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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

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17 DENNIS M. MANN, A. THOMAS
OVENSHINE, BRENT D. TURRIN,
18 CHESTER T. WRUCKE, *et al.*,

19 Plaintiffs,

20 v.

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

22 Defendant.
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Docket No. C98-02094 CW (EDL)

PLAINTIFFS' PRETRIAL BRIEF

Pretrial Conf: June 13, 2003

Time: 10:00 a.m.

Trial date: June 30, 2003

Judge: Honorable Claudia Wilken

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1 Pursuant to Civil L.R. 16-10 and the Court's Pretrial Order, Plaintiffs, David P. Adam et
2 al., submit the following trial brief.

3 **I.**

4 **INTRODUCTION**

5 Plaintiffs are scientists and former employees of the Geologic Division of the United
6 States Geologic Survey (USGS), an agency within the U.S. Department of the Interior. They
7 allege that they were subjected to age discrimination that resulted in the termination of their
8 employment in an agency-wide so-called Reduction-In-Force (RIF) carried out in 1995.
9 Plaintiffs have alleged both disparate treatment and disparate impact claims under the Age
10 Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* (ADEA).

11 Plaintiffs originally alleged additional causes of action based upon the Civil Service
12 Reform Act of 1978, 5 U.S.C. 7701 *et seq.* (CSRA). By order filed May 17, 2001, this Court
13 granted partial summary judgment to Defendant on Plaintiffs' CSRA claims, based on review of
14 the Merit Systems Protection Board (MSPB) record. On May 31, 2002, the Court granted in part
15 and denied in part defendant's motion for summary judgment on plaintiffs' discrimination
16 claims. The Court granted summary judgment to defendant with respect to the age discrimination
17 claims of plaintiffs Hirshorn and Turrin, the retaliation claims of plaintiffs Adam, Lewis, Lindh,
18 and Turrin, the national origin discrimination claims of plaintiffs Csejtey, Iyer, and King, and the
19 sex discrimination claim of plaintiff Davis. See May 31, 2002 Order at 9:15-10:10, 21:4-23:5.
20 The Court denied the motion for summary judgment as to Plaintiffs' disparate treatment and
21 disparate impact age discrimination claims under the ADEA. Subsequently, by order dated May
22 ___, 2003, the court denied Defendant's second motion for summary judgment on Plaintiffs'
23 disparate treatment and disparate impact claims under the ADEA.

24 **II.**

25 **FINDINGS OF FACT**

26 **A. Exhaustion of Administrative Remedies**

27 Plaintiffs exhausted their administrative procedures by filing a timely Merit Systems
28 Protection Board Appeal in October 1995. Each of the plaintiffs appealed the action taken against

1 them in the RIF to the Merit Systems Protection Board (“MSPB”). After a hearing that included
2 91 days of testimony and generated an administrative record of 175 volumes, MSPB
3 Administrative Judge Philip Arnaudo issued written decisions sustaining the agency’s actions in
4 each of the plaintiff’s appeals. A timely civil action in this matter was filed in the Northern
5 District of California on May 26, 1998. Venue in this action is properly in the Northern District
6 of California. Defendant, Secretary of the Department of the Interior, in her official capacity, is a
7 proper defendant under ADEA.

8 **B. Plaintiffs Established a *Prima Facie* Case.**

9 Plaintiffs established a *prima facie* case of age discrimination: Plaintiffs were each over
10 40 years old at the time of the RIF, were qualified for their positions, and suffered an adverse
11 employment action as a result of the RIF. See Plaintiffs’ Exhibit 370, Defendant’s Supplemental
12 Responses to Plaintiffs’ First Set of Interrogatories, No 2 and No. 4. The Court found that
13 “Defendant does not dispute that the other fifteen Plaintiffs have established a *prima facie* case
14 of age discrimination.” May 30, 2002 Order, at 10:11-12.

15 The USGS Geologic Division conducted a reduction-in-force (hereafter “RIF”) of 37% of
16 its workforce on October 15, 1995. The 15 named plaintiffs in this case were part of a group of
17 541 Geologists who were separated from federal service or downgraded. 350 permanent
18 employees and 191 non-permanent employees were separated and 119 employees were demoted
19 and 124 were reassigned. See Plaintiffs’ Exhibit 11, General RIF Information, US Geological
20 Survey- Geologic Division [AR 18410]¹

21 Plaintiffs’ job title/series/grade, tenure subgroup (all were full-time and all but Wrucke
22 was a non-veteran), date of birth, service computation date and adjusted service computation
23 date, as of October 15, 1995, is shown in Table I:

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28 ¹ “AR refers to page number in Plaintiffs’ Exhibit 166, the U.S. Merit Systems
Protection Board Administrative Record in *Adam et al v. Department of the Interior*.

TABLE I - STATUS OF PLAINTIFFS ON OCTOBER 14, 1995

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

C. The USGS Geologic Division Pre-RIF Organizational Structure.

Before the 1995 RIF and reorganization, the Geologic Division of the U.S. Geological Survey (“USGS”) was comprised of five offices: (1) Office of Energy & Marine Geology (responsible for the Energy Resources and Marine & Coastal Surveys Programs); (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 Volcano, Landslide, Earthquake Hazards Reduction, and Magnetic Field Monitoring & Charting Programs); and (5) Office of Mineral Resources (responsible for the Mineral Resource Surveys Program).

Each office was managed by an Office Chief and contained several branches. Each branch was managed by a Branch Chief. The Branch Chief positions were staffed by scientists on a rotating basis. In other words, a scientist would rotate into a Branch Chief position for a

1 limited time period, generally 3-5 years. When the limited term was up, the scientist would
2 return to his scientific position and one of his colleagues would rotate into the Branch Chief
3 position. AR 15872.

4 In addition to the programmatic division into offices and branches, the Geologic Division
5 was divided geographically into the Eastern, Central and Western Regions, with the Western
6 Region based in Menlo Park, California. The management of the USGS was centralized in
7 Reston, Virginia, under the supervision of the Office Chiefs. Branch Chiefs were located in
8 regional offices, but they reported to the Office Chiefs at headquarters. Plaintiffs' Exhibit 375,
9 Declaration of Jill McCarthy in Support of Defendant's Motion, ¶¶ 3-4.

10 **D. Plans for "Change" at the USGS and History of the RIF.**

11 On November 15, 1993, the USGS published a report entitled "A Vision for the 21st
12 Century". Plaintiffs' Exhibit 7, "The United States Geological Survey: A Vision for the 21st
13 Century" dated November 15, 1993. [Bates 00878-00918]. The report purports to "represent the
14 beginning of what must be a long-term commitment to change." Under the heading
15 "Recruitment", the authors stated as follows:

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

22 Id. p. 10. On March 15, 1994, Ben Morgan², the USGS' Chief Geologist, wrote a memorandum
23 to the USGS Director, which addressed the need of the Geologic Division to "reduce its
24 workforce by approximately 380 people and salary costs of approximately \$30 million by the end
25 of Fiscal Year 1995". Mr. Morgan stated that:

26 At the completion of the window for early retirement, about January 15, 1995, a
27 complete reassessment of RIF requirements should be made based on retirement
28 figures. If at that time it is necessary to proceed, I am proposing that the RIF be
spread geographically across the Division, and **that it be targeted for the**
professional/technical categories especially in the GS12-15 grades....
Throughout the process, steps will have to be taken to avoid a disparate impact of

28 ² Ben Morgan was Chief Geologist from May 1987 to October 1994. Morgan
testimony, MSPB Hearing Vol. 1, 32:22-33:3.

1 a RIF on women and minorities, many of whom have been employed in recent
2 years and would be vulnerable under current RIF regulations **because of lack of**
3 **seniority.**

4 Plaintiffs' Exhibit 546, Morgan Memo, dated March 15, 1994, p. 4. [at AR20759] Ben Morgan
5 sent the Office Chiefs of the Geologic Division a memo re: formation of a RIF planning team,
6 dated June 27, 1994, which stated

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

10 Plaintiffs' Exhibit 29, Morgan Memo, dated June 27, 1994. The plan was to reduce the FTE (full
11 time equivalent positions) by 380 people. Plaintiffs' Exhibit 167, Morgan testimony, MSPB
12 Hearing Vol. 1, 37:9-13, 38: 9-13, 38:17-21 [AR 00035-65] The buyouts resulted in 230
13 employees agreeing to retire prior to February 1995. Plaintiffs' Exhibit 168, John Filson³
14 testimony, MSPB Hearing Vol. 1, 67:8-9 [AR 00066-00105] By the end of March 1995,
15 approximately 400 people had taken a buy-out or early retirement. Plaintiffs' Exhibit 169, P.
16 Patrick Leahy⁴ testimony, MSPB Hearing Vol. 1, 107:24-108:1 [AR 00107-201, 209-285] The
17 goal of getting the **senior** scientists to retire was not achieved, so the USGS Geologic Division
18 decided to conduct a RIF which would focus on the GS-12 through GS-15 positions. Plaintiffs'
19 Exhibit 167, Morgan testimony, MSPB Hearing Vol. 1, 42:4-6, 43: 18-25 [AR 00035-65] The
20 USGS managers decided to increase their goal to separate 525 individuals in the RIF. Plaintiffs'
21 Exhibit 169, P. Patrick Leahy testimony, MSPB Hearing Vol. 1, 108:2-6 [AR 00107-201, 209-
22 285]

23 A Mock RIF using a sample of USGS Marine Branch employees was conducted in
24 Woods Hole, using Department of Navy software, to determine who would be adversely affected
25 by the RIF. It was learned that if the Title V RIF rules were followed, the older scientists would
26 be permitted to bump and retreat to lower graded positions. If the RIF rules were followed, there

27 ³ John Filson was the Acting Chief Geologist from November 1, 1994 through
28 March 30, 1995. John Filson testimony, MSPB Hearing Vol. 1, 63:24-25.

⁴ P. Patrick Leahy was the Chief Geologist from March 31, 1995 to the present. P.
Patrick Leahy testimony, MSPB Hearing Vol. 1, 104:13-20.

1 would not be a very significant cost savings. Morgan testimony, MSPB Hearing Vol. 1, 43:18-25
2 [AR 00035-65] A system was developed so that older employees could be targeted for release in
3 the RIF.

4 **E. Anti-Older Worker Environment.**

5 Dr. Gordon Eaton became the Director of USGS in early 1994. Prior to his appointment
6 to this position, his supervisor, former Secretary of the Interior Bruce Babbitt, expressed to Dr.
7 Eaton his concerns about the direction of the USGS. According to Dr. Eaton, Secretary Babbitt
8 believed that the USGS had been inadequately "responsive to change in terms of national need
9 [and] societal concerns." Secretary Bruce Babbitt was also concerned that "there had been
10 inadequate development of leadership among the young people" in the organization. Dr. Eaton
11 set out to address these concerns.⁵ Plaintiff's Exhibit __, Eaton MSPB Testimony, page 10:21 -
12 12:7 [AR 13050 -13053]. Dr. Eaton requested the personnel department to compile lists of
13 employees who were eligible to retire. Id, page 20:14-21 [AR 13060]. He discussed the reason
14 why the RIF was done, after the three buyout programs resulting in hundreds of people leaving
15 the agency. "The number of people that took the buyout were young people", referring to the fact
16 that too many young employees took the buyout the first time. Id, page 21:4-6 [AR 13061]. He
17 admitted that he was trying to get the older employees to retire:

18 A. I – I think I indicated that – that the issue was constrained by A) the fact that
19 the budget was – was diminishing in terms of actual purchasing power and
20 because there was no mandatory retirement age, **there was no incentive for
people to move out the top as they had in the past when there was a
mandatory retirement age.**

21 Id., page 22: 18-23 [AR 13062].

22 _____
23 ⁵ Eaton asked Ovenshine to chair an *ad hoc* committee to advise him on how to
24 encourage the retirement of senior employees. Plaintiffs' Exhibit __, Ovenshine Deposition 32:3
25 - 33:25. The committee developed the concept of the Pecora Fellowship, in which in exchange
26 for agreeing to retire in late 1994 the employee would continue to occupy their office, have
27 access to full supporting services, and receive a budget for scientific expenditures for their
28 research work for a period of one year, extendable to two. The Committee offered to senior
scientists the right to continue to occupy their offices, the right to continue to have supporting
services, and a budget for scientific expenditures for their work for a period of one year,
extendable to two, provided they retire. Plaintiffs' Exhibit __, at Ovenshine Deposition 33:9-25.
Approximately 40 fellowships were awarded. Plaintiffs' Exhibit __, at Ovenshine Deposition
47:2 - 49:14. When sufficient numbers of older employees did not agree to retire, Eaton initiated
the RIF plan in earnest.

1 Within two weeks of being appointed in early 1994, Dr. Eaton visited the three main
2 USGS centers, located in Menlo Park, California; Denver, Colorado; and Reston, Virginia. From
3 the beginning of his incumbency as Director of the U.S. Geological Survey, Gordon Eaton⁶ let it
4 be known in talks to employee assemblies and in private conversations that it was time for older
5 employees of the Geologic Division to retire.⁷ See Plaintiffs' Exhibit 4, Eaton speech in Menlo
6 Park in the morning on March 23, 1994, Menlo Park video library Videotape No. 077. (Run time
7 43 minutes); Plaintiffs' Exhibit 5, Eaton speech in Denver, Colorado on March 25, 1994
8 [missing from Menlo Park video library]⁸; Plaintiffs' Exhibit 6, Eaton speech in Reston,
9 Virginia on March 28, 1994, Menlo Park video library, Videotape No. 006. (Run time 93
10 minutes.) Dr. Eaton admitted that he made jokes about **getting rid of the dinosaurs** during a
11 speech he made on March 25, 1994, to the USGS scientists in Denver, Colorado:

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

23 ⁶ Defendant argued that Dr. Eaton's MSPB testimony that these "dinosaur jokes"
24 were **not aimed at older employees**, just "people who would not change". Plaintiffs' Exhibit
25 ____, MSPB testimony of Dr. Eaton [AR 13045 - 13133]

26 ⁷ Eaton gave a number of video-taped speeches to USGS employees in which ageist
27 references to "dinosaurs" were made. For example, see Declaration of Dr. Grantz in Opposition
28 to Motion for Summary Judgment, which discusses the speech Eaton gave in Menlo Park on the
afternoon of March 23, 1994 Menlo Park video library, Videotape No. 005 (Run time 71
minutes).

28 ⁸ Although the defendant agreed to provide a DC ROM of this speech during
discovery, the CD provided by the US Attorney's office was blank.

1 See Exhibit 5 ; Stipulation by USGS Counsel [AR -]; Declaration of Grantz in
2 Opposition to Motion for Summary Judgment, p. 4:3-18. On March 23, 1994, Director Eaton
3 described a poster of bewildered-looking dinosaur which was captioned: “Which is scarier,
4 change or extinction” given to him by Bill Normark, Assistant Chief Geologist for the Western
5 Region. Plaintiffs’ Exhibit 251, Director Gordon P. Eaton’s testimony at MSPB Hearing, page
6 70:10-15. [AB 13110]. Dr. Eaton's "dinosaur comments" indicate stereotyping of older
7 employees as resistant to change and express Dr. Eaton's desire to replace these older employees
8 with younger employees.

9 George Plafker testified that on July 29, 1994, he accompanied Director Gordon Eaton on
10 a helicopter tour in Alaska. Plaintiffs’ Exhibit 656, Declaration of George Plafker in Opposition
11 to Motion for Summary Judgment. While on this tour, they had a conversation about the
12 impending RIF, in which Director Eaton said the RIF was necessary because of a funding crunch,
13 and that he felt the best way to deal with the funding crunch was for folks who were eligible for
14 retirement to retire. *Id.* Eaton encouraged Plafker to retire because it would free up money to hire
15 younger people. *Id.*

16 George Gryc testified that when Gordon Eaton became the director, he called him to
17 introduce himself as the Director’s Representative and was told by Eaton that “you do not
18 represent [the Director]” and that he “thought it was time for someone younger to take on those
19 duties.” Plaintiffs’ Exhibit 654, Declaration of George Gryc in Opposition to Motion for
20 Summary Judgment. Shortly after this conversation with Director Eaton, the duties of the
21 Director's Representative for the Western Region were removed from Dr. Gryc’s position
22 description and assigned to a younger geologist, Thomas Casadevall, who was designated as the
23 Assistant Director for the Western Region. *Id.*

24 A. Thomas Ovenshine testified that after Eaton became the Director, he understood that
25 Eaton wanted all of the Senior Executive Service (SES) employees to tender their resignations.
26 Before agreeing to leave SES, Dr. Ovenshine received a verbal agreement from Director Gordon
27 Eaton that he would not only receive saved pay (pay retention) for four years, but that he would
28 also continue to be employed by the United States Department of Interior for this period. Dr.

1 Ovenshine agreed to voluntarily step down from SES only after receiving Director Eaton's
2 assurance and agreement that I would receive pay retention for four years. The reassignment and
3 pay retention was approved in September, 1994. See, Plaintiffs' Exhibit 514, Memorandum to
4 Appropriate Division Chief from SES Members Title, [MSPB Appellant's Exhibit 28-S Exhibit
5 3] [AR _____]; Plaintiffs' Exhibit 515, Memo to Chief Geologist from A. Thomas
6 Ovenshine, dated September 2, 1994 [MSPB Appellant's Exhibit 28-S Exhibit 4] [AR
7 _____]; Plaintiffs' Exhibit 516, OPM Form 1390, dated 9/28/94, [MSPB Appellant's
8 Exhibit 28-S Exhibit 5, AR _____]; Plaintiffs' Exhibit 517, Cover letter to Thomas A.
9 Ovenshine, dated Sept. 29, 1994 [MSPB Appellant's Exhibit 28-S Exhibit 5]; Plaintiffs' Exhibit
10 508, Ovenshine Deposition 30:2-18. [AR _____]. When it was rumored that Dr.
11 Ovenshine was to be RIF'ed, he wrote to Leahy, and emailed a copy to Director Eaton asking for
12 his help and reminding him of the written agreement that he would be employed for four years if
13 he voluntarily left SES. Plaintiffs' Exhibit 518, email to Eaton, cc'g letter to Leahy, dated July
14 17, 1995, Appellant's Exhibit 28-S, Exhibit 9. [AR _____]. He did not respond, so he sent
15 another e-mail on August 2, 1995. See Plaintiffs' Exhibit 519, email to Eaton, dated August 2,
16 1995, Appellant's Exhibit 28-S, Exhibit 10. [AR _____]. Eaton replied that he had to be
17 completely silent out of legal necessity and that "the whole process could be destroyed or
18 challenged" if he personally intervened for him. Plaintiffs' Exhibit 520, email to Ovenshine
19 from Eaton, dated August 2, 1995, Appellant's Exhibit 28-S, Exhibit 11. [AR _____].

20 Dr. David Scholl testified that he was asked to applied for and had an interview with
21 Eaton for the Chief Geologist for the Geologic Division position in March, 1995. Plaintiffs'
22 Exhibit 658, Declaration of David Scholl in Opposition to Motion for Summary Judgment.
23 Eaton's Chief of Staff, Linda Stanley was present during the discussion. *Id.* The subject of the
24 upcoming RIF was raised and Eaton told him that procedures had been developed whereby senior
25 scientists could be targeted. *Id.* Dr. Scholl objected to the wisdom of getting rid of the senior
26 scientists, because of the damage this would have on the reputation and the work of the Survey.
27 *Id.* He was not selected for the position and retired when he learned that Leahy was selected to
28 carry out the RIF. *Id.*

1 In addition, in March, 1995, at the beginning of the RIF process, all employees of the
2 geologic division were advised to attend a briefing "about the coming reductions-in-force." This
3 flier was posted at the USGS facilities in Menlo Park and Deer Creek by the agency. John
4 Filson, Acting Chief Geologist, Judy George and Sandy Sherman of the Office of Personnel were
5 the advertised speakers. The notice announcing the briefing included a one-panel cartoon of a
6 dog, holding a piece of paper and speaking to a larger dog while an obviously older dog sits in
7 the corner reading a newspaper. The caption on the cartoon reads, "You gotta help me, Mom..
8 This assignment is due tomorrow and Gramps doesn't understand the new tricks." Plaintiffs'
9 Exhibit 9, Larson Cartoon, MSPB Exhibit No. Y-64B [AR _____]. This cartoon appears to
10 be a reference to the cliché, "you can't teach an old dog new tricks." It is susceptible to the
11 inference that those implementing the RIF would be biased against older employees because of
12 their perceived reluctance to adjust to changes in the work place.

13 Plaintiffs have also proffered as evidence that the RIF was implemented with
14 discriminatory intent a memorandum outlining the "Ground Rules of Reduction in Force" written
15 by Chief Geologist Patrick Leahy and distributed on June 19, 1995. Plaintiffs' Exhibit 10,
16 Ground Rules for Reduction in Force. [AR 17274-17278] In this memo, Leahy details the
17 policies he established within the statutory and regulatory context of an RIF. With respect to
18 assignment rights (bumping rights), Leahy decided that no assignment rights would be permitted
19 "beyond those required by law and regulation." *Id.* at 17278. Leahy recognized that he had the
20 discretion to grant assignment rights in a manner "that would expand bumping. rights for most
21 Division employees." He chose not to adopt this position, in part, because the "[e]mployees
22 with least seniority would be most vulnerable to downgrading or separation. As a result, the
23 remaining staff would include most of our highly experienced senior scientists, but many of the
24 younger more recently trained staff would be lost." *Id.* at 17278. Therefore, while
25 "acknowledging that [the chosen bumping policy] denies senior staff an advantage we could have
26 granted them," Leahy limited those employees' bumping rights. *Id.* at 17278.

27 Director Eaton's jokes and comments depict a culture at the USGS which is ageist.
28 Eaton, by his remarks, created a climate in which it was ok to ridicule older employees, to force

1 them out of their jobs and replace them with younger people. Plaintiffs presented evidence that
2 the anti-older worker statements made by the USGS upper management created an environment
3 in which the upcoming RIF was widely recognized as an opportunity to target older employees,
4 including women, minority group members, and whistleblowers. One example was an email
5 written by Assistant Branch Chief David Oppenheimer: “This organization was going to get **one**
6 **chance to clean house** and this was the time to do it”. Plaintiffs’ Exhibit 155, David
7 Oppenheimer e-mail, August 15, 1995, p. 3, MSPB Agency Exhibit 33.3(DHO-B) [AR_____].
8 Another instance was illustrated by the conversation of the Chief of Personnel, Dean Anderson
9 and Dr. and Mrs. Grantz. On the day he was to receive his specific RIF notice, Dr. Grantz and his
10 wife, Marsha Grantz, bumped into Mr. Anderson outside the building. Mr. Anderson said that the
11 reason for RIF’ing him was his “age”. See Declarations of Dr. Grantz and Mrs. Grantz. Thus, the
12 plans to “change” the USGS adversely impacted older employees and affected every level of the
13 decision-making process.

14 **F. RIF Procedures Used by USGS.**

15 The RIF process used by the USGS in this case is complex. The planning and
16 implementation of the RIF was carried out in several distinct phases:

17 (1) Creation of Five-Year Science Program Plans.

18 On February 1, 1995, Acting Chief Geologist John Filson directed each of the five Office
19 Chiefs to appoint a Program Council for each of the science programs under that Office Chief’s
20 control. This resulted in the creation of ten Program Councils, each of which was comprised of
21 the Branch Chiefs and Senior Scientists whose research was principally funded by the science
22 program that was the domain of that council. See supra, footnote 1, for a list of the science
23 programs. Each Program Council was charged with the task of developing a “Five-Year Plan” to
24 meet the scientific responsibilities of the program over the next five fiscal years. These plans
25 were to state the scientific priorities of each program, with sufficient specificity to serve as the
26 basis for the development of staffing plans. Plaintiffs’ Exhibit 375, Declaration of Jill McCarthy
27 in Support of Defendant’s Motion, at ¶ 6; Ex. 1.

1 (2) Revision of Position Descriptions.

2 On March 9, 1995, Acting Chief Geologist John Filson directed all managers to have
3 their employees update their position descriptions to accurately describe their current duties.
4 Managers were asked to ensure that position descriptions for research scientists reflected all
5 major project assignments and any special duties or responsibilities. Plaintiffs' Exhibit 375,
6 Declaration of Jill McCarthy in Support of Defendant's Motion, at ¶ 7, Ex. 2. Younger
7 employees were coached to make their Position Description very narrow and specific, to avoid
8 being displaced in the RIF, whereas many of the plaintiffs were told to make their Position
9 Description generic. This practice enabled the USGS to create "unique competitive level codes"
10 to target specific positions for retention or elimination in Round I (the Competitive Level
11 Process) and then used the position descriptions in Round II (the Bump and Retreat Process) to
12 exclude the plaintiffs from other positions.

13 (3) Creation of Staffing Plans.

14 In April 1995, the Program Councils prepared staffing plans. In preparing staffing plans,
15 each Program Council had to determine which duties and skills were required to meet the goals
16 and priorities of that program's Five-Year Plan, given the expected funding. A salary cap was
17 established for each program using a "worst-case" funding scenario. In May 1995, a non-
18 managerial ad hoc committee, led by senior scientist Thomas Fouch and comprised of scientific
19 staff from across the Division (the "Fouch Committee"), reviewed each staffing plan to ensure
20 that it was sufficient to meet the priorities set forth in that program's Five-Year Plan. The Fouch
21 Committee prepared comments and recommendations for each Program Council, which resulted
22 in some changes being made to the staffing plans. McCarthy Decl. at ¶¶ 8-9.

23 The staffing plans were then "populated" by the Program Councils by comparing the
24 duties identified in the recently updated position descriptions with the program needs as reflected
25 in the staffing plans. If a position description was not placed on a staffing plan, that position was
26 to be abolished. McCarthy Decl. at ¶ 10. The staffing decisions of each of the Program Councils
27 were then reviewed by the Geologic Division Council, which was comprised of the new Chief
28 Geologist, Patrick Leahy, the two Associate Chief Geologists, the three Regional Geologists, and

1 the five Office Chiefs. On May 16-17, 1995, the Geologic Division Council reviewed the list of
2 positions to be abolished to see if another program, group of programs, or support office could
3 support any of the positions. Some positions were added to some of the staffing plans as a result
4 of this review. McCarthy Decl. at ¶ 11. A final review and adjustment to the staffing plans took
5 place in late July 1995 when it became clear that funding for the Geologic Division would be
6 above the “worst-case” planning level. Office Chiefs were asked to submit a list of positions to
7 add to the staffing plans of their respective programs. The final selection of positions to be added
8 back, based on the new funding projections and overall Geologic Division needs, was conducted
9 by the Geologic Division Policy Council, comprised of the Division Council less the five Office
10 Chiefs. McCarthy Decl. at ¶ 12. Some of the positions were vacant, and some were encumbered.
11 Defendant claimed that the add-back decisions were based on the position descriptions, not the
12 individuals in the positions. AR 15298-15300.

13 Plaintiffs maintained that the “add back lists” were used to create vacancies, which were
14 selectively filled with people the managers wanted to “save”, who had lower status in the RIF,
15 lower ASCDs and were younger.⁹ The “add-back list” included people who had been bumped or
16 retreated upon and many of those positions did not go through the Round II process. For instance,
17 Lanford Adami was not permitted retreat rights into James Saburomaru’s position, which was
18 added back after Mr. Adami was evaluated in Round II.

19 (4) Treatment of Management Positions.

20 Historically, the Geologic Division filled management positions from the science ranks
21 for limited terms on a rotational basis. Scientists would compete for leadership slots with the
22 understanding that the assignment would be for a limited period of time and they would rotate
23 back into science positions after serving a term in management. A number of the plaintiffs had
24 served in management positions in the past and would have been eligible to bump or retreat into
25 positions held by current managers. To protect individuals holding management positions, a shell
26 game was enacted. On June 11, 1995, the USGS reassigned the sitting managers to their former
27

28 ⁹ This process was illegal, pursuant to the RIF regulations. See *Cook and Shank v. Department of the Interior*, 97 FMSR 5172.

1 science positions. AR 15304 and 15342. Meanwhile, these managers were immediately
2 reappointed as "Acting" managers until after the RIF was completed. The defunct science
3 positions of the managers were added to the staffing plans, even though the position descriptions
4 were out of date and the work was not currently being done by the USGS. None of these
5 positions were put through Round I of the RIF. Since a few individuals had been hired directly
6 as managers, and had no former science positions, the USGS created bogus position descriptions
7 for those managers who had none. For example, John Sutter, who replaced Mitchell Reynolds in
8 May 1995, did not have a science Position Description which was on the staffing plan, yet he was
9 protected from being retreated on by the enactment of these rules. Defendant claimed the
10 fictitious position descriptions were associated with their current programs and consistent with
11 their scientific skills. AR 15342. These position descriptions were not reviewed by the Program
12 Councils or the Geologic Division Council and were not shown to be related to the Science
13 Plans.

14 The USGS included new managerial positions on the staffing plan that were neither
15 staffed nor funded. AR 00184 and 15308. These positions were kept vacant and none of the
16 plaintiffs were allowed to compete for these positions in the RIF. Of the group of approximately
17 eighty managers, only four were separated in the RIF. Following the RIF, the protected managers
18 were placed into the unfunded managerial positions. None of the plaintiffs were allowed to apply
19 for these positions, as only individuals who had not been RIFd would be considered. Plaintiffs
20 Arthur Grantz, Stephen Lewis, Allen Lindh, and A. Thomas Ovenshine were eligible to retreat
21 into these managerial positions, but for the "shell game".

22 (5) Determination of Assignment Rights.

23 The Civil Service Reform Act of 1978 specifically requires an executive agency, such as
24 the Department of the Interior to adhere to merit system principles. See 5 U.S.C. 2301(a)(2). 5
25 CFR 351.201(b) reflects the congressional concern for fairness, limiting an agency's discretion in
26 filling a vacancy during a reduction in force. 5 U.S.C. 2301(b)(2) provides in part:

27 All employees and applicants for employment should receive fair
28 and equitable treatment in all aspects of personnel management . . .

1 5 C.F.R. 351.701(c) requires the USGS to offer released employees assignment to
2 another position in two situations, provided that the position is no more than three grades below
3 the position from which the employee was released:

- 4 (i) Bumping: An employee can bump to a position held by another employee in a
5 lower tenure group/subgroup if he/she is qualified to perform that job. For
6 example, career veterans (Tenure Group/Subgroup IA) can bump career non-
7 veterans (Tenure Group/Subgroup IB), and career non-veterans can bump career-
8 conditional and temporary or term employees (Tenure Groups II or III).
- 9 (ii) Retreating: An employee can retreat into a job in the same tenure group/subgroup
10 that is “essentially identical” to a job he/she previously held if the employee has
11 higher retention standing than the incumbent.

12 McCarthy Decl. at ¶ 20, Exhibit 4, 5 CFR §351.402(b). The right to bump to a position is based
13 on the released employee’s qualifications, while the right to retreat to a position is based on the
14 job duties of the released employee’s previous position, as reflected in the position description.

15 A second SME (subject matter expert) panel (Round II) was convened to review the
16 assignment rights of employees released from their positions. The SME panel members
17 (“SMEs”) that evaluated reassignment rights of Western Region employees were non-managerial
18 senior scientists from the Western Region, including Charles Bacon, Rick Blakely, Bob Page,
19 Floyd Gray, Randolph Koski, Steve Ellen, William Ellsworth, and Carl Wentworth. The SME
20 panel’s evaluation was reviewed by the Branch Chief of the position whose incumbent was to be
21 displaced. If there was a disagreement between the SMEs and the Branch Chief regarding a bump
22 or retreat, it was resolved by the Chief Geologist. However, none of the named plaintiffs were
23 found to be eligible to bump or retreat in any position by the SMEs. McCarthy Declaration at ¶
24 21.

25 For each released employee, the SMEs were provided a list of positions in the Geologic
26 Division within the Menlo Park local commuting area that were: (1) held by employees with
27 lower retention standing, (2) no more than three grades below the grade of the released employee
28 and (3) in a “Pod” or area of expertise. The USGS Personnel Office created “Pods” on an ad hoc

1 basis, by using categories of areas of expertise originally developed by the Geological Society of
2 America (“GSA”), plus additional categories to accommodate positions that did not fit into any
3 of the GSA specialties. Each position remaining in the staffing plans was assigned one or more
4 Pods based on the expertise required by the position, as reflected in the position description.
5 Plaintiffs had no input into this process, but some of them later complained that they were not
6 included in the appropriate “Pod”.

7 Defendant assigned Pods to the current and past position descriptions of the released
8 employees. The RIF Assignment Rating Sheets were used by the Personnel Office to determine
9 which positions should be evaluated by the Subject Matter Experts. After a determination by
10 Personnel Office employees, who used the Pods to identify those positions to which released
11 employees were likely to have assignment rights, the list was sent to the SMEs for closer
12 examination. McCarthy Decl. at ¶ 22.

13 The SMEs were instructed to evaluate the released employee’s possible bump and retreat
14 rights. All notes taken by the SMEs during this process were destroyed on a daily basis. The
15 SMEs were instructed to use plaintiffs’ position descriptions and Professional & Technical
16 Records (“PTR”) to determine whether they were “qualified” to bump into a position on the
17 staffing plan. Like a *curriculum vitae*, a PTR describes a Geologic Division employee’s positions,
18 research, and publications throughout his or her career. To evaluate retreats, the SMEs were
19 instructed to examine the position descriptions for the plaintiffs’ prior positions, and the position
20 descriptions of the position being considered for retreat. If a released employee was found to have
21 a right to bump or retreat to a position, he or she was offered assignment to that position. If a
22 released employee was not found to have such a right, he or she was separated. McCarthy Decl. at
23 ¶ 23.

24 Defendant also devised a hair splitting use of the concept of “essentially identical” which
25 plaintiffs maintain violated the existing federal law and regulations. The USGS instructed both
26 Round I and Round II SMEs that the essential identity of each positions was a “two-way
27 street”. If the PD of either the “retreator” or “retreatee” contained a single duty that was not in the
28 comparison PD, it was determined to be not “essentially identical”.

1 5 C.F.R. 351.501(a) requires “competing employees shall be classified on a retention register on
2 the basis of their tenure of employment, veteran preference, length of service, and performance.”
3 The procedure the USGS used in conducting this RIF eliminated consideration of seniority,
4 veteran preference, length of service and performance as factors in retention, and allowed USGS
5 management to target older employees. As a result of this newly devised procedure, virtually all
6 (97.3%) competitive levels and retention registers contain only one scientist. Most of the
7 employees who were RIF’ed would not have been RIFd but for the unique CLCs because their
8 adjusted service computation date (ASCD) was superior to “essentially identical” Geologist
9 positions that survived. This change in policy caused plaintiffs to be RIF’ed, whereas, under the
10 old rules, they would have been retained and the employees with less seniority and qualifications
11 would have been RIFd.

12 Jill McCarthy testified that Geologic Division Human Resource Officer John McGurk
13 recommended that each position be placed in a separate competitive level for purposes of the RIF
14 because believed that the existing CLCs did not comply with OPM regulations and MSPB law.
15 See Plaintiffs’ Exhibit ___, McCarthy declaration, p.6:7-17. McCarthy points out that McGurk’s
16 recommendation of placing each scientist in a unique CLC could not be put into effect without
17 further evaluation of each position. Id at p.6. Defendant did exactly the opposite of what was
18 necessary to fixed the problem: they established the CLCs based on the qualifications of the
19 individual scientists, after changing their position descriptions to support the pigeon-holing of
20 each scientist.

21 OPM responded to Congressional inquiries about the use of unique CLCs. See Plaintiffs’
22 Exhibit ___, letter to Congressman John L. Mica, Chairman of the House Subcommittee on
23 Government Reform and Oversight from James B. King, Director of OPM, dated August 31,
24 1995, states, in pertinent part:

25 In establishing competitive levels the agency must, consistent with OPM’s
26 retention regulations, determine whether two or more positions are interchangeable
27 and may thus be placed in the same competitive level. However, the agency has no
28 latitude to elect a policy of narrow rather than broad competitive levels (or the
opposite). Instead, the agency reaches its determination whether or not two or more
positions are interchangeable for competitive level purposes based solely on the
individual position descriptions of the positions. Again, in establishing competitive

1 levels, the agency must make a judgment determination based on the position
 2 descriptions of record, but the agency has no opportunity to manipulate
 3 competitive levels for the purpose of targeting individual employees for RIF
 4 action.” .

5 The USGS violated the requirement that interchangeable positions be placed in the same
 6 CLC by placing people with “essentially identical” duties into single CLCs. This deprived them of
 7 the right to retreat or bump other employees. For example, Dr. Wrucke, a Veteran GS-14 Series
 8 1350 Geologist, was at the top of the “AA” register in his competitive level and therefore would
 9 have been the last to be reached for release had proper CLCs been used to group people with
 10 similar duties. However, because he was assigned a unique CLC and placed in a Retention
 11 Register of one, he was denied the right to compete on the basis of his Veterans Preference in
 12 Veteran Tenure Subgroup (1A) and ASCD which was more favorable than other employees. *Id.*
 13 Eleven USGS Geologists with expertise in Regional Geology were in CLC AA prior to 1995 and
 14 should have remained in the same competitive level, because all of their general duties (as
 15 opposed to current assignments) were interchangeable. Similarly, Dr. Ford was in a “AA” GS-15
 16 competitive level occupied by six Geologist 1350 positions. He would have been at the top of the
 17 list based on his ASCD and the last to be reached for release in pay grade 15. If all of the grade 15
 18 AA positions were abolished, he could have retreated on Subgroup 1B GS-14 positions in the AA
 19 CLC. Dr. Csejtey was also in the AA GS-15 competitive level and would have superior retention
 20 rights to other younger employees in his subgroup.

21 **TABLE II -SUMMARY OF AGE AND YEARS OF SERVICE COMPARISONS**

22 PLAINTIFF NAME	23 # OF POSITIONS CONSIDERED AND DENIED	24 # OF PEOPLE RETAINING POSITIONS	25 % OF COMPARATORS S YOUNGER THAN PLAINTIFF	26 % OF COMPARATORS WITH FEWER YEARS OF SERVICE THAN PLAINTIFF
27 ADAM, DAVID P.	(RIF ASSIGNMENTS RATING SHEET) 137	123	96	100
28 ADAMI, LANFORD	137	121	100	100
CALZIA, JAMES P.	101	73	88	100
CSEJTEY JR., BELA J.	170	149	100	100

1	DAVIS, ALICE	74	54	98	96
2	DRINKWATER, JAMES	65	45	82	96
3	FORD, ARTHUR B.	209	200	99	100
4	IYER, MAHADEVA	142	153	100	100
5	GRANTZ, ARTHUR	168	131	100	100
6	KING, CHI-YU	134	121	100	100
7	LEWIS, STEPHEN D.	41	30	83	90
8	LINDH, ALLAN G.	164	154	91	94
9	MANN, DENNIS M.	94	73	86	100
10	OVENSHINE, THOMAS A.	197	175	100	100
11	WRUCKE, CHESTER	105	89	100	100
				Average: 95%	Average: 98.4%

12

13 Table II is a summary of information provided in the RIF Assignments Rating Sheet. The

14 RIF Assignment Rating Sheet lists each position for each of the plaintiffs, which were allegedly

15 considered in Round II of the RIF. See Plaintiffs' Exhibit __, Chiala Declaration. The RIF

16 Assignments Rating Sheet for each plaintiff was reformatted in an Excel spreadsheet. The data

17 from the database provided to Dr. Switzer was added, so that the ages and years of service could

18 be compared. This was summarized for each plaintiff and printed out as a RIF Data Spreadsheet.

19 Table II summarizes this data for all plaintiffs, by comparing plaintiffs to the comparators, by age

20 and years of service. It shows that on average, Plaintiffs were older than 95 % of their

21 comparators. Seven of the fifteen plaintiffs were the oldest of all their comparators. On average,

22 Plaintiffs had served more years than 98.4 % of their comparators. Eleven of the fifteen Plaintiffs

23 had served more years than any of their comparators. Overall, Plaintiffs were older and had served

24 more years than the vast majority of their comparators.

25 (6) Spoilation of Evidence

26 _____Dean Anderson, Chief of the Personnel Office in Menlo Park, ordered that the SMEs leave

27 their notes in the meeting room where the decisions on CLCs were made in Round I and when

28 bump and retreat were being made in Round II. Notes made and used by the Subject Matter

1 Experts (SMEs) were destroyed by a shredder. Few records and no handwritten SME notes
2 survived the process. William Normark, Assistant Chief Geologist for the Western Region and the
3 ranking Geologic Division Official, admitted in a memo dated September 29, 1995, that
4 "informal notes" taken by SMEs during evaluation panels "were destroyed at the end of each day."
5 Susan Murphy, Dean Anderson, and Catherine Balboni, all of the USGS Personnel Office,
6 admitted that SMEs were told to leave their notes in the meeting rooms and that at the end of the
7 day someone from the Personnel Office would collect and destroy them. Robert Tilling, who was
8 a leader of the Round I SME Panel, testified that all notes were collected and destroyed.

9 5 C.F.R. 351.505, which provides that "each agency shall preserve intact all registers and
10 records relating to an employee for at least one year from the date the employee is issued a
11 specific notice." However, USGS personnel destroyed all of the notes taken during the Round I
12 and Round II discussions, by placing them in a shredder at the end of each day. A memorandum
13 by William Normark, then Assistant Chief Geologist for the Western Region and the ranking
14 Geologic Division Official, dated September 29, 1995, states that "informal notes" taken by SMEs
15 during evaluation panels "were destroyed at the end of each day." Dean Anderson, head of the
16 USGS Personnel Office in Palo Alto testified that he told the Subject Matter Experts (SME) who
17 were deciding who to RIF to leave their notes in the meeting rooms and that at the end of the day
18 someone from the Personnel Office would collect and destroy them. Plaintiffs' Exhibit ___,
19 Deposition of Dean Anderson, September 16, 1996. He changed his story at the MSPB hearing
20 and testified that there were only post-up notes which were destroyed. Plaintiffs' Exhibit ___,
21 MSPB Vol. ___ 211:3-212:24 [AR 00828-00829] Randy Koski, one of the SMEs, testified that the
22 notes were on "lined tablet paper". Plaintiffs' Exhibit ___, MSPB Vol. 161:11-162:17 [AR 06027-
23 06028] Robert Tilling, who was a leader of the Round I SME Panel, testified that notes were
24 collected and destroyed. Plaintiffs tried to find out why bumps and retreats were denied to them,
25 only to discover that the documents they needed to investigate the matter had been destroyed.

26 (7) Statistical evidence.

27 Plaintiffs' statistical expert, William Lepowsky, majored in math at Harvard, graduating
28 summa cum laude in 1967. Plaintiffs' Exhibit 311, Report of William Lepowsky on Behalf of

1 Plaintiffs, dated January 31, 2003. He received a master's degree in mathematics from the
2 University of California at Berkeley in 1968, and has taught mathematics and statistics since
3 1969. He received a master's degree in statistics from Berkeley in 1976. He is a member of the
4 American Statistical Association and the California Mathematics Council for Community
5 Colleges.

6 Defendant's statistical expert, Chester I. Palmer, graduated from Dartmouth College in
7 1969. Plaintiffs' Exhibit 298, Dr. Palmer's CV. He received a master's degree in mathematics
8 from Cornell in 1971. He completed a master's of philosophy degree in mathematics at Yale
9 University in 1973. He completed a doctorate in education at Auburn University in 1979.

10 Both Mr. Lepowsky and Dr. Palmer are qualified as statistical expert witnesses. The two
11 experts presented distinct views of the affect of the RIF on older employees, based on the same
12 database of employees. The database Mr. Lepowsky used was provided by Dr. Paul Switzer, who
13 obtained it from Dr. Samaranayake, the defendant's rebuttal expert witness a the MSPB hearing.
14 Dr. Palmer testified that he used the age information from a database provided by Dr.
15 Samaranayake, but also used the retention registers provided by the Defendant.

16 Mr. Lepowsky testified that age was a factor in the RIF, based upon the finding of Dr. Paul
17 Switzer, who provided testimony and declarations during the MSPB hearing. Dr. Switzer gave
18 two p-values, 6/100 of 1% and 1/10,000 of 1%. P-values of less than 5% are commonly said to be
19 statistically significant. Mr. Lepowsky testified that it is clear that given the model Dr. Switzer
20 chose to use, in the case of age, the p-value associated with his conclusion is extremely small,
21 indicating the strength of the conclusion. The p-value measures the likelihood that the observed
22 results would be at least extreme as they are, if this was a matter of random chance. Because the
23 p-value is so small, that is strong evidence that the observed effect of age is not mere
24 happenstance.

25 Dr. Palmer testified that age was not a factor. Mr. Lepowsky testified on rebuttal that the
26 defendant's statistical expert, Dr. Palmer was incorrect in his analysis of the RIF, because he did
27 not separate the scientific and non-scientific positions. Lepowsky also explained how Dr.
28 Palmer's analysis was skewed by excluding the Eastern and Central Region employees and only

1 analysing the employees in the Western Region.

2 The Court finds that the evidence presented by defendant that the USGS reasons for
3 conducting the RIF, namely shortage of funds and need for a reorganization satisfied their burden
4 to articulate a legitimate justification. The Court finds that defendant's claim "plaintiffs were not
5 RIF'ed because of their age" is not supported by substantial evidence.

6 **III.**

7 **ARGUMENT**

8 **A. PLAINTIFFS ESTABLISHED THAT AGE WAS A FACTOR**
9 **IN THE RIF IN VIOLATION OF THE ADEA**

10 The court has jurisdiction of this matter pursuant to the Age Discrimination in
11 Employment Act (ADEA), 29 U.S.C. §633a. The ADEA protects persons who are age 40 and
12 older against discrimination when age is a determining factor in an adverse employment action. 29
13 U.S.C. §623(a)(1). The ADEA applies to civilian employees of agencies of the federal
14 government. "All personnel actions affecting employees ... who are at least 40 years of age ... in
15 executive agencies ... shall be made free from any discrimination based on age." 29 U.S.C.
16 §633a(a). See also 29 U.S.C. §631(b).

17 "A plaintiff alleging discrimination under ADEA may proceed under two theories of
18 liability: disparate treatment or disparate impact." *Rose v. Wells Fargo & Co.*, 902 F.2d 1417,
19 1421 (9th Cir. 1990), citing *Palmer v. United States*, 794 F.2d 534, 536 (9th Cir. 1986).
20 Disparate treatment is the most easily understood type of discrimination. The employer simply
21 treats some people less favorably than others because of their race, color, religion, or other
22 protected characteristics. Proof of discriminatory motive is critical, although it can in some
23 situations be inferred from the mere fact of differences in treatment. Claims that stress disparate
24 impact by contrast involve employment practices that are facially neutral in their treatment of
25 different groups but that in fact fall more harshly on one group than another and cannot be
26 justified by business necessity. Proof of discriminatory motive is not required under a disparate-
27 impact theory. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 619(1993); see *Mangold v. California*
28 *Pub. Utils. Comm'n*, 67 F.3d 1470, 1474 (9th Cir. 1995).

1 Although the Supreme Court applies disparate treatment to the ADEA, the Court
2 acknowledged in *Hazen Paper*, 507 U.S. at 610 that it has "never decided whether a disparate
3 impact theory of liability is available under the ADEA" Existing Ninth Circuit precedent at the
4 time of the *Hazen Paper* decision approve of a disparate impact theory under the ADEA. *E.g.*,
5 *Rose*, 902 F.2d at 1421; *see also EEOC v. Local 350*, 998 F.2d 641, 648 n.2 (9th Cir. 1993) ("in
6 this circuit a plaintiff may challenge age discrimination under a disparate impact analysis"). The
7 Ninth Circuit has continued to assume that this theory is still viable after *Hazen Paper*. *Coleman*
8 *v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000). In this case, plaintiffs have alleged both
9 disparate treatment and disparate impact claims under the ADEA.

10 **1. Plaintiffs Established A *Prima Facie* Case of Age Discrimination**
11 **Under the Disparate Treatment Theory.**

12 A plaintiff may prove age discrimination in violation of the ADEA by direct evidence or
13 by an indirect or inferential method of proof. *See, e.g., Wright v. Southland Corp.*, 187 F.3d 1287
14 (11th Cir. 1999), cited in *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002), *cert. granted*
15 123 S. Ct. 816 (2003). Discrimination can be shown indirectly following the "pretext" model of
16 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Within this framework a plaintiff may
17 establish a *prima facie* case of discrimination with circumstantial evidence: a plaintiff must show
18 that he or she is a member of a protected class; that he or she was qualified for the position he or
19 she held or sought; that he or she was subjected to an adverse employment decision; and that he or
20 she was replaced by someone who was not a member of the protected class or that the
21 circumstances of the decision otherwise raised an inference of discrimination. *See St. Mary's*
22 *Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). Once the plaintiff establishes a *prima facie*
23 case, a presumption of discriminatory intent arises. *Id.* To overcome this presumption, the
24 defendant must come forward with a legitimate, nondiscriminatory reason for the employment
25 decision. *Id.* at 506-07. If the defendant provides that explanation, the presumption disappears.
26 *See id.* at 511; *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). In response to the
27 defendant's offer of a nondiscriminatory reason, the plaintiff must produce either "specific,
28 substantial evidence of pretext," *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983), or

1 some "direct evidence of discriminatory motive." *Godwin v. Hunt, Wesson, Inc.*, 150 F.3d 1217,
2 1220 (9th Cir. 1998). "The shifting burdens . . . set forth in *McDonnell Douglas* are designed to
3 assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985). As explained in *St. Mary's Honor*
4 *Center v. Hicks*, 509 U.S. 502, 511 (1993) the burden-shifting rubric of *McDonnell Douglas*,
5 rejection of the employer's proffered legitimate nondiscriminatory reasons for the challenged
6 employment decision "will permit the trier of fact to infer the ultimate fact of intentional
7 discrimination." Such discrimination can also be inferred from a fact finder's disbelief of the
8 reasons provided by defendant. *Id.* at In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S.
9 133, 148 (2000), the Supreme Court held that "a plaintiff's *prima facie* case, combined with
10 sufficient evidence to find that the employer's asserted justification is false, may permit the trier
11 of fact to conclude that the employer unlawfully discriminated."

12
13 To make out a *prima facie* case of discrimination, Plaintiffs must show that they were
14 members of the protected class who were satisfactorily performing their jobs, that they suffered
15 adverse employment actions, and that the circumstances of the adverse actions raise an inference
16 of discrimination. Defendant does not dispute that Plaintiffs have established a *prima facie* case
17 of age discrimination, as discussed *supra*.

18 2. Direct Evidence of Age Discrimination Was Established.

19 At this point in the *McDonnell Douglas* analysis, the presumption of discriminatory intent
20 "drops out of the picture." *Wallis*, 26 F.3d at 889 (quoting *Hicks*, 509 U.S. at 511). The burden
21 shifts back to Plaintiffs to "produce enough evidence to allow a reasonable factfinder to conclude"
22 that Defendant's proffered explanation is false or that the true reason for the discharge was
23 discriminatory. *Nidds*, 113 F.3d at 918. Plaintiffs may satisfy their burden by presenting either
24 evidence of Defendant's discriminatory animus or evidence that the RIF was not legitimate or
25 nondiscriminatory, *i.e.*, that Defendant's articulated reason was a pretext for unlawful
26 discrimination by "either directly persuading the court that a discriminatory reason more likely
27 motivated the employer or indirectly by showing that the employer's proffered explanation is
28 unworthy of credence." *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1124 (9th Cir. 2000)

1 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). Plaintiffs have
2 presented evidence that falls into both categories. First, Plaintiffs have proffered comments from
3 the director of the USGS and from those involved in implementing the RIF from which the
4 factfinder could infer discriminatory animus. In addition, Plaintiffs contend that the RIF was
5 implemented in a manner biased against employees over the age of forty.

6 Contrary to Defendant's argument that this evidence merely shows that Dr. Eaton and
7 others in management were simply encouraging employees to embrace change, it is sufficient
8 along with the evidence establishing Plaintiffs' *prima facie* case to permit an inference of
9 discriminatory animus. *See Reeves*, 530 U.S. at 143. Neither can this evidence be relegated to the
10 category of "stray remarks" insufficient to raise an inference of discriminatory animus. The Ninth
11 Circuit held in *Godwin v. Hunt Wesson, Inc.* 150 F.3d 1217, 1219 (9th Cir. 1998) that comments
12 that directly suggest the existence of bias are *not* stray remarks because no inference is necessary
13 to find discriminatory animus. *See, e.g., Schnidrig v. Columbia Machine Co., Inc.*, 80 F.3d 1406
14 (9th Cir. 1996) (Supervisor's comment that he wanted younger employees for the job is not a stray
15 remark.); *Cordova v. State Farm Ins. Co.*, 124 F.3d 1145 (9th Cir. 1997) (Calling another
16 employee a "dumb Mexican" and a comment that the company was required to hire minorities
17 were *not* stray comments.). To the contrary, Plaintiffs have presented more than a single isolated
18 comment "uttered in an ambivalent manner and not tied directly to the termination." *Nesbit v.*
19 *Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993). Rather, they have presented sufficient evidence
20 from which the court as factfinder could conclude that decisionmakers in the agency, and
21 particularly those involved in formulating and implementing the RIF, articulated a prohibited,
22 discriminatory animus.

23 Additionally, an inference of discrimination can be raised when there is evidence that the
24 defendant employer chooses a less qualified person for the position or ignores the superior
25 qualifications of the plaintiff. *McCullough v. Real Foods, Inc.* 140 F.3d 1123, 1128-29 (8th Cir.
26 1998); *Williams v. Nashville Network*, 132 F.3d 1123, 1132-33 (6th Cir. 1997). "The ultimate
27 burden of persuading the trier of fact that the defendant intentionally discriminated against the
28 plaintiff remains at all times with the plaintiff." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S.

1 248, 253 (1981); accord *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143, (2000).

2 The burden of showing something by a "preponderance of the evidence," the most
3 common standard in the civil law, "simply requires the trier of fact 'to believe that the existence of
4 a fact is more probable than its nonexistence before [he] may find in favor of the party who has
5 the burden to persuade the [judge] of the fact's existence.'" *Concrete Pipe & Prods. of Cal. v.*
6 *Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397
7 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original) (citation omitted)). The
8 inquiry is simply that of any civil case: whether the plaintiff's evidence is sufficient for a rational
9 factfinder to conclude by a preponderance of the evidence that the employer violated the statute -
10 that [the protected trait] was a motivating factor for any employment practice. *Costa*, 299 F.3d at
11 848. Here, the court concludes that Plaintiffs have satisfied their burden of proving by a
12 preponderance of the evidence that Defendant terminated their employment in the RIF because of
13 age.

14 If plaintiffs produce direct evidence of discrimination, the *McDonnell Douglas* test is
15 "inapplicable." *Thurston*, 469 U.S. at 119, and they may proceed under the mixed motives theory
16 of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Fifth Circuit, held in *Mooney v.*
17 *Aramco Services Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995), that "[o]nce a plaintiff presents direct
18 evidence of discrimination, the burden of proof shifts to the employer to show that the same
19 adverse employment decision would have been made regardless of discriminatory animus. If the
20 employer fails to carry this burden, plaintiff prevails." The Ninth Circuit concluded in *Godwin*,
21 150 F.3d at 1221, citing *Davis v. Chevron, U.S.A., Inc.*, 14 F.3D 1082, 1085 (5th Cir. 1994), that
22 direct evidence is evidence which, if believed, proves the fact of discriminatory animus without
23 inferences or presumptions. In *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851 (9th Cir. 2002),
24 *cert. granted* 123 S. Ct. 816 (2003), however, the court questioned whether direct evidence or
25 something less was required to invoke the *Price Waterhouse* mixed motives analysis, *i.e.*, "there is
26 no longer a basis for any special 'evidentiary scheme' or heightened standard of proof to
27 determine 'but for' causation." Further, in *Costa*, the court rejected as "misplaced," *id.* at 853 n.
28 3, the position that mixed motives analysis "basically requires that the plaintiff prove a

1 particularly strong case - more than ordinarily would be required for an inference of
2 discrimination to be permissible.” *Id.* at 853. Finally, “[t]o the extent that courts are using "direct
3 evidence" as a veiled excuse to substitute their own judgment for that of the jury, we reject that
4 approach.” *Id.*

5 Defendants maintain that Director Eaton’s speeches comparing senior scientists to
6 dinosaurs, the RIF poster with the Larson cartoon inferring that “you can’t teach old dogs new
7 tricks”, Chief Geologist Leahy’s ground rules for the RIF, and other instances of age bias have not
8 been shown to be related to the decisions affecting the individual plaintiffs in the RIF. Defendant
9 argues that these are “stray remarks” because they are not tied directly to the employment decision
10 or made by one involved in the decision and therefore they do not create an inference of age
11 discrimination. See *Nidds v. Schindler Elevator Corp.*, 113 F. 3d 912, 918-919; *Nesbit v. Pepsico,*
12 *Inc.*, 994 F. 2d 703, 705 (9th Cir. 1993); *Merrick v. Farmers Insurance Group*, 892 F. 2d 1434,
13 1438-1439 (9th Cir. 1990); *Cianci v. Pettibone Corp.*, 152 F. 3d 723, 727-728 (7th Cir. 1998).
14 Defendant concedes that a discriminatory motive may be inferred where the remark is made by a
15 decisionmaker or by one who provided input into the decision. See, e.g., *Fakete v. Aetna, Inc.*, 308
16 F. 3d 335, 339 (3d Cir. 2002) (statement by supervisor who made the decision to fire plaintiff);
17 *Hunt v. City of Markham, Illinois*, 219 F. 3d 649, 652-53 (7th Cir. 2000) (statements by mayor,
18 who recommends actions, including the denial of raises sought by plaintiffs, to city council).

19 This case is more akin to the “cat’s paw” analysis. See *Russell v. McKinney Hospital*
20 *Vetnure*, 235 F.3d 219, 226-29 (5th Cir. 2000) (“We therefore look to who actually made the
21 decision or caused the decision to be made, not simply to who officially made the decision.
22 Consequently, it is appropriate to tag the employer with an employee’s age-based animus if the
23 evidence indicates that the worker possessed leverage, or exerted influence, over the titular
24 decisionmaker”); *Shager v. Upjohn*, 913 F.2d 398, 405 (7th Cir. 1990) (“if the [formal
25 decisionmakers] acted as the conduit of [the Director’s] prejudice - his cat’s paw - the innocence
26 of the [decisionmakers] would not spare the [government] from liability”); *Kendrick v Penske*
27 *Transportation Services, Inc.* 220 F. 3d 1220, 1231 (10th Cir. 2000) (“a defendant may be held
28 liable if the manager who discharged the plaintiff merely acted as a rubber stamp, or the ‘cat’s

1 paw,” for a subordinate employee’s prejudice, even if the manager lacked discriminatory intent.”.

2 Following these guidelines, this court finds that Plaintiffs have established age
3 discrimination by direct evidence, namely aforementioned comments of Dr. Eaton, including the
4 dinosaur joke, the cartoon that was part of the announcement of meetings concerning the
5 upcoming RIF, and Dr. Leahy’s memorandum. Defendant failed utterly to carry her burden of
6 proof that she would have made the same decision in the absence of the discriminatory motive.

7 **3. Pretext Is Shown by The Inconsistencies, Violations of**
8 **Defendant’s Own Rules and Federal Regulations and Lack**
9 **of Credibility of It’s Asserted Justification.**

10 Pretext can be inferred from different or changing explanations given by the employer
11 about the reason for the action taken. The Ninth Circuit has held that shifting rationales for an
12 adverse employment action can be probative evidence of pretext. *Payne v. Norwest Corp.*, 113
13 F.3d 1079, 1080 (9th Cir. 1997); *Godwin v. Hunt Wesson, Inc.* 150 F.3d 1217, 1222 (9th Cir. 1998)
14 Similarly, in *Williams v. Nashville Network*, 132 F.3d 1123, 1132-33 (6th Cir. 1997), the Court of
15 Appeals reversed the district court’s denial of plaintiff’s motion for judgment as a matter of law,
16 relying in part on the defendant’s shifting explanation, and proffering of an untrue explanation, as
17 evidence of discrimination. In *Young v. Warner-Jenkinson Co., Inc.* 152 F.3d 1018, 1022 (8th Cir.
18 1997) the court held that inconsistent explanations for the challenged action were sufficient to
19 raise an inference of discrimination. See also, *Wilson v. AM General Corp.*, 167 F.3d 1114, 1121
20 (7th Cir. 1999). Contradictions in the employer’s proffered legitimate reasons for its employment
21 action establishes pretext. *Combs v. Plantation Patters, Inc.*, 106 F.3d 1519 (11th Cir. 1997).
22 When an employer gives a different story at first, finds the story implausible and abandons the
23 first story and goes to a different story, or articulates no reason for substantial periods of time,
24 pretext is established. *EEOC v. Ethan Allen, Inc.* 44 F.3d 116, 66 FEP Cases 1102 (2nd Cir. 1994);
25 *Goldsmith v. City of Atmore*, 996 F.2d 1155 , 62 FEP Cases 769, 776 (11th Cir. 1993); *Edwards v.*
26 *USPS*, 909 F.2d 330, 53 FEP 729 (8th Cir 1990); *Landahl v. Air France*, 930 F.2d 1434, 55 FEP

1 Cases 1033 (9th Cir. 1991).¹⁰ Changing the reasons for the employee’s selection has been held to
2 be evidence of pretext. See *Dominguez-Cruz v. Shuttle Caribe*, 202 F. 3d 424, 431 (1st Cir. 2000);
3 *Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160 (6th Cir. 1996), Amended on Denial of
4 Rehearing En Banc, 97 F.3d 833 (6th Cir. 1996); *EEOC v. Continuity Programs, Inc.*, 63 FEP
5 Cases 1127 (E.D. Mich. 1993); *Edwards v. U.S. Postal Service*, 909 F.2d 320, 322-24 (8th Cir.
6 1990); *Schmitz v. St. Regis Paper Co.*, 811 F.2d 131, 132-33 (2nd Cir. 1987); *Clark v. Huntsville*
7 *City Bd. of Ed.*, 717 F.2d 525, 529 (11th Cir.1983); *Bell v. Birmingham Linen Service*, 715 F.2d
8 1552, 1559 (11th Cir. 1983); *Taggart v. Time*, 924 F 2d 43 (2nd Cir. 1991); *Nichols v Lewis*
9 *Grocer*, 138 F. 3d 563, 567-8 (5th Cir. 1998).

10 An employer’s failure to follow its own procedures has been held relevant to demonstrate
11 discriminatory intent. In *Kolstad v. American Dental Association*, 108 F.3d 1431, 1436 (D.C.Cir.
12 1997), *vacated and modified in other respects*, 139 F.3d 958 (D.C. Cir. 1998), *vacated and*
13 *modified on punitive damages*, 119 S.Ct. (1999) stated that, “An employer’s preselection of a job
14 candidate, in violation of its own procedures requiring fair consideration of qualified applicants, is
15 “undeniably relevant to the question of discriminatory intent.” ...and “operates to discredit the
16 employer’s proffered explanation for its employment decision.” Other circuits have also found
17 the failure to follow internal procedures to be probative evidence of pretext. *Lynn v. Deaconess*
18 *Medical Center-West Campus*, 160 F.3d 484, 488 (8th Cir. 1998); *Maddow v. Proctor & Gamble*
19 *Co., Inc.* 107 F.3d 846, 849 (11 Cir. 1997); *Huff v. UARCO, Inc.* 122 F.3d, 374, 380-83 (7th Cir.
20 1997).

21 One example of pretext is the Department of Interior’s interpretation of the RIF
22 regulations, to require that the “substantially identical” requirement be a “two way street”.
23 Defendant wrongly denied plaintiffs retreat rights, claiming that if the plaintiff did additional
24

25 ¹⁰ In *Edwards*, at 53 FEP Cases 730-731, the 8th Circuit noted:

26 We can find no legitimate non-discriminatory reason for the failure to transfer Ms.
27 Edwards. This record reveals pretext, inconsistency, and contradictory explanations
28 which change every time they are recorded. . . .The District Court’s contrary finding,
made on the basis of Mr. Spencer’s third explanation – offered on the eve of trial, three
years after the investigation of this incident – is clearly erroneous and cannot stand.

1 duties which could not be learned by the Retraitee within 90 days, the positions were not
2 “essentially identical”. Such a rule has been held to violate the RIF regulations. See *Parkhurst v.*
3 *Department of Transportation* 96 FMSR 5153 (1996), cited in *Pigford v. Department of Interior,*
4 97 FMSR 5269 (1997). Positions which involve the same duties are “essentially identical” even if
5 the tools used to perform the duties of the position change. Technological changes in the way the
6 job is done, e.g. the introduction of a new software package to perform a duty formerly done by
7 outmoded technology, cannot be used as a valid basis for denying an employee a retreat. More
8 importantly, a retreat may not be blocked by the employees’ former position had duties that are
9 no longer required, such as stenographer skills, in *Pigford’s* case or Project Chief in Antarctica, in
10 Arthur Ford’s case. The SMEs unlawfully denied retreats based on the fact that plaintiffs had
11 additional duties in their former positions which could not be learned by the Retraitee within 90
12 days.

13 Pretext was also established by the fact that 100 positions were “added-back” to the USGS
14 roster of positions to be funded after the RIF. Defendant admits that 100 “add back” positions
15 were created after Congress decided not to cut the USGS funding more than 1%. [AR 15297-
16 15301; AR 15369-15371] The government now claims they did not fill most of these positions
17 because they were “positions that were multi-disciplinary in nature and could be utilized by more
18 than one program.” However, the explanation given by USGS at the time said the opposite:
19 “Because these lists were program specific, they did not necessarily represent the broader needs of
20 the Division. See Summary of Geologic Division Reduction-In-Force Process, p. 3. [AR 19566]

21 Over 40 of these positions were left vacant and not staffed with existing employees. The
22 RIF rules require that the positions be filled with existing employees. Moreover, the evidence
23 showed that after the RIF, many more positions were announced and filled. However, none of the
24 Plaintiffs were given notices for any of the vacant positions, even though they indicated that they
25 wished to be considered for positions filled after the RIF.

26 Similarly, the practices to select which positions to abolish in the RIF were shown to be a
27 pretext for age discrimination. Plaintiffs testified that the USGS allowed the rules to be bent by: a)
28 staffing individuals whose position descriptions (PDs) did not match position descriptors; b) using

1 staffing plan position descriptors which were tailored for specific individuals, deliberately
2 omitting other individuals or leaving descriptors general to allow managerial selection of
3 individuals for retention; c) coaching individuals in writing PDs; d) protecting of choices and
4 omissions through management involvement in SME deliberations; e) making staffing plan
5 changes without group consensus, i.e., informal telephone calls between managers to take
6 employees off the staffing plan.

7 In most instances, these practices resulted in younger employees retaining their positions.

8 **4. Plaintiffs' Established That the RIF Had a Disparate Impact**
9 **on Older Employees.**

10 In order to establish a *prima facie* disparate impact claim, Plaintiffs must show "that a
11 facially neutral employment practice has a 'significantly discriminatory' impact upon a protected
12 class." See *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1076 (9th Cir. 1976) citing
13 *Connecticut v. Teal*, 457 U.S. 440, 446 (1982). Thus, "disparate impact theory targets 'practices
14 that are fair in form, but discriminatory in operation.'" *Smith v. Xerox Corp.*, 196 F.3d 358, 364
15 (2d Cir. 1999) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). The plaintiff
16 must 1) show a. significant disparate impact on a protected class or group, 2) identify the specific
17 employment practices or selection criteria at issue, and 3) show that the disparity is linked to the
18 challenged policy or practice. *Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174 (9th Cir. 2002), *cert.*
19 *denied* 123 S.Ct. 854 (2003), citing *Antonio v. Wards Cove Packing, Inc.*, 810 F.2d 1477, 1482
20 (9th Cir. 1987), *rev'd on other grounds* 490 U.S. 641 (1989). If the employee establishes a *prima*
21 *facie* case of disparate impact, the burden shifts to the employer to prove that the challenged
22 practice is job-related for the position and consistent with business necessity. If the employer
23 meets its burden of showing "business necessity," the burden shifts back to the employee to show
24 that the same goal could be accomplished with less adverse impact upon the protected class.
25 *Coleman*, 232 F.3d at 1291.

26 Defendant contends that Plaintiffs have failed to satisfy two of the three criteria necessary
27 to establish their *prima facie* case. First, Defendant argues that Plaintiffs failed to identify in their
28 pleading the "specific, identified employment practice or selection criteria" responsible for the

1 disparity. *Stout v. Potter*, 276 F.3d 1118, 1121 (9th Cir. 2002). As the Supreme Court recently
2 held in the related context of disparate treatment, however, the burden of establishing a *prima*
3 *facie* case “is an evidentiary standard, not a pleading requirement.” *Swierkiewicz v. Sorema, N.A.*,
4 534 U.S. 506, 510 (2002). An ADEA violation is, therefore, sufficiently pled if the complaint
5 alleges that the plaintiff was “terminated ...on account of his age, detail(s) the events leading up to
6 the termination, provide(s) relevant date, and include(s) the ages ... of at least some of the relevant
7 persons involved” *Id.* at 514.

8 This standard was met in the present case, and the relevant question is whether Plaintiffs
9 have submitted sufficient evidence that a specific employment practice was responsible for the
10 alleged disparate impact on the protected class. Plaintiffs have sufficiently identified the policies
11 and practices within the RIF that they contend had a disparate impact. These policies include, but
12 are not limited to, the narrowing of competitive level codes, the limiting of assignment rights, and
13 the use of "add back" lists. *See Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990)
14 (holding that a policy of committing employment decisions to the subjective discretion of
15 managers is a facially neutral employment practice subject to disparate impact analysis). Based
16 on this evidence, the Court concludes that Plaintiffs have satisfied the second requirement of a
17 *prima facie case*: they have identified specific employment practices that they claim have had a
18 disparate impact on the protected class. The statistical disparity, moreover, is significant enough
19 to raise an inference of causation. *Stout v. Potter*, 276 F.3d 1118, 1122 (9th Cir. 2002) citing
20 *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-96 (1988). Moreover, “[i]t is not
21 sufficient to present evidence raising an inference of discrimination on a disparate impact claim
22 The plaintiff ‘must actually prove the discriminatory impact at issue.’” *Stout*, 276 F.3d at 1122,
23 citing *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1421 (9th Cir. 1990). Plaintiffs have satisfied
24 that burden here.

25 During the MSPB hearing, Dr. Paul Switzer, Professor of Statistics at Stanford University,
26 analyzed the RIF using both his own methodology and the "logistic regression" analysis used by
27 Agency witness Dr. V.A. Samaranayake. He testified that the statistical correlation between age
28 and the probability of being RIFed is "as plain as the nose on one's face" (Declaration of Dr.

1 Switzer of October 08, 1997). Plaintiffs' statistical expert, Mr. Lepowsky presented his opinion
2 that Dr. Switzer's analysis is correct. In his Supplemental Declaration, he states: "Dr. Switzer
3 gives two p-values, 6/100 of 1% and 1/10,000 of 1%. P-values of less than 5% are commonly said
4 to be statistically significant. It is clear that given the model Dr. Switzer chose to use, in the case
5 of age, the p-value associated with his conclusion is extremely small, indicating the strength of the
6 conclusion. The p-value measures the likelihood that the observed results would be at least
7 extreme as they are, if this was a matter of random chance. Because the p-value is so small, that is
8 strong evidence that the observed effect of age is not mere happenstance. In five of the seven
9 analyses I did, the p-values I obtained were likewise, extremely small, as were Dr. Switzer's.
10 From my analysis of the data, I concur with Dr. Switzer's finding that age was a factor in the
11 RIF."

12 Dr. Palmer's conclusion that age was not a factor in the RIF is erroneous, even assuming
13 that his assumptions were correct that 1) non-scientists should be included in the analysis, and 2)
14 only Western Region Geologic Division employees, not Eastern and Central Region employees,
15 should be considered. There were other serious problems in Dr. Palmer's analysis identified by
16 Mr. Lepowsky. Mr. Lepowsky explained that it is clear from Dr. Palmer's report and his
17 deposition that if he had used a *one-tailed*, rather than a *two-tailed* analysis, his findings would
18 show that age was a factor.

19 Dr. Palmer admitted that a *one-tailed* analysis is a standard statistical method. "These
20 terms indicate whether the significance levels are computed from one or two tails of a sampling
21 distribution. The practical difference between one-and two-tailed tests is that the P value produced
22 by a *two-tailed* test is generally twice the size of the P value produced by a *one-tailed* test. . .
23 [S]tatistical texts frequently recommend the use of a *one-tailed* test when the only question of
24 interest is the likelihood of a difference in one direction, e.g., when only a positive disparity
25 between two numbers is of interest." Baldus & Cole, Statistical Proof of Discrimination, (1980) p.
26 307. If a one-tailed test was used, three of the eight conclusions show statistically significance that
27 the probability that older workers were adversely affected in the RIF. See Plaintiffs' Exhibit 299,
28 Deposition of Dr. Palmer, p. 147:3:- 149:18. The one-tailed test is more appropriate than the two-

1 tailed test in age discrimination cases. See, *Little v. Master-Bilt Products, Inc.* (ND Miss. 1980)
2 506 F. Supp. 319. See also, Paetzold and Willborn, The Statistics of Discrimination,
3 Shepard's/McGraw-Hill, 1994, 1995; Kaye, "Is Proof of Statistical Significance Relevant?",
4 Wash. L. Rev., Vol. 61:1333 (1986).

5 The court rejects Defendant's contention that Plaintiffs have not satisfied their *prima facie*
6 case because the statistical evidence they presented is so flawed that it is insufficient to establish a
7 disparate impact on the protected class. Specifically, Defendant contends that Plaintiffs' statistical
8 analysis failed to account for several relevant factors, citing *Coleman* where the plaintiffs
9 presented statistical evidence suggesting that twice the percentage of employees over the age of
10 forty were laid off during a RIF as those under the age of forty. 232 F.3d at 1281. The court,
11 however, found the plaintiffs' statistics unreliable because they did "not take into account any
12 variable other than age." *Id.*

13 In this case, it is simply untrue that Plaintiffs' statistical analysis is equally unreliable
14 because it failed to consider the factors of grades, length of service and performance. Plaintiffs'
15 experts Switzer and Lepowsky specifically considered those variables as well as others and still
16 reported an overwhelming statistical disparity due to age. Further, Defendant "cannot defeat [a
17 statistical] showing of discrimination simply by pointing out possible flaws in [the] data. Rather,
18 [the defendant] had to produce credible evidence that curing the alleged flaws would also cure the
19 statistical disparity." *Equal Employment Opportunity Comm'n v. Gen. Tel. Co. Of Northwest,*
20 *Inc.*, 885 F.2d 575, 582-83 (9th Cir. 1989); *see also Coleman*, 232 F.3d at 1281 (when other
21 variable were considered the results were "far less dramatic" and "not even significant").
22 Defendant has not produced such evidence. Instead, Defendant relies on the conclusions reached
23 by the ALJ at the MSPB hearing and the flawed analysis of Dr. Palmer. Even though the ALJ
24 credited Defendant's expert over Plaintiffs' expert, he did not find that Plaintiffs' statistical
25 showing was insufficient as a matter of law.

26 To satisfy the *prima facie* case in a disparate impact case, "the law does not require the
27 near-impossible standard of eliminating all possible nondiscriminatory factors." *Hemmings*, 285
28 F.3d at 1188. Rather, so long as Plaintiffs' analysis is not "so incomplete as to be inadmissible as

1 irrelevant,” *see Basemore v. Friday*, 478 U.S. 385, 400 n.10 (1986), complaints about the
2 “inadequacies of a study are more appropriately considered an objection going to the weight of the
3 evidence rather than its admissibility.” *Hemmings*, 285 F.3d at 1188. Defendant has not shown
4 that the inclusion of factors allegedly omitted by Plaintiff’s statistical expert would eliminate the
5 age-based statistical disparity. The court concludes after reviewing the reports and testimony that
6 Plaintiffs’ statistical evidence is more persuasive than that of Defendant.

7 Defendant also contends that it has presented evidence of a “business necessity” that is
8 un rebutted by Plaintiff. Specifically, Defendant contends that “the goals of saving money and
9 meeting the changed mission of the agency could [not] have been met by any means other than by
10 the RIF.” However, Defendant has failed to satisfy its burden of showing why the means used in
11 the RIF were necessary, not simply that the RIF was a necessity.

12 **B. PLAINTIFFS’ ARE ENTITLED TO REINSTATEMENT, BACKPAY,**
13 **LOST LEAVE, RETIREMENT AND OTHER BENEFITS, ATTORNEYS**
14 **FEEES AND COSTS.**

15 Plaintiffs have requested an order reinstating each plaintiff to their former grade and pay
16 level at the time of the RIF, as well as reimbursement for lost back pay, sick and vacation leave,
17 medical benefits, retirement benefits, and prejudgment interest, as testified by Plaintiffs’ Damages
18 Expert Witness Thomas C. Thomas.

19 A plaintiff granted an award in an age-discrimination matter is entitled to a court-ordered
20 enhancement in order to compensate for the "negative tax consequences" of receiving a lump sum
21 award for back pay and front pay in a single year. *O’Neill v. Sears Roebuck & Co.*, ___ F.Supp.2d
22 ___, 2000 WL 1133269, *4 (E.D.Pa., July 31, 2000), quoting *Squires v. Bonser*, 54 F.3d 168, 172
23 n.7 (3d Cir. 1995). Plaintiffs’ economic damages must be grossed-up to account for the tax impact
24 of the lump sum payment on the back pay. *See Van Hoose v. Department of the Navy*, 102 FEOR
25 30004 (August 22, 2001); *Holler v. Department of the Navy*, 102 FEOR 30005 (August 22, 2001);
26 *Goetze v. Department of the Navy*, 102 FEOR 30006 (August 22, 2001).

27 Defendant shall be enjoined from further retaliation of plaintiffs who are employed by the
28 U.S.G.S. Defendant is further ordered to pay reasonable attorneys fees and costs incurred in

1 bringing this action. Counsel for plaintiff shall file a motion within thirty days of this order.

2
3 **CONCLUSION**

4 For the foregoing reasons, Plaintiff requests that the court find that plaintiffs have
5 established age discrimination based on disparate treatment and disparate impact theories.

6 Respectfully submitted,

7
8 DATED: May 14, 2003

MARY DRYOVAGE

9
10
11
12 DATED: May 14, 2003

THOMAS W. OSBORNE
AARP Foundation Litigation

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3 DAVID P. ADAM, *et al.*,

4 Plaintiffs,

5 v.

6 GAIL NORTON, SECRETARY,
7 U.S. DEPARTMENT OF THE INTERIOR,

8 Defendant.

Docket No. C98-02094 CW (EDL)

CERTIFICATE OF SERVICE

9
10 I am a citizen of the United States and have an office in the County of San Francisco; I am
11 over the age of eighteen years and not a party to the above-entitled action; my business address is
12 240 Stockton Street, 9th Floor, San Francisco, CA 94108.

13 On May 14, 2003, I served the within **PLAINTIFFS' PRETRIAL BRIEF** on the parties
14 in said action by E-MAILING, FAXING and MAILING a true copy of each such document in a
15 sealed envelope to the following address:

16 STEVEN J. SALTIEL
17 Assistant U.S Attorney
18 450 Golden Gate Avenue, Box 36055
19 San Francisco, CA 954102

via fax 415 436-6748
via email: Steven.Saltiel@usdoj.gov

20 ALISON DAW, Assistant U.S Attorney
21 280 S. First Street
22 San Jose, CA 95113

via fax 408-535-5081

23 I declare under penalty of perjury that the foregoing is true and correct and was executed
24 on May 14, 2003, in San Francisco, CA.
25
26
27
28