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

If an employee establishes such a prima facie case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for its employment decision. Id. Once an employer articulates such a reason, the employee must demonstrate that the articulated reason is a pretext for discrimination "either directly by persuading the court that a discriminatory reason more likely than not motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). The employee's evidence must be "both specific and substantial to overcome the legitimate reasons" articulated by the employer. Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 659 (9th Cir. 2002) (emphasis in original). The ultimate burden of

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proof remains always on the employee to show that the employer intentionally discriminated against him or her because of his or her age. Coleman, 232 F.3d at 1281.

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

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the "old dog" cartoon on the RIF meeting notice all demonstrate that age-based discrimination motivated Plaintiffs' termination or demotion.

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

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

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

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

B. Disparate Impact

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

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

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

If an employee establishes such a prima facie case, the burden then shifts to the employer who may either demonstrate that no statistical disparity exists or may "produce evidence that its disparate employment practices are based on legitimate business reasons, such as job-relatedness or business necessity." Rose v. Wells Fargo & Co., 902 F.2d 1417, 1424 (9th Cir. 1990). Once the employer does so, then the employee must show that another employment practice would serve the employer's legitimate interests without having a similar undesirable discriminatory effect. Id. To prevail on their disparate impact claim, Plaintiffs must "isolate[e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical

disparities." Wards Cove Packing Co. Inc. v. Atonio, 490 U.S. 642, 656 (1989) (quoting Watson, 487 U.S. at 994). Here, Plaintiffs identify the RIF as a whole as the specific employment practice that had a disparate impact on older workers. The Ninth Circuit has held that a RIF may be such a specific employment practice. Pottenger, 329 F.3d at 749. However, the Supreme Court has made clear that an employee cannot "make out a case of disparate impact simply by showing that, 'at the bottom line,' there is . . . imbalance in the work force." Wards Cove, 490 U.S. at 657. Rather, the employee must "demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." Id.; see also 42 U.S.C. § 2000e-2(k)(1)(B)(i) (requiring that the plaintiff demonstrate that "a particular employment practice causes a disparate impact" unless the plaintiff "can demonstrate to the court that the elements of [the defendant's] decisionmaking process are not capable of separation for analysis"). Under the circumstances presented here, Plaintiffs cannot meet their obligation to isolate and identify the specific employment practice responsible for the disparate impact by pointing to the RIF as a whole, because Defendant's decisionmaking process during the RIF can be separated into different elements. In fact, Plaintiffs did so in their opposition to Defendant's motion for summary judgment, identifying the use of more narrow competitive level codes and the refusal to

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expand assignment rights as specific employment practices that had a disparate impact on older workers.

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

II. Retaliation

The ADEA also makes it "unlawful for an employer to discriminate" an employee because the employee "has opposed any practice made unlawful by [the ADEA]" or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA]." 29 U.S.C. § 623(d). "To make out a claim of retaliation [under this section], an employee must establish three things: first, that he

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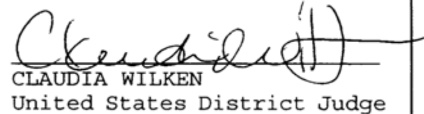
[or she] engaged in statutorily protected activity; second, that he [or she] was discharged or suffered some other adverse employment decision; and third, that there is a causal connection between the two." O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 763 (9th Cir. 1996).

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

IT IS SO ORDERED.

Dated: JUN 22 2004



CLAUDIA WILKEN
United States District Judge

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as noted on the following page

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