UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

APPELLANTS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs Appellants Kathleen A. Breen, et al., by and through undersigned counsel, hereby appeal the Memorandum Opinion and Order issued on September 30, 2005, denying their Application for a Preliminary Injunction (attached as Ex. 1) and request that this Court immediately issue the preliminary injunction requested. Plaintiffs will be irreparably harmed if this Court does not issue an injunction before midnight today, October 3, 2005, when their federal employment as Air Traffic Controllers, including any possibility of earning sufficient years-of-service retirement credit toward their full special federal retirements, will be terminated. Plaintiffs have earlier today filed a Notice of Interlocutory Appeal with the District Court.

Jurisdiction

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1) because Plaintiffs are appealing the District Court's refusal of an injunction. See id.

Background

Plaintiffs in this case are a group of 834 federal Flight Service Air Traffic Controllers, nearly half the total number of Flight Service Controllers (outside Alaska), whose total numbers approximately 1,935.[1] All 1,935 of these Flight Service Controllers will lose their federal jobs at midnight tonight, when contractor Lockheed Martin will assume control of the nation's Flight Service Stations. Until now, Flight Service Controllers, who have always been federally employed, are responsible for providing navigation and weather assistance to pilots, primarily in general aviation, providing emergency assistance to pilots, and informing pilots of flight restrictions, including those around the President of the United States. See Mem. Opp. at 2; Pls' Appl. at 6. Since 2001, the

[1]The FAA's exemption of Alaska from the contracting out of Flight Service is purportedly based on unique weather and geography. This, of course, ignores the unique weather and geography of all other regions of the country. See Plaintiffs' Application for a Preliminary Injunction at 19. It is completely illogical for the federal government to manage and staff Flight Service for one state only.

Federal Aviation Administration (FAA) has engaged in a process of contracting out the Flight Service Controllers for the admitted, officially stated reason that they are an "aging workforce." See Exs. 2-4 attached (Pls' Add'l Hrg. Exs. 1-3, filed September 6, 2005). Flight Service Controllers are on average approximately 51 years old, whereas Air Traffic Controllers as a whole (including Flight Service) average approximately 44 years of age. See Exs. 5-6 attached (Pls' Hrg. Slides 3 and 4); Pls' Opp. Ex. 4; PI Ex. 2 at ¶ 13; see also Defs' Opp. at 41-42 (accepting as true for purposes of Plaintiffs' Application that the Flight Services Controllers are an older workforce).

Because of the high stress nature of their jobs, Air Traffic Controllers in the federal government enjoy a special retirement program that allows them to retire at age 50 after 20 years of service as an Air Traffic Controller. See 5 U.S.C. § 8336(e); 5 U.S.C. § 8412(e); 5 C.F.R. § 842.207; see also Pls' Appl. at 42; PI Ex. 40. The Controllers' special retirement program requires them to pay into the system at a significantly higher rate while they are working, but correspondingly grants them a higher annuity when they retire. See Ex. 7 attached (Pls' Hrg. Slide 10); Pls' Appl. at 42; PI Ex. 40. However, if

they fail to have sufficient years-of-service credits to reach their early retirement eligibility, they irrevocably lose the extra annuity payments that they paid into the system while they were working as Controllers.

Because the FAA's contracting out plan also envisages a radical consolidation of the number of Flight Service Stations from 58 in the continental United States, Hawaii, and Puerto Rico to 17, plus three hubs, the planned contracting out will have the effect of uprooting a large number of older Controllers from their families and communities, imposing widespread dislocation and severe hardships in the cases of a number of Controllers who have families with serious medical problems or property investments. See Ex. 7 attached (Pls' Hrg. Slide 10); Pls' Appl. at 31, 102-12; PI Ex. 29.

ARGUMENT

In order to obtain a preliminary injunction, Plaintiffs are required to show 1) likelihood of success on the merits, 2) irreparable harm, 3) no harm to third parties, and 4) that the injunction is in the public interest. See Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998); Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 110 (D.C. Cir. 1986). Each of these elements is met as addressed below.

Standard of Review

This Court reviews a district court decision regarding a preliminary injunction for abuse of discretion, and any underlying legal conclusions de novo. Katz v. Georgetown Univ., 246 F.3d 685, 688 (D.C. Cir. 2001). As will be apparent below, a full de novo review of the relevant evidence and legal conclusions compels conclusions different from those of the District Court, shows that the Court below abused its discretion, and requires that the requested injunction be granted.

Plaintiffs' Arguments and Evidence Established the Likelihood of Success on the Merits

The District Court overlooked the Plaintiffs' principal legal arguments when it concluded that Plaintiffs were unlikely to succeed on the merits of their age discrimination case. The District Court erroneously analyzed this case solely from the point of view of traditional McDonnell Douglas burden shifting applicable to circumstantial cases, and failed to analyze Plaintiffs' persuasive direct evidence of age discrimination (see Mem. Op. at 7), which renders moot the question of burden shifting. Cf. McDonnell Douglas v. Green, 411 U.S. 792 (1973).[2]

[2]Plaintiffs addressed the issue of burden shifting in their Application for a Preliminary Injunction only as an alternative theory.

Moreover, because McDonnell Douglas is irrelevant to a direct evidence case, so too is the analysis of the Court below with respect to differences between the ages of Flight Service Controllers and other Controllers. See Mem. Op. at 9-10.

Direct Evidence

Plaintiffs can make out a prima facie case of age discrimination in a mixed motive case by showing that there is direct evidence of animus toward older employees based on their age. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Pls. Appl. at 93-95; 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"). The burden is then shifted to the Defendants to prove their affirmative defense that they would have taken the same action absent their bias based on age. See Price Waterhouse, 490 U.S. at 242.

In this case, Plaintiffs produced a series of official statements from key FAA officials, including by Defendant Marion

C. Blakey, the FAA Administrator, that plainly and unambiguously confirmed that the employees' age was a motivating factor in the FAA's decision to eliminate its Flight Service Controller workforce. The context for the statements by FAA officials is clearly shown by the FAA's slide presentations justifying its contracting out of the Flight Service workforce. In one presentation, the FAA cited "aging workforce" as one of the "primary reasons" for subjecting Flight Service to the contracting out process, Ex. 2 attached; in another an "aging workforce" is part of the FAA's "business case" for the contracting out. Ex. 3 attached. Defendant Blakey stated in official meetings about the contracting out that "the workforce is aging." Mem. Op. at 12 (quoting the Hearing Testimony of witness Michael Sheldon). In seeking to put a favorable gloss on the use of "aging workforce" in its public statements, the FAA claims that it was really for the workforce's benefit that the FAA conducted the contracting out. See Motion for Summary Judgment at 47, 104; Opp. to PI 34-35; see also Mem. Op. at 10-11. The absurdity of this reasoning is apparent when one considers that the planned action is firing all 1,935 of these

federal employees, including all 834 Plaintiffs.[3]

In her subsequent slide presentations, the FAA's Director of the Office of Competitive Sourcing, Joan Kansier, revised her slides to replace "aging workforce" with the euphemistic and neutral-sounding term, "retirement eligible workforce", in a transparent effort to reduce the obvious, age-based animus of the agency's original "aging workforce" statement.[4] Compare Ex. 8 attached (Pls' Hrg. Slide 5) and PI Ex. 50 with Ex. 2 attached. It is this same "retirement eligible workforce" language that was picked up the by the FAA Administrator in her speech on October 21, 2004, which was subsequently published on the web. See Mem. Op. at 7; Ex. 9 attached (Pls' Hrg. Slide 6) Pls' Appl. at 47-48; PI Ex. 51; Defs' Ex. D; WEB SITE]. The Administrator clearly sees the Flight Controller workforce as a problem, since contracting out is the main way to upgrade the services the Controllers provide - which clearly reflects a biased view of "productivity and competence decline with old age" and "inaccurate and stigmatizing stereotypes." Mem. Op. at

[3]Another 80-plus Controllers have proposed to become Plaintiffs in this action. See Mem. Op. at 1 n.1.

[4]In fact, Defendants' attorney at the Preliminary Injunction Hearing several times correlated older workers with retirement eligible workers. Hrg. Tr. of Sept. 1, 2005, at 48, 53, and 55.

7 (quoting Hazer Paper Co. V. Biggins, 5-7 U.S. 604, 610 (1993). See id. In its analysis of Defendant Blakey's public statements without any discussion of Exs. 2-4 attached (Additional Hearing Exhibits 1-3), the District Court has avoided addressing the context in which they arose, one in which the FAA originally referred an "aging workforce" as the reason for its actions rather than a factor correlated with age. Cf. Mem. Op. at 9-15.

In light of the direct evidence produced by the Plaintiffs of the agency's unlawful age discriminatory motivation — which Plaintiffs anticipate developing further in discovery and at trial, the burden shifts to Defendants to prove an affirmative defense that they would still have taken the same actions. See Price Waterhouse, 490 U.S. at 242. The District Court did not analyze the likelihood that Defendants would be able to meet their burden, but it did address the question of whether Defendants' legitimate nondiscriminatory reasons might withstand scrutiny. In performing this analysis, the Court however disregarded the centrality of age to Defendants' business case (see Exs. 2-3 attached), and committed a number of errors in its analysis of Defendants' assertions. For example, it relies on the superficial, unvalidated Grant Thornton feasibility study as a justification for contracting out the Flight Service

Controllers, but the FAA had already made its decision to subject Flight Service to contracting out when it designated it as a commercial activity before the Grant Thornton study. See Pls' Opp. at 21; Compare PI Ex. 26 (AFSSs assigned Reason Code "A," shielding them from outsourcing) with PI Ex. 27 (Reason Code "B," exposing the AFSSs to outsourcing); see also Defs' Ex. Q §§ 1.1, 1.2 (explaining that the feasability study was conducted only after the FAA proposed Flight Service for contracting out). The Court likewise ignores the fact that other alternatives to the Lockheed Martin plan did not require Flight Service Controllers to be fired. Cf. Mem. Op. at 4 n.2; Pls' Opp. at 17-20. The FAA takes the rosy view that Lockheed Martin will offer jobs lasting at least three years to all Flight Service Controllers, but in fact nearly a thousand incumbent Controllers will lose their jobs when Lockheed Martin closes facilities in April 2006. See Mem. Op. at 4, n. 2. Moreover, the "three year guarantee" of employment for ex-federal Controllers is hollow in light of the fact that the employees are clearly designated by Lockheed Martin as being "at will" employees who may be required to leave the company's employ for any reason at any time. See PI Ex. 1 at ¶20; id. at Attach. B.

The Court is in error in suggesting that the administrative process by which Lockheed Martin was selected is unassailable. For instance, the Court characterizes the selection process as a "blind review," but it is quite apparent that, at a minimum, the government's bid was readily identifiable from internal evidence. See PI Ex. 28 at 178 (stating "[w]e [PSP3 - MEO] are the only prospective service provider with ... workforce in place at current facilities"). The Court's reliance on the Special Master in the contract bid dispute process (Mem. Op. at 14, n.5) is similarly misplaced, since the Special Master never addressed any issues of age discrimination. See Defs' Opp. 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"). Moreover, the Court does not consider or analyze the fact that the Contesters in that process were required to meet a higher burden of proof to show bias in the administrative bid process ("clear and convincing evidence", see Defs' Ex. Y at 65) than Plaintiffs must bear in the current age discrimination case ("preponderance of the evidence"), so that on the issue of bias, the administrative process can have no preclusive or probative effect. Restat 2d of Judgments § 28(4).

Disparate Impact

As fully briefed by Plaintiffs below, Opp. to MSJ at 32-33, the federal sector provision of the ADEA, 29 U.S.C. 633a, is modeled after the federal sector provision of Title VII, 42 U.S.C. § 2000e-16. It is unquestionable that disparate impact suits in federal cases under Title VII are permitted, and there is no higher authority that holds to the contrary with respect to the ADEA. In light of the fact that Congress passed the federal sector provisions of the ADEA after passage of the federal sector provisions of Title VII, it is clear that Congress intended to allow disparate impact cases to be brought under the ADEA.

Irreparable Harm

In addressing the issue of irreparable harm, the District Court does not consider the issue of Plaintiffs' years-of-service retirement credits toward their special retirement program. See Mem. Op. at 20-23; Hrg. Tr., September 1, 2005, at 37. Plaintiffs only receive credit toward their special retirement for "good time," i.e., time that they work as Controllers. See Pls' Appl. at 42; PI Ex. 40. During this time, they pay more into the system, in the expectation that they will receive a higher payout when they have served their 20 years and

reach age 50. Time in other federal employment does not count as "good time" toward air traffic controller retirement; and most Controllers have a narrow set of skills that do not qualify them for comparable positions in other parts of the government. As a practical matter, these retirement credits can only be calculated and awarded for time actually worked as an Air Traffic Controller. Thus, it would be impossible to calculate how to award credits retroactively (for time not worked), and trying to award credits retroactively faces potential obstacles to implementation by the U.S. Office of Personnel Management. The loss of these special retirement credits, which Plaintiffs cannot make up, is clearly irreparable harm affecting all Plaintiffs, for which there is no adequate remedy at law.[5]

In addition, the District Court did not address the massive harm to which employees are being subjected by their obligatory relocations, specific examples of which were cited at the Preliminary Injunction Hearing and in Plaintiffs' Application for a Preliminary Injunction. Hrg. Tr. at 19-21, Appl. for PI and Exhibits thereto passim. In particular, a number of

[5]The fact that witness Michael Sheldon testified that he might take a "million dollars" to settle his case does not address the impossibility of his being able to earn any more retirement credit through federal Controller work, unless he prevails in this case. Hrg. Tr., Sept. 1, 2005, at 27.

employees have personal medical, family, and property issues that make it next to impossible for them to relocate in response to the FAA's contracting out.

Balance of Harm to the Parties

Plaintiffs do not take issue with the District Court's finding that "the harm to the individual plaintiffs [due to the loss of their federal employment] appears to represent a slightly greater harm [over the expense that will be incurred by the contractor and the agency if the planned change is interrupted]." Mem. Op. at 23.

Public Interest

The District Court's finding that cost savings through competitive outsourcing and the finality of a decision are more consistent with the public interest than Plaintiffs' injunction request (Mem. Op. at 23-24) is clearly erroneous, because the lower Court disregarded the direct evidence of the government's adverse action against its "aging workforce." Plaintiffs submit that the public interest will be better served by prompt Court review of the massive governmental age discrimination at issue here than in allowing federal monies to be spent on contracting out for an obviously illegal scheme. Allowing the mass

Reduction-in-Force to go forward now and undoing it later after Court review would be a gross waste of time and money and clearly detrimental to the public interest.

Conclusion

As the District Court recognized, "[t]he human toll that Flight Service outsourcing will take on a valued segment of the federal workforce is tangible." Mem. Op. at 24.[6] Thus, it is a complete mystery why the District Court did not discuss either the government's admitted age discriminatory motivation in terminating its "aging workforce" and the Controllers' loss of opportunity to do Controller work and thus earn the sufficient years-of-service retirement credit they need for their early retirement program, which loss can never be compensated through back pay or back annuities.

For the reasons stated above, this Court should enjoin the termination of the 834 Plaintiffs' Flight Service Controller positions, which otherwise will be effective at midnight tonight. Plaintiffs are fully prepared to bring this case to a speedy conclusion in the District Court before April 1, 2006, the next step in the contracting out process.

[6]A 1,935 Controller workforce that is "specially trained — and by all accounts, very dedicated and skilled . . . ," according to the lower Court. Mem. Op. at 1.

Respectfully submitted,

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October 3, 2005

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellants' Motion for Preliminary Injunction, List of Exhibits, and Exhibits 1-9 was served this 3d day of October 2005, via both facsimile and first class mail, postage prepaid, upon counsel for Defendants as follows:

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