IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KATHLEEN A. BREEN, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:05CV00654-RWR
NORMAN Y. MINETA, et al.,	)	
Defendants	)	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION
TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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INTRODUCTION

The Age Discrimination in Employment Act ("ADEA") applies to "personnel actions." 29 U.S.C. § 633a(a). The "personnel actions" at issue here, what plaintiffs refer to as the "mass RIF," were demonstrably non-discriminatory. As we explained in our opening memorandum ("Defs' Mem.") (*e.g.*, at 25), all of the FAA's flight service specialists outside Alaska[1] – young and old alike, male and female alike, black and white alike – are subject to that same personnel action. *See*, *e.g*. Williams Decl. (Defs' Ex. AA); Washington Decl. (Defs' Ex. BB).

Since the FAA's actual "personnel actions" – the RIF of all employees regardless of age in a position the government no longer needs – were plainly non-discriminatory, plaintiffs attempt to shift focus from the personnel actions to the

[1] We will not hereafter repeat the "outside Alaska" qualification each time we refer to the "mass RIF," but it should be understood. We address plaintiffs' arguments with respect to the exception for Alaska in, footnote 3, *infra*.

prior decisions that led to the conclusion that the government no longer needs flight service specialists (of any age) on the government payroll. But, as we explained in our opening memorandum (at 72-77), those decisions were not "personnel actions." The ADEA does not preclude the government from deciding which services the government will or will not provide or from prioritizing which government services or programs will grow or contract. If the government decides that it needs more FBI agents and fewer administrative law judges, or more levee repair workers and fewer rocket scientists, or more air traffic controllers and fewer or no flight service specialists, it is entitled to make those decisions whether or not FBI agents, levee repair workers, and air traffic controllers are, on average, younger than administrative law judges, rocket scientists, or flight service specialists. If it no longer makes sense for the government to provide directly a service or operate a program, the ADEA does not require its continuance merely because the employees are older than those in some other governmental service or program. In any event, the government's non-personnel decisions that the government need no longer provide flight service specialist services directly were motivated and justified by legitimate non-discriminatory reasons.

Plaintiffs also attempt to obscure the non-discriminatory nature of an across-the-board RIF of all employees in the flight service specialist position by claiming that the "FAA has chosen to retain" some of the employees who are, on average, younger than others. Pls' Opp. Mem. at 14. In the first place, the FAA has not "retain[ed]" any employees as flight service specialists, or spared any of them from

the "mass RIF" of flight service specialists. It has, in separate personnel actions, hired some of the former flight service specialists in <u>other</u> positions. Those other personnel actions must, of course, be free of age discrimination, and any plaintiff who can contend that he or she was discriminated against with respect to selection for a different FAA position may file a claim of age discrimination with respect to that personnel action. But whether there was or was not discrimination with respect to one or some of those selections for other FAA positions is not a claim set forth in the Amended Complaint and has no bearing on the legality of the personnel action at issue in this case, the "mass RIF" from the flight service specialist positions. Second, the FAA has not unilaterally "chosen" which specialists will or will not have other jobs with the FAA: The FAA could not hire any of these employees for a different job unless <u>the employee chose</u> to apply for one. And it is understandable that younger employees were more likely to apply for (and hence be chosen for) different FAA jobs precisely because the impact of the "mass RIF" falls <u>least</u> heavily on the <u>most senior</u> workers. Those employees who are eligible to retire with a full government pension may now receive that pension <u>and</u> continue to work for Lockheed Martin without regard to provisions requiring mandatory retirement at age 56 that affect only their government service, 5 U.S.C. §§ 8335(a), 8425(a).

Third, plaintiffs seem to think that an employer's concern with an "aging workforce" is somehow tantamount to age <u>discrimination</u>. Pls' Opp. Mem. at 1-9. That's wrong. An employer is entitled to consider whether it is likely to lose a critical mass of expertise over a relatively short period of years, a situation that can face

employers with an aging or retirement-eligible workforce. *Rowan v. Lockheed Martin Energy Systems, Inc.*, 360 F.3d 544, 548-49 (6th Cir. 2004); *Mereish v. Walker*, 359 F.3d 330, 337 (4th Cir. 2004). The "very essence of age discrimination," on the other hand, is "for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). If there is evidence of any such belief in the record, it does not come from defendants. It was instead the lead plaintiff who testified that someone aged 62 or 65 would be too old to handle the stress of the job. Breen Testimony, September 1, 2005, Hearing Transcript at 17. By contrast, defendants' decisions, which will result in numerous current FAA employees being able to work at Lockheed without being subject to statutory mandatory retirement provisions that apply only to federal employees, necessarily reflect the FAA's view that workers older than 56 can continue to be productive and competent.

ARGUMENT

I. The Agency's Decision To Terminate All Of Its Flight Service Specialist Positions Does Not Discriminate On The Basis Of Age

The only "personnel actions" at issue in this case, the "mass RIF" of flight service employees, are utterly indiscriminate. All of the flight service specialist positions outside Alaska are terminated, regardless of the age, race, or gender of the incumbents and, for that matter, regardless of performance ratings or other variables that an agency can legitimately use when it must choose among employees. As we explained in our opening memorandum (Defs' Mem. at 41), that simple fact

(which plaintiffs do not dispute[2]) that the flight service specialist positions of all of the more than 100 flight service specialists under 40 have been eliminated just as the positions of all of the flight service specialists over 40 have also been eliminated compels dismissal of this action or summary judgment for the FAA.

Plaintiffs argue that it would be "unduly rigid" to require that they show as part of their *prima facie* case that similarly situated employees – *i.e.*, the under-40 flight service specialists – were spared from the "mass RIF" plaintiffs challenge. Pls' Opp. Mem. at 10 n.9. But the case on which plaintiffs rely, *George v. Leavitt*, 407 F.3d 405, 412 (D.C. Cir. 2005), indicated that the requirement of showing that similarly situated employees were treated dissimilarly could be dispensed with by showing instead that the discharge was "not attributable to the" most common legitimate reasons for discharge, including "the elimination of plaintiff's position altogether." *Id.* (emphasis added). Since this case does involve the elimination of plaintiffs' positions altogether, a showing that substantially younger flight service specialists were treated differently remains a requirement of plaintiffs' *prima facie* case, a requirement that they have not met.

That the appropriate comparison is between the older and younger flight service specialists is illustrated by a recent ADEA case, *Grimm v. Alro Steel Corp.*, 410 F.3d 383 (7th Cir. 2005). The employer closed facilities in South Bend and Niles, and offered transfers to a third facility to Niles workers as a group, but not to

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[2] See Plaintiffs' Response to Defendants' Statement of Material Facts as to Which There is No Genuine Issue ¶¶ 48, 50.

any of the South Bend workers. In affirming summary judgment for the employer in an ADEA suit brought by the older South Bend workers, the court observed that the "relevant similarly situated workers" were not workers from Niles "but the five [workers] at the South Bend plant who were under 40." 410 F.3d at 386. And those "young workers were treated exactly like the older workers–all were let go." *Id.*

There is even less basis here than in *Grimm* to compare plaintiffs to any group other than the younger flight service specialists. In *Grimm*, the South Bend and Niles workers, though at two different locations, at least appear to have been doing much the same job. By contrast, plaintiffs are seeking to compare their positions with those of en-route and terminal air traffic controllers or even to the FAA workforce as a whole. Pls' Opp. Mem. at 15. As the declarations of Paul J. Sheridan and Wanda Reyna (Defs' Exs. C & G) explained, there are many significant differences between the duties and responsibilities of flight service specialists on the one hand and the duties and responsibilities of en-route and terminal air traffic controllers on the other. The positions are not even close to being fungible, and there is thus no reason why the Court should deem en-route and terminal air traffic controllers – much less the entire FAA workforce – as similarly situated to flight service specialists.[3]

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[3] This case is more like *Grimm* with respect to any comparison between flight service specialists in Alaska, who are not subject to the RIF, and those in the rest of the country, who are. As we explained in our opening memorandum, aviation in Alaska has unique requirements, *e.g.*, Defs' Ex. R. Those requirements had already led to Alaska-only operational responses even before the "mass RIF": Every one of (continued...)

II. The Legality Of The "Mass RIF" Is Not Affected By Which Former Flight Service Specialists Have Chosen To Apply For, And Which Have Been Accepted For, Different Agency Positions

Plaintiffs contend that the agency is "acting in an age discriminatory manner," because the "FAA has chosen to retain" some of the employees who are, on average, younger than others. Pls' Opp. Mem. at 14. This confuses the question presented in this case – whether the RIF was motivated by age bias – with agency decisions on separate applications of some individual plaintiffs (and some non-plaintiff flight service specialists) for other, non-flight service specialist positions within the agency. As we explained in our opening memorandum (Def's Mem. at 41 n.16, citing First Amended Complaint ¶¶ 49-50), in this case plaintiffs are challenging the "mass RIF" of their positions as flight service specialists, not any refusal-to-hire claim that some of them might choose to assert, if they in fact applied for and were denied different positions within the FAA.

What matters for this case is that the FAA has not "retain[ed]" any employees – of any age – as flight service specialists. It has, in separate personnel actions, hired some of the former flight service specialists in other positions. Nor does the FAA even have the right unilaterally to choose which specialists will or will not

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[3](...continued)
the FAA's 14 part-time, non-automated flight service stations is in Alaska. Sheridan Decl. (Defs' Ex. C) ¶ 2. Plaintiffs do not suggest any reason why age, rather than the special role general aviation plays in a state where surface transportation alternatives are limited by geography, affected the agency's decision to continue operating flight service facilities in Alaska but not in the rest of the country. *See* Pls' Opp. Mem. at 16 n.15.

obtain other jobs within the FAA. The FAA could not hire any of these employees for a different job unless the employee chose to apply for one.

That the employees who have applied, and been accepted, for other, different positions within the FAA tend to be somewhat younger than the flight specialist workforce as a whole does not, as plaintiffs suppose, indicate that the RIF of the flight specialist positions was infected by age bias. To the contrary, that result follows from the point Ms. Kansier made in her declaration (Defs' Ex. A at ¶ 21) that the impact of the RIF falls the least heavily on the most senior workers. Those employees who are eligible to retire with a full government pension may now receive that pension and continue to work for Lockheed without regard to provisions requiring mandatory retirement at age 56 that affect only their government service. 5 U.S.C. §§ 8335(a), 8425(a).[4] Such (on average) older employees are thus less likely to choose to apply for a new job at the FAA than their less senior colleagues, since they cannot simultaneously receive both a government pension and a government salary. It should thus be no surprise – and is certainly no indication of age bias in the RIF – that flight service specialists who have found other jobs in the FAA would tend to be younger on average.

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[4] Indeed, but for the RIF, at age 56, those older employees would have been forced to retire from federal service and, at least if Ms. Breen's testimony is credited, would have faced limited employment options for a second career in the private sector, September 1, 2005, Transcript at 9.

III. Plaintiffs Cannot Collaterally Attack Any Of The Decisions Leading Up To The RIF Under The Guise Of An ADEA Claim

As plaintiffs acknowledge, the RIF is the culmination of "several years and several preliminary steps," Pls' Opp. Mem. at 9, including the FAA's July 20, 2005, Order adopting the special master's findings and recommendation to award the contract to Lockheed and DOT's May 9, 2003, decision upholding the FAA's decision to designate the functions performed by flight service specialists as commercial.

As defendants explained in their opening memorandum, those earlier decisions are immune from collateral attack because, among other reasons, this Court lacks jurisdiction over such decisions and because they do not constitute adverse personnel actions under the ADEA. Defs' Mem. at 61-63, 72-77.

Although plaintiffs deny that they seek to collaterally attack the FAA's decisions, Pls' Opp. Mem. at 25-26 & n.22, that claim is belied by close attention to their arguments. Consider, for example, plaintiffs' argument that the Lockheed Martin bid will not provide the "best value" to the government. Pls' Opp. Mem. at 22-23. Whether or not the Lockheed Martin bid provides the "best value" to the government depends upon a number of technical factors and considerations, which the special master, Judge Edwin B. Neill of the General Services Board of Contract Appeals, analyzed in a 102-page opinion. *See* Defs' Ex. Y. Judge Neill rejected plaintiffs' objections and recommended that the award of the AFSS contract to Lockheed be sustained. *Id.* The FAA subsequently issued an order adopting Judge Neill's findings and recommendations. Defs' Ex. Z. To the extent that plaintiffs

now seek to collaterally attack that order, this Court lacks jurisdiction over such a challenge because Congress has vested exclusive jurisdiction to review such orders in the courts of appeals. *See* 49 U.S.C. §§ 46110(a) & (c).[5]

While plaintiffs may, of course, challenge whether the RIF itself violated the ADEA (as we explained above, it did not), the ADEA does not provide an alternative back-door means for plaintiffs to second-guess the agency's antecedent judgments that the flight services function was not inherently governmental, that Lockheed's bid was the best value to the government, or any of the other decisions that may have led to the RIF, but that were not themselves "personnel actions" within the meaning of the ADEA.[6] How an employer <u>conducts</u> a RIF is reviewable, but the "wisdom" of a private employer's "business judgment[s]" or of a federal agency's analogous judgments that lead to <u>having</u> a RIF "is not for a court or jury to decide," and the ADEA is not a vehicle for reviewing the propriety of such underlying decisions. *Furr v. Seagate Technology, Inc.*, 82 F.3d 980, 986 (10th Cir. 1996), *cert. denied sub nom. Doan v. Seagate Technology, Inc.*, 519 U.S. 1056 (1997).

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[5] No timely petition for review of the order was filed. Our opening memorandum overlooked the point that these plaintiffs would, for prudential reasons, lack standing to seek such review, *see NFFE v. Cheney*, 883 F.3d 1038 (D.C. Cir. 1989), *cert. denied*, 496 U.S. 936 (1990). But the threshold question whether plaintiffs would have standing is directed by section 46110 to the Court of Appeals, rather than to this Court, just as the merits (assuming standing) would be.

[6] An adverse personnel action occurs when an employee "experiences materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities." *Forkkio v. Powell*, 306 F.3d 1127, 1131 (D.C. Cir. 2002) (citation omitted). While the RIF qualifies as an adverse personnel action, the antecedent decisions do not. Defs' Mem. at 72-77; Pls' Opp. Mem. at 34.

IV. Even If The Agency's Decisions That Were Not Personnel Actions Were Subject To Review Under the ADEA, Those Decisions <u>Were Supported By Legitimate Non-Discriminatory Reasons</u>

Even if plaintiffs were entitled to challenge the non-personnel decisions that preceded the across-the-board, and hence non-discriminatory, RIF of all flight service specialist positions, we explained in our opening memorandum (at 33-60) why each of those decisions was made for legitimate non-discriminatory reasons.

The FAA had legitimate reasons to conclude that the flight service functions are not inherently governmental. *See* Defs' Exs. V & W. It had legitimate reasons to conclude that a substantial amount of money could be saved without sacrificing safety by consolidating flight service functions. Defs' Mem. at 49-52. It had legitimate reasons to conclude that it was appropriate to conduct a private-public competition. *Id.* at 52-53. And it had legitimate reasons to conclude that Lockheed Martin's bid offered the government the best value. *Id.* at 53-54.

According to plaintiffs, looking at each of those decisions is the problem, as they argue that defendants "try desperately to isolate and detach the chain of linked decisions" that ultimately led to the RIF. Pls' Opp. Mem. at 9. n.8. Those different decisions may be "linked." But it is important to recognize that, linked or not, those decisions were distinct. Plaintiffs' approach melts down each of the decisional links and forges a new, wholly hypothetical, single amalgam of a decision to conduct a "mass RIF" into which they merge every distinct decision from the initial recognition that the flight service specialist function is not inherently governmental to the decision to RIF the positions that had become surplus after the con-

tract award to Lockheed Martin. *See*, *e.g.*, Pls' Opp. Mem. at 9 n.8, 12, 19-20, 23. Plaintiffs' meltdown of the different decisions into that undifferentiated amalgam has two kinds of effects that are dysfunctional to careful analysis.

First, as we have just explained, plaintiffs are not entitled to judicial review under the ADEA of such non-personnel decisions as whether the flight service functions are or are not inherently governmental. By melting down that and every other decisional link into a single amalgamated decision to have a "mass RIF," plaintiffs attempt improperly to circumvent that restriction.

Second, where we explained why a given factor justified one of the links in the decisional chain, plaintiffs purport to rebut our argument merely by observing that that factor doesn't support the whole of their hypothetical amalgamated "mass RIF" decision. For example, we cited (Def's Mem. at 52) the Grant Thornton feasibility study as evidence supporting the FAA's decision to conduct a public-private competition, not, as plaintiffs would have it (Pls' Opp. Mem. at 12), for the entirety of a decision "for implementing the impending mass RIF" or (Pls' Opp. Mem at 21) for Grant Thornton's views of the legal question of precisely which functions are inherently governmental. Similarly, we cited a working group report for the proposition that it had long become obvious that substantial economies could be obtained through consolidation of offices, Defs' Mem. at 11, 50, not, as plaintiffs suppose (Pls' Opp. Mem. at 20 n.19), as support for every other link that they melt into an amalgamated "mass RIF" decision.

There is no reason why plaintiffs should demand that every reason, or even any reason, for any one link in the decisional chain be rejected or viewed as "pre-textual" unless it also offers support for every other link or the entirety of the amalgamated decision plaintiffs forge after melting the links. After all, the "links" here are decisions that involve different considerations. Deciding whether a function is or is not "inherently governmental" has no necessary relation to the different question whether the function is being provided efficiently. Here, the function was both not inherently governmental and inefficiently provided. But it is also possible for a government agency to be providing a service that is inherently governmental in a very inefficient manner; and it is just as possible for a government agency to be very efficient at providing something that isn't inherently governmental. And even where, as here, a government agency is inefficiently providing a service that is not inherently governmental, it is yet another separate question whether any private bidder can offer a better value than a proposal to keep the service within the agency through a redesigned in-house "Most Efficient Organization."

In addition to inappropriately demanding that defendants offer reasons for acting that would support a hypothetical single amalgamated decision to conduct a "mass RIF," plaintiffs rely on a series of quick-hit and ill-founded quibbles supposedly illustrating that the FAA decisionmakers lied. For example, plaintiffs argue that defendants "falsely claim that the Administration required the FAA to complete [*sic*] a minimum of 15 percent of its commercial activities," Pls' Opp. Mem. at 22, based on OMB testimony from July 2003 that it had by then "moved away

from mandated numerical goals and baselines." Pls' Opp. Ex. 6. However, Mr. Hennigan's Declaration had explained that his office had "identified the AFSS function as the function that would be competed in" August 2002, a time when the President's management agenda was calling for agencies to do cost comparisons by 2003 of 15% of their commercial activity inventories. Hennigan Decl. (Defs' Ex. P) at ¶¶ 8, 16; *see* Defs' Ex. N. (Fiscal 2002 Management Agenda) at 18.[7]

Plaintiffs also rely (Pls' Opp. Mem. at 23) on the notion that the agency has given "false FAA cost estimates" (Pls' Slide 5[8]) since the FAA now estimates that savings from the initiative will be $2.2 billion and at another time has estimated the savings at $1.7 billion. However, Kansier's declaration explained that the higher, $2.2 billion figure includes "savings that have already been achieved by forgoing automation and facility enhancements and reducing the number of new hires in anticipation of completion of the acquisition." Kansier Decl. (Defs' Ex. A) ¶

[7] Of course, the reasons for competing the flight service function would have made compelling sense with or without a hard numerical goal. Chronology is also important in considering plaintiffs' contentions (Pls' Opp. Mem. at 15) that the agency violated the original Executive Order 13180 (Dec. 7, 2000), which, focusing on other issues, referred in passing to "provision of air traffic services," as "an inherently governmental function." By the time Hennigan's office made its decision, and by the time the key agency decisions upholding the conclusion that flight service functions are not inherently governmental were issued in 2003 (Defs' Exs. V & W), that language had been omitted by Executive Order 13264 (June 4, 2002). Plaintiffs' reliance on the original, unamended Executive Order 13180 as evidence of alleged prior agency errors is in any event rebutted for the reasons explained (but ignored by plaintiffs) in Defendants' Exhibit E.

[8] Plaintiffs identify this as slide 5. This was copied by defendants as the seventh in the set of sides they received. In any event, we refer to the slide subtitled "False FAA Cost Estimates."

10. Even if those kinds of "savings" were not included, and the savings by other measures are smaller, a savings of $1.7 billion or even $1.2 billion (the third figure on plaintiffs' slide, which is not an "FAA cost estimate" to begin with) is by any rational estimation a powerful non-discriminatory reason to accept a Lockheed offer that will also modernize service to the aviation community. Nor does the existence of what plaintiffs term their duties involving "monitoring the President" make a decision that those functions are non-governmental "inexplicabl[e]." Pls' Opp. Mem. at 16. The plaintiffs do not decide where the President goes or decide upon the scope of the no-fly zones where he does go. They communicate the decisions that others have made on those points to pilots – who can access the no-fly information directly over the Internet – and that communication function, the agency actually did explain, is not inherently governmental. Defs' Ex. W at 8.

Some of plaintiffs' quibbles are not only wrong but strikingly opportunistic. For example, when defendants established a "Preferred Placement Program" for the RIFed employees with a centralized process "to speed up" hiring and placement of these employees, Reyna Decl. ¶ 12, plaintiffs illustrate the adage that no good deed goes unpunished by citing this as one of the instances where the FAA's "inexplicitly" changing its policies supposedly gives rise to some inference of age discrimination. Pls' Opp. Mem. at 15.[9] Similarly, after arguing (Pls' Opp. Mem. at 17-18, 22) that

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[9] The FAA's use of such a centralized register is neither inexplicit nor inexplicable. Under its Personnel Management System ("PMS"), the FAA has authority to use a centralized selection process to "realize economies of scale" when dealing (continued...)

the FAA engaged in age discrimination because it did not have public-private competitions for more air traffic control towers (a contention we address below), plaintiffs turn around and argue that insofar as the agency did conduct such competitions that also illustrates discrimination. Pls' Opp. Mem. at 17 n.16. And then there's plaintiffs' contention (Pls' Opp. Mem. at 22-23) that Lockheed's bid could not have been the "best value" because it was "a more costly and discriminatory" option than some other, unstated option, presumably (given plaintiffs' citation to ¶ 7 of the DeGaetano Declaration) the one bid in the process that was cheaper than Lockheed's. But that cheaper bid was from another private contractor; the choice between those two private bids makes no difference to whether there would be a "mass RIF." And, as Mr. DeGaetano explained, the competition was about "best value," not lowest sticker price, and the Lockheed bid, though slightly more expensive than one of the other private bids, was clearly superior technically to all the other bids, DeGaetano Decl. ¶ 7 (Defs' Ex. X), a conclusion Judge Neill's decision (Defs' Ex. Y) amply sustains. To the extent that plaintiffs are arguing instead that some proposal to continue to provide the services with federal employees would be a better value than Lockheed's bid, that was exactly what the competition was designed to test, and as Judge Neill found, the in-house bid came up short both on cost and technical merit.

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[9](...continued)
with a large number of applicants. FAA PMS Ch. 1, ¶ 7 (http://www.faa.gov/ahr/policy/PMS/pmsch1.htm#staf7) .

We do not extend further our illustrations of plaintiffs' mining of documents for some perceived agency inconsistencies in deciding whether flight services are inherently governmental, whether to conduct a competition, and whether Lockheed's bid was the best value, since those decisions are not reviewable to begin with, and the sensibleness of those decisions is evident. The FAA's conclusion that the function is not inherently governmental, Defs' Exs. V & W, is straightforward and would be compelling no matter what the age of the incumbents (a point nowhere considered by that analysis). The conclusion that the current structure for delivering flight services is far too costly and in need of consolidation is supported not only by numerous agency studies but by the plaintiffs' union's own admission, Pls' Ex. 10. And the public-private competition was an open contest to select the best value for the government, with detailed and exacting scrutiny of both technical and cost considerations, which were openly stated and applied to all contestants without regard to age.

V. The FAA's Decision Not To Have Public-Private Competitions For Larger Air Traffic Control Towers Does Not Evidence Age Bias

Plaintiffs argue that the FAA "reject[ed]" a "more effective, non-discriminatory alternative[ ]" by not expanding its earlier program to contract out air traffic control at low-traffic towers to busier towers with more air traffic. Pls' Opp. Mem. at 17 (heading). As we explained above, the ADEA authorizes review only of "personnel actions," not of other decisions that determine what activities the government does or does not undertake, even though one effect of such decisions may be on

the array of positions available. Thus, no claim under the ADEA can be based on any decision by the government to continue or expand some endeavors, whether it be manning contract towers or guarding the borders or providing hurricane relief, while simultaneously reducing or even eliminating others. The relative ordering of priorities among possible governmental activities is not a "personnel action."

Even if the FAA's decision not to expand the contract tower program were reviewable, it would not support plaintiffs' claims.[10] In the first place, such an expansion would not have been an "alternative," – "non-discriminatory" or otherwise – to the reordering of the flight service function. If, as the FAA concluded as a result of the open public-private competition, Lockheed will be able to do a better job technically of providing flight services and save the FAA $2.2 billion, it makes sense for the FAA to sign the contract with Lockheed regardless of what makes sense with respect to handling the different functions of air traffic control tower operations. Suppose plaintiffs are right that the FAA could save money by contract-

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[10] It is not entirely clear whether plaintiffs mean to rely on this point as part of a disparate impact claim as well as a disparate treatment claim. *See* Pls' Mem. at 34 (disparate impact claim addresses some combination of a "long list" of practices that, "while perhaps not actionable," in some respect may "lie at the root of the FAA's discriminatory action"). Neither with respect to the contract tower decision nor in any other respect do plaintiffs state a claim under either a disparate treatment or disparate impact theory.

As our opening brief explained, a disparate impact claim is not available against the federal government in any event. Def's Mem. at 77-91. Plaintiffs say that our recitation of the legislative history of the Act is "vague," Pls' Opp. Mem. at 32, but a better characterization is that it was detailed, Def's Mem. at 84-89, and that it provides a full basis for the Court to make its own judgment on that point.

ing out more tower operations and that there is no good countervailing reason not to do so. That is not an "alternative" to not wasting money on a flight service function that itself needs reorganization and modernization. If an agency actually is wasting taxpayer money on functions *A* and *B*, ending the waste with respect to function *A* isn't an "alternative" that justifies continued wasteful spending on function *B*.

In any event, there are at least three legitimate and non-discriminatory reasons for not expanding the tower contract program.

First, at the time the FAA was making its decisions regarding the flight service functions, expanding the contract tower program would have saved less money than competing the flight services.[11] Plaintiffs claim that expanding the contract tower program would save $62.5 to $65 million per year. Pls' Opp. Mem. at 17. By contrast, even if one used the <u>smallest</u> savings estimate for the Lockheed contract from plaintiffs' slide 5, $1.2 <u>billion</u> over a ten-year period, that savings from the Lockheed contract is twice what plaintiffs contend contract tower expansion would save the government.[12]

Second, although the separation and control of aircraft, like flight services, is not inherently governmental, the "integrated separation and control of aircraft on a nationwide basis is key to providing safe and efficient air space." Determination of

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[11] Obviously, the savings potential for contracting out tower air traffic control may change as a result of changes in technology, air traffic, or other factors.

[12] Moreover, the Lockheed contract offers substantial improvements in the delivery of flight services to the general aviation public. *See* Defs' Ex. Y and X.

Secretary Norman Y. Mineta, December 18, 2002 (Defs' Ex. HH, filed herewith) at 5. Secretary Mineta explained that, while "portions of the air traffic control systems" at the less trafficked towers that are already subject to the contract tower program would not, if disrupted, have a "significant impact on the national airspace system as a whole," the "same cannot be said for the composite total of air traffic control services provided at FAA's en route and larger terminal facilities," which is therefore part of the "core capability" of the FAA not subject to public-private competition. *Id.* at 6. While this determination does not by itself categorically preclude any expansion of the contract tower program, it does make it clear that the scope of any expansion of the contract tower program to towers at larger airports may be limited by the need to preserve that core capability to control and separate traffic in the national air space system. Unlike en route and terminal air traffic controllers, flight service specialists are not involved in control and separation of air traffic, Sheridan Decl. (Defs' Ex. C) ¶ 7, that, on a nationwide, composite basis, comprises that FAA core capability.

Third, even if the FAA wanted to expand the contract tower program, the Secretary recognized the stark fact that "any large-scale privatization of air traffic control would be highly controversial in Congress." Def's Ex. E.[13] As a former member of Congress and one of the few persons ever to serve as a cabinet officer under presidents of both major parties, Secretary Mineta was especially well qualified to

[13] Indeed, there is even some opposition to the proposal to award the contract for flight services to Lockheed. *See* Pls' Ex. 64.

reach that political judgment. An agency that decides not to proceed with an action because it is likely to be strongly and widely opposed in Congress is not discriminating on the basis of age. It is acting in recognition of the restraints imposed on agencies by republican democracy.

VI. References To An "Aging Workforce" In Agency Documents Are No Indication Of Age Discrimination In Agency Personnel Actions

Plaintiffs begin their argument (Pls' Opp. Mem. at 5) by citing FAA documents that refer to an "aging workforce" as a primary reason for deciding to conduct the public-private competition. Those references do not support plaintiffs' claim. What plaintiffs must show is not whether the FAA had or thought it had an "aging workforce," but whether it engaged in age discrimination.

The principle document plaintiffs rely upon was generated by Joann Kansier, who, as her declaration (Defs' Ex. A) explained, directed the conduct of the public-private competition. However, the point to which the "aging workforce" snippet relates, the decision to have such a competition, was made before her involvement, as she also explained. Kansier Decl. ¶ 3. That decision was made in August 2002 – prior to any of the "aging workforce" documents cited by plaintiffs – by the Chief Financial Officer's office, Hennigan Decl. ¶ 16, and the Deputy Chief Financial Officer has indicated that he did not take either age or retirement eligibility into account, *id.* ¶ 23. We do not point these facts out in any way to distance defendants

from Ms. Kansier or her important role in conducting the competition.[14] But neither are defendants representing that the actual decision to have a competition, made by Hennigan's office, was influenced by concerns with age or retirement eligibility. Hennigan's declaration establishes that it was not.[15]

It would not help plaintiffs even if it were undisputed or assumed that concerns about an aging workforce were taken into account. What the ADEA forbids is age discrimination, not concern with an aging or retirement-eligible workforce. The very union that plaintiff Breen now heads had already expressed that concern about this precise workforce long before Kansier's statement. The union said: "The Flight Service workforce is rapidly aging. In fact, 40-50% are eligible to retire today. By the year 2002, 80% of the workforce will be eligible to retire. It is of paramount im-

[14] In an attempt to connect Kansier's role with a decision that age might conceivably have influenced, plaintiffs say that she "instigated" the "decision to consider technical factors more heavily than cost in assessing the bids." Pls' Mem. 8. n7. So what? The in-house employees' bid to keep the work within the FAA would not have been a better value than Lockheed's no matter what the relative weight of technical value and cost because Lockheed's bid was better than the in-house proposal with respect to both cost and technical merit. *See* Defs' Exs. X and Y.

[15] In addition to the Kansier document, plaintiffs rely (Pls' Mem. at 5) on a January 2003 presentation that also postdated the August 2002 decision. Plaintiffs also say (*id.*) that the Administrator has spoken of an "aging workforce," based on "[m]ultiple sources," by which plaintiffs mean two sources. One of those sources is an unknown person's sentence fragment description of a speech of the Administrator rather than the full text of her prepared remarks. *Compare* Pls' Supp. Ex. 3 with Defs' Ex. FF (filed with Defs' Resp. to Pls' Notice of Supp. Filings). The second (Sept. 1, 2005, Transcript at 31-33), is remarkable for its lack of specificity.

portance to initiate a new training pipeline for employees in Flight Service."[16] As the union's statement shows, being "eligible to retire" is not, as plaintiffs contend is the case when they cite defendants' use of the words (Pls' Opp. Mem. at 5), a "euphemism" for "aging." The loss of experience that may occur when a large proportion of a workforce is "eligible to retire" in a relatively short time span <u>is</u> the concern captured by "aging workforce." The FAA had expressed a similar concern even with respect to a group, air traffic controllers, that (as plaintiffs constantly emphasize) is actually somewhat younger than flight service specialists such as plaintiffs, by noting that with a "single generation controller workforce," the agency lacks a "normally distributed experience base," Pls' Ex. 14 at 14.

An employer with a workforce mostly hired over a relatively short period of time from a relatively narrow age cohort runs the risk that at some point much of that workforce will choose to retire (or be required to retire by a statutory mandate in this instance, 5 U.S.C. §§ 8335(a), 8425(a)) over a relatively short span of years, forcing the employer to hire another single-generation cohort of mostly inexperienced replacements. Thus, as we explained in our opening brief (at 35), an employer may have an understandable and lawful concern that retirement of a large portion of the workforce would "result in a sudden loss of a 'critical mass of expertise and knowledge in certain areas,'" *Mereish v. Walker*, 359 F.3d 330, 337 (4th Cir.

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[16] Defs' Ex. GG, filed with Defendant's Response to Plaintiffs' Notice of Supplemental filing and available at http://www.library.unt.edu/gpo/NCARC/testimony/naats-te.htm, last visited September 8, 2005.

2004). The ADEA does not prohibit employers from valuing a reasonable balance of ages and experience levels in their employment structures. *E.g.*, *Rowan v. Lockheed Martin Energy Systems, Inc.*, 360 F.3d 544, 548-49 (6th Cir. 2004); H.R. Rep. No. 90-805, *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2213, 2219-20.[17]

What the ADEA prohibits is not the reasonable concern with the imbalance in experience that can result from a lopsidedly retirement-eligible or aging workforce, but age discrimination, the "very essence" of which is "for an older employee to be fired because the employer believes that productivity and competence decline with old age," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). That is the very essence of what did not happen here. Before the agency made its "mass RIF" decision, the flight service specialists were required to retire at age 56. 5 U.S.C. §§ 8335(a), 8425(a)). As a result of the FAA's "mass RIF" decision, their new employer, Lockheed, will not be able to impose a mandatory retirement age.[18] Of course, many flight service specialists may prefer to retire at 56 with full civil

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[17] *See Cochrane v. Norton*, 2003 WL 21768006 at *4 (N.D. Calif.) (court "strongly disagrees" with assertion that agency report "highlighting the difficulty of an aging workforce demonstrates a discriminatory animus"); *Duffy v. Barnhart*, 2002 WL 1933236 at *8 n.11 (E.D. Pa.) (rejecting ADEA claim where federal agency's "concern[ ]" with "general aging" of its workforce related to impending "loss of expertise"); *Hanan v. Corso*, 1999 WL 320858 at *16-17 (D.D.C.) (Facciola, M.J.) (employer's speech noting that, as "relatively large numbers" of employees became eligible for retirement, there were not "adequate numbers of younger employees in the pipeline to maintain a stable internal succession system" did not evidence an intent to discriminate).

[18] Congress could choose to allow or require Lockheed to impose a mandatory retirement age on the flight service specialists, but it has not done so.

service retirement benefits. But that does not amount to a claim that the FAA acted on ageist views that someone who is 57, or 62, or 65 is too old to do the job. Whatever else may be said about the FAA's decisions, the effect of those decisions of eliminating early mandatory retirement necessarily implies that the FAA has not viewed the flight service specialists as too old to be productive and competent.

CONCLUSION

For the reasons stated above and in Defendant's Opposition to Plaintiffs' Application for a Preliminary Injunction and Memorandum in Support of Motion to Dismiss and For Summary Judgment, defendants' motion to dismiss or, in the alternative, for summary judgment, should be granted.

Respectfully Submitted,

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