

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

3 **FILED**

4 DAVID P. ADAM, et. al.,

No. C 98-2094 CW

JUN 22 2004

5 Plaintiffs,

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

FINDINGS OF FACT
AND CONCLUSIONS
OF LAW

6 v.

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

9 Defendant.

10
11 Plaintiffs David Adam, Lanford Adami, James Calzia, Bela
12 Csejtey, Alicé Davis, James Drinkwater, Arthur Ford, Arthur Grantz,
13 Hariharaiyer Mahadeva Iyer, Chi-Yu King, Stephen Lewis, Allan
14 Lindh, Alexander Thomas Ovenshine, and Chester Wrucke were employed
15 by the United States Department of Interior, in the Geologic
16 Division of the United States Geological Survey (USGS). In 1995,
17 the Geologic Division of the USGS conducted a reduction in force
18 (RIF). As a result of the RIF, Plaintiffs Adam, Adami, Calzia,
19 Csejtey, Davis, Drinkwater, Ford, Grantz, Iyer, King, Lewis,
20 Ovenshine, and Wrucke were separated from the Survey and Plaintiff
21 Lindh was demoted. Following proceedings before the Merit Systems
22 Protection Board and several motions for summary judgment in this
23 Court, this case proceeded to trial on all of these Plaintiffs'
24 claims that the adverse actions taken against them were the result
25 of discrimination based on their age and Plaintiff Iyer and King's
26 claims that they were retaliated against. The Court now enters its
27 findings of fact and conclusions of law with respect to these
28 claims.

FINDINGS OF FACT

I. Structure of the Geologic Division

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

II. The Transition Team

In 1993, following the change in presidential administration, from that of President George Bush to President William Clinton, the USGS prepared for the appointment of a new Director by creating a Transition Team composed of employees of all Divisions of the USGS that was charged with preparing a report discussing the future

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

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

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

Pl. Ex. 7 at 10.

The Transition Team report thus expresses the USGS's
legitimate concern that too many of its employees were highly
experienced scientists and too few of its employees were less
experienced scientists and technical support staff. However, the
Transition Team report goes beyond this legitimate concern to

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

15 III. Appointment of Dr. Gordon Eaton

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

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1 IV. Dr. Eaton's Speeches

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

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

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

20 V. Program Plans

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

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

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

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

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

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

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

16 VI. Financial Constraints Affecting the Geologic Division

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