidence that the employer terminated him because he was 73 and the new insurance policy did not cover employees over 70. 389 F. 3d at 812. The Court reasoned:

> When a plaintiff alleges disparate treatment based on direct evidence in an ADEA claim, we do not apply the burden-shifting analysis set forth in McDonnell Douglas Corp. V. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668 (1973) *in determining whether the evidence is sufficient to defeat a motion for summary judgment*.

389 F. 3d at 812 (emphasis added). The Court held that in granting the employer

summary judgment, the district court erroneously applied the McDonnell Douglas burden-shifting analysis, and denied plaintiff the opportunity to challenge the legitimacy of the employer's articulated reason for its decision. 389 F. 3d at 813.

Even assuming that appellants presented direct evidence of discriminatory animus in the USGS, this does not relieve them of their burden to prove that the decisions affecting them in the RIF were motivated by their age. Thus, the district court concluded that "evidence of a culture of age-based discriminatory animus is not sufficient to establish that any particular Plaintiff was adversely impacted during the RIF because of his or her age." ER 1239. Enlow instructs that such evidence may be sufficient to defeat summary judgment, as indeed it did in this case. ER 225-228, 1042. At trial however, none of the plaintiffs other than Calzia and Wrucke could present evidence that the relevant decisionmakers had a discriminatory animus. Nor could they present evidence that called into question the legitimate, programmatic reasons for appellee's actions.

Appellants also argue that the district court failed to apply the mixed-motive analysis prescribed by Desert Palace, Inc. V. Costa, 539 U.S. 90 (2003). AOB 16-19.[16] In Desert Palace, the Supreme Court held that direct evidence was not

[16]Appellants did not raise this issue before the district court. See, e.g., ER 1246-1264. Accordingly, this Court should decline to address it. Yang v. California Dept. of Social Services, 183 F. 3d 953, 957 (9th Cir. 1999).

required in order to obtain a jury instruction under 42 U.S.C. § 2000e-2(m), a provision in Title VII for which there is no analogous provision in the ADEA. 539 U.S. at 101. Even if Desert Palace did apply to appellants' ADEA claims, it provides no basis for reversing the district court's decision. 42 U.S.C. § 2000e-2(m) provides that a plaintiff establishes an unlawful employment practice if he demonstrates that a protected criterion was a motivating factor for an employment practice. The district court analyzed the evidence and found that age was not a factor, let alone a motivating factor, in any of the decisions affecting appellants in the RIF. ER 1220-1227, 1230-1236. Appellants have failed to demonstrate that this finding is clearly erroneous.

Accordingly, the district court's finding in favor of appellee on appellants' disparate treatment age discrimination claims should be affirmed.

C. The District Court Properly Found in Favor of Appellee on Appellants' Disparate Impact Age Discrimination Claims.

The Supreme Court recently held that the disparate impact theory of liability is available under the ADEA. Smith v. City of Jackson, Mississippi, 544 U.S. 228, ___, 125 S. Ct. 1536, 1540-45 (2005) ("Smith").[17] To establish a disparate impact

[17]Under the disparate impact theory, a facially neutral employment practice may be deemed an unlawful employment practice without evidence of the employer's subjective intent to discriminate when the practice causes a disparate impact on a protected class of employees. Wards Cove Packing Co. V. Atonio,

claim under the ADEA, it "is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact." Id., 544 U.S. at ____, 125 S. Ct. at 1545. Instead, the plaintiff must identify "the *specific* employment practices that are allegedly responsible for any observed statistical disparities." Id. (emphasis in original), *quoting* Wards Cove, 490 U.S. at 656. Otherwise, employers could be potentially liable for "the myriad of innocent causes that may lead to statistical disparities . . ." Id., *quoting* Wards Cove, 490 U.S. at 657.

The evidence presented at trial showed that the RIF proceeded in several distinct stages. See supra at 12-25. Indeed, appellants complain about specific policies and practices implemented in the RIF, such as creating "unique competitive level codes" (AOB at 10), and disallowing intra-tenure group bumping (AOB at 11). Appellants failed, however, to present evidence that any specific employment policy or practice used in the RIF was responsible for a disparate impact on older employees. Despite the fact that the RIF was comprised of several distinct elements, appellants presented a statistical analysis of the results of the RIF as a whole. Accordingly, the district court properly concluded that appellants failed to "meet their obligation to isolate and identify the specific

---

490 U.S. 642, 645 (1989) ("Wards Cove").

employment practice responsible for the disparate impact . . ." ER 1242.

Even if it were appropriate to look at the results of the RIF as a whole, appellants did not prove that the RIF had a significant disparate impact on older employees "because of their membership in a protected group." Katz v. Regents of the University of California, 229 F. 3d 831, 835 (9th Cir. 2000), quoting Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994 (1988). Appellant's analysis failed to account for the influence on RIF outcome of factors other than age, such as the USGS's need for specific subject matter expertise to accomplish the goals set out in its Program Plans. See supra at 40. Because appellants presented no evidence that took scientific specialty into consideration, and since it is not reasonable to assume that the USGS was indifferent to the type of work being performed in deciding which positions to retain, the district court properly found that appellants did not prove that age played a "causal role in determining which employees were affected by the RIF." ER 1219-20. Appellants do not argue, nor can they demonstrate, that this finding was clearly erroneous.

Finally, there is another basis to affirm the district court's rejection of appellants' disparate impact claims. Section 4(f)(1) of the ADEA provides that it shall not be unlawful for an employer to take an action "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Based on

this provision, the Supreme Court held in Smith that the scope of liability for a disparate impact claim under the ADEA is narrower than under Title VII of the Civil Rights Act of 1964. Id., 544 U.S. at ___, 125 S. Ct. at 1544. In Smith, the Court held that the City's decision to grant a larger raise to newer employees was based on a "reasonable factor other than age" (i.e., seniority and rank) that addressed the City's legitimate goal of retaining police officers. Id., 544 U.S. at ___, 125 S. Ct. at 1546. The Court added:

> While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test [under Title VII], which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.

Id.

The USGS conducted a RIF to respond to its legitimate goal of increasing operating funds while facing decreasing appropriations from Congress. As discussed above, decisions in the RIF were based on factors other than age, such as scientific specialty, and the desire to avoid disruption. While there may have been other means of achieving its goal, the choices made were clearly reasonable.

The district court, which issued its decision before the Supreme Court issued its opinion in Smith, concluded that even if appellants could establish a

prima facie disparate impact case, appellee would prevail under a business necessity test. ER 1243. Applying this test, the district court found that appellants failed to identify "any other course of action that [appellee] 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." Id. Appellants now argue that, under Smith, the district court erred by requiring appellants to meet this standard. AOB at 37. Remand on this issue, however, is unnecessary. It is clear that, under Smith, the more stringent business necessity test does not apply to a disparate impact claim under the ADEA. Smith, 544 U.S. at ___, 125 S. Ct. at 1544-46. Even if appellants were able to show a disparate impact based on age, appellee need only prove that its practices were based on "reasonable factors other than age." As discussed above, there is conclusive evidence in the record that appellee's choices were based on reasonable factors other than age. See Vernon v. Heckler, 811 F. 2d 1274, 1277 (9th Cir. 1987) (Court of Appeals may affirm on any basis supported by the record).

Therefore, this Court should affirm the district court's finding on appellants' disparate impact claims.

D. The District Court Properly Granted Summary Judgment on Appellants' Claim for Judicial Review Under 5 U.S.C. § 7703.

Although only the Court of Appeals for the Federal Circuit can review MSPB decisions, if the action is a "mixed case" involving discrimination claims, judicial review must be sought in the district court under the applicable discrimination statute. Washington v. Garrett, 10 F. 3d 1421, 1428 (9th Cir. 1993). The district court has jurisdiction in a "mixed case" to review the lawfulness of the personnel action as well as the discrimination claims. Id. While the discrimination claims are reviewed de novo, the nondiscrimination claims are reviewed on the administrative record under the more deferential standard of 5 U.S.C. § 7703(c). Morales v. Merit Systems Protection Board, 932 F. 2d 800, 802 (9th Cir. 1991). The CSRA provides, in pertinent part, that:

> [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.

5 U.S.C. § 7703(c).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Hathaway v. Merit Systems Protection Board, 981 F. 2d 1237, 1240 (Fed. Cir. 1992), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). The question before the district court is not how to rule upon a de novo appraisal of the facts, but whether the administrative determination is supported by substantial evidence in the record as a whole. Kimm v. Department of the Treasury, 61 F. 3d 888, 891 (Fed. Cir. 1995).

On May 17, 2001, the district court granted appellee's motion for partial summary judgment on appellants' CSRA claims. ER 174-198. The district court concluded that each of the MSPB's findings on nondiscrimination claims that were challenged by appellants was supported by substantial evidence, including findings that: (1) there were bona fide financial reasons for the RIF (ER 180-82); (2) the procedures used in the RIF complied with applicable regulations (ER 182-89); and (3) the decisions regarding staffing, competitive levels, and assignment rights with respect to each of the appellants were proper (ER 189-98).

Appellants do not argue, and cannot demonstrate, that the MSPB's findings were arbitrary and capricious, or unsupported by substantial evidence. Instead, appellants contend that the district court somehow applied the more deferential standard under 5 U.S.C. § 7703 to their age discrimination claims. AOB at 21-24.

Appellants are mistaken. In granting summary judgment on appellants' CSRA claims, the district court specifically did not address their discrimination claims. ER 180, 190. Moreover, the court twice denied summary judgment on the age discrimination claims, thereby giving appellants their day in court on both disparate treatment and disparate impact theories. ER 214-236, 1041-1044. Appellants also criticize the MSPB's findings on their age discrimination claims. AOB at 21-24. These findings are inconsequential, however, since appellants received de novo review, and a full trial, on their discrimination claims. Accordingly, the district court's grant of summary judgment on appellant's CSRA claims for judicial review should be affirmed.

E. The District Court Properly Granted Summary Judgment on the National Origin Discrimination Claims of Iyer and King.

In addition to their age discrimination claims, Iyer and King alleged that they were separated in the RIF because of their national origin. ER 234. Although the district court found that they could establish prima facie cases of discrimination, it granted summary judgment on these claims because Iyer and King failed to proffer evidence that the RIF was a pretext for discrimination. ER 235.

Once an employer articulates a legitimate, nondiscriminatory reason for an

adverse employment action, the presumption of discrimination drops from the case, and plaintiffs must demonstrate that the articulated reasons are a pretext for discrimination by "either directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Neither Iyer nor King presented evidence that called into doubt the RIF decisions affecting them. Moreover, neither presented evidence of a discriminatory animus based on national origin.

Appellants cannot identify any evidence presented to the district court sufficient to defeat summary judgment. Instead, appellants assert conclusory allegations regarding the treatment of Iyer and King. AOB at 40-42. These claims should be given no weight because they are (I) not cited to or supported by the record, and/or (ii) concern Iyer and King's retaliation claims, which did go to trial (ER 1243-44). Accordingly, the district court's grant of summary judgment on the national origin claims should be affirmed.

F. The District Court Properly Found in Favor of Appellee on the Retaliation Claims of Iyer and King.

Appellants Iyer and King also claimed that they were separated in the RIF because they previously complained that minority scientists received inadequate

funding. In order to prevail on a claim for retaliation, a plaintiff must establish that: (1) he engaged in protected activity; (2) his employer subjected him to an adverse employment action; (3) there was a causal link between the protected activity and the employer's action. Miller v. Fairchild Industries, 797 F.2d 727, 731 (9th Cir. 1986). After a full trial on their claims, the district court found that, although Iyer and King each engaged in protected conduct and suffered an adverse employment action, there was no evidence "suggesting a causal connection between their protected activity and their termination." ER 1244.

Appellants cannot show that the district court's finding of no causation was clearly erroneous. The evidence presented at trial showed that, while Iyer and King put their complaint in a memo to the Office Chief, the memo played no role in staffing decisions by the Branch Chief. SER 381. The SME who evaluated their assignment rights was not aware of the memo. SER 336. Appellants' conclusory assertions – unsupported by citations to the record – do not warrant reversal of the district court's findings. See AOB at 40-42.

G. The District Court Erroneously Calculated the Damages Awarded to Calzia and Wrucke.

The ADEA authorizes an award of back pay, but not compensatory damages for pain and suffering. 29 U.S.C. § 626(b); Naton v. Bank of California, 649 F. 2d

691, 698-99 (9th Cir. 1981). An award of back pay may not be based on speculation or guesswork, but rather on specific evidence from which the calculation can be deduced. Kolb v. Goldring, Inc., 694 F. 2d 869, 873 (1st Cir. 1982).

The district court awarded damages to Calzia of $171,522 plus pre-judgment interest, and to Wrucke of $169,714 plus pre-judgment interest. SER 735-736. In awarding these sums, the district court accepted the damages calculations performed by appellants' expert. SER 697, 703. Both of these calculations contained clear errors that inflated the award.

1. James Calzia

Appellants' expert calculated Calzia's economic loss by comparing what he would have earned had he not been terminated with what he actually earned. SER 697. In calculating what he would have earned, the expert assumed that Calzia would have been promoted from GS Grade 12, Step 10 to GS Grade 13, Step 4. SER 721-722. However, there is no factual basis in the record for this assumption. While step increases within a grade will ordinarily occur after specific waiting periods (5 CFR § 531.405), an increase in grade will not occur unless a peer panel recommends a promotion to a higher grade. See SER 297; 5 CFR § 531.202. There was no evidence supporting the assumption that Calzia would have been

promoted to GS-13 just because he reached the highest step in GS-12. Since the assumption is not supported by the record, the expert's opinion has no evidentiary value. Gallant v. Heckler, 753 F. 2d 1450, 1456 (9th Cir. 1984). This erroneous assumption inflates Calzia's total economic loss by $118,796. SER 725-727. In addition, without any basis, the district court added $1,000 to the expert's calculation of Calzia's loss. SER 697, 736.

2. Chester Wrucke

The district court found that Wrucke failed to mitigate his damages by declining a reassignment to a GS-13 position. SER 691-692. Had Wrucke accepted this reassignment, he would have stayed in his grade for two years, and would have enjoyed "Pay Retention" thereafter. Under Pay Retention, Wrucke would have retained the basic pay of his GS-14, Step 10 position as long as it did not exceed 150% of the top step of the GS-13 position to which he bumped. SER 684.

In calculating Wrucke's damages, appellants' expert incorrectly calculated the salary he would have earned under Pay Retention because he failed to separate general increases in *basic* pay from *locality* pay. As a result, appellants' expert has underestimated the amount Mr. Wrucke would have earned in the GS-13 position, thereby inflating his damages.

While on Pay Retention, Wrucke would have received 50% of cost of living increases. SER 684. Regulations issued by the Office of Personnel Management ("OPM") provide that the 50% limitation applies to the general schedule increase in the basic pay, not locality pay. See 5 CFR § 536.205(c) ("When an increase in the scheduled rates of the grade of the employee's position occurs while the employee is under pay retention, the employee is entitled to 50% of the amount of the increase in the maximum *rate of basic pay* payable for the grade of the employee's current position.") (emphasis added). "Rate of basic pay" is defined in the regulations as being "exclusive of additional pay of any kind." 5 CFR § 536.102. Locality pay, or "comparability payment," is a single percentage that is applied to an employee's scheduled rate of basic pay. 5 U.S.C. § 5304(c)(1).[18] Therefore, the correct method of calculating Mr. Wrucke's salary under Pay Retention is to add one-half of the general increase to the prior year's basic pay, and then apply the locality pay percentage to his new salary. This error by appellants' expert inflates Wrucke's total economic loss by $63,144. SER 729-733.

[18]Accordingly, when OPM publishes salary tables, it publishes two forms of tables: the salary table incorporating the general increase to basic pay, and the salary table incorporating the general increase plus the locality pay. OPM's salary tables are posted at www.opm.gov.

CONCLUSION

Based on the foregoing, this Court should affirm the district court's finding and conclusions on appellants' age discrimination and retaliation claims, and should affirm the court's grant of summary judgment on the national origin and CSRA claims. In addition, the Court should remit the action to the district court to recalculate the damages awarded to Calzia and Wrucke.

DATED: February 28, 2006

Respectfully submitted,

KEVIN V. RYAN
United States Attorney

_____

STEVEN J. SALTIEL
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE TO FED. R. APP. P. 32(a)(7)(c) AND CIRCUIT RULE 32-1

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 13,686 words.

DATED: February 28, 2006

_____

STEVEN J. SALTIEL
Assistant United States Attorney

STATEMENT OF RELATED CASE

The undersigned counsel is aware of the following case pending before this Court that is related to this case: Guy Cochrane, et al. v. Gale Norton, No. 03-16860. On September 28, 2005, this Court dismissed the appeal in that case for failure to file the opening brief.

DATED: February 28, 2006

STEVEN J. SALTIEL
Assistant United States Attorney