

No. 04-1012

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAVID JOHN DIERSEN,
Plaintiff-Appellant,

v.

DAVID M. WALKER,
Comptroller General of the
United States,
Defendant-Appellee.

Appeal From The United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 00-C-2437
The Honorable Judge Amy J. St. Eve

REPLY BRIEF OF
PLAINTIFF-APPELLANT, DAVID JOHN DIERSEN

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ARGUMENT

Plaintiff-Appellant DAVID JOHN DIERSEN's (Diersen) statement of issues on pages 1 and 2 of his brief is complete and accurate. Defendant-Appellee UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE's (GAO) statement of issues on page 1 of its response brief is not complete or accurate. The complete and correct statement is as follows:

Is there a material issue of fact as to whether:

-- GAO's affirmative action (AA) "goals" for its Chicago office were justified?

-- GAO's actions to achieve its AA goals for its Chicago office constituted illegal quotas and resulted in discrimination against Diersen?

-- GAO retaliated against Diersen and ultimately constructively discharged him because he opposed the actions that GAO took to achieve its AA goals for its Chicago office and because since 1988 he participated in a class action lawsuit that claims that the actions GAO took to achieve its AA goals resulted in age discrimination?

I. The pleadings, depositions, answers to interrogatories, admissions, and affidavits in this case show that there are many genuine issues as to many material facts

Diersen's statement of case on pages 2 through 4 of his brief is complete and accurate. GAO's statement of case page 2 of its response brief is not complete or accurate. For example, there was no "full briefing" because GAO did not file an answer until May 15, 2001 even though Diersen filed this litigation on July 30, 1998; GAO objected to virtually every one of Diersen's discovery requests; GAO refused to comply with many of Diersen's discovery requests; GAO destroyed many of the most crucial AA and other documents that Diersen requested; GAO admitted to very few of Diersen's

material facts; on June 5, 2003, the magistrate judge denied Diersen's May 19, 2003 motion to compel discovery, to extend discovery, and for sanctions for spoliation of relevant documents and on July 28, 2003, the district court judge upheld that denial; and on November 3, 2003, the district court judge constructively granted GAO's motion to strike Diersen's statement of material facts as well as his response to GAO's statement of material facts.

Diersen's statement of facts on pages 4 through 18 of his brief is complete and accurate. GAO's statement of facts on pages 3 through 15 of its response brief is not complete or accurate. For example, GAO outrageously ignores one of the most important facts in this litigation, namely, that even though GAO gave Diersen a written "feedback and coaching" document on June 27, 1997 that stated that he was exceeding performance expectations in all areas, GAO nevertheless gave him two alternatives on September 17, 1997 if he did not retire by September 30, 1997 -- accept a constructive demotion or an adverse transfer. Further, GAO falsely states that Diersen "met" with its EEO counselor on September 26, 1997, GAO falsely implies that the statements Diersen made to GAO's EEO counselor on September 19, 1997 and his September 30, 1997 written discrimination complaint did not put GAO on notice of all the claims that he raised in this litigation. GAO falsely implies that Diersen received the EEO counselor's report on October 15, 1997 or shortly thereafter while GAO knows it did not provide Diersen with that report until February 23, 1998. GAO falsely states that Diersen did not disagree with GAO's statement of his claims and GAO falsely implies that its investigation of Diersen's claims was adequate. On pages 10 through 15 of its response brief, GAO makes disparaging comments about Diersen's claims and

outrageously argues that its arguments are facts because the district court “determined,” “found,” and/or “noted” that GAO’s arguments were facts.

GAO outrageously argues in its response brief that the district court’s grant of summary judgment should be affirmed because “Diersen’s entire argument is conclusory,” because he failed “to provide any evidentiary support,” because he “is unable to show a specific error which warrants reversal,” because his brief is a “long-winded rant replete with protestations but unsupported by any evidence,” because the district court accepted GAO’s arguments as though they were facts, because his facts and arguments are merely his “*personal* belief,” and because he failed to “put up or shut up.” GAO outrageously ignores the fact that Diersen provided detailed affidavits on November 16, 1997, December 24, 1997, April 25, 2001, and August 18, 2003 and that he provided many documents that support his statements in those affidavits. For example, Diersen provided affidavits from former coworkers and superiors including Patrick Dolan, David Jacob, Melvin Koenigs, and Frank Zbylski (R. 123, ex E, p. 611-620 and 623-626). While GAO destroyed its most crucial AA documents, Diersen was still able to obtain and provide many AA documents (R. 123, ex. E, p. 168-262; ex. H, W, X, AA, EE, and GG).

GAO argues that the court’s decision in *Albiero v. Kankakee*, 246 F.3d 927, 933 (7th Cir. 2001) supports GAO’s argument that Diersen has not provided sufficient evidence for a jury to accept his version of events. Albiero did not provide documents that supported the statements he made in his affidavit. However, Diersen provided many documents that support his statements in his affidavits including affidavits from former coworkers and superiors Dolan, Jacob, Koenigs, and Zbylski. While GAO

destroyed its most crucial AA documents, Diersen was still able to obtain and provide the district court with many AA documents.

GAO argues that the court's decision in *Bahl v. Royal Indemnity Company*, 115 F.3d 1283, 1292 (7th Cir.1997) supports GAO's argument that Diersen's superiors honestly held their views. Bahl based his claims largely on derogatory comments made by an employee of the company who was neither a decision maker nor one who played a role in his termination. However, Diersen provided many AA documents that show all of his superiors were under tremendous pressure to force older employees out of the agency, especially those who are white or male and especially employees like Diersen who opposed GAO's AA goals and participated in litigation that claimed GAO's actions to achieve its goal resulted in age discrimination.

GAO argues that the court's decision in *Schultz v. G.E. Capital Corporation*, 37 F.3d 329, 334 (7th Cir. 1994) supports GAO's argument that Diersen's facts are not evidence but merely self-serving statements and attempts to shift blame. Schultz presented no evidence other than his own remarks to support his claims and the other plaintiff argued his employer should have used an alternative criteria to assess his work performance. However, Diersen as provided many documents that support the statements he made in his affidavits. For example, Diersen provided affidavits from Dolan, Jacob, Koenigs, and Zbylski and many AA documents.

GAO argues that the court's decision in *Kizer v. Children's Learning Center*, 962 F.2d 608, 613 (7th Cir. 1992) supports GAO's argument that Diersen's facts do not exist and that he bases his arguments solely on his subjective beliefs. Kizer failed to demonstrate that demonstrate that "she was doing the job well enough to meet her

employer's legitimate expectations" and she failed to point "to specific facts which raise a genuine issue for trial." However, GAO admits that Diersen met its expectations and Diersen has pointed to many specific facts that demonstrate discrimination and retaliation, including that he was subjected to tangible adverse employment actions including the performance appraisal GAO gave him on September 17, 1997, the two alternatives GAO gave him on that date if he did not retire, and GAO's denial of his September 18, 1997 request to be reassigned to the Office of Special Investigations (OSI).

GAO argues that the court's decision in *Cowan v. Prudential Insurance Co.*, 141 F.3d 751, 759 (7th Cir. 1998) supports GAO's argument that Diersen does not support his arguments with specific facts. Cowan was terminated after being put on probation twice for failing to meet sales quotas. However, Diersen has supported his arguments with specific facts, including that even though GAO gave Diersen a written "feedback and coaching" document on June 27, 1997 that stated that he was exceeding performance expectations in all areas, GAO nevertheless gave him two alternatives on September 17, 1997 if he did not retire by September 30, 1997 -- accept a constructive demotion or an adverse transfer.

II. Diersen Exhausted The Administrative Remedies That GAO Gave Him And All Of His Claims In This Action Are Reasonably Related To The Claims He Raised In His Administrative Discrimination Complaint And Describe The Same Conduct And Implicate The Same Individuals

A. Diersen's Administrative Discrimination Complaint Included Disparate Impact Claims

Diersen showed on pages 21 through 26 of his brief that he included the same disparate impact claims in his administrative discrimination complaint that he included

as his second cause of action (facially neutral policies and practices had disparate impact) in his fifth amended complaint. GAO argues that the court's decision in *Noreuil v. Peabody Coal Co.*, 96 F.3d 254 (7th Cir. 1996) supports its argument that Diersen's disparate impacts claims are substantially different from his disparate treatment claims. While Noreuil did not include disparate impact claims in his administrative complaint, the record clearly shows that Diersen did and that GAO refused to investigate them. Further, the record clearly shows that Diersen's claims implicate not only his Chicago office superiors who implemented GAO's AA goals but GAO's Comptroller Generals who established those goals.

GAO argues that the court's decision in *Vela v. Village of Sauk Village*, 218 F.3d 661 (7th Cir. 2000) and *Kersting v. Wal-Mart Stores, Inc.*, 250 F.3d 1109 (7th Cir. 2001) supports its argument that Diersen's disparate impact claims are not reasonably related to his disparate treatment claims. The court found that Vela's sexual harassment claim, which she did not include in her administrative complaint, was "wholly diverse from the claim of disparate treatment described in her EEOC charge." However, Diersen included both his adverse impact claims and his adverse treatment claims in his administrative complaint. The court disallowed Kersting's claims that did not involve the same individuals and similar conduct. However, all of Diersen's claims involve GAO's AA goals, the same individuals (Chicago Office Manager Aronovitz; Deputy Office Manager Herman; and Assistant Director Trop, and GAO's Comptroller Generals), and similar conduct (job assignments, performance expectations and appraisals, pay increases, promotions, constructive discharge, and sabotage of post retirement job search).

GAO argues that the court's decision in *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221 (7th Cir. 1993) supports its argument that Diersen's litigation in this court duplicates *Chennareddy v. Bowsher*, Case No. 87-3538. However, in *Serlin*, both complaints were pending in the same court, both complaints involved the same parties, the complaints were "identical in all material respects" except that one argued both intentional and unintentional violations while the other argued only intentional violations. However, *Chennareddy* is pending in the United States District Court for the District of Columbia while *Diersen* is pending in this court, the many plaintiffs in *Chennareddy* seek class action certification while Diersen is the only plaintiff in *Diersen* and he seeks individual relief for his individual claims, and *Chennareddy* involves many claims not made in *Diersen* and *Diersen* involves many claims not made in *Chennareddy*.

B. Diersen's Discrimination Complaint Included His Continuing Retaliation Claims, the Continuing Violation Doctrine Applies, and His Pre-1997 Claims Are Not Time Barred

Diersen showed on pages 26 through 31 of his brief that his discrimination complaint included his continuing retaliation claims and that the continuing violation doctrine applies and his pre-1997 claims are not time barred.

GAO argues that the court's decision in *Stone v. City of Indianapolis Public Utilities Division*, 281 F.3d 640 (7th Cir. 2002) supports its argument that Diersen could not claim retaliation in September of 1997 because he did not have "a history of prior EEO complaints or some other form of protected activity." GAO's argument is false because it admits that Diersen did engage in "protected activity" prior to September of 1997. The court clarified in *Stone* the "proper standard for summary judgment for retaliation claims." GAO failed to meet that standard because Diersen showed that "he

was treated differently than similarly situated” employees who did not engage in protected activities, because Diersen showed that GAO had retaliatory motive, because Diersen rebutted GAO’s noninvidious reasons for its adverse employment actions, because Diersen showed a “causal link” his protected activities and GAO’s unlawful acts, and because Diersen showed that GAO’s alleged nonretaliatory motives were actually pretextual.

GAO argues that the courts’ decisions in *Rennie v. Garrett*, 896 F.2d 1057 (7th Cir. 1990), *Bohac v. West*, 85 F.3d 306, 309 (7th Cir. 1996), and *Johnson v. Runyon*, 47 F.3d 911 (7th Cir. 1995) support its argument that GAO’s 45-day deadline for filing a retaliation claim barred Diersen’s pre-1997 claims. However, in *Rennie*, the court found that such deadlines should be construed as being statutes of limitations that can be waived based on equitable exception rather than as jurisdictional prerequisites that cannot be waived. In *Bohac*, the court found that “employee’s failure to comply with ADEA’s time limits in making administrative complaint with Army was not absolute jurisdictional bar to ADEA claim.” In *Johnson*, the court found that the employees was entitled to tolling of the limitations period under exceptions listed in 29 C.F.R. § 1614.105(a)(2).

GAO argues that the courts’ decisions in *Baldwin County Welcome Center v. Brown*, 104 S.Ct. 1723 (1984) and *Hentosh v. Finch University*, 167 F.3d 1170 (7th Cir. 1999) support its argument that Diersen’s pre-1997 claims are barred because of GAO’s success in misleading him concerning his rights. However, *Baldwin* deals strictly with filing a complaint within 90 days of receiving a right-to-sue letter. Rather than filing a complaint within 90 days of receiving a right-to-sue letter, Baldwin merely filed a copy

of her right-to-sue letter. However, Diersen included his pre-1997 claims in his administrative complaint, in his initial complaint in this litigation, and in all subsequent amended complaints. Even if Diersen had not included his pre-1997 claims in his complaints, he presented substantial evidence for equitable tolling while Baldwin did not. In *Hentosh*, the “employee failed to identify any actions by (the employer) that may have prevented her from filing” her complaint within the time limitation. Even if Diersen had not included his pre-1997 claims in his complaints, he identified many actions that GAO took that prevented those claims from being filed sooner and from being investigated.

GAO argues that the courts’ decisions in *Murray v. CTA*, 252 F.3d 880 (7th Cir. 2001) and *Shaw v. Autozone, Inc.*, 180 F.3d 806 (7th Cir. 1999) support its argument that Diersen’s fears of further harassment and retaliation were “subjective” because he continued to oppose GAO AA goals and because he continued to participate in *Chennareddy*. Both *Murray* and *Shaw* failed “to alert the employer to the allegedly hostile environment.” However, Diersen alerted each and every one of his supervisors to the hostile environment he suffered because he opposed GAO’s AA goals and because he participated in *Chennareddy*. Sadly, all of Diersen’s supervisors either agreed with GAO’s AA goals or lacked the power to protect him from the hostile environment. Even if Diersen had ceased his opposition or even if he had ceased his participation, it is now very clear that GAO would have still wasted his career, forced him into early retirement, and sabotaged his post retirement job search because GAO had selected him be an example of how GAO retaliates against those who fail to go along with its discriminatory and retaliatory actions to meet its AA goals.

GAO argues that the facts Diersen presented in support of his continuing violation argument are “inconsistent” and that the court’s decision in *Speer v. Rand McNally & Co.*, 123 F.3d 658 (7th Cir.1994) supports GAO’s argument that to invoke the continuing violation doctrine, Diersen has to argue that he did not suspect discrimination/retaliation in the workplace until 1997. However, the facts Diersen presented are not inconsistent and *Speer* does not support GAO’s argument. According to *Speer*, “Continuing violation doctrine allows plaintiff to get relief under Title VII for time-barred act by linking it with act that is within limitation period.” That is exactly what Diersen did. According to *Speer*, “Continuing violation theory requires at least one viable charge within appropriate limitations period under Title VII.” That viable charge is GAO’s requiring Diersen to accept a constructive demotion or an adverse transfer if he did not retire by September 30, 1997. According to *Speer*, “Under covert theory, Title VII plaintiff charges that employer has, for period of time, followed practice of discrimination, but has done so covertly, rather than by way of open notorious policy.” If GAO’s AA policy was not covert, GAO would simply state that its policy is to drive all its old white males out of the agency so that their positions can be filled by young minorities and young females. According to *Speer*, “Purpose of permitting Title VII plaintiff to maintain cause of action on continuing violation theory is to permit inclusion of acts whose character as discriminatory acts was not apparent at time they occurred. Diersen has shown that some of GAO’s discriminatory and retaliatory acts did not appear to be discriminatory or retaliatory at the time they occurred.

III. Diersen Has Made A *Prima Facie* Showing Of His Reverse Discrimination Claims, His Age Discrimination Claims, And His Retaliation Claims

Diersen has provided more than sufficient evidence to show that he met all four prongs of *McDonnell Douglas* to establish both discrimination and retaliation, not just the first two prongs. Forcing an employee to accept a constructive demotion or an adverse transfer if he does not retire in less than two weeks is an adverse employment action. GAO admits that it has never forced a minority or female employee who was meeting its expectations to accept a constructive demotion or an adverse transfer if they did not retire.

The district court correctly concluded on pages 16 and 17 of its November 3, 2003 memorandum opinion and order that Diersen was “a member of a protected class” and he had “reasonably performed to his employer’s expectations” and therefore he had met the first and second prongs of the *McDonnell Douglas* burden-shifting model to prove discrimination. Because forcing an employee to accept a constructive demotion or an adverse transfer if he does not retire in less than two weeks is an adverse employment action, the district court erroneously concluded that Diersen had not met the third prong of the test. Because GAO admits that it has never forced a minority or female who was meeting its expectations to accept a constructive demotion or an adverse transfer if they did not retire, the district court erroneously concluded that Diersen had not met the fourth prong of the test.

GAO admits that it has never forced a minority or female employee who did not engage in statutorily protected activity to accept a constructive demotion or an adverse transfer if they did not retire. The district court correctly concluded on pages 22 and 23 of its November 3, 2003 memorandum opinion and order that Diersen had “engaged in statutorily protected activity” and that he had “performed his job according to his

employer's legitimate expectations" and therefore he had met the first and second prongs of the *McDonnell Douglas* burden-shifting model adapted to the retaliation context. Because forcing an employee to accept a constructive demotion or an adverse transfer if he does not retire is an adverse employment action, the district court erroneously concluded that Diersen had not met the third prong of the test. Because GAO admits that it has never forced a minority or female employee who did not engage in statutorily protected activity to accept a constructive demotion or an adverse transfer if they did not retire, the district court erroneously concluded that Diersen had not met the fourth prong of the test.

Diersen showed on pages 31 through 45 of his brief that he has made a *prima facie* showing of all his claims. Diersen can prove to a jury all his discrimination and retaliation claims using the direct method of proof, circumstantial evidence, and the indirect burden-shifting method of proof. Diersen has shown the timing of the actions it took against him shortly after he became a participant in *Chennareddy* in 1988 and shortly before his last day to take early retirement in September of 1997 is extremely suspicious.

A. The 1997 Performance Appraisal Was A Tangible Adverse Employment Action

Diersen showed on pages 33 and 34 that the performance appraisal that GAO gave Diersen for 1997 was a tangible adverse employment action because it was so negative in relation to the performance appraisals that GAO gave others in its Chicago office for that year. It was so negative that GAO used it to justify giving Diersen two alternatives if he did not retire by September 30, 1997 – accept a constructive demotion or an adverse transfer. That obviously substantially affected Diersen's salary and

responsibilities. Diersen has shown that the performance appraisal that GAO gave Diersen for 1997 would have assured that GAO would have given him either its lowest or its second lowest PFP ranking for 1997 and that it would have severely damaged if not ended any opportunity for promotions. During September of 1997, Trop made it clear to Diersen that if he complained about the appraisal, she would give him an even lower one. Trop's actions were designed to threaten Diersen and they evidenced the subjectivity in GAO's performance appraisal system and how GAO uses that subjectivity to meet its AA goals.

GAO argues that the courts' decisions in *Schultz*, *Kizer*, and *Cowan* support its argument that no "actual evidence" supports Diersen's argument that the 1997 performance appraisal was an adverse employment action. GAO further argues that the courts' decisions in *Sweeney v. West*, 149 F.3d 550 (7th Cir. 1998) and *Smart v. Ball State University*, 89 F.3d 437 (7th Cir. 1996) support its argument that the 1997 performance appraisal did not "cost him a promotion, diminish his chance for a pay increase, or result in a demotion." However, GAO as admitted that the appraisal was so negative in relation to other appraisals that GAO used it to justify giving Diersen two alternatives if he did not retire by September 30, 1997 – accept a constructive demotion or an adverse transfer. That admission shows that the appraisal was an adverse employment action.

The court's decision in *Sweeney* does not involve performance appraisals and does not support GAO's argument for many reasons. GAO had far greater motive to retaliate against Diersen than *Sweeney's* employer had to retaliate against her. Diersen complained since 1980 about GAO's AA goals and participated in a class action lawsuit

since 1988 that claimed those goals resulted in age discrimination while Sweeney merely complained that her superiors “had invaded her personal locker” and “went into her office while she was on leave.” GAO admits that it gave Diersen extremely severe ultimatums if he did retire in less than two weeks while Sweeney’s superiors merely told her that “no one liked her” and gave her “counseling statements” that “admonished her to improve her performance” because she accepted unauthorized overtime pay and had bragged that she could get her superiors “fired.” Further, Sweeney relied on sexual harassment cases in her pleadings, but according to the court, “appears not to be claiming that she was *sexually* harassed.”

In *Smart*, the court found that “‘Adverse job action,’ which is required to support Title VII retaliation claim, is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well” and that “The dispositive question in our case is not whether (the plaintiff’s) performance evaluations were undeservedly negative, but whether even undeserved poor evaluations can alone constitute the second element of her prima facie case.” The only evidence that Smart presented in support of her retaliation claim was her poor performance appraisals and her employer did not use those evaluations to take any adverse employment action against her and “she completed the training program on time and is currently working at Ball State as a full-fledged tree surgeon.” However, Diersen’s employer used the 1997 evaluation it gave him to force him to accept one of two adverse employment actions – a constructive demotion or an adverse transfer – if he did not retire by the end of the month.

B. GAO’s Denial Of Diersen’s Request For Transfer To OSI Was A Tangible Adverse Employment Action

Diersen showed on pages 34 through 36 of his brief that GAO's denial of Diersen's request for transfer to OSI was a tangible adverse employment action because GAO had given him two alternatives if he did not retire – accept a constructive demotion or an adverse transfer. If Diersen did not accept a constructive demotion, any transfer would have been adverse because the specialized financial education and experience he had acquired auditing financial regulators since 1990 would have been rendered useless. GAO argues that the courts' decisions in *Cowan* and *Smart* support its argument that Diersen's argument lacked "specificity" that GAO's denial of his request merely made him "unhappy." However, one of the two alternatives that GAO gave Diersen if he did not retire was to transfer to another group in its Chicago office. Therefore, because OSI was another group in the office, GAO did offer the possibility of transfer to OSI. Further, GAO had every reason to expect that Diersen would ask to be transferred to the OSI group because the manager of that group was the only group manager in GAO's Chicago office who had not overtly discriminated and/or retaliated against Diersen in the past. Diersen would not have retired if GAO had transferred him to OSI, therefore, GAO's refusal to transfer him did change his employment status. If a minority, female, or younger GAO employee with qualifications similar to Diersen's had requested transfer to OSI in 1997, GAO would have transferred that employee to OSI without hesitation.

C. Diersen Has Shown That Age Discrimination And Reverse Discrimination And Retaliation Took The Form Of A Constructive Discharge

Diersen showed on pages 36 through 38 that the actions of many of his superiors, coworkers, and subordinates throughout his GAO employment amounted to a hostile work environment and ultimately, a constructive discharge.

GAO argues that the courts' decisions in *Schultz; Kizer; Cowan; E.E.O.C. v. University of Chicago Hospitals*, 276 F.3d 326 (7th Cir. 2002); and *Mosher v. Dollar Tree Stores*, 140 F.3d 662 (7th Cir. 2001) supports its argument that "Diersen failed to present evidence that his work environment was so intolerable that a reasonable person would have been compelled to resign." GAO knows full well that courts have to look at the totality of the circumstances, nevertheless, GAO attempts to mislead by failing to acknowledge all the facts that Diersen presented that compelled him to resign including the many adverse employment actions that his superiors had taken against him, especially since 1988; the performance appraisal Trop gave him on September 17, 1997; the ultimatums Trop gave him on September 17, 1997 if he did not retire by September 30, 1997; and the statements Trop, Herman, and Aronovitz made to him on September 17 and 18, 1997.

IV. Diersen Has Shown That He Was Treated Differently From Similarly Situated Employees In Different Race, Gender, And Age Groups

GAO argues that the courts' decisions in *Rogers v. City of Chicago*, 320 F.3d 748 (7th Cir. 2003); *Grayson v. O'Neill*, 308 F.3d 808 (7th Cir.2002); and *Radue v. Kimberly-Clark Corporation*, 219 F.3d 612 (7th Cir. 2000) support its argument that Diersen's comparison between himself and Melvin Thomas is "irrelevant" because allegedly, they lack "similar attributes, experience, education, and qualifications." However, Diersen and Thomas are both CPAs, both have substantial pre-GAO employment experience, both asked to assigned to audits in which they could use their pre-GAO work

experience. Diersen showed on page 39 of his brief that GAO did not require minorities or females with similar qualifications to accept downgrades to transfer to GAO from other federal agencies and that GAO consistently gave his superiors, coworkers, and subordinates, including Thomas, who had similar or less education, work experience, and professional certifications than he had, but who were minority, female, and/or younger a) better job assignments, b) higher performance appraisals, c) higher PFP rankings, d) larger pay increases, e) faster promotions, and f) more promotions.

Further, GAO falsely argues that Thomas was eligible to take early retirement and that “Diersen has produced no evidence that Thomas received a higher performance review in 1997.” The average rating that GAO employees received in 1997 was 4.5 on a scale of 5. The 1997 appraisals Diersen provided (R. 123, ex. E, pages 351-362 and 638-655) which showed that Thomas received a rating of 5 on a scale on 5 for 1997 while Diersen received rating of 4 on a scale of 5 for 1997.

V. Diersen Has Shown That GAO’s Explanation For Its Actions Is Pretext

Diersen has shown on pages 39 through 41 of his brief that based on Trop’s, Herman’s, and Aronovitz’s 1997 affidavits, GAO’s primary reason it articulates for the adverse employment actions it took against Diersen is that he has mental problems that severely impede his job performance. Diersen has shown with direct and circumstantial evidence that that reason is a pretext and that the true explanation is discrimination and retaliation and that GAO is attempting to hide that true explanation. To argue that a person creates his own problems is to argue that person has mental problems. Diersen has shown that GAO has failed to articulate any legitimate nondiscriminatory reason for any of the adverse employment actions that it took against him. He has done far more

than raise doubts about GAO's explanations for its actions, he has refuted all of them. He has shown that GAO's explanations have no real basis in fact, that GAO's explanations did not actually motivate the actions that GAO took against him, and that GAO's explanations were insufficient to motivate the actions that GAO took against him. He has shown that each of GAO's explanations is a pretext, a lie, a phony explanation, dishonest explanation, and deceit used to cover its tracks. He has shown that GAO did not and could not have sincerely believed its explanations for the actions it took against him. He has shown that GAO believes that "the end justifies the means." He has shown that GAO really believes that achieving AA goals justifies both discriminating against its older white male employees and retaliating against those who complained. He has shown that GAO really believes that achieving AA goals justifies falsely arguing that those who oppose its AA goals, and especially those who participate in *Chennareddy*, have mental problems that severely impede their job performance.

GAO argues that the court's decision in *Rothman v. Emory University*, 123 F.3d 446 (7th Cir. 1997) supports its argument that Diersen has not shown that its explanation for its actions is pretext. However, while "Rothman's claims rest primarily on his own perceptions of Emory's motivations," Diersen's claims rest on the many AA and other documents that GAO issued since 1980 that clearly show GAO's motivations are to drive employees like Diersen out of the agency who oppose giving preference to young minorities and young women and to especially drive employees like Diersen out of the agency who participate in a class action lawsuit that claims such preference giving resulted in age discrimination.

A. GAO's Reasons For Its Appraisal Of Diersen's Performance For 1997 Is A Pretext

Diersen has shown on pages 41 through 43 of his brief that to justify the adverse employment actions it took against Diersen on September 17, 1997, GAO argues that Diersen's job performance deteriorated rapidly since June 26, 1997 because he intentionally created many stressful situations in his personal life that he was unable to deal with. However, Diersen has shown that Trop's criticisms of his performance were subjective, unwarranted, and unfair. Further, Diersen has shown that all the performance appraisals that Trop gave Diersen's coworkers for 1997 were dramatically higher than the one she gave him that her explanation for his 1997 performance appraisal is a lie and a phony reason offered by GAO to cover its tracks.

GAO argues that the 1997 performance appraisal it gave Diersen did not reflect "a serious performance problem." However, GAO used that performance appraisal to justify giving him two alternatives if he did not retire by September 30, 1997 – accept a constructive demotion or an adverse transfer. GAO argues that the low ratings contained in the 1997 performance appraisal it gave Diersen "reflected that he had been under a lot of stress that year which affected his work relationships and virtually all his work that year needed substantial revision." However, while it is true that Trop inflicted a tremendous amount of stress on Diersen during 1997 to force him to retire, GAO's argument that that stress negatively impacted his job performance is false and involves just one of many disputed material facts in this litigation.

GAO argues that the courts' decisions in *Sanchez v. Henderson*, 188 F.3d 740 (7th Cir. 1999); *Bahl*; and *Schultz* support its argument that Diersen did not present "actual evidence" to show that the reasons Trop gave for giving Diersen such a low 1997 appraisal was pretext, but instead a "personal judgment" and "opinions" and

“viewpoints” and “conclusions” and a “subjective view.” However, while Sanchez, Bahl, and Schultz rested their claims primarily on their own perceptions of their employers’ motivations, Diersen’s claims rest on the many AA and other documents that GAO issued since 1980 that clearly show GAO’s motivations are to drive employees like Diersen out of the agency.

B. GAO’s Reason For Its Denial Of Diersen’s Request For Transfer To OSI Is a Pretext

Diersen has shown on pages 43 through 44 of his brief that GAO argues that he found only two things a “living hell” in 1997 -- a lower-than-expected performance evaluation and the denial of his request for transfer to OSI. However, the primary adverse employment action that Diersen complained of to Elliott on September 19, 1997 was that Trop gave him two alternatives if he did not retire by September 30, 1997 – accept a constructive demotion or an adverse transfer. Diersen would never have asked for a transfer to OSI if Trop had not given him those two alternatives on September 17, 1997.

GAO argues that the courts’ decisions in *Sanchez*, *Bahl*, *Schultz*, *Kizer*, and *Cowan* support its argument that Diersen did not present “evidence” to show that the reasons GAO gave for not transferring him to OSI was pretext, but instead a “conclusory version” and “his personal opinions” and “biased viewpoints” and “drawn conclusions” and a “subjective view.” However, while Sanchez, Bahl, Schultz, Kizer, and Cowan rested their claims primarily on their own perceptions of their employers’ motivations, Diersen’s claims rest on the many AA and other documents that GAO issued since 1980 that clearly show GAO’s motivations are to drive employees like Diersen out of the agency.

C. GAO's Explanation For Why Diersen Retired Is Pretext

Diersen has shown on pages 44 and 45 of his brief that GAO argues that “Diersen voluntarily took early retirement because he did not get the job reassignment he wanted.” However, the sequence of events shows that argument is misleading and that GAO knows it is misleading. As explained above, Diersen did not ask for a transfer to OSI until September 18, 1997. He would never have asked for that transfer if Trop had not given him two alternatives on September 17, 1997 -- accept a constructive demotion or an adverse transfer. GAO's argument that Diersen took early retirement on September 30, 1997 because he would not be eligible for regular retirement for 6 years when he was 55 years old on September 29, 2003 is outrageous because 6 years is a long time and GAO had made it clear to Diersen that those 6 years would be a “living hell” if he did not retire by September 30, 1997.

GAO argues that the courts' decisions in *Sanchez*, *Bahl*, *Schultz*, *Kizer*, and *Cowan* support its argument that “Diersen's challenge to the district court's finding is bare-boned” and a “simple conclusory version” and an “unproven characterization” to show that GAO's explanation for Diersen's retirement is pretext. However, while *Sanchez*, *Bahl*, *Schultz*, *Kizer*, and *Cowan* rested their claims primarily on their own perceptions of their employers' motivations, Diersen's claims rest on the many AA and other documents that GAO issued since 1980 that clearly show GAO's motivations are to drive employees like Diersen out of the agency.

VI. Diersen Has Shown That GAO Retaliated Against Him After September Of 1997 For Filing Administrative Discrimination Complaint, For Contacting Elected Officials, For Filing This Lawsuit, And For Posting His Claims On The Internet

Diersen has shown on pages 45 and 46 that the district court erroneously accepted GAO's argument that Diersen had "not provided any direct evidence of retaliation" after he retired or shown "that he was treated less favorably than similarly situated employees who did not complain." However, Diersen has made a *prima facie* showing of his post-retirement retaliation claims. GAO's post-retirement retaliation against Diersen included failing to properly and fairly investigate and resolve his discrimination complaint, providing GAO's investigator with false affidavits, and sabotaging his job search.

GAO argues that the courts' decisions in *Jordan v. Summers*, 205 F.3d 337 (7th Cir. 2000); *Sanchez*; *Bahl*; *Schultz*; *Kizer*; and *Cowan* support its argument that "Diersen's challenge to the district court's finding is bare-boned" and a "simple conclusory version" and an "unproven characterization" to show that GAO's explanation for Diersen's retirement is pretext. However, while *Jordan*, *Sanchez*, *Bahl*, *Schultz*, *Kizer*, and *Cowan* rested their claims primarily on their own perceptions of their employers' motivations, Diersen's claims rest on the many AA and other documents that GAO issued since 1980 that clearly show GAO's motivations are to drive employees like Diersen out of the agency.

CONCLUSION

For the reasons set forth above, Diersen respectfully request this Court to reverse the decision of the United States District Court for the Northern District of Illinois granting GAO summary judgment, to remand this case to the District Court for further proceedings, and for all other just and proper relief.

Dated: September 2, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

I hereby certify that this brief complies with F.R.A.P. Rule 32(a)(7).

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2004, I delivered 15 copies of this reply brief to the Clerk of the United States Court of Appeals, Seventh Circuit, and 2 copies to counsel for GAO:

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