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Facsimile Cover Sheet

Client Name: Breen v. Mineta

To: Name: Brian G. Kennedy, Esq.

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From: Charles W. Day, Jr.

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Message:

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September 28, 2005

VIA FACSIMILE ONLY

Brian G. Kennedy, Esq.
United States Department of Justice
20 Massachusetts Ave., N.W.
Rm. 6104
Washington, DC 20530

Re: Breen v. Mineta, Civil Action No. 05-0654 (RWR)

Dear Mr. Kennedy:

We have received Defendants' Reply brief to our Opposition to Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment. There are several incorrect statements in your Reply, which candor to the tribunal dictates that Defendants retract or correct.

First, Defendants state the figure of "$1.2 billion" is "not an 'FAA cost estimate' to begin with." Reply at 15. In fact, the General Accounting Office, as its Report clearly states, obtained the cost estimate from the FAA's Air Traffic Organization, see GAO-05-724 Air Traffic Operating Costs, Pls' Supp. Ex., at 10, and FAA officials concurred in the Report's findings and conclusions, id. at 17.

Second, Defendants contend that Plaintiffs have not made out a prima facie case because they have not shown that there are younger, similarly situated employees who have not been adversely affected. However, Plaintiffs have clearly shown that the rest of the Series 2152 air traffic controllers are noticeably younger employees, who are similarly situated to the Flight Service Controllers but who are not being affected by the RIF,

and Plaintiffs have therefore clearly satisfied the requirements of their prima facie case. Cf. Reply at 5.

Third, Defendants state that Flight Service Controllers cannot compare themselves to air traffic controllers as a whole. Reply at 6. Clearly, whether all Series 2152 air traffic controllers, including Flight Service Controllers, are similarly situated is a material fact in dispute that must be decided by a jury and therefore precludes summary judgment.

Fourth, Defendants try to subdivide the A-76 contracting out process into a "RIF" and "underlying decisions." Reply at 10. What is clear from the factual record of this case, however, is that the decision to eliminate the jobs of the Flight Service Controllers was a single decision-making process that was implemented through reclassification and the A-76 process, which culminated in the RIF of this "Agency workforce." See Pls' Opp. Mem at 9.

Fifth, the Reply denies that taking other cost savings measures are an "alternative" to "not wasting money" on Flight Services. Reply at 19. The issue, however, is that Defendants' refusal to avail themselves of less onerous, non-discriminatory means of saving money is strongly indicative of pretext on Defendants' part when they claim that their actions are motivated by a desire to save money.

Finally, Defendants imply that the Flight Service Controllers will benefit from having the mandatory retirement age lifted once their jobs are contracted out. See Reply at 25. This supposed "benefit," however, will only accrue to that fraction of the workforce (slightly over 50%) who will be working as at-will employees for Lockheed Martin longterm after April 2006. Moreover, any contention that the contracting out was motivated by a desire on the part of the FAA to enhance its ex-employees' retirement options will not pass the straight-face test.

We request that you promptly retract or correct these erroneous portions of your Reply, or retract the Reply in its entirety.

Very truly yours,

Charles W. Day, Jr.

Charles W. Day, Jr.