UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KATHLEEN A. BREEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 05-00654 (RWR)
	)	
NORMAN Y. MINETA	)	
SECRETARY OF TRANSPORTATION	)	
DEPARTMENT OF TRANSPORTATION, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL FILING

Plaintiffs Kathleen L. Breen, et al., hereby file their Reply to Defendants' Response to Plaintiffs' Notice of Supplemental Filing and in support thereof state as follows:

A central issue in this case is whether there is direct evidence of age-discriminatory intent, as Plaintiffs maintain there is.

If Plaintiffs can show by "direct evidence" that age discrimination was a "motivating factor" in Defendants' decision to fire the predominantly over 40 (92%) Flight Service Controllers whose jobs are at issue, then Plaintiffs are entitled to a finding of liability unless Defendants can prove by a preponderance of the evidence that they would have taken

the same action regardless of the Controllers' age.[1] See Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989). The FAA's slide presentations from January 12, 2003 and June 25, 2003 (Notice, Ex. 1 and 2) provide precisely the kind of direct evidence of discrimination that would support a finding of liability.[2]

Joann Kansier's presentation of the "FAA's Business Case for Competitive Sourcing" (Notice, Ex. 1) describes the "State of AFSS" in the right-hand column as including problems such as "Aging facilities and equipment" and "Imbalanced workload" and most significantly, "Aging workforce." See id. Other than the revealing term "Aging workforce," the list is identical to the cleaned up list on the FAA's website, which substitutes the euphemism "Retirement eligible workforce" for "Aging workforce." See Plaintiffs' Application for a Preliminary Injunction ("Application"), Ex. 50. At oral argument on September 1, 2005,

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[1]Though the existence of direct evidence means that Plaintiffs are not required to show discrimination through circumstantial evidence, Plaintiffs can also show age discrimination based on circumstantial evidence through the three-part burden shifting scheme of McDonnell Douglas v. Green, 411 U.S. 792 (1973).

[2]The government's counsel grudgingly conceded at oral argument: "I think that it's very clear that at worst, it would be a mixed motive case." Tr. at 49:25-50:1.

the Court raised the question of whether statements introduced by the Plaintiffs (such as Ex. 50) should be interpreted to as being age animus. Tr. at 49:20-24. In light of the FAA's much clearer, stronger inclusion of "Aging workforce" in the list of reasons for contracting out and terminating the Plaintiffs, the FAA's animus is much more apparent. It is telling that the FAA subsequently felt the need to replace its "Aging workforce" term with the less obviously discriminatory "Retirement eligible workforce."

The slide from the FAA's January 12, 2003 program (Notice, Ex. 2) belies Defendants' assertion that their intense focus on age was merely evidence of their delight in the good fortune of those employees (a clear minority) who were actually eligible to retire and could take a second job. See Defendants' Response at 2. In fact, the Agency's January 12, 2003 slide, entitled "Primary Reasons for Proposing Flight Service Stations (FSS) for Study" (emphasis added), lists "Aging workforce" separately from the category ">50% (sic) eligible to retire." Notice, Ex. 2. A candid observer, even one entertaining the FAA's implausible rationale, would have to conclude that "Aging workforce" was a separate reason for proposing the FSS for study (and eventual elimination effective October 4, 2005).

Plaintiffs' third additional exhibit (Notice, Ex. 3) is evidence that the FAA Administrator's audience either heard her state that an "Aging workforce" was a concern or understood her to be stating that the Flight Service Controllers are an aging workforce.

Defendants conclude their Response with a bizarre and irrelevant colloquy on how, in some situations, consideration of age could be legitimate. Even if this were so, the situation they describe — recruiting and training younger employees because older employees are going to retire — bears no relationship to the situation at issue in this case — firing the older workers (who are under a mandatory retirement age of 56). See Response at 3-5. If age was a consideration in firing the FAA's Flight Service Controllers, then it was impermissible and discriminatory as a matter of law.[3]

[3]If so, Plaintiffs are entitled at minimum to a finding of mixed motive discrimination.

Respectfully submitted,

/s/

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