2005 WL 2861274 (D.D.C.) (Trial Motion, Memorandum and Affidavit)
United States District Court, District of Columbia.

Kathleen A. BREEN, et al., Plaintiffs,
v.
Norman Y. MINETA Secretary of Transportation Department of Transportation, et al., Defendants.

No. 05-00654 (WRY).
2005.

Plaintiffs' Opposition to Defendants' Motion to Dismiss OR, IN the Alternative, for Summary Judgement

Joseph D. Gebhardt, (Dc Bar No. 113894), Charles W. Day, Jr., (Dc Bar No. 459820), Mark A. Dann, (Dc Bar No. 484523), Gebhardt & Associates, Llp, 1101 17th Street, N.W., Suite 807, Washington, Dc 20036-4716, (202) 496-0400, Counsel for Plaintiffs

Plaintiffs Kathleen A. Breen, et al., by and through undersigned counsel, hereby oppose Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (hereinafter "Motion"), and in support of their Opposition file the attached Memorandum, setting forth Plaintiffs' arguments and reasons why Defendants' Motion should be denied and this case should be allowed to proceed to discovery and then to trial.

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' OPPOSITION

INTRODUCTION

As Plaintiffs stated in their Application for Preliminary Injunction, incorporated herein by reference, this case raises serious questions concerning Defendants' treatment of its older employees, particularly the Plaintiffs, who have dedicated many years of faithful service to the Federal Aviation Administration ("FAA"). Plaintiffs are all Automated Flight Service Station Air Traffic Controllers ("FS Controllers") who are 40 years of age or older and employed by the FAA. On October 4, 2005, they will be adversely impacted by Defendants' decision to terminate their federal employment and related benefits through the FAA's discriminatory Reduction-in-Force (""). Plaintiffs contend, and intend to show at trial, that Defendants' decision to eliminate their jobs constitutes unlawful age discrimination in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621, 633a et seq. In fact, Defendants' own "Business Case for [the] Competitive Sourcing" at issue in this case is admittedly premised, in part, on the fact that the FS Controllers are members of an "Aging

workforce." Supp., Ex. 1-2;[1] see Testimony of Michael Sheldon, Sept. 1, 2005 Hrg. Tr. at 32-33.

The FAA is discriminating against Plaintiffs based on their age by terminating all of the estimated 1,935 Air Traffic Control Specialists who work in the FAA's Automated Flight Service Stations ("AFSSs") in the continental United States, Hawaii, and Puerto Rico, about 92 percent of whom are over 40 years of age.[2] As shown below, Plaintiffs are able to prove a prima facie case of disparate treatment. The direct and circumstantial evidence proves that age not only motivated Defendants' unlawful decision to terminate Plaintiffs' federal employment, but that it was a determining factor, and Defendants' purported reasons for doing so are a pretext for discrimination. Also, Defendants are unable to prove that the FAA would have made the same decision absent their discriminatory motivation.

Despite Defendants' claims to the contrary, Plaintiffs have not attempted to collaterally attack prior administrative decisions under the guise of their ADEA claims. The doctrine of collateral estoppel does not preclude Plaintiffs from proffering circumstantial evidence of Defendants' discriminatory animus. Finally, Plaintiffs' disparate impact claim is valid, and they are able to meet their prima facie burden through statistical evidence, which shows that Defendants' mass RIF will have a substantially greater impact on the estimated 92 percent of the older (over 40) FS Controllers who will be adversely affected by the FAA's discriminatory mass RIF.

STANDARD OF REVIEW

Defendants moved to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(l) or, in the alternative, for summary judgment pursuant to Rule 56. Rule 12(b)(l) deals with the Court's subject matter jurisdiction, while Rule 56 allows for a ruling on the merits. A Rule 12(b)(l) motion "imposes on the court an affirmative obligation to ensure that it is acting within the scope of its juris-dictional authority." Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). In deciding the motion, the Court "must construe the allegations in the complaint in the light most favorable to the plaintiff." Scolaro v. D.C. Bd. of Elections & Ethics, 104 F. Supp. 2d 18, 22 (D.D.C. 2000); see also Scott v. England, 264 F. Supp. 2d 5, 6 (D.D.C. 2002) (court must accept all of the complaint's factual allegations as true and draw all reasonable inferences in the plaintiff's favor); Alliance for Democracy v. Fed. Election Comm'n, 362 F. Supp. 2d 138, 141 (D.D.C. 2005). It must also "resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." Phoenix Consulting, Inc. v. Ang., 216 F.3d 36, 40 (D.C. Cir. 2000).

Under Rule 56(c), summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 318 (1986); Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C. Cir. 1995). Summary judgment is not proper where, as in this case, the evidence is such that a reasonable fact-finder could rule in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 243 (1986). In deciding a summary judgment motion, "the court must draw all inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true." Carter v. George Wash. Univ., 180 F. Supp. 2d 97, 102 (D.D.C. 2001) (quoting Anderson, 477 U.S. at 248), aff'd, 387 F.3d 872 (D.C. Cir. 2004)). Morever, "the D.C. Circuit has directed that because it is difficult for a plaintiff to establish proof of discrimination, the court should view summary-judgment motions in such cases with special caution." Carter, 180 F. Supp. 2d at 103; see also Aka v. Wash. Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (en bane). Generally, "pre-discovery summary judgment motions are premature and should only be used for exceptional circumstances." Barry v. U.S. Capitol Guide Bd., 2005 WL 1026703, *4 (D.D.C. May 2, 2005); see also Radich v. Goode, 886 F.2d 1391, 1391 (3d Cir. 1989) ("court must give a party opposing summary judgment an adequate opportunity to obtain discovery"). There has been no discovery in this case.

ARGUMENT

I. PLAINTIFFS HAVE PROFFERED DIRECT EVIDENCE OF DEFENDANTS' DISCRIMINATORY ANIMUS.

The "FAA's Business Case for [the] Competitive Sourcing" that is the foundation for the mass RIF is admittedly premised, in part, on the fact that the FS Controllers are members of an "Aging workforce." See Suppl. Ex. 1. On June 25, 2003, the

FAA's Director of the Office of Competitive Sourcing ("OCS"), Joann Kansier, made a presentation to the Air Traffic Control Association in which she identified the factors that motivated Defendants' decision to contract out Flight Services, and one of these reasons was that the FS Controllers were an "Aging workforce." This was not the first time the FAA used "Aging workforce" as a reason for contracting out the FS Controllers' jobs. The same justification was previously cited by the FAA as one of its "Primary Reasons for Proposing [Flight Services] for Study" in a January 12, 2003 presentation made to the FAA Managers Association.[3] See Suppl. Ex. 2 (emphasis added). Multiple sources have reported that the FAA Administrator, Defendant Marion C. Blakey, has spoken about the FAA's "aging workforce" when referring to the FS Controllers (and their elimination). See Suppl. Ex. 3; Testimony of Michael Sheldon, Hrg. Tr. at 31-33. These statements by FAA officials, which were subsequently supplanted with the euphemism "Retirement eligible workforce," are direct evidence that age unlawfully motivated Defendants' decision to terminate Plaintiffs' jobs. See similarly Balderston v. Fairbanks Morse Engine Div. Of Coltec Industries, 328 F.3d 309 (7th Cir. 2002) (direct evidence of discrimination can be shown by admission by decisionmaker that his actions were based on age); Smith v. F.W. Morse & Co., 76 F.3d 413, 421 (1st Cir. 1996) (evidence such as an admission by an employer that it took actual or anticipated age into account in reaching an employment decision is a "smoking gun").

In order to distance themselves from these statements, and based solely on Ms. Kansier's self-serving explanation, Defendants claim that the items listed in their "Business Case" - their "Primary Reasons" for contracting out Flight Services - are not actually reasons at all, but merely neutral factors that were incidentally benefitted by the FAA's decision. See Mot. at 34-35. This claim is not credible on its face. The plain wording of these documents ("Business Case" and "Primary Reasons") demonstrates that Defendants were citing reasons for their actions, not mitigating factors.[4] Defendants' argument is premised on the irrational notion that the so-called "benefits" of the contracting out listed in its Business Case, see Mot. at 34, did not in fact motivate the FAA's decision to conduct the contracting out in the first place. To accept Defendants' argument, this Court must believe that "aging facilities and equipment," an "unbalanced workload," and "inadequate funding" were not problems (or in Defendant Blakey's words, a "dilemma") the FAA sought to solve. The more cogent explanation is that the FAA considered all of these factors, including the "Aging workforce," to be problems, and that the mass RIF is Defendants' response.[5] Defendants concede that these factors were "internal and external influences" on the FAA, see Mot. at 34, and the Court should see their strained attempt at distinguishing "influences" from "reasons" for what it is - semantics. But see Reeves, 530 U.S. at 141 (liability depends on whether age "had a determinative influence on the outcome") (emphasis added).

Defendants now contend Ms. Kansier cannot speak for the FAA regarding anything that happened before she became the OCS Director until February 2003, after the FAA made some of its preliminary decisions that eventually led to the mass RIF (e.g., its decision to designate Flight Services as a commercial activity). See Mot. at 34. Similarly, Defendants ask the Court to disregard Ms. Kansier's statements simply because some of their antecedent decisions were made by other FAA employees. See Mot. at 36-37. However, these claims are totally unconvincing. As an initial matter, the January 12, 2003 presentation, which lists "Aging workforce" as one of the FAA's "Primary Reasons for Proposing [Flight Services] for Study," was prepared and used by the FAA before Ms. Kansier became the OCS Director. Regardless, it is well established that an official in a position of authority, not to mention a designated Agency spokesperson, is fully capable of speaking on behalf of the Agency. See Faragher v. City of Boca Raton, 524 U.S. 775, 789-793 (1998). As OCS's Director, Ms. Kansier "ran" the AFSS contracting out and was responsible for briefing "persons and organizations interested in the AFSS competition." See Mot. at 33-34; see also FAA, "FAQS, FAA Action on Competitive Sourcing," available at http://www.faa.gov/aba/html budget/html cs/FAQ FAA Categories.cfm? Category ID=5, (last accessed Sept. 9, 2005). (OCS was "focused exclusively on the AFSS" contracting out for 2.5 years). Thus, she was an Agency decision-maker uniquely qualified to explain all aspects of the FAA's decision-making process (including its effort to deal with its aging workforce of FS Controllers), and doing so was a primary duty of hers.

Finally, Defendants rely on cases that are readily distinguishable from the present facts, and their arguments reveal a fundamental failure to comprehend Plaintiffs' claims. One case on which Defendants rely addresses stray remarks made by a defendant's employees between 1986 and 1989 that were unrelated to the eventual RIF that defendant implemented between 1991 and 1993. See Mot. at 33-34 (citing EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 952 (8th Cir. 1999)). By contrast, Ms. Kansier's statements were made during prepared presentations designed precisely to explain the FAA's actions while that process was underway and unfolding.[6] See Aka, 156 F.3d at 1290 ("court must consider all the evidence in its full context"). A defendant in another case cited by the FAA failed to offer evidence that the person who made a discriminatory remark was involved in the decision-making process or had the ability to influence the decision at issue in that case. See Mot. at 33-34 (citing Hall v. Giant Food, Inc., 175 F.3d 1074, 1079-80 (D.C. Cir. 1999) (noting a temporal gap merely obscures

the nexus between a statement and a discriminatory act, but that it "is not necessarily dispositive in itself')). Here again, the facts of this case are distinguishable because Ms. Kansier played a central role and was significantly influential in the FAA's decision-making process.[7]

Defendants refuse to acknowledge that the FAA's decision to terminate Plaintiffs' jobs took several years and several preliminary steps to implement, and although some decisions were certainly made by other FAA managers, Ms. Kansier played a pivotal role in the decision. Defendants' desperate, post hoc attempt to argue that the FAA's various decisions were made in isolation and had no relation to one another is plainly inaccurate and shows a fundamental refusal on their part to recognize the sequential nature of the FAA's choices.[8] Nevertheless, the simple fact remains that one of the factors the FAA used in its "Business Case" and one of its "Primary Reasons" for contracting out the FS Controllers was this "Aging workforce," and its repeated statements to that effect are direct evidence of Defendants' discriminatory animus.

II. PLAINTIFFS CAN ESTABLISH A CLAIM OF DISPARATE TREATMENT UNDER THE ADEA.

Should the Court not find that direct evidence of age discrimination in the FAA's statements, Plaintiffs may still prevail on their disparate treatment claim under a modified McDonnell Douglas analysis. See Rachid, 376 F.3d at 305. Plaintiffs have the initial burden of proving a prima facie case for age discrimination, and Defendants must proffer a legitimate, nondiscriminatory reason for undertaking the mass RIF. See Id. at 312. Plaintiffs must then show (1) that Defendants' reasons are not true, but instead a pretext for discrimination; or (2) that Defendants' reasons, although true, are only one of the reasons for their conduct, and another "motivating factor" is Plaintiffs' ages. Id. If Plaintiffs demonstrate that age was a motivating factor in FAA's plan, Defendants must prove that its decision would have been made regardless of discriminatory animus. Id.

Plaintiffs' prima facie burden is not meant to be onerous, see Burdine, 450 U.S. at 253, and they need only proffer *"evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion"* O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996) (emphasis in original; internal quote omitted). The D.C. Circuit has "made clear" that Plaintiffs can carry their burden by establishing that: (1) they are members of a protected class; (2) they suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination. See George v. Leavitt, 407 F.3d 405, 412 (D.D.C. 2005) (quoting Brown v. Brody, 199 F.3d 446, 452 (D.C. Cir. 1999)).[9]

A. Plaintiffs Have Proffered Facts Sufficient to Create a Reasonable Inference of Age Discrimination.

Plaintiffs are all 40 years of age or older, and therefore are members of a protected class under the. See 29 U.S.C. § 631(b); PI Ex. 1. They will also suffer adverse employment actions when they are terminated from federal service and lose their federal benefits as planned under the mass RIF. See PI Exs. 24, Att. A; 32. Finally, several additional factors give rise to an inference of age discrimination.

1. Defendants' Repeated, Contemporaneous References To The FS Controllers as an Aging Workforce and a Retirement Eligible Workforce Raise a Reasonable Inference of Age Discrimination.

Defendants' use of the term "Agency workforce" in its "Business Case," see Suppl. Ex. 1, the FAA's statement that age was one of its "Primary Reasons for Proposing [Flight Services] for Study," see Suppl. Ex. 2, Defendants' subsequent use of the euphemistic term "Retirement eligible workforce," see PI Ex. 50, and its continued references to the FS Controllers' retirement eligibility, see Slides 3, 4; see also Def. Ex. D, all give rise to a reasonable inference of age discrimination.[10] These statements were made contemporaneously to the FAA's decision. See Hanan v. Corso, 1999 U.S. Dist. LEXIS 23160, 46-48 (D.D.C. 1999) (Facciola, J.) ("the closer in time the statement is to the decision at issue, the more likely the federal courts will find it probative of a discriminatory intent"); see also Schuster v. Lucent Techs., Inc., 327 F.3d 569, 575 (7th Cir. 2003) ("age-based derogatory remarks made around the time of and in reference to an employment action are relevant to a finding of discrimination"); Schreiber v. Worldco, LLC, 324 F. Supp. 2d 512, 519 (D.N.Y. 2004) ("although evidence of one stray comment by itself is usually not sufficient proof to show age discrimination, that stray comment may bear a more ominous

significance when considered within the totality of the evidence")(citation omitted). It is also clear from the context in which these statements were used ("FAA's Business Case" and "Primary Reasons") that age bias motivated the FAA's action. Moreover, Defendants do not deny this fact. See Defs' Resp. to Pls' Notice of Suppl. Filing at 3.11

To the extent Defendants deny they considered age, their own evidence refutes their claim. Defendants' third stated reason (out of only four) for implementing the impending mass RIF was the July 12, 2002 Feasibility Study. See Mot. at 52. However, that document states quite clearly that the FAA needed to conduct further studies, including a "Business Case Analysis" before subjecting Flight Services to an A-76 competition. See Defs' Ex. Q at § 5(p.) 9). It also states the FAA used criteria in making its decision to compete the AFFSs that "were purposefully omitted," excluded, and "dropped" from the Feasibility Study because they were used to support the FAA's Business Case, which lists "Aging workforce" as one of its factors. See id. at § 3.2.1 (p. 6).

Having explicitly used age as factor in its decision-making process, Defendants can find no shelter from liability in the Supreme Court's holding in Hazen Paper because that decision is limited

solely to cases "when the factor motivating the employer is some feature other than the employee's age." Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993). See Mot. at 36. Moreover, by its own words, that decision does not apply to cases where pension status is used as a proxy for age, where pensions are closely tied to age, or where plaintiffs proffer additional evidence inferring defendant's discriminatory motive, see id. at 612-13, and this case fits squarely into each of these exceptions. See Pls.' PI Appl. At 81-83. For example, it is evident from the record that Defendants merely supplanted the term "Agency workforce" with "Retirement eligible workforce" in their later statements, which shows the latter term was merely a code for age. Compare Suppl. Ex. 1 with PI Ex. 50.

2. Defendants' Decision to Hire Younger Students Rather than Experienced FS Controllers and the FAA's Plan for the Future Raise a Reasonable Inference of Age Discrimination.

Contrary to Defendants' claim that their Plan for the Future is "separate from, and unrelated" to this case, the FAA has explicitly relied on that document to justify its decision to hire younger students rather than retain older, experienced FS Controllers. See Mot. at 39. Without discovery, it is difficult to precisely state how many of the FS Controllers the FAA has retained to work as Tower or En Route Controllers.[12] However, it is clear from the available record that the FAA has hired a significantly larger number of younger, inexperienced students to fill its vacant Controller positions rather than retaining the older FS Controllers, who by Defendants' own admission are "experienced and valuable employees." See Mot. at 1. Furthermore, although the average age of the FS Controllers is 50.9, see Letter from Joseph L. Tryon to Charles W. Day, Jr., GEBHARDT & ASSOCIATES, LLP, dated 9/14/05, at 1 (copy attached as Exhibit 4). The average age of the FS Controllers the FAA has chosen to retain as of August 19, 2005, is only 43.3, see Decl. of Scott Malon, dated September 15, 2005, Attach A (Attached as Exhibit 2).[13] This pattern is persuasive evidence that the FAA is acting in an age-discriminatory manner.[14] See Taylor v. Canteen Corp., 69 F.3d 773, 780 (7th Cir. 1995) ("an employer implementing a RIF may not favor younger employees over older ones by finding new positions only for younger workers"); McReynolds v. Sodexho Marriott Servs., 208 F.R.D. 428, 433-434 (D.D.C. 2002).

3. Statistical Evidence of the FAA's Disparate Treatment Raises a Reasonable Inference of Age Discrimination.

Defendants concede that statistical evidence may support Plaintiffs' prima facie burden. See Mot. at 42. Their objection arises from an attempt to limit the scope of the Court's analysis solely to any disparities between the employees within Flight Services, but the relevant question is whether disparity exists between the FAA's various workforces - i.e., the only one Defendants chose to contract out (Flight Services) and all the rest which they chose not to contract out (all others, including Tower and En Route).

The average age of the FS Controllers is 50.9. See Ex. 4. By contrast, the average age of the FAA's total Controller workforce (Tower, En Route, and Flight Services) is only 44.7 and the average age of the FAA's entire workforce (Controllers and all other employees) is merely 47. See Ex. 4. Thus, the FS Controllers were the FAA's oldest workforce by

far, see PI Ex. 2 at ¶ 13, and this disparity is statistically significant because the chances are less than 1 in 1,000 that it could have arisen by chance, see Ex. 4. In light of these facts, which Defendants accept as true for purposes of their Motion, see Mot. at 41 -42, Defendants' decision to single out the FS Controllers for contracting out and a mass RIF rather than one of the FAA's other workforces, by itself, raises a reasonable inference of age discrimination. See, Stokes v. Westinghouse Savannah River Co., 206 F.3d 420, 429-430 (4th Cir. 2000) (holding that the proper comparison is between the terminated workforce and the residual work force of persons containing some unprotected persons); see also, Duke v. Uniroyal, Inc., 928 F.2d 1413, 1418 (4th Cir. 1991) (same).

4. The FAA's Deviation from Established Policies and Practices Raises a Reasonable Inference of Age Discrimination.

A discriminatory inference may be drawn when an Agency departs from normal processes without justification. See Lathram v. Snow, 336 F.3d 1085, 1093-94 (D.C. Cir. 2003). The same inference may be drawn from inconsistent practices on a defendant's part. For these reasons, the Court must consider as relevant any deviation by the FAA from its established policies, including, for example, its decision to designate some AFSSs as commercial in 2001 in direct contravention of Executive Order 13180. Compare PI Ex. 26 with Exec. Order No. 13180 (December 7, 2000) (amended on June 6, 2002); see also PI Exs. 26, 27 (indicating the AFSSs were first designated as commercial in 1999). The Court must also take note of the various inconsistencies in Defendants' story.[15]

In addition to the anomalies previously discussed by Plaintiffs, Defendants' own evidence reveals more irregularities the FAA is unable to reconcile. For example, the April 30, 1998 Flight Service Architecture Working Group Report on which Defendants rely states that the AFSS "[i]nflight services... should be maintained as a governmental role" and that "nearly all general aviation air/ground services are federally provided and should remain so." See Defs' Ex. M at §§ 1.3, 4.1. Similarly, the FAA's Feasibility Study repeatedly concluded that the Flight Services' NOTAM D function, which includes the monitoring of the President, is a governmental function ("mandates performance by the Government only") and should not be subjected to competition. See Defs' Ex. Q at § 4.1 (p. 16). Yet, Defendants inexplicably deviated from these conclusions by revoking Flight Services' inherently governmental designation and contracting out all of the AFSS functions, including the FS Controllers' NOTAM D duties. The FAA also inexplicitly changed its established procedures by establishing a "centralized selection process" for determining which of the FS Controllers would be retained in a Tower or En Route position (with only one "Selecting Official for all selections made" by the FAA). See Defs' Ex. G at ¶ 12 (noting that the FAA normally refers the list of candidates to the various facilities). These deviations from established policies are unexplained and support Plaintiffs' prima facie case.[16]

5. Defendants' Decision to Reject More Effective, Nondiscriminatory Alternatives Raises a Reasonable Inference of Age Discrimination.

No fewer than four lengthy reports presently in the record speak extensively and enthusiastically about the vast benefits, including significant financial savings, that the FAA would obtain if it expanded its Contract Tower Program. See Defs' Exs. F, H, I; PI Supp. Ex. at 13-14. The April 12, 2000 Office of Inspector General ("OIG") Audit Report concluded that the FAA underestimated the cost savings it could obtain from expanding the Contract Tower Program in its report to Congress, and that it should revise its study because Defendants could have saved an estimated $881,000 per Tower per year ($62.5 million). See Defs' Ex. F at IV ¶ 3. The follow-up September 4, 2003 OIG Report indicates that the FAA never responded to the OIG's 2000 Report. See Defs' Ex. H at 11 ¶ 4. It went on to state, however, that based on revised estimates, the FAA could have saved about $917,000 per Tower per year had it chosen to expand its Contract Tower Program ($65.1 million). Like these reports, the FAA's May 18, 1998 Federal Contract Tower Program Report also praises the success of the FAA's Contract Tower Program, which was a tested and proven success. See Defs' Ex. I at 1-6; Mot. at 9.

Taken together, these reports, which are the only reports that actually assess and thoroughly calculate the possible cost benefits and efficiencies of any FAA contracting out initiative (only discussing the Towers, not Flight Services) demonstrate that the FAA could have saved almost $325 million between 2000 and 2005, and more than $60 million a year after that had it expanded this well-established program. See similarly, PI Supp. Ex. at 11-15 (describing several other cost-saving measures the FAA has refused to implement despite repeated recommendations by interested parties); Defs' Ex. H (noting

that the FAA failed to collect $2.4 million it was entitled to under a contractor's failure to properly staff its Towers). But Defendants chose to reject this effective, non-discriminatory initiative, see Defs' Ex. T, and instead, the FAA expended about $20 million to establish OCS to contract out Flight Services. See Ex. 2 at ¶24; id. at Att. C at 2. As previously noted, the FAA's Tower employees are a significantly younger workforce than the FS Controllers. Thus, Defendants' decision not to pursue this alternative course of action, which would have saved the Government more money to date than the forthcoming RIF, raises a reasonable inference of age discrimination. See Rudder v. D.C., 890 F. Supp. 23, 46 (D.D.C. 1995) (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660 (1989)).

Not only did Defendants have effective, nondiscriminatory alternatives to save money, but as Plaintiffs have previously explained, they also have other effective methods of consolidating the AFSS facilities, which did not necessitate a mass RIF.[17] See Pls' PI Appl. at 77 (citing PI Exs. 10, 11). In fact, Defendants concluded that efficiency improvements at the AFSSs could be accomplished through gradual retirement/attrition. See e.g., Defs' Ex. M at § 4.4.

B. The FAA's Stated Reasons for Implementing the Mass RIF Are a Pretext for Discrimination.

Once Plaintiffs have proffered a prima facie case of discrimination, the burden shifts to

Defendants to produce a legitimate, nondiscriminatory reason for their actions. See Teneyck, 365 F.3d at 1151. After Defendants set forth their reasons, Plaintiffs must then carry their "ultimate burden" of proffering evidence from which a reasonable trier of fact can infer intentional discrimination. See id. **at** 1151. Defendants have proffered only four reasons for implementing the mass RIF: (1) FAA Studies and Reports; (2) the Feasibility Study; (3) the Administration's Competitive Sourcing Initiative; and (4) the FAA's determination that the Lockheed Martin bid provided the best value to the government. See Mot. at 49-54.

1. The Studies and Reports on Which Defendants Rely Do Not Support the Mass RIF.

Defendants are correct that the various studies cited by the FAA recommend that the AFSSs be consolidated. See Mot. at 49. However, these reports do not endorse, and in fact some of them reject, the implementation of amass RIF of the older FS Controllers, which Defendants chose to initiate. For example, the 2001 OIG Report recommends only that the AFSSs be consolidated; it does not endorse the contracting out of the FS Controllers' jobs or the implementation of amass RIF. In fact, it states that the consolidation "could be accomplished entirely through retirements and without a reduction in force." See PI Ex. 11 at 5. See also, Ex. 10 at 3.1; Defs' Ex. M at § 4.4.

Similarly, the December 6, 1996 OIG Audit Report, which was completed more than nine years before the FAA announced its proposed RIF on February 1, 2005, concluded only that the FAA can save money by consolidating the AFSSs in light of new technologies (i.e., OASIS). See Defs' Ex. L at 4.[18] Although that Report contains a fleeting reference to possible private sector alternatives for Flight Services, the focus of that portion of the Report was the "FAA's alternative analysis for OASIS," see id. at 8 (emphasis added). The OIG merely recommended that the FAA "perform an extensive evaluation of the full range of alternatives" for providing Flight Services, see id. at 10. Because the OIG conducted no analysis and reached no conclusion concerning the contracting out of Flight Service or the implementation of the RIF, it simply cannot be understood as support for the FAA's decision to terminate the FS Controllers' jobs.

Moreover, the FAA's response to the Report contained no mention of any plans to take any adverse actions, and the Report itself states that the FAA had resolved its recommendations. See id. at 10, 14. Also, Defendants never conducted an "extensive evaluation of the private sector," or any analysis for that matter, until after they had already decided to contract out Flight Services (more than six years later). See Defs' Ex. Q §§ 1.1, 1.2 (explaining that the Feasability Study was conducted only after the FAA proposed Flight Services for contracting out). Given these facts, the 1996 OIG Report can hardly be viewed as a justification for Defendants' decision.[19]

2. The FAA's Feasibility Study Does Not Support the Mass RIB.

According to the Feasibility Study, the FAA decided to subject the Fads to a competitive contracting out and "[o]ice [Flight Services] was proposed as a candidate... the next step was to determine the feasibility." See Deft' Ex. Q §§ 1.1, 1.2. In fact, the FAA had already changed the Reason Codes assigned to the Fads from "A" (which shielded them from contracting out) to "B" (which exposed them) by March 31, 2001, more than year before the Feasibility Study subsequently justified this decision. Compare PI Ex. 26 with PI Ex. 27. Hence, Defendants cannot claim the Feasibility Study motivated the FAA's decision; at most it merely validated that decision after the fact.

Moreover, as noted above, the Feasibility Study states quite explicitly that the FAA was motivated, at least in part, by factors that "were purposefully omitted" from the Study and placed into the "FAA's Business Case," which was a necessary part of the equation that had to be completed before the FAA proceeded. See Defs' Ex. Q §§ 3.2.1,5 (pp. 6, 19). Also, Defendants have proffered no proof to demonstrate that the Feasibility Study was validated after it was concluded, a step the Study itself recommends. See id. at § 5(p.) 9).[20] Finally, the FAA did not even comply with the conclusions in the Study regarding governmental functions. See supra at 25. It is not credible for Defendants to rely on a study to justify their actions when they did not comply with the recommendations contained therein.

3. The Government's Competitive Sourcing Initiative Does Not Support the Mass RIF.

Defendants concede "the FAA cannot rely on the requirements of the Administration's competitive sourcing initiative as a reason for its action because the Administration did not require the FAA to choose Flight Services for an A-76 competition." See Mot. at 55. Moreover, Defendants falsely claim that the Administration required the FAA to complete a minimum of 15 percent of its commercial activities, when they were actually not obligated to do so. Cf Ex. 6 hereto. Finally, Defendants' complete refusal to expand its Contract Tower Program suggests that they did not in fact take the Government's competitive sourcing initiatives seriously, as they claim. See Mot. at 55. Defendants' concession that they were not required to subject Flight Services to an A-76 Study, the falsity of their claims, and their lack of credibility belie any argument they have made on this issue. See Reeves, 530 U.S. at 147-49.

4. The Lockheed Martin Bid Will Not Provide the Best Value to the Government.

Defendants contend that Lockheed Martin's bid represented the "best value" to the Government and that neither age nor retirement eligibility of the FS Controllers played any role in the bid selection process. To support this, they claim that the FAA's Source Selection Authority ("SSA"), the individual responsible for awarding the outsourcing contract, reviewed "drafts" of the Source Selection Evaluation Board ("SSEB") Report, the Technical Evaluation Report ("TER") and Appendixes B and C of the TER, but somehow remained ignorant about the identity of the bidders simply because they were designated by a PSP number rather than their names. See Defs' Stmt. of Material Facts at ¶¶ 24, 25. However, by his own admission, the SSA selected Lockheed Martin as the contractor based on the SSEB's recommendation, and they knew the identities of all of the bid- ding parties. See Defs' Ex. X at 5 (stating that DeGaetano reviewed TER App. B); Pls.' Ex. 28 at 178 (stating "[w]e [PSP3 - MEO] are the only prospective service provider with... workforce in place at current facilities"). Also, the reports that the SSA reviewed clearly identified the MEO by noting by, for example, noting that PSP 3 was presently staffing the AFSSs. See e.g., PI Ex. 28 at 178.

Finally, there is a clear dispute of fact as to the cost savings the FAA claims it will achieve as a result of its decision to terminate the FS Controllers' jobs. Evidence proffered by Plaintiffs indicate that Defendants' own estimates have been erratic and diminishing. See e.g., Slide 5 (estimates have gone down from $2.2 billion to $1.2 billion); PI Suppl. at 10 (GAO states that the FAA will save only $241 million over five years). Moreover, the non-discriminatory alternatives that Defendants refused to implement would have saved the FAA more money. See e.g., Slide 6; Defs' Ex. X at ¶ 7; see supra at 22. Under even the narrowest definition, a more costly and discriminatory option simply cannot be deemed a "best value."

C. Plaintiffs Have Also Satisfied the Requirements for a Mixed Motive Claim, and Defendants' Evidence Does Not Support a Same-Decision Affirmative Defense.

Under a modified McDonnell Douglas analysis, which incorporates mixed-motive claims in the ADEA, Plaintiffs can prevail by showing that age was a motivating factor in Defendants' decision, even if they were also motivated by some other, lawful reason as well. See Rachid, 376 F.3d at 312 (analyzing post-Desert Palace ADEA claim under "a merging of the McDonnell Douglas and Price Waterhouse approaches"); see similarly Porter v. Natsios, 2005 U.S. App. LEXIS 13123 at ** 12-13 (D.C. Cir. July 1, 2005) (plaintiffs carry their prima facie burden "by demonstrating that discrimination or retaliation played a 'motivating part' or was a 'substantial factor' in the employ- ment decision").[21] As detailed above, Plaintiffs have proffered an immense amount of direct and circumstantial evidence demonstrating that Defendants' mass RIF is motivated by age bias. See supra at 11. By their own admission, Flight Services' "Aging workforce" was one of the FAA's "Primary Reasons for Proposing [Flight Services] for Study." See Suppl Ex. 2.

By contrast, Defendants have adduced insufficient evidence to support their burden of proving their "Same-Decision" affirmative defense. See Price Waterhouse, 490 U.S. at 244-45. In its entirety, Defendants' evidence that they would still have terminated the FS Controllers' jobs consists of a single statement by one FAA employee, the FAA's Deputy Chief Financial Officer, who claims that he would have taken the same actions regardless of any age discrimination by the FAA. See Mot. at 60. Significantly, Defendants maintain that several different people were involved in the FAA decision-making process and that no single person's actions was solely determinative. See Mot. at 19, 20. Assuming this is true for purposes of this Opposition, then no single person's testimony can be sufficient evidence that the FAA would still have contracted out Flight Services despite the Agency's consideration of employees' ages. Moreover, an FAA employee's testimony is simply not "objective evidence" as required by the very standard of proof that Defendants cite. See Mot. at 60 (Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (The employer must present some objective evidence and "must show that its legitimate reason, standing alone, would have induced it to make the same decision")).

III. PLAINTIFFS HAVE NOT ATTEMPTED TO COLLATERALLY ATTACK PRIOR ADMINISTRATIVE DECISIONS UNDER THE GUISE OF AN ADEA CLAIM.

As Plaintiffs explained above, Defendants' adverse employment actions, the FAA's mass RIF against the FS Controllers, are predicated on a series of precursory and sequential decisions that occurred over several years. See supra at 9 n. 8. The fact that Plaintiffs had to wait until their case ripened with the announcement of their impending termination before they could expose the FAA's discriminatory actions, see Forkkio v. Powell, 306 F.3d 1127, 1131 (D.C. Cir. 2002) (citing Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999)), does not prevent them from now showing how Defendants' earlier decisions were motivated by an age discriminatory motive and eventually culminated in the FAA's ultimate actions in violation of the ADEA. See Panzer v. Norden Sys., 151 F.3d 50, 56-57 (2d Cir. 1998) (holding that "evidence that, even if insufficient alone, may nonetheless work with other submitted proofs (such as biased remarks) to support a [finding of] discrimination.").

A. The Central Issues Raised by Plaintiffs Have Not Been Addressed or Resolved in Any Forum.

The central legal and factual issues in this case are whether the FAA discriminated against the FS Controllers, their "Aging workforce," on the basis of age, and whether the FAA's policies had a disparate impact on the FS Controllers. Moreover, the factual inquiries that must be resolved in order to assess Plaintiffs' legal claims are unique and go toward resolving the specific issue of discrimination. These issues have never been raised or litigated in any other forum and because they were never actually put in issue or previously decided, prior litigation does not preclude inquiries into these matters by this Court. See e.g., Haring v. Prosise, 462 U.S. 306 (1983) (noting the importance of preserving federal courts as an available forum for the vindication of individual's rights); see also Mot. at 66 n. 28 ("discrimination was not in issue at the administrative level" and "none of the administrative findings has any relevance to plaintiffs' ADEA claim").

In support of their ADEA claims, Plaintiffs maintain that the FAA' s decision to revoke Flight Services' inherently governmental designation and its decision to change the AFSSs' Reason Codes were influenced by Defendants' age-discriminatory animus and that these were initial steps toward the FS Controllers' eventual terminations.[22] These actions, which Plaintiffs discuss merely to show some of the FAA's discriminatory actions, are distinctly different from the unrelated and more narrow question of whether, for example, it was reasonable for the FAA to take these actions. See generally, Defs' Exs. V, W. Likewise, Plaintiffs submit that the FAA demonstrated bias against its older Flight Services employees, which is

distinctly different than whether the FAA had a bias for or against the MEO or Lockheed Martin. See Mot. at 67 ("these administrative proceedings are clearly different in kind than the administrative proceedings in a typical ADEA case because Judge Neill was focused on the propriety of a contract award, not plaintiffs' claims of discrimination").[23] Because the legal and factual questions presently before this Court are unique and distinguishable from issues previously addressed in a non-EEO administrative forum, this Court has jurisdiction to decide them on their merits.[24] When constitutional facts are at issue, such as those within the context of an ADEA claim, a court is empowered to review those facts denovo. See Ohio Valley Water Co. v.Ben Avon Borough, 253 U.S. 287 (1920); Cook v. Pan American World Airways, Inc., 771 F.2d 635, 643 (2d Cir. 1985); Clayton v. Republic Arlines, Inc., 716 F.2d 729 (9th Cir. 1983).

B. The Doctrine of Collateral Estoppel Does Not Preclude Plaintiffs from Proffering Circumstantial Evidence of Defendants' Discriminatory Animus.

Although some prior findings by an administrative agency may be given preclusive effect, there is a presumption against the doctrine of collateral estoppel, and Defendants have the burden of proving it applies in this case. See Crawford v. Jackson, 323 F.3d 123, 131 (DC. Cir. 2003) ("the burden of showing that any issue in the present litigation as to which he seeks preclusion is identical to the one that was decided earlier"). In order for a factual finding to be precluded, Defendants must show (1) the same issue now being raised was previously contested by the same parties and submitted for judicial determination, (2) the issue was actually and necessarily determined by a court of competent jurisdiction, and (3) preclusion in this case must not work a basic unfairness to the party bound by the first determination. See Beverly Health & Rehab. Servs. v. NLRB, 317F.3d316, 322 (D.C. Cir. 2003); see also U.S. v. TDC Mgmt. Corp., 288 F.3d 421, 424 (D.C. Cir. 2002) ("A prior determination can only preclude re-litigation of the same issue if it was 'essential to the [prior] judgment.'") (quoting Restat 2d of Judgments § 27); Union Pac. R.R. Co. v. Surface Transp. Bd., 358 F.3d 31, 38 (D.C. Cir. 2004) (courts "disallow preclusion where its use would create perverse incentives or unfairness"). These factors are in addition to Defendants' burden of showing that (4) that the special master acted in a judicial capacity, (5) he resolved disputed issues of fact properly before it, and (6) the parties had an adequate opportunity to litigate. See U.S. v. Utah Constr. & Mining Co., 384 U.S. 394 (1966). However, even if Defendants carry their burden of showing these factors, any issue may be relitigated if Plaintiffs could not, as a matter of law, have obtained review of the judgment in the initial action, or if they had a heavier burden of proof in the initial action than in the subsequent action, or if the burden of proof has shifted to Defendants. See Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); Cook v. Pan American World Airways, Inc., 771 F.2d 635, 643 (2nd Cir. 1985); Clayton v. Republic Airlines, Inc., 716 F.2d 729 (9th Cir. 1983).; see also Restat. 2d of Judgments § 28.

Plaintiffs are not precluded from proffering evidence regarding unlawful bias in the FAA's bidding process for five reasons, regardless of Judge Edwin B. Neill's decision in Washington, et al. v. FAA, 05-ODRA-00342C and 05-ODRA-00343C (consolidated) (June 28, 2005) ("ODRA Opinion"). First, Defendants fail to identify with particularity the specific facts alleged by Plaintiffs that were directly refuted by the ODRA Opinion. For example, Plaintiffs assert that there were "prejudicial errors in the bidding process" and that "the FAA decided to select Lockheed Martin as its service provider because that proposal would have the most detrimental impact on the older FS Controllers." See PI Appl. at 25. However, Defendants have failed to cite a single finding in the ODRA Opinion that forecloses the existence of prejudicial errors in the process or any finding that refutes Plaintiffs' claim that the FAA was seeking an outcome that would be detrimental to the FS Controllers. Similarly, although the ODRA Opinion concludes that the FAA had a "rational basis" for selecting the Lockheed Martin bid, it did not find that the FAA's conclusion was the result of a "rigorous critique" of that bid.[25]

Second, with respect to the issue of bias, Judge Neill required the Contesters in the preceding adjudication to meet a higher burden of proof than they must meet in order to prevail on their present claims of discrimination. Specifically, Judge Neill required the Contesters to "show improper conduct by clear and convincing evidence." See Defs' Ex. Y at 65 (citing Am-Pro Protective Agency, Inc. v. U.S., 281 F.3d 1234, 1239-40 (Fed. Cir. 2002)). By contrast, Plaintiffs now need only satisfy the lower "preponderance of the evidence" standard of proof. See Teneyck, 365 F.3d at 1149. Because Plaintiffs were previously required to meet a higher burden of proof, the doctrine of collateral estoppel does not apply, and the prior decision has no bearing on this case.[26] See Beverly Health & Rehab. Servs. v. NLRB, 317 F.3d 316, 322 (D.C. Cir. 2003).

Third, Defendants have never asserted and have therefore failed to show that the facts they seek to preclude from this case were necessary to Judge Neill's determination. See United States v. TDC Mgmt. Corp., 288 F.3d 421, 424 (D.C. Cir.

2002)(holding that "a prior determination can only preclude re-litigation of the same issue if it was essential to the prior judgment.") (citation omitted). Fourth, because Plaintiffs have proffered direct evidence of Defendants' age discrimination, Defendants have the burden of proving their "same-decision" affirmative defense, and where the burden of proof has shifted to Defendants, the doctrine of collateral estoppel does not apply.[27] See Cobb v. Pozzi, 363 F.3d 89, 114 (2d Cir. 2003); Clark v. Bear Stearns & Co., 966 F.2d 1318, 1322 (9th Cir. 1992) ("Collateral estoppel does not preclude claims that have a different burden of proof than previously decided claims [.]"); Guenther v. Holmgreen, 738 F.2d 879, 888 (7th Cir. 1984) ("It is, of course, well established that issue preclusion may be defeated by shifts in the burden of persuasion or by changes in the degree of persuasion required." (citation omitted)); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4422 at 592 (2002) ("Failure of one party to carry the burden of persuasion on an issue should not establish the issue in favor of an adversary who otherwise would have the burden of persuasion on that issue in later litigation."); Restatement (Second) of Judgments § 28(4) (1982). Finally, the D.C. Circuit has held that "[w]hile preclusive effect may sometimes attach to administrative proceedings, we see no reason why it should attach to proceedings where the examiner may only make 'recommendations' and lacks power to issue binding judgments." Murray v. Gilmore, 406 F.3d 708, 714 (D.C. Cir. 2005). Judge Neill's decision was merely a recommendation to Defendant Blakey. See Defs' Exs. Y at 102; Z.

IV. PLAINTIFFS CAN ESTABLISH A VALID CLAIM OF DISPARATE IMPACT UNDER THE ADDED.

This Court has jurisdiction over Plaintiffs' disparate impact claim, which is cognizable under the ADEA's federal sector provision. Furthermore, Plaintiffs have proffered sufficient statistical proof of the disparate impact of the FAA's actions, and are confident that further discovery will allow them to develop a fuller record regarding Defendants specific business practices.

A. This Court Has Jurisdiction over Plaintiffs' Disparate Impact Claim.

Defendants' contention that this Court does not have jurisdiction over Plaintiffs' disparate impact claim under the federal sector provision of the ADEA, 29 U.S.C. § 633a, in unpersuasive.

As an initial matter, Defendants are correct that Smith, et al. v. City of Jackson, et al., 544 U.S.___, 125 S.Ct. 1536 (2005), which recognizes disparate impact claims under the ADEA's private sector provision, does not apply to the present case.[28] See Mot. at 80. However, Defendants nevertheless discuss that case at length while conveniently waiting until the end of its argument to disclose and discuss those cases that do address this issue, namely Lumpkin v. Brown, 898 F. Supp. 1263, 1271 (N.D. 111. 1995); Evans v. Atwood, 38 F. Supp. 2d 25, 29-30 (D.D.C. 1999); Arnold v. U.S. Postal Service, 649 F. Supp. 676, 679-81 (D.D.C. 1986), rev'd on other grounds, 863 F.2d 994, 998 (D.C. Cir. 1988); and Palmer v. U.S., 794 F.2d 534, 538 (9th Cir. 1986). See also Keith R. Fentonmiller, The Continuing Validity of Disparate Impact Analysis for Federal - Sector Age Discrimination

Claims, 47 Am. U. L. Rev. 1071 (1998). This is because these cases have uniformly recognized a disparate impact claim under the federal sector provision of the ADEA.

There are also D.C. Circuit decisions that tend to support the application of disparate impact to federal employees like Plaintiffs. For instance, Kogerv.Reno, 98 F.3d 631, 693 (D.C. Cir. 1996), assumed, without deciding, that disparate impact applied to § 633a. Also, the D.C. Circuit has advocated abroad reading of § 633 a so as to avoid discrepancies between the protections the ADEA offers to private employees and those available to federal employees. See Forman v. Small, 271 F.3d 285, 296-99 (D.C. Cir. 2001) (holding the ADEA allows for retaliation claims against the federal government).

Defendants' vague recitation of the section 633a legislative history is equally unpersuasive, particularly in light of the fact that here too, Defendants blithely disregard obvious and key facts.[29] First, after the inception of disparate impact claim in Griggs v. Duke Power Co., 401 U.S. 424 (1971), Congress amended Title VII of the Civil Rights Act in 1972 to extend its protections to federal employees. See 42 U.S.C. § 2000e-16. Second, by Defendants' own admission, Congress embraced this theory when they amended Title VII, see Mot. at 89, and courts uniformly found disparate impact claims were cognizable under the federal sector provisions of Title VII, see Washington v.Davis, 426 U.S. 229, 249-53 (1976); Coppersmith v.

Roudebush, 517 F.2d 818, 821 (D.C. Cir. 1975). Third, courts applied disparate impact to claims under Title VII's federal sector provisions despite the fact that Congress had given no express waiver of sovereign immunity for such claims. See 42 U.S.C. § 2000e-16; Smith, 125 S.Ct. at 1540-42. Fourth, only two years after extending Title VII to federal employees, in 1974, Congress amended the ADEA and extended its protections to federal employees, in part, as Defendants acknowledge, out of concern that "the main burden of [government personnel cuts] not fall upon older workers simply because they have attained a certain chronological age." See Mot. at 86 (citing 119 Cong. Rec. 2648 (1973)). See similarly, Fentonmiller, 47 Am. U. L. Rev. 1071. Fifth, Congress patterned the federal sector provision of the ADEA after the federal sector provisions of Title VII. See Lehman v. Nakshian, 453 U.S. 156, 163-64 (1981). Indeed, the language of the two provisions track one another. Compare 29 U.S.C. § 633a(a) with 42 U.S.C. § 2000e-16(a). In light of this sequence of events, Defendants' unpersuasive claim that the ADEA does not allow federal employees to advance disparate impact claims fails.

B. Plaintiffs Have Presented Sufficient Statistical Evidence To Make A Prima Facie Showing Of Disparate Impact.

In order to prevail on a claim of disparate impact, Plaintiffs must show that a specific facially neutral practice has a disproportionate effect on older employees at the FAA. The practice under challenge here is the FAA's mass RIF of its predominantly older FS Controllers (the Agency's oldest workforce at almost 51 years on average). See Ex. 4. The mass RIF applies only to Flight Services and affects the 92 percent who are 40 years of age or older as well as the collaterally damaged 8 percent who are under 40.[30] The younger employees do not have the same investment in their retirement as older employees, are more likely to be retained by the FAA and otherwise have more career options open to them, and are likely to be more mobile, so that they are likely to be less severely affected by the RIF in contrast to the older FS Controllers. See Cronin v. Aetna Life Insurance Co., 46 F.3d 196, 204 (2d Cir. 1995) ("A finder of fact is permitted to draw an inference of age discrimination from evidence that, in implementing... a reorganization or reduction, the employer has located new positions for younger, but not older employees.").

In this case, Plaintiffs were only able to challenge the discriminatory actions of the FAA under the ADEA once those actions manifested themselves in adverse personnel actions. However, the RIF is the culmination of a long list of practices and policies which, while perhaps not themselves actionable, lie at the root of the FAA's discriminatory actions. These practices include the classification of Flight Services as a commercial activity, the implementation of studies that purport to justify the contracting out of Flight Service, the definition of which parts of Flight Services would be considered for contracting out, all of which, while facially neutral, are likely to have contributed to the disparate impact on older FS Controllers rather than other, younger FAA employees, including the FAA's Tower and En Route Controllers. Discovery is required to demonstrate the specific effect of each of these practices.

In Connecticut v. Teal, the Supreme Court ruled that the State of Connecticut's record of promoting African Americans at the end of a promotion process did not cure the discriminatory impact of its prior promotion test that disproportionately excluded African Americans. 457 U.S. 440 (1982). In the instant case, the fact that the bottom line affects only the "Aging workforce" of FS Controllers who are being terminated should not obscure the facially neutral distinctions that spared the younger FAA employees and sacrificed the older FS Controllers. Plaintiffs should be granted time to develop the record in order to conclusively prove the discriminatory impact of the facially neutral practices that resulted in the discriminatory RIF.

CONCLUSION

For all the reasons stated above, Plaintiffs respectfully request that this Court deny Defendants' Motion and allow this case to proceed to discovery and then to trial.

REQUEST FOR HEARING

Plaintiffs respectfully request an Oral Hearing on the merits of Defendants' Motion.

Footnotes

1 For purposes of this memorandum, Plaintiffs will refer to exhibits previously presented to the Court as follows: Plaintiffs' Application for Preliminary Injunction (PI Ex. X); Plaintiffs' Motion for Leave to Supplement Their Application for Preliminary Injunction (PI Suppl. Ex. X); Plaintiffs' Motion Hearing (Slide X); Plaintiffs' Notice of Filing of Supplemental Exhibits (Suppl. Ex. X); and Defendants' Motion (Defs' Ex. X).

2 Plaintiffs are relying on August 2004 staffing information obtained from the FAA in 2004 (the only complete data set that has been made available to Plaintiffs). See Decl. of William Dolan, dated Sept. 16, 2005, at ¶ 3-7, Attach. A, copy attached as Exhibit 1. The spreadsheet provided to the Court has been redacted pursuant to Local Rule 5.4(f).
Although the parties' staffing numbers differ, Defendants rely on the testimony of a Lockheed Martin employee to validate their number and have not provided Plaintiffs or the Court with the underlying data. See e.g., Mot. at 21 (citing Defs' Ex. B at ¶34). Without discovery, Plaintiffs are unable to verify the accuracy of Defendants' calculations.

3 It should be noted that this presentation listed both "Aging workforce" and retirement eligibility ("50% eligible to retire") as separate issues. Id. Thus, Defendants may not claim that "Aging workforce" was merely an ill chosen term intended to refer to the fact that Flight Services is (incorrectly) perceived to have a largely retirement eligible workforce.

4 Defendants' claim that Ms. Kansier's self-serving "explanation" for her later use of the term "Retirement eligible workforce" "forecloses the creation of a reasonable inference of age discrimination," see Mot. at 36, is not an accurate statement of the law. Cf. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 133 (2000) ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence") (quotation omitted). If Defendants' assertion were true, it would be tantamount to requiring the plaintiffs always to elicit confessions from the defendants.

5 "Aging workforce" appears in a list of problems, and it is clear that the FAA also regarded the "Aging workforce" as one more problem. See Mot. at 35 n. 13. As the maxim noscitur a sociis states, a thing is known by its associates.

6 Although the FAA prepared the Feasibility Study in 2002, Defendants' decision to implement a mass RIF rather than taking some other action was made in 2005, when they decided to accept the Lockheed Martin bid.

7 Ms. Kansier was intimately involved in creating the AFSS Screening Information Request ("SIR"), and according to one report, "Kansier had to figure out how the Federal Acquisition Regulation, on which OMB's competitive sourcing rules are based, meshes with FAA's separate Acquisition Management System." She worked on extending the competition deadline, she arranged to lengthen the contract period from five to 10 years, and she instigated the FAA's decision to consider technical factors more heavily than cost in assessing the bids. See Amelia Gruber, Shifting Gears, April 1, 2005, at http://www.govexec.com/features/0405-01/0405-01s2.htm (last accessed Sept. 9, 2005). Ultimately, Ms. Kansier's precise role in the FAA's decision-making process is an important dispute of fact that precludes summary judgment. However, it is clear that she was part of the decisional process that led to the FAA's choice to terminate the FS Controllers' jobs.
As courts have noted, "a defendant cannot avoid liability for discrimination with multiple layers of paper review, when the facts on which the reviewers rely have been filtered by another employee determined to purge the labor force of protected workers." Roberts v. Swift & Co., 198 F. Supp. 2d 1049, 1061 (D. Iowa 2002) ("A seemingly objective decision is not free of discriminatory animus where earlier discriminatory decisions lead to the adverse employment action") (internal citation omitted). Ms. Kansier may have been a step along the way to the ultimate RIF at issue here, but her statements regarding why the Agency decision was being undertaken should most certainly be imputed to the Defendants. See Rachid v. Jack in the Box, Inc., 376 F.3d 305, 315 (5th Cir. 2004) ("age-related remarks are appropriately taken into account when analyzing the evidence, even where the comment is not in the direct context of the termination and even if uttered by one other than the formal decision maker, provided that the individual is in a position to influence the decision").

8 Defendants try desperately to isolate and detach the chain of linked decisions the FAA made to reach their ultimate goal of terminating Plaintiffs' federal jobs. This is evident in their efforts to isolate Ms. Kansier's role in the decision-making process. It is also apparent in Defendants' collateral estoppel argument, which tries to sever the FAA's decisions to designate Flight Services as a commercial activity and to single out Flight Services for an A-76 study from the eventual RIF when those preliminary decisions were necessary steps in reaching the subsequent adverse actions. See infra at 25. Because each of these decisions led to the mass RIF, they cannot be isolated from one another, and Plaintiffs must be permitted to show how each of Defendants' discriminatory decisions played a necessary part in bringing about their terminations.

9 Defendants argue that Plaintiffs must use comparators to meet their prima facie burden. See Mot. at 33 n.ll. However, in George, the D.C. Circuit "made clear" that this rigid approach to discrimination cases is legally flawed. George, 407 F.3d at 412. Defendants' argument that Plaintiffs must show they were treated differently than similarly situated employees "is not a correct

statement of the law." While Plaintiffs can raise an inference of discrimination by demonstrating they were treated differently from similarly situated employees from outside their protected class, "this is not the only way." Id. (discussing Teneyck v. Omni Shoreham Hotel, 365 F.3d 1139, 1150-51 (D.C. Cir. 2004)). For example, discrimination might also be shown by the fact that the employer's legitimate reasons are suspect. Id. Moreover, Plaintiffs maintain that the FS Controllers, as an entire workforce, were singled out and targeted for contracting out and a mass RIF, so the comparators in this case, if necessary, would be the other FAA workforces, and it is clear that these workforces were much younger on the whole. See infra at 14; Slides 1-7.

10 Defendants claim that Plaintiffs' "mischaracterize" and "seriously distort" Defendant Blakey's statements regarding the FS Controllers' retirement eligibility are not credible, and both a plain reading and the context of her statements controvert Defendants' claims. Like the statements previously discussed, Defendant Blakey's references to retirement eligibility accompany two factors that the FAA had to view as problems - AFSS costs and aging facilities - and the only reasonable conclusion is that the employee's older age too was viewed by the FAA as a dilemma.

11 In their Response, Defendants state that "if the agency" considered the FS Controllers' ages "it can be perfectly proper" because it "may have an understandable concern." See id. (emphasis added). But they conspicuously omit any affirmative assertion that their consideration of age was perfectly proper and that the FAA did have an understandable concern. Moreover, Defendants cannot assert this reason now as a post hoc justification for the FAA's actions. See Townsend v. WMATA, 746 F. Supp. 178, 186 (D.D.C. 1990); see also Miller-El v. Dretke, 545 U.S.___, 125 S.Ct. 2317, 2328 (2005) (noting "[i]t would be difficult to credit the [defendant's] new explanation, which reeks of afterthought" and that accepting a "substitute reason" would ignore "its pretextual timing").

12 Compare PI Ex. 2 at ¶26; id. Art. D (projecting hiring of 436; 65 former FS Controllers and 309 younger students) with Defs' Ex. G at ¶7 (projecting hiring of 836; 120 former FS Controllers and presumably 716 students); compare Defs' Ex. G at ¶7 (108 former FS Controllers hired) with Ex. 4(15 former FS Controllers hired); see also Email from Scott Malon, dated May 26, 2005, copy attached as Exhibit 3 (498 FS Controllers are certified and qualified to work in Tower and En Route positions); Defs' Ex. AA at ¶14 (claiming the FAA announced 38 vacancies for displaced FS Controllers on August 22, 2005, the day the declarant executed his declaration).

13 On July 31, 2005, the average age was only 35.5.

14 Defendants also claim that "[i]t is wholly unreasonable to read any age-based animus" from the wording of its Plan for the Future, see Mot. at 39, but in the context of the FAA's statements regarding "Aging workforce" and retirement eligibility and its reliance on the Plan as an excuse for not retaining more FS Controllers, a reasonable trier of fact is capable of finding that the FAA's words take on a very different meaning. Cf. Forman v. Small, 350 U.S. App. D.C. 24,271 F.3d 285, 293 (D.C. Cir. 2001) (based on "a series of comments... that implicitly referred to [plaintiff's] age" concluding that "the employer's correlation of old age with declining productivity represented the very essence of age discrimination") (citations omitted); Sperling v. Hoffmann-La Roche, Inc., 924 F. Supp. 1396, 1408-09 (D.N.J. 1996) (denying defendant's motion to dismiss based on complaint that asserted plaintiffs were terminated because they were "perceived to be 'less productive or less energetic'... because consideration of stereotypes such as these in making employment decisions is precisely what the ADEA was intended to eradicate") (citation omitted).

15 Defendants do not deny their actions directly contradicted the Executive Order. Nor do they explain their erratic decision to list some, but not all, AFSSs on its 2000 and 2001 FAIR Inventories. See PI Exs. 25; 26. Nor do they justify their decision to change the AFSSs' "Reason Codes" before completing the Feasibility Study, which purports to assess the factors that are relevant to such a determination. Compare Mot. at 7 n. 4 with id. at 15. Nor do they provide much justification for treating the Alaska AFSSs differently from the other facilities (Alaska's FS Controllers are not being RIF' ed). Given their deviations from Agency policies and inconsistencies, Defendants' assertion that Plaintiffs' arguments are "baseless" is simply disingenuous.

16 It should be noted that one of Defendants' exhibits shows that the FAA has a history of not complying with the FAIR Act and OMB Circular A-76 and of relying on faulty studies to support its actions. See Defs' Ex. J at 2-3 (Nat'l Air Traffic Controllers Assoc. v. Mineta, Case No. 99CV1152 (N.D. Ohio Feb. 4, 2005)).

17 Ms. Kansier claims that the NAATS Proposal was never given to FAA, but Walter W. Pike presented the Proposal to Defendant Blakey in May or June 2003. Compare Defs' Ex. A at ¶(24 with Decl. of Walter W. Pike, dated September 16, 2005, Ex. 5 hereto.

18 Specifically and in its entirety, the report's "Conclusion" merely states:
In our opinion, FAA can realize substantial resource savings through further consolidation of AFSSs. Current technology provides FAA the ability to provide the same or increased level of flight services from fewer numbers of facilities without compromising safety. The following discussion summarizes FAA's prior efforts in modernizing the flight service system, examines current operating and cost efficiencies, and highlights potential benefits of further consolidation.
Id. Also, its allusion to having in-flight services be performed in the commercial sector was directly refuted two years later by the

1998 Flight Service Architecture Working Group Report. Compare id. at 9 with Defs' Ex. Mat §§ 1.3,4.1.

19 While Defendants did not discuss the 1998 Flight Service Architecture Working Group Report in this section of their brief, they infer elsewhere in their pleadings that the FAA was also motivated by this report. See e.g., Defs' Stmt. of Material Facts at ¶8. However, the report only discusses consolidating the AFSSs and reducing employees' hours; it recommended achieving consolidation by attrition through retirement and concluded that "[i]nflight services... should be maintained as a governmental role" and that nearly all general aviation air/ground services are federally provided and should remain so." See Defs' Ex.M at §§ 1.3,4.1. Thus, it does not support Defendants' decision to terminate the FS Controllers' jobs.

20 Defendants claim the Study was validated, but they do not specify when that so-called validation by "subject matter experts" occurred. See Mot. at 45. However, their use of this particular terminology, which is identical to the wording of the Study, compare id. with Defs' Ex. Q § 2, suggests they are not referring to any validation of the Study after it was released, which is the deviation from standard practices that Plaintiffs discuss and a departure from the recommendations of the Study itself. See Pls' PI Appl. at 20; Defs' Ex. Q §§ 4.2, 5 (noting its conclusions needed "further evaluation and validation"). Because five out of 10 of the FS Controllers' activities have Homeland Security implications, it was unreasonable for the FAA not to have validated the Study, which was premised on assumptions that may have been incorrect. See Defs' Ex. Q § 3.3.1.

21 Although Defendants are correct that the mixed-motive analysis is typically applied to cases where there is direct proof of discrimination, the very case to which they cite held that plaintiffs made use circumstantial evidence and still prevail. See Mot. at 58 n. 23 (citing Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003)). Regardless, Plaintiffs have adduced direct evidence of Defendants' discriminatory animus.

22 Despite Defendants' assertion to the contrary, Plaintiffs are not attempting to collaterally attack the FAA's decision to change Flight Services' designation as an independent ADEA claim. See Mot. at 70-72. As Defendants observe, Plaintiffs were required to wait until the FAA took an adverse employment action against them before they could advance an ADEA claim, see id. at 72-77, but this does not preclude them from now illustrating Defendants' prior animus and discriminatory actions that paved the way for their impending termination.

23 It is worth noting that administrative findings in an ADEA case are not binding on any District Court. See Chandler v. Roudebush, 425 U.S. 840, 863-64 (1976).

24 Despite Defendants allusions to the contrary, Plaintiffs advanced their claim pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 626(b), not 49 U.S.C. § 4610. See Mot. at 63. See also 29 U.S.C. § 633a(c).

25 To the extent Defendants rely on the ODRA Opinion to refute specific allegations, their citations have no relation to Plaintiffs' statements of fact. For example, Plaintiffs assert that "the Lockheed Martin proposal was the only bid that was considered to be without a single 'influential weakness.'" See PI Appl. at 29. In a misplaced attempt to refute this assertion, Defendants cites to ODRA Opinion finding 44, which contains absolutely no reference to "influential weaknesses," and pages 67-70, which do not identify a single "influential weakness" attributed to the Lockheed Martin bid. See Mot. at 68 (citing Defs' Ex. Y at 19, 67-70).

26 In fact, the ODRA Opinion is riddled with facts that support Plaintiffs' allegation that bias existed within the FAA's bidding process. See e.g., Defs' Ex. Y at 45 (noting a Factor Team member was "defensive of Lockheed's proposal" and "love[d] Lockheed"); id. at 46 (noting a Team Leader admitted there was a problem with the processes and that one member had a "grudge" against the MEO); id. at 62 (noting a Team member did not act in accordance with guidance given to evaluators and was offensive and overbearing to others). These facts demonstrate irregularities in the process that is probative of Defendants' prejudicial bias and discriminatory pretext notwithstanding Judge Neill's analysis of them within the context of the narrow question he was to decide. See id. at 62-65.

27 Defendants' reliance on Carey v. O'Donnell, 506 F.2d 107, 110 (D.C. Cir. 1974), is misplaced. This case is not "virtually identical" as they allege. See Mot. at 63. The decision at issue in that case was the Civil Aeronautics Board's decision to approve a merger between two private airlines and integrate their pilots' seniority lists, an issue wholly different from the FAA's decision to terminate the FS Controllers' jobs. Moreover, the court in Carey found solace in Congress's vesting of airline merger issues in the Civil Aeronautics Board to include the fair and equitable integration of seniority lists. See id. By contrast, Congress has vested the U.S. District Courts with the authority to decide ADEA claims of discrimination. See also 29 U.S.C. § 633a(c).

28 The Supreme Court has cautioned against relying on cases that are not directly on point. An obvious example of why this admonition should be heeded, is the Circuit Courts' misplaced reliance on Hazen Paper to foreclose disparate impact claims under the ADEA's private sector provision, see e.g., Mullin v. Raytheon Co., 164 F.3d 696, 699-704 (1st Cir. 1999); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1048 (6th Cir. 1998), a misreading of Hazen which was only later rectified by the Supreme Court in Smith. See Smith, 125 S.Ct. at 1540 ("It was only after our decision in Hazen Paper..., that some of those courts concluded that the ADEA did not authorize a disparate-impact theory of liability").

[29] Defendants' discussion of legislative history relies on passages so general as to be subject to whatever interpretation Defendants are predisposed to give them. As a case in point, Defendants contend that the disparate impact of "facially neutral policies can hardly be described as 'cruel' or 'self-defeating,' or as 'destroying' the employees' 'spirit.'" Mot. at 85. With these words, far from describing an objective fact, Defendants demonstrate a callous indifference to the fate of their longstanding, loyal workforce, which is evident in their claim that laying waste to the careers of 1,935 highly skilled federal employees is not "cruel and self-defeating" and will not "destroy the spirit of those who want to work." Evidently Defendants, who are not confronted with the loss of their federal jobs, federal benefits, federal retirement, and other federal perks, can afford to be complacent about other people's loss of those jobs, benefits, and retirement, and perks. Or perhaps, they simply overlooked the Declarations submitted with Plaintiffs' Application for a Preliminary Injunction. See Exs. 1, 2, 24, 33, 34, 43-48, 57-63. Defendants' predisposition to trivialize the harm of disparate impact discrimination blinds them to the obvious application of the very words they cite.

[30] In the history of disparate impact litigation, it has never been required that the adversely affected group be solely composed of members of a protected class. For example, in Griggs, a neutral requirement that employees either possess a high school diploma or pass a series of skills tests was found to pose a disparate impact on African American workers. See Griggs, 401 U.S. at 424. There, the Supreme Court held that the employment practice had a disproportionate impact on African American workers, although the requirements ostensibly also operated to screen out some white workers. See id. at 431 n.6 (citing North Carolina 1960 census figures showing that 34 percent of white males possessed a high school diploma versus 12 percent of African American males and EEOC statistics that testing procedures passed 58% of whites versus 6 percent of African Americans.) Disparate impact means only that a facially neutral policy has a disproportionate impact on members of a protected class; it does not require the practice have an exclusive impact on the class.