

No. 04-1012

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UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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David John Diersen,  
Plaintiff-Appellant,

v.

David M. Walker,  
Comptroller General of the  
United States,  
Defendant-Appellee.

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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

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BRIEF AND REQUIRED SHORT APPENDIX OF  
PLAINTIFF-APPELLANT, DAVID JOHN DIERSEN

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## **JURISDICTIONAL STATEMENT**

The United States District Court for the Northern District of Illinois, Eastern Division, has jurisdiction in this matter pursuant to 28 U.S.C. § 1331 because it involves a federal question under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34, *et seq.* and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e, *et seq.*

Venue is proper pursuant to 28 U.S.C. 1391 because Defendant, the UNITED STATES GENERAL ACCOUNTING OFFICE (GAO), is a federal agency that employed Plaintiff, DAVID JOHN DIERSEN (Diersen), in its Chicago office between 1980 and 1997.

On November 3, 2003, the district court granted GAO's motion for summary judgment that disposed of all of Diersen's claims and on December 31, 2003, Diersen filed his notice of appeal.

The United States Court of Appeals for the Seventh Circuit has jurisdiction under Rules 3 and 4 of the Federal Rules of Appellate Procedure.

## **STATEMENT OF ISSUES**

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?

### **STATEMENT OF CASE**

This case involves claims of many discriminatory and retaliatory adverse employment actions during a time period of almost 18 years (January 1980-September 1997) and post-retirement retaliatory actions during a time period of over 6 years (October 1997-present). (R. 37, p. 49-86) GAO spent almost 7 months (October 1997-April 1998) investigating Diersen's constructive discharge claims. (R. 123, ex. E, pages 263-739) However, GAO refused to investigate Diersen's claims that GAO's discriminatory and retaliatory acts had continued for many years, that the adverse employment actions GAO had taken against him were a linked series, cumulative, and part of a pattern, and that Diersen's fear of greater retaliation prevented him from filing a written discrimination complaint any sooner than he did. (R. 123, ex. E, p. 368-369) GAO refused to correct many serious deficiencies in its investigation that Diersen identified in his March 19, 1998 letter to GAO. (R. 123, ex. Q, p. 375-423) On April 29, 1998, GAO denied Diersen's administrative discrimination complaint and issued a "Notice of Right to Sue" letter. (R. 123, ex. E, p. 819-822)

This case was before the United States District Court for the District of Columbia for almost 2 years (July 1998-April 2000) before it was transferred to United States District Court for the Northern District of Illinois in April of 2000. (R. 30) GAO refused to answer Diersen's original complaint as well as his first, second, third (R. 30), and fourth amended complaints. (R. 34, 35)

Diersen's April 25, 2001 Fifth Amended Complaint includes three counts – age discrimination in violation of ADEA, reverse discrimination in violation Title VII, and retaliation in violation of both ADEA and Title VII (R. 37, p. 80-86) and six causes of action: (1) preferential treatment resulted in disparate treatment and reverse discrimination; (2) facially neutral policies and practices had disparate impact; (3) *prima facie* case of age discrimination, reverse discrimination, and retaliation; (4) retaliation for opposition and participation between 1980 and 1997; (5) constructive discharge in September of 1997 for opposition and participation; and (6) retaliation after September of 1997 for filing administrative discrimination complaint, contacting elected officials, filing this suit, and posting claims on the internet. (R. 37, p. 49-79)

GAO answered on May 15, 2001 that “At all times pertinent hereto, the defendant acted in good faith and without any intent to engage in any unlawful discriminatory act or practice with respect to the plaintiff. All of GAO's acts and actions were done for legitimate, non-discriminatory reasons, which were not a pretext for any unlawful discriminatory act or practice against plaintiff.” (R. 38, p. 11)

GAO objected to virtually all of Diersen's discovery requests, refused to comply with many of those requests, destroyed many of the most crucial AA documents that Diersen requested, and admitted to very few of Diersen's material facts. (R. 42-128)

On February 26, 2003, Magistrate Judge Nan R. Nolan ordered GAO “to immediately cease destroying documents relevant to Mr. Diersen's claims.” (R. 85)

On May 19, 2003, Diersen filed motion for sanctions for spoliation of relevant documents, to compel discovery, and to extend discovery (R. 104); on June 5, 2003, Magistrate Judge Nolan denied that motion (R. 107); on June 25, 2003, Diersen filed

objections (R. 110) to that denial; on July 14, 2003, GAO filed its response (R.116); on July 21, 2003, Diersen filed his reply (R. 117); and on July 28, 2003, Judge Amy J. St. Eve overruled Diersen's objections (R. 118).

On July 3, 2003, GAO filed a motion for summary judgment. (R. 111) On August 18, 2003, Diersen filed an opposition to that motion (R. 119), a memorandum of law in support of his opposition (R. 120), an affidavit and statement of additional material facts (R. 121), a response (R. 122) to GAO's statement of material facts, and many exhibits (R. 123) in support of his affidavit and statement of additional material facts.

On September 16, 2003, GAO filed a motion (R. 126) to strike Diersen's affidavit and statement of additional material facts and his response to GAO's statement of material facts and on October 3, 2003, Diersen filed his response (R. 128) to that motion. On November 3, 2003, Judge St. Eve issued a 24-page memorandum opinion and order (R. 129) that granted GAO's motion for summary judgment and constructively granted GAO's motion to strike Diersen's affidavit and statement of additional material facts and his response to GAO's statement of material facts.

The original record on appeal consists of 14 volumes of pleadings. Diersen has made many extremely reasonable offers to settle this litigation, but GAO has rejected all of them.

## **STATEMENT OF FACTS**

### GAO, The Defendant-Appellee

GAO is headed by the Comptroller General of the United States, it is the investigative arm of Congress, and it exists to support Congress in meeting its Constitutional responsibilities and to help improve the performance and accountability of

the federal government. (R. 121, par. 1) GAO's employment policies and practices often serve as models for other federal agencies. (R. 121, par. 52) Elmer Staats (Staats) served as Comptroller General between 1966 and 1981, Charles Bowsher (Bowsher) between 1981 and 1996, James Hinchman (Hinchman) between 1996 and 1998, and David Walker (Walker) since 1998. (R. 121, par. 17, 65, 133, 197) Bowsher, Hinchman, and Walker have publicly and forcefully advocated that GAO should recruit, retain, and promote as many young minorities and as many young females as possible; they have made it clear that they value "youth" far more than "experience;" and they blame many of GAO's problems on its older white male GS-13 and 14 (Band II) employees, especially those who have accounting degrees. (R. 121, par. 66, 67, 134, 198)

Throughout Diersen's employment with GAO, his superiors were expected to meet GAO's AA goals. (R. 123, ex. E, p. 168-262; R. 123 ex. GG; R. 121, par. 17, 81, 89, 97, 119, 120, 122, 125, 131, 135, 171, 190) No court has found that GAO's Chicago office discriminated against any minority or female. (R. 121, par. 3) GAO admits that rectification of any prior GAO discriminatory acts was never a justification for any its AA goals for its Chicago Office. (R. 121, par. 325) If an employer gives preference to younger employees, it must by definition discriminate against older employees; if an employer gives preference to minorities, it must by definition discriminate against whites; if an employer gives preference to females, it must by definition discriminate against males. (R. 121, par. 280)

Achieving GAO's AA goals required Diersen's superiors to give preference to young minorities and to young females in hiring, job assignments, pay, and promotions,

and therefore, to discriminate against its older employees, especially those who were white males. (R. 121, par. 308, 309) To help GAO achieve its AA goals, GAO established, revised, and implemented many policies and procedures, including those that govern hiring, job assignment, performance appraisal, pay grades (for example, in 1989, GAO combined GS-13 and GS-14 into a "Band II"), pay increases (for example, in 1989, GAO instituted pay-for-performance (PFP)), promotion, and early retirement. (R. 121, par. 290, 291) The average age of GAO's Chicago office professional employees is the lowest of all GAO's offices and divisions. (R. 121, par. 126)

Cecile Trop (Trop) was one of Diersen's superiors between 1990 and his retirement in 1997 and his immediate supervisor during 1981 and between 1993 and his retirement. (R.121, p. 63, 114) Stewart Herman (Herman) was one of Diersen's superiors throughout his entire GAO career. (R. 121, par. 46) Leslie Aronovitz (Aronovitz) was one of Diersen's superiors between 1988 and his retirement. (R. 121, par. 101)

#### Diersen, The Plaintiff-Appellant

Diersen is a conservative white male born in 1948, his political affiliation is Republican, his religion is Lutheran, his national origin is 100 percent German, and he is not a veteran or disabled. (R. 121, par. 2) Diersen earned a bachelor of science degree in management from Northern Illinois University in 1970 while working part-time for the Park Forest Post Office. (R. 121, par. 4) He attended evening classes and earned an MBA from Loyola University in 1976, (R. 121, par. 6) a master of science degree in accounting from DePaul University in 1980, (R. 121, par. 20) and a master of science

degree in financial markets and trading from the Illinois Institute of Technology in 1997.  
(R. 121, par. 141)

Diersen passed the CPA examination on his first attempt in 1979 (R. 121, par. 12) and he passed the Certified Internal Auditor examination on his first attempt in 1981. (R. 121, par. 64) He became a licensed CPA in 1982 (R. 121, par. 70), a Certified Fraud Examiner in 1990 (R. 121, par. 121), a Certified Government Financial Manager in 1994 (R. 121, par. 128), a Certified Financial Services Auditor in 1996 (R. 121, par. 137), and a Forensic Accountant in 1997 (R. 121, par. 144).

IRS hired Diersen as a GS-7 Revenue Officer in its Collection Division in 1971 and promoted him to GS-9 in 1972, to GS-11 in 1973, to GS-12 in 1974, and to its Special Procedures Staff in 1976. (R. 121, par. 5)

#### Diersen's GAO Employment 1980-1988

In 1980, to transfer to GAO from IRS, GAO required Diersen to accept a downgrade from GS-12 to GS-9, an approximate \$6,000 reduction in pay, something GAO did not require minorities or females with similar education, professional certifications, or work experience to accept. (R. 121, par. 15)

To do well under GAO's performance appraisal system and to have any opportunity to be promoted beyond GS-13, GAO requires its employees to fully support achievement of its AA goals. (R. 121, par. 25) Nevertheless, soon after Diersen transferred to GAO, he made it clear to his superiors, coworkers, and subordinates that he favored equal opportunity and that he opposed any kind of preference giving based on age, race, or gender. (R. 121, par. 26)

Diersen soon saw that his superiors treated him much differently than they treated young minorities and young females, for example, they assigned him to supervisors who a) gave him undesirable assignments and few leadership roles (R. 121, par. 22, 83, 95, 295); b) gave him higher performance expectations (R. 121, par. 29, 30, 41); c) assigned him problem employees to supervise (R. 121, par. 86); d) gave him lower performance appraisals (R. 121, par. 30, 36, 42, 44, 45); e) gave him no bonuses (R. 121, par. 45); f) gave him lower pay increases (R. 121, par. 42, 45); g) discouraged him from applying for promotions (R. 121, par. 28, 36, 42); h) did not promote him back to GS-11 until 1981, back to GS-12 until 1982, or to GS-13 until 1986 (R. 121, par. 62); i) denied his applications for promotion to GS-14 in 1987 and 1988 (R. 121, par. 88, 91); j) prevented him until 1986 from working on audits of IRS, audits in which he could apply the knowledge of IRS that he had gained by working there for almost 9 years (R. 121, par. 5, 21, 34, 37, 38, 40); and k) never assigned him to audits of IRS's Collection Division (R. 121, par. 39).

#### Diersen's GAO Employment 1988-1997

Soon after he became 40 on September 29, 1988, Diersen made it clear to his supervisors, coworkers, and subordinates that he had become a participant in a class action lawsuit against GAO, *Chennareddy v. Bowsher*, Case No. 87-3538, which is still pending in the United States District Court for the District of Columbia, a lawsuit that claims that GAO's AA goals constituted illegal quotas and its actions to achieve its AA goals resulted in age discrimination. (R. 121, par. 93)

Diersen soon saw the derogatory statements that his superiors, coworkers, and subordinates made about his motives, judgment, and ability becoming more frequent

and more harsh. Diersen continues to believe that his superiors orchestrated those statements to create a hostile work environment to prompt him to leave GAO. (R. 121, par. 27, 33, 35) Diersen's superiors abruptly took him off audits of IRS, abruptly assigned him to an annually reoccurring audit that was inappropriate for his work experience and one of the worse assignments in the office, gave him unrealistic performance expectations, gave him an extremely low performance appraisal, denied the grievance that he filed over that appraisal, and gave him the lowest of GAO's four PFP rankings for 1989 (R. 121, par. 95, 103, 105).

Diersen complained to his Congressman Henry Hyde and GAO moderated its retaliatory actions somewhat. (R. 121, par. 96) GAO made it clear to Diersen that GAO would never again assign him to audits of IRS (R. 121, par. 95), assigned him to audits of financial regulators (R. 121, par. 113), and gave him its second lowest PFP ranking for all but one year between 1990 and 1996. GAO gave very very few of its employees its lowest PFP ranking and GAO gave very few of its employees its second lowest PFP ranking (R. 121, par. 105).

Between 1992 and 1997, Diersen spent a tremendous amount of his personal time and money obtaining a masters degree that directly related to the type of audits that GAO had assigned him to do – audits of financial institution regulators. (R. 121, 123, 141) In 1995, GAO assigned Diersen an older minority female problem employee to supervise and made it clear to Diersen that he had to give her "accurate" performance appraisals, something GAO had not required her previous supervisors to do. Diersen believes that GAO's requiring him to supervise that employee was part of

GAO's plan to force him to take early retirement. See *Poole v. Hinchman*, No. 98cv3977. (R. 121, par. 132)

On February 21, 1997, in an 8-page single-spaced letter, Diersen brought his complaints about discrimination and retaliation to the attention of Charles W. Woodward, the Chairman of GAO's Mid-Level Employee Council and sought his help. (R. 121, par. 138)

On June 26, 1997, Trop gave Diersen a "Feedback and Coaching" form that stated he was exceeding her expectations in all seven of GAO's job performance areas. (R. 121, par. 142)

#### GAO Employment Actions Involving Diersen in September of 1997

The average performance appraisal GAO gave its Chicago office employees for 1997 was 4.5 on a scale of 5. For 1997, Trop appraised the performance of Diersen and only four other employees. The overall rating she gave Diersen (4) was extremely low in relation to the other four ratings she gave. She gave Cody Goebel (4.8), Roger Kolar (4.9), Melvin Thomas (Thomas) (5), and Richard Tsuhara (5). With an overall rating of 4, the appraisal that Trop gave Diersen for 1997 was dramatically below the office's 4.5 average and one of the very lowest in GAO's Chicago office. Because the appraisal was so low, it would have warranted GAO's second lowest if not its lowest PFP ranking, and therefore, either a minimal or no merit pay increase. The appraisal Trop gave Diersen for 1995 was 4.6, for 1996 it was 4.4. Between 1996 and 1997, Trop dramatically lowered Diersen's mark for its extremely important "Teamwork, Working Relationships, and Equal Opportunity" job dimension from 5 (Outstanding) to 3 (Fully Successful). (R. 121, par. 30, 167)

On September 17, 1997, relying primarily on the appraisal Trop had just given Diersen, she gave him two alternatives if he did not retire by the end of the month -- accept a constructive demotion or an adverse transfer. (R. 121, par. 146, 148) September 30, 1997, was the last day of GAO's early retirement offer and the last day of GAO's self-imposed hiring freeze. (R. 121, par. 157) If Diersen did not retire by the end of the month, he would not again be eligible to retire for 6 years when he would be 55 on September 29, 2003. (R. 121, par. 154) Diersen immediately appealed the alternatives that Trop had given him to Herman and to Aronovitz, but both Herman and Aronovitz refused to change the alternatives that Trop had given him. (R. 121, par. 151)

On September 18, 1997, because Trop, Herman, and Aronovitz had refused to change the alternatives that Trop had given Diersen on September 17, 1997, he asked Herman and Aronovitz to transfer him to GAO's Office of Special Investigations (OSI), but they denied his request. (R. 121, par. 151)

On September 19, 1997, because Diersen's superiors had given him two alternatives if he did not retire by September 30, 1997 -- accept a constructive demotion or an adverse transfer -- he contacted GAO's Civil Rights Counselor Allen Elliot (Elliott) by phone. During Diersen's September 19, 1997 phone conversation with Elliott and during subsequent phone conversations with him, Diersen complained about many discriminatory and retaliatory acts that his superiors had taken against him since he transferred to GAO from IRS to force him to leave the agency because of his race, because of his gender, because of his age, because of his opposition to GAO's AA goals, and because of his participation in *Chennareddy*. Diersen told Elliott that fear of greater retaliation had prevented him contacting him sooner. Elliott advised Diersen

against claiming reverse discrimination because Trop was taking a major adverse employment action at the time against an older minority female Gwen Poole (Poole) who Trop had assigned Diersen to supervise. Elliott also advised Diersen against claiming retaliation because he had not previously filed a discrimination complaint. (R. 121, par. 146-159)

Diersen concluded that his superiors would make his next 6 years with the agency a “living hell” for him if he did not retire not only because of the very serious adverse employment action he would have to accept if he did not retire and because Elliott refused to help him, but also because they a) gave him a performance appraisal for 1997 that was among the lowest in the office even though Trop had advised him in writing on June 26, 1997 that he was exceeding performance expectations in all areas; b) refused to consider raising that appraisal; c) failed to offer any training to correct his alleged performance deficiencies; d) made many false extremely negative statements about his motives, judgment, and abilities; e) threatened to make even worse statements about him if he did not retire; f) denied his September 18, 1997 request to be transferred to the group in which his education, professional certifications, and work experience could be utilized; g) never specified a group that he could transfer to; h) promised to give him a “very strong” letter of recommendation if he retired; and i) never told him that his understanding of the above was incorrect. (R. 121, par. 146-159)

Diersen considered the timing of his superiors’ actions during September of 1997 to be extremely suspicious. Diersen continues to believe that if he did not retire by the end of that month, his superiors would eventually terminate him and cause him to lose his retirement benefits. Diersen continues to believe that the conditions that his

superiors subjected him during September of 1997 were retaliatory for his opposition to GAO's AA goals, retaliatory for his participation in *Chennareddy*, a linked series, cumulative, part of a pattern, onerous, intolerable, and demeaning, and a pretext to force him to retire. (R. 121, par. 146-159)

Rather than suffer what he believed would be 6 years of a living hell and what that would do to his mental and physical health, Diersen succumbed to what he believed to his superiors' efforts to constructively discharge him and retired "under protest" and filed a discrimination complaint on September 30, 1997. He retired because he believed the alternatives his superiors had given him were unbearable, because they made it clear to him that if he did not take early retirement, he had no future with GAO and that the rest of his GAO employment would be a "living hell," and because Elliott convinced him that GAO would ultimately deny any administrative discrimination complaint that Diersen might file. (R. 121, par. 146-159)

#### Diersen's September 30, 1997 Administrative Discrimination Complaint

The primary adverse employment action that Diersen cited in his September 30, 1997 written discrimination complaint was that his superiors had given him two alternatives if he did not retire by the end of September, 1997 -- accept a constructive demotion or an adverse transfer. (R. 123, ex. E, p. 351-362) Diersen did not file a written discrimination complaint any sooner than September 30, 1997 because he feared greater retaliation. (R. 121, par. 49, 152, 153, 191, 303)

Diersen set forth his claims against GAO in a) his 7-page single-spaced attachment to his September 30, 1997 administrative complaint (R. 123, ex. E, p. 351-362), b) his 13-page single-spaced November 16, 1997 affidavit (R. 123, ex. E, p. 371-

381), c) his 93-page single-spaced December 24, 1997 rebuttal affidavit (R. 123, ex. E, p. 382-472), and d) in his 8-page single-spaced March 19, 1998 letter to GAO's Civil Rights Office Director Nilda Aponte (Aponte) and in his 4 attachments to that letter (R. 123, ex. Q, p. 375-423).

Elliott issued his "Counselor's Report" on October 15, 1997. (R. 123, ex. E, p. 363-367) Diersen first became aware of that report on February 23, 1998, when he received a report from GAO's Investigator Marcia Ruskin (Ruskin). (R. 121, Par. 192)

In its October 17, 1997 letter to Diersen, GAO agreed to investigate that it had "discriminated against him" and that he was "harassed to such an extent that (he was) forced to take early retirement." Elliott and Ruskin made it clear to Diersen that he had no real choice but to assent to that characterization of his claims and the limits GAO placed on the scope of their investigation. (R. 121, par.153)

GAO spent almost 7 months (October 1997-April 1998) investigating Diersen's constructive discharge claims. (R. 123, ex. E, pages 263-739) But GAO refused to investigate Diersen's claims that GAO's discriminatory and retaliatory acts had continued for many years, that the adverse employment actions GAO had taken against him were a linked series, cumulative, and part of a pattern, and that Diersen's fear of greater retaliation prevented him from filing a written discrimination complaint any sooner than he did. (R. 123, ex. E, p. 368-369)

On December 23, 1997, Patrick Dolan (Dolan), a white male Chicago office Band II who had been Diersen's immediate supervisor between 1989 and his retirement in 1993 (R. 121, par. 109), provided Ruskin with a signed affidavit that stated that a) prior to Diersen's retirement, he had spoken with Cora Kelly (Kelly) who then was a

senior member of GAO's Chicago office administrative staff and that Kelly had told Dolan that the office had assigned Poole to Diersen "to get rid of" her, that that effort had become a "big problem," and that the office "then tried to get rid of Mr. Diersen;" b) Diersen had been concerned about reverse discrimination for years, that a major age discrimination lawsuit had been filed against GAO, and that Diersen had followed that lawsuit very closely; c) Dolan had "felt for a long time that older white males have not been treated fairly" in GAO and that that unfair treatment was a "pervasive environment;" d) examples of that unfair treatment included Trop's being rehired after she left GAO, a special permanent Band III position reporting directly to GAO headquarters being created for her in Chicago, and her being "wired" for that position; e) when Dolan retired, he believed that he had been viewed as a "dinosaur" since 1989 when pay banding went into effect; f) GAO decided to use buyouts and early outs instead of RIFs as its primary tools for downsizing in the 1990s because that would allow GAO to rid itself of older white males and keep its younger minorities and females; and g) after GAO adopted a "core group concept" for its field offices, it encouraged all its field office staff to gain issue area knowledge relevant to the core group they were assigned to, that the work of the core group Diersen was assigned to was highly technical and important, that Dolan knew of no one in the office other than Diersen who acquired an issue area related graduate degree, that nevertheless GAO does not reward such efforts unless you are on "GAO's fast track," and that because Diersen was not on such a fast track, he "got screwed." (R. 123, ex E, p. 611-614)

On December 26, 1997, Frank Zbylski (Zbylski), a white male Chicago office Band II who took early retirement in January of 1997, provided Ruskin with an affidavit

that stated that a) Diersen's being required to supervise Poole was a "no win situation for him;" b) Diersen "had absolutely no control over" GAO's decision to expand the scope of the audit he was assigned to in 1997 but nevertheless, "Mr. Diersen's (performance appraisal) was impacted;" c) GAO had rejected his request to be assigned to OSI; d) concerning pressure to retire that he "could see the handwriting on the wall when they went to core groups and disbanded my section;" and e) "GAO seems to be pressing to satisfy the younger workers' interests" and "in Chicago during 1995 and 1996, the Band Is were very dissatisfied with their assignments. Management in effect bought off on what the Band Is wanted, that is, to do basically the same work as Band IIs. They were trying to get rid of titles like Evaluator in Charge. This was very demoralizing for the Band IIs. There should be a paper trail in Chicago documenting these changes. I felt that these documents prove that they were on a 'youth kick'." (R. 123, ex. E, p. 623-626)

On December 27, 1997, Melvin Koenigs (Koenigs), a white male Chicago office Band II who took early retirement in 1993, provided Ruskin with an affidavit that stated that a) his reasons for retiring included that his "assignments at the time had become less interesting and my responsibilities had declined" and b) "I know that during the last 10-15 years everyone has been under pressure to improve EEO." (R. 123, ex. E, p. 618-620)

On December 29, 1997, David Jakab (Jakab), a white male Chicago office Band II who took early retirement in 1996, provided Ruskin with an affidavit stating that a) he was "sure that managers in all the GAO regional offices would like to see older Band II employees, regardless of their gender or race, retire because this would open up

promotion possibilities for others. I even commented to this effect at the time I announced my retirement” and b) “The Chicago Office had a vigorous affirmative action program for many years. I believe this has caused some general consternation among some of the employees, particularly White men.” (R. 123, ex. E, p. 615-617)

On March 19, 1998, Diersen sent Aponte a letter in which he identified many serious deficiencies in Ruskin’s investigation. GAO did not correct any of the deficiencies that Diersen identified in that letter. (R. 123, ex. Q, p. 375-423)

On April 29, 1998, GAO denied Diersen’s administrative discrimination complaint and issued a “Notice of Right to Sue” letter. (R. 123, ex. E, p. 819-822)

#### Additional GAO Actions Involving Diersen Since September 30, 1997

Trop provided Ruskin with an affidavit dated December 8, 1997 (R. 121, par. 175); Herman provided Ruskin with an affidavit dated December 2, 1997 (R. 121, par. 174), and Aronovitz provided Ruskin with affidavits dated November 10, 1997 and December 8, 1997 (R. 121, par. 173).

According to reports prepared by Reliable Reference Checks, Inc., Documented Reference Check, and Allison & Taylor, Inc., on five occasions since September 30, 1997 -- July 2, 1998, February 8, 1999, April 14, 1999, June 9, 1999, and July 14, 1999 -- Trop, Herman, and Aronovitz did not follow GAO’s procedures set forth in GAO Order 2294.3 for responding to inquiries from prospective employers about Diersen’s job performance. According to the reports, they failed to respond to inquiries about Diersen’s GAO employment, refused to acknowledge that he was eligible to be rehired by GAO, and failed to keep their promise to him to respond to inquiries about his GAO

employment in a manner consistent with Aronovitz's promised strong letter of recommendation. (R. 121, par. 163)

In addition, since Diersen's retirement, GAO a) issued a letter of recommendation that he believes is not "very strong" (R. 123, Ex. Q. p. 811, 812); b) replaced him with two white males who are substantially younger and substantially less qualified than him (R. 121, par. 166); c) gave leadership roles that Diersen would have been best qualified for to his former coworkers and subordinates who were substantially younger, minority, and/or female (R. 121, par. 168); d) gave his highly visible office initially to a substantially younger minority female who is an outspoken advocate of AA and then to Thomas, a minority who Diersen had supervised (R. 121, par. 165); e) promoted Daniel Lee, a substantially younger Asian-American, to fill the Band II opening created by his retirement (R. 121, par. 325); f) hired and promoted many young minorities and many young females (R. 121, par. 169); g) destroyed many crucial documents that relate to the actions GAO's Chicago office took to achieve its AA goals (R. 121, par. 323, 324, 326, 332, 334); and h) refused to even consider settlement of this litigation.

Since September 30, 1997, Diersen has sought employment commensurate with his education, professional certifications, and work experience, but he has concluded that his prospects for ever finding such employment are extremely poor primarily because GAO refused to promote him beyond GS-13, GAO took so many adverse employment actions against him including forcing him into early retirement, and GAO continues to refuse to even consider settlement of this litigation. (R. 121, par. 315)

## SUMMARY OF ARGUMENT

Summary judgment is not proper in this case because the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there are many genuine issues as to many material facts.

GAO's AA goals for its Chicago office were not justified and its 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 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.

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. Diersen's administrative discrimination complaint included his disparate impact claim and his continuing retaliation claim. The continuing violation doctrine applies to his pre-1997 claims and they are not time barred.

Diersen has made a *prima facie* showing of his age discrimination claims, his reverse discrimination claims, and his retaliation claims. Diersen has made a *prima facie* showing that he was subjected to tangible adverse employment actions including the performance appraisal GAO gave 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 OSI. Diersen has shown that age discrimination, reverse

discrimination, and retaliation took the form of a constructive discharge. Diersen has made a *prima facie* showing that GAO treated him differently from similarly situated employees in different age, race, and gender groups. Diersen has shown that GAO's explanations for its actions, including its appraisal of his performance for 1997, its giving him two alternatives if he did not retire, and its denial of his request for transfer to OSI, are all pretext.

Diersen has shown that GAO retaliated against him after September of 1997 for filing an administrative discrimination complaint, for contacting elected officials, for filing this lawsuit, and for posting his claims on the Internet.

### **STANDARD OF REVIEW**

Summary judgment is proper only when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” F.R.C.P. 56(c). A genuine issue of triable fact exists when “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Pugh v. City of Attica*, 259 F.3d 619, 625 (7<sup>th</sup> Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)). The party seeking summary judgment has the burden of establishing the lack of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). A party will be successful in opposing summary judgment only if it presents “definite, competent evidence to rebut the motion.” *Equal Employment Opportunity Comm’n v. Roebuck & Co.*, 233 F.3d 432, 437 (7<sup>th</sup> Cir, 2000). The Court must consider “the evidentiary record in the light most

favorable to the non-moving party” and must draw “all reasonable inferences in his favor.” *Lesh v. Crown Cork & Seal Co.*, 282 F.3d 467, 471 (7<sup>th</sup> Cir. 2002).

## **ARGUMENT**

Summary judgment is not proper in this case because the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there are many genuine issues as to many material facts. GAO is not entitled to a judgment as a matter of law because GAO has not met the burden of establishing the lack of any genuine issue of material fact. Diersen complied with all the requirements of Local Rule 56 and submitted more than enough definite and competent evidence to rebut GAO’s motion for summary judgment. He has shown that many genuine issues of triable fact exist and that a reasonable jury could return a verdict for him. He has shown that the district court erroneously routinely treated GAO’s arguments as though they were facts, erroneously routinely treated his facts as though they were arguments, improperly characterized many of GAO’s facts as being undisputed even though he had disputed them, did not consider the evidentiary record in the light most favorable to him, and did not draw all reasonable inferences in his favor.

### **I. 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**

The facts show that Diersen exhausted the administrative remedies that GAO gave him before he filed this lawsuit. Diersen pursues in this lawsuit only those claims that he raised in his September 30, 1997 administrative discrimination complaint and claims that are reasonably related to those claims. A strong factual relationship exists

between all of Diersen's claims. The claims that Diersen made in his 1997 administrative discrimination complaint and in this lawsuit describe the same conduct and implicate the same GAO employees.

The district court erroneously accepted GAO's disputed argument that it could review only a few of Diersen's claims because allegedly, he had exhausted his administrative remedies for only a few of his claims and allegedly, the rest of his claims were not reasonably related to those few claims. The district court erroneously accepted GAO's disputed argument that GAO, and therefore the district court, could and should ignore all but a few of the claims that Diersen made in a) his 7-page single-spaced attachment to his September 30, 1997 administrative complaint, b) his 13-page single-spaced November 16, 1997 affidavit, c) his 93-page single-spaced December 24, 1997 rebuttal affidavit, and d) in his 8-page single-spaced March 19, 1998 letter to Aponte and in his 4 attachments to that letter.

The district court erroneously ignored the fact that in GAO's October 17, 1997 letter to Diersen, GAO agreed to investigate that it had "discriminated against him" and that he was "harassed to such an extent that (he was) forced to take early retirement" and erroneously accepted GAO's disputed argument that because GAO did not include in that letter the fact GAO had given him two alternatives if he did not retire – accept a constructive demotion or an adverse transfer – GAO, and therefore the district court, could not and should not consider that extremely important fact. The district court erroneously accepted GAO's disputed argument that because GAO refused to investigate all but a few of Diersen's claims, he failed to exhaust his administrative

remedies for those claims that GAO refused to investigate, and therefore the district court could not and should not review those claims that GAO refused to investigate.

On September 19, 1997, because Diersen's supervisor Trop had given him two alternatives if he did not retire by September 30, 1997 – accept a constructive demotion or an adverse transfer -- and because her superiors Herman and Aronovitz had refused to change those alternatives, he contacted GAO's Civil Rights Counselor Elliott by phone. During that phone conversation with Elliott and during subsequent phone conversations with him, Diersen complained about many discriminatory and retaliatory acts that his superiors had taken against him since he transferred to GAO from IRS to force him to leave the agency because of his race, because of his gender, because of his age, because of his opposition to GAO's AA goals, and because of his participation in *Chennareddy*. Diersen told Elliot that fear of greater retaliation had prevented him contacting him sooner. Elliott advised Diersen against claiming reverse discrimination because Trop was taking a major adverse employment action at the time against Poole. Elliott also advised Diersen against claiming retaliation because he had not previously filed a discrimination complaint. Diersen retired "under protest" on September 30, 1997 because the aforesaid alternatives that Trop, Herman, and Aronovitz had given him were unbearable, because they made it clear to him that if he did not take early retirement, he had no future with GAO and that the rest of his GAO employment would be a "living hell," and because Elliott convinced him that GAO would ultimately deny any administrative discrimination complaint that Diersen might file.

All of Diersen's claims in this action are reasonably related to the claims that he raised in his 7-page single-page description of his claims that he attached to his

September 30, 1997 administrative discrimination complaint. However, Elliott and GAO's Investigator Ruskin made it clear to Diersen that he had no real choice but to assent to their characterizations of his claims and the limits they placed on the scope GAO's investigation. In addition, all of Diersen's claims in this action are reasonably related to the claims he raised in his November 16, 1997 affidavit, his December 24, 1997 rebuttal affidavit, in his March 19, 1998 letter to Aponte, and in attachments to that letter.

Further, all of Diersen's claims in this action describe the same conduct and implicate the same GAO employees, especially Staats, Bowsher, Hinchman, Walker, Trop, Herman, and Aronovitz. Diersen claims that GAO discriminated against him and retaliated against him because of AA goals that Staats, Bowsher, Hinchman, and Walker established. Diersen claims that during 1988 and 1989 and then again in 1997 GAO used an adverse transfer and an unfair performance appraisal to force him to leave the agency because of its AA goals, because of his opposition to those goals, and because of his participation in *Chennareddy*. Trop was one of Diersen's superiors between 1990 his retirement in 1997. Herman was one of Diersen's superiors throughout his entire career. Aronovitz was one of Diersen's superiors between 1988 and his retirement in 1997. Trop was Diersen's immediate supervisor during 1981 and again between 1993 and his retirement in 1997.

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

Diersen 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. Those

employment practices included hiring, audit assignment, leadership role assignment, pay banding, PFP, promotion, and retention. Diersen's disparate impact claims involve decades of GAO's AA policies which were carried out by Staats, Bowsher, Hinchman, and Walker. Diersen has shown that they implemented those goals in GAO's Chicago office as though they were actually quotas. The disparate impact claims that Diersen included in both his administrative discrimination complaint and his fifth amended complaint implicate the conduct of all of GAO's employees since 1980 who were involved with a) hiring, job assignment, pay and bonus determinations, and promotion decisions for GAO's Chicago office and b) implementing GAO's AA goals for its Chicago office.

The district court erroneously accepted GAO's disputed argument that Diersen did not raise his disparate impact claim during GAO's investigation of his administrative discrimination complaint and that disparate impact is not reasonably related to his other claims, and that Diersen's disparate impact claim implicates different conduct and different individuals from his other claims. During GAO's investigation of Diersen's administrative discrimination complaint, he asked Ruskin to obtain statistical information from GAO concerning his disparate impact claims. However, GAO never provided that information either because Ruskin never asked GAO for it or because GAO simply refused to provide it. During the discovery phase of this lawsuit, Diersen asked GAO to provide the same statistical information. However, GAO refused to provide much of what Diersen requested and the Magistrate Judge refused to compel GAO to provide that information. If the district court had compelled GAO to comply with Diersen's discovery requests, Diersen could submit even more overwhelming statistical

correlation evidence to support his disparate impact claims. Diersen could even better demonstrate that many of GAO's employment practices including pay banding and PFP had a disproportionately negative effect on members of his protected class of over age 40 white male Band IIs.

It is unfortunate that GAO refused to investigate how its AA goals were being implemented in its Chicago office and refused to provide Diersen with statistics that show the extent that its employment practices negatively affected older white male Band IIs. However, the criteria is not, as GAO argues, what was the focus of GAO's investigation, the criteria is did Diersen raise disparate impact claims during GAO's investigation of his administrative discrimination complaint and did he include those claims in his fifth amended complaint. The answer to both those questions is yes.

GAO also argues that Diersen's disparate impact claims are not reasonably related to his disparate treatment claims. However, the record shows that all of GAO's personnel policies since at least 1980, including its job assignment policies, performance appraisal policies, and promotion policies, were mandated by GAO's Comptroller Generals to achieve GAO's AA goals. The record also shows that Diersen's Chicago office superiors carried out those policies in a way that discriminated against him.

#### **B. Diersen's Discrimination Complaint Included His Continuing Retaliation Claims**

Diersen's September 30, 1997 administrative discrimination complaint included charges of retaliation, and during GAO's investigation of that complaint, Diersen raised all the acts of retaliation that had occurring up to that point. The district court erroneously accepted GAO's disputed argument that Diersen did not raise his claims of

pre-1997 retaliation during GAO's investigation of his administrative discrimination complaint.

On September 19, 1997, because Trop, Herman, and Aronovitz had given Diersen two alternatives if he did not retire by September 30, 1997 – accept a constructive demotion or an adverse transfer -- he contacted Elliott by phone. During that conversation and subsequent conversations, Diersen complained about all the acts of retaliation that he had suffered up to that point. He complained about many adverse employment actions that his superiors had taken against him since he transferred to GAO to force him to leave the agency because of his race, because of his gender, because of his age, because of his opposition to GAO's AA goals, and because of his participation in *Chennareddy*. Diersen told Elliot that fear of greater retaliation had prevented him contacting him sooner. Elliott advised Diersen that he could not claim retaliation because he had not previously filed a discrimination complaint.

Diersen's administrative discrimination complaint included a 7-page single-spaced description of his claims. All of Diersen's retaliation claims in this action are reasonably related to the claims he raised in that complaint. However, Elliott and Ruskin made it clear to Diersen that he had no real choice but to assent to their characterizations of his claims and the limits they placed on the scope GAO's investigation. Elliott issued his "Counselor's Report" on October 15, 1997. It refers to Diersen's retaliation claims and cites some of GAO's retaliatory acts. GAO did not provide Diersen with a copy of Elliott's report until February 23, 1998. If Elliott had provided Diersen with a copy in a timely manner, Diersen would have asked Elliott to include even more examples of GAO's retaliatory acts. In addition, all of Diersen's

retaliation claims in this action are reasonably related to the claims he raised in his November 16, 1997 affidavit, his December 24, 1997 rebuttal affidavit, in his March 19, 1998 letter to Aponte, and in attachments to that letter. Therefore, Diersen's retaliation claim was exhausted and fall within the "scope of the charge" doctrine.

GAO argues that during his 1997 contacts with Elliott, Diersen failed to complain that Trop, Herman, and Aronovitz were retaliating against him in violation of Title VII and ADEA for his opposition since 1980 to GAO's AA goals and his participation since 1988 in *Chennareddy*. Elliot knows and therefore GAO knows that argument is false and therefore, GAO should be sanctioned for knowingly making a false statement.

**C. The Continuing Violation Doctrine Applies And Diersen's Pre-1997 Claims Are Not Time Barred**

The district court erroneously accepted GAO's disputed argument that Diersen is not entitled to redress for any event that occurred more than 45 days before September 19, 1997 because he allegedly failed to include such events in his 7-page attachment to his September 30, 1997 administrative discrimination complaint. GAO's claim that Diersen did not include pre-1997 events in his attachment to his administrative discrimination complaint is false on its face and GAO should be sanctioned for making that claim.

The continuing violation doctrine applies to Diersen's pre-1997 claims and they are not time barred for the following reasons. GAO's AA goals link all the pre-1997 acts that Diersen complains of to the acts that occurred within 45 days before his first contact with Elliott on September 19, 1997. Pressure to meet GAO's AA goals forced all of Diersen's superiors to discriminate against him and to retaliate against him for complaining about those goals. To meet GAO's AA goals, Diersen's superiors were

forced to de-motivate, to constructively demote, and to force out older white males, especially older white males who complained about the goals. The action that GAO took against Diersen within 45 days prior to September 19, 1997 were the culmination of many years of GAO's efforts to force him to leave the agency so that it could give his position and his office to minorities, to females, and to those who were substantially younger than him. For example, Thomas, a minority employee who Diersen supervised, currently sits in Diersen's former office and leads audits of financial institution regulators that Diersen would have led if GAO had not forced him into early retirement.

The district court erroneously accepted GAO's disputed argument that the "continuing violation" doctrine does not apply because the actions GAO took against Diersen were "not covert." However, many if not all the pre-1997 acts that Diersen complains of were not immediately apparent to him as being discriminatory or retaliatory at the time they occurred. Diersen's superiors were under strict orders to convince him that the many adverse employment actions he suffered were caused by his own actions rather than GAO's AA goals or his complaints about those goals.

Because GAO refuses to admit that its AA goals caused Diersen to suffer adverse employment actions, he is in fact claiming that GAO's actions were covert. Further, because Diersen claims in his second cause of action that GAO took great efforts to make its important personnel policies and practices appear to be facially neutral while in fact they were actually designed to encourage its older white male employees to leave the agency, he is claiming that GAO's actions were covert.

Throughout Diersen's GAO employment, his superiors made it clear to him that they believed the many adverse employment actions that he suffered were not actionable. Even if some of the pre-1997 acts Diersen complains of were not actionable at the time they occurred, cumulatively, they certainly became actionable on September 17, 1997 after his superiors gave him two alternatives if he did not retire – accept a constructive demotion or an adverse transfer. Even if some of the pre-1997 events are not actionable because they are untimely, Diersen has shown that they are relevant to the September 1997 events and therefore admissible.

Diersen's not filing an administrative discrimination complaint until September 30, 1997 was not his "deliberate choice." Diersen had many valid justifications for not filing an administrative discrimination complaint any sooner than he did. The primary justification was as GAO acknowledges "fear of suffering greater retaliation." If Diersen had filed an administrative discrimination complaint before 1981, GAO would have delayed his promotion to GS-11 even longer; if he had filed one before 1982, GAO would have delayed his promotion to GS-12 even longer; if he had filed one before 1986, GAO would never have assigned him to and audit of IRS and GAO would never have promoted him to GS-13; if he had filed one before 1987, GAO would never have assigned him to a second audit of IRS and GAO would never have given him a leadership role on an audit; if he had filed one before 1994, GAO would have forced him to take GAO's first buyout offer; and if he had filed one before 1997, GAO would have forced him to transfer frequently between issue areas so that he could not build up issue area expertise.

Another justification for Diersen's not filing an administrative discrimination complaint sooner was the fact that since 1987, *Chennareddy* has been pending and Diersen was and still is a member of the putative class in that class action lawsuit. Many if not all of Diersen's claims were raised in *Chennareddy* and it would be duplicative and possibly harmful to the success of *Chennareddy* if Diersen were to also raise duplicate claims in an administrative discrimination complaint. It certainly appears that one of the reasons GAO is so happy that *Chennareddy* remains pending for so many years is that as long as the lawsuit remains pending, it discourages if not prevents GAO employees from filing administrative discrimination complaints that allege age discrimination, reverse discrimination, or retaliation for complaining about such discrimination.

The aforesaid facts and the United States Supreme Court decision in *National Railroad Passenger Corporation v. Morgan*, (00-1614) 536 U.S. 101 (2002), 232 F.3d 1008, clearly show that the continuing violation doctrine applies to Diersen's pre-1997 claims and therefore, they are not time barred.

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

Diersen 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. Diersen has made a *prima facie* showing of all his claims with a preponderance of evidence that: (1) "background circumstances"

exist that support an inference that his employer discriminated against older white males and that he engaged in statutorily protected activity, (2) he met or exceeded his employer's legitimate expectations, (3) he suffered tangible adverse employment actions, and (4) he was treated differently from similarly situated employees and former employees who were outside of his protected class and less favorably than similarly situated employees and former employees who did not engage in statutorily protected activity. Diersen has shown with a preponderance of evidence that GAO's allegedly non-discriminatory reasons for its employment actions were a pretext and that race and gender discrimination and retaliation were the real reasons.

The district court erroneously accepted GAO's disputed arguments that Diersen presented no direct evidence that his age, race, or gender was a determining factor in any of the adverse employment actions GAO took against him; that Diersen had not established the third and fourth prongs of the McDonnell Douglas burden-shifting method, and therefore, had not presented a *prima facie* case of discrimination; and that Diersen had not show that reasons GAO gave for its adverse employment actions were pretextual. However, as show below, because Diersen has made a *prima facie* showing of his age discrimination claims, his reverse discrimination claims, and his retaliation claims, he is entitled to present them to a jury.

**A. Diersen Has Shown That He Was Subjected To Tangible Adverse Employment Actions**

Diersen has made a *prima facie* showing that GAO subjected him to many tangible adverse employment actions that involved significant changes in his employment status involving hiring, audit assignments, leadership roles, promotions, bonuses, and pay increases. Diersen has made a *prima facie* showing that GAO

frequently used tangible employment actions to bring the official power of the agency to bear on him to retaliate against him for opposing GAO's AA goals and for participating in *Chennareddy*.

The district court erroneously accepted GAO's disputed argument that Diersen did not show "that the GAO decisions he complains of rise to the level of adverse action." Giving an employee two alternatives if he does not retire – accept a constructive demotion or an adverse transfer – on its face is an adverse employment action.

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

The performance appraisal that GAO gave Diersen for 1997, as described above, 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.

Diersen has shown that the appraisal was not designed to serve as a morale-builder or a motivator. It was designed to force him to retire. Because the appraisal was so low, it would have warranted GAO's second lowest if not its lowest PFP ranking, and therefore, either a minimal or no merit pay increase. GAO's plan to force Diersen to retire early included making increasing use of the extreme subjectivity in GAO performance appraisal system to give him progressively lower performance appraisals.

The district court erroneously accepted GAO's disputed argument that the 1997 performance appraisal GAO gave Diersen did not "cost him a promotion, diminished his chance for a pay increase, or resulted in a demotion" and that the ratings in the appraisal were not "adverse" or atypical at all. 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.

## **2. GAO's Denial Of Diersen's Request For Transfer To OSI Was A Tangible Adverse Employment Action**

GAO's denial of Diersen's request for transfer to OSI was a tangible adverse employment action because GAO had given 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. However, a transfer to OSI would have been the least adverse.

The district court erroneously accepted GAO's disputed arguments that a) one of the two alternatives that GAO gave Diersen if he did not retire, namely, transfer to another group in the office, was not an adverse employment action; b) if Diersen did not transfer to another group, he would not have to accept a constructive demotion; c) GAO's refusal to transfer Diersen to OSI did not cause him to "lose current benefits,

salary, or responsibilities;” and d) the reasons GAO gave for refusing to transfer him were legitimate.

Diersen did not ask GAO to transfer him to OSI until September 18, 1997 and he never would have done so if Trop had not given him two alternatives on September 17, 1997 -- accept a constructive demotion or an adverse transfer. Because Diersen had acquired over 8 years experience auditing financial industry regulators, because he had become a Certified Financial Services Auditor in 1996, because he had just finished spending a tremendous amount of his personal time and money to acquire a specialized masters degree that was directly related to auditing financial regulators, and because transferring to OSI would have rendered much of that experience and education useless, only an adverse employment action could have caused him to ask for such a transfer.

Diersen’s initial contact with Elliott was on September 19, 1997 and Elliott issued his “Counselor’s Report” on October 15, 1997. However, GAO did not provide Diersen with a copy of that report until February 23, 1998. Elliot’s summary of Diersen’s claims in that report is negligently if not intentionally misleading. 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.

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. GAO could make most productive use of Diersen's education, work experience, and professional certifications by assigning him to audits of IRS. GAO could make the second most productive use of his qualifications by continuing to assign him to audits of financial institution regulators. GAO could make the third most productive use of his qualifications by assigning him to OSI because he did investigative work while he worked for IRS, because he had become a Certified Fraud Examiner in 1994, and because he had become a Forensic Accountant in 1997. 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.

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

During Diersen's GAO employment, many of his superiors, coworkers, and subordinates subjected him to many thinly veiled verbal threats of adverse employment actions. They constantly ascribed evil motive and/or bad judgment to just about everything Diersen said or did. Some routinely insulted him and ridiculed his conservative values and beliefs. These were not merely "stray remarks." Their severe unfair criticism of his job performance permeated the workplace. Because they rapidly realized that Diersen would not drop his opposition to GAO's AA goals, their objective

rapidly became forcing him to leave the agency. Their efforts to force him to leave the agency increased dramatically after he became age 40 in 1988 and an active participant in *Chennareddy*. However, toward the end of 1989, they scaled back their efforts after he complained to his Congressman Henry Hyde. But during September of 1997, their efforts to force him to leave the agency resumed in full force.

Diersen has shown 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. Diersen has shown that the work environment that GAO subjected him to during 1997 was even more egregious than a hostile work environment. He has shown that during that year, GAO subjected him to a work environment that was one of frequent and severe conduct that was so threatening and humiliating and offensive that it unreasonably interfered with his work performance. Diersen has shown that taking early retirement was the only way for him to extricate himself from an intolerable hostile work environment. Diersen has shown that the intolerable conditions were motivated by discriminatory and retaliatory intent. Further, Diersen has shown that there were many extraordinary conditions that prevented him from remaining on the job while seeking redress.

If Diersen did not take early retirement by September 30, 1997, it would be 6 years before he would again be eligible to retire. Diersen has shown that his superiors made it clear to him that if he did not retire by September 30, 1997, they would make the next six years with the agency even more of a "living hell." They made it clear to Diersen that they would treat him far more harshly than they had treated Poole. They made it clear to Diersen that if he did not retire, they would use the tremendous

subjectivity in GAO's performance appraisal system to rapidly become even more critical of his performance and give him lower and lower performance appraisals to justify terminating him.

The district court erroneously ignored all but two of the actions that GAO took against Diersen in September of 1997 and erroneously accepted GAO's disputed argument that he had not demonstrated that the actions that GAO took against him during that month in conjunction with actions that GAO had previously taken against him constituted a constructive discharge and erroneously concluded that he failed "to put forth any evidence of a discriminatory work environment so intolerable that a reasonable person would have been compelled to resign."

Trop told Diersen on September 17, 1997 if he did not somehow arrange to transfer to another group in the office, he would no longer be allowed to supervise employees and he would be supervised by employees who he had formerly supervised. That obviously was a "threat" and an adverse employment action intended to not only diminish Diersen's salary and job responsibilities, but to force him to retire. GAO's denial of Diersen's request to be transferred to OSI significantly changed Diersen's employment status.

When Diersen filed his discrimination complaint, he had many valid reasons to believe that his superiors would make the rest of his GAO career a "living hell." The primary reason was that Trop had given him two alternatives on September 17, 1997 if he did not retire by September 30, 1997 – accept a constructive demotion or an adverse transfer. Diersen has shown that age discrimination and reverse discrimination took the form of a constructive discharge and that he is entitled to present his claims to a jury.

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

The district court erroneously accepted GAO's disputed argument that Diersen had not shown that GAO routinely treated its younger minority employees and its younger female employees more favorably than its older white male Band II employees.

Diersen has shown that GAO did not require minorities or females with similar qualifications to accept downgrades to transfer to GAO from other federal agencies. Diersen has shown that GAO consistently gave his superiors, coworkers, and subordinates 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.

Diersen has shown that GAO assigned Thomas, a minority, to audits of financial institution regulators shortly after he joined GAO so that both he and GAO would productively use the pre-GAO knowledge he had gained while employed in the financial markets. Diersen has shown that GAO refused to assign Diersen, a white, to audits of IRS during his first 6 years with the agency, and except for a 3 year period between 1986 and 1988, GAO refused to assign Diersen to audits of IRS for the remainder of his GAO employment. GAO allowed Thomas, a minority, to use his pre-GAO knowledge while, except for a 3 year period, GAO refused to allow Diersen, a white, to use his pre-GAO knowledge.

**C. Diersen Has Shown That GAO's Explanation For Its Actions Is Pretext**

The district court erroneously accepted GAO's disputed argument that the reasons it gave for the adverse actions it took against Diersen during September of

1997 to force him to retire were legitimate and that GAO honestly believed those reasons.

Based on Trop's December 8, 1997 affidavit, Herman's December 2, 1997 affidavit, and Aronovitz's November 10, 1997 and December 8, 1997 affidavits, it appears that 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.

Many people, including Staats, Bowsher, Hinchman, Walker, Trop, Herman, and Aronovitz, who believe in the "end" of race and gender based preference giving do not hesitate to use the "means" of ascribing mental problems to those who oppose such preference giving. 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.

**1. GAO’s Reasons For Its Appraisal Of Diersen’s Performance For 1997 Was A Pretext**

The district court erroneously ignored the evidence Diersen presented and accepted Trop’s disputed reasons why she gave Diersen a performance appraisal for 1997 that was extremely low in relation to all the other appraisals given in the office except for the one that Diersen gave Poole.

To justify the adverse employment actions it took against Diersen during September of 1997, GAO argues that during 1997, Diersen’s job performance deteriorated rapidly because he intentionally created many stressful situations in his personal life that he was unable to deal with. The situations that Diersen allegedly was unable to deal with included pursuing litigation, undergoing elective surgery, and completing the requirements for a master’s degree. GAO argues that those situations allegedly resulted in a) Trop having to make substantial revisions to virtually everything Diersen wrote, b) Diersen failing to adequately review a draft report, and c) Diersen inappropriately passing work on to his coworkers and subordinates. GAO alleges those alleged results resulted in his relationships with his coworkers and subordinates being negatively affected.

However, Diersen has shown that Trop's criticisms of his performance were subjective, unwarranted, and unfair. Trop routinely sees a need to substantially revise just about all writing, including her own writing. Trop can and does routinely find what she believes to be serious errors in published documents, including published GAO reports, and she routinely totally rewrites documents, including her own documents. Trop can and does find fault with anyone's review of anything. Trop routinely directed Diersen to give his subordinates every opportunity to demonstrate their potential, but then criticized him for doing so. Further, Diersen has shown that Trop's success in foisting on Diersen all the audit group's problems negatively affected Diersen's relationships with his coworkers and subordinates.

Further, Diersen has shown that GAO's explanation for his 1997 performance appraisal is a lie and a phony reason offered by GAO to cover its tracks. All of the performance appraisals that Trop gave Diersen's coworkers for 1997 were dramatically higher than the one she gave him. Diersen has shown that if he had been young minority or a young female, if he did not oppose GAO's AA goals, or if he was not an active participant in *Chennareddy*, Trop would have given him a dramatically higher 1997 performance appraisal and Trop would not have given him two alternatives he did not retire – accept a constructive demotion or an adverse transfer.

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.

## **2. GAO’s Reason For Its Denial Of Diersen’s Request For Transfer To OSI Was a Pretext**

The district court erroneously accepted GAO’s disputed reasons why it refused to transfer Diersen to OSI.

GAO argues that when Diersen filed his discrimination complaint, 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.

Diersen told Herman and Aronovitz he could no longer work with Trop because she had given him those two alternatives. He told Herman that he did not have much respect for the managers of the other audit groups in the office except for the OSI manager because they all had discriminated and retaliated against him because he opposed GAO’s AA goals and because he participated in *Chennareddy*. Even though the group that audited IRS would have been by far the most logical group for Diersen to ask for transferred to, he did not do so because GAO had made it clear to him that it

would reject such a request. He asked to be reassigned to OSI because that was the next most logical group for him to be reassigned to.

Because none of the other groups in its Chicago office had vacancies, GAO never really offered Diersen an opportunity to transfer to another group. As best, GAO offered him the opportunity to ask for a transfer. Diersen has shown that GAO's explanation for its denial of his request to be transferred to OSI was a lie and a phony reason offered by GAO to cover its tracks. He has shown that GAO would have created an opening and transferred him to OSI if he had been younger, if he had been a minority, if he had been a female, if he did not oppose GAO's AA goals, or if he was not an active participant in *Chennareddy*. GAO argues that it refused to transfer Diersen to OSI because "there was no vacant position" in that group. However, that argument is false. If that argument was true than GAO's claim that it offered Diersen a transfer was false because in September of 1997, there were no vacant positions in GAO's Chicago office. GAO argues that during September of 1997, it "offered" Diersen "the opportunity to transfer to another group area." However, that argument is false. Because there were no vacancies in the other groups, there was no "opportunity." GAO argues that Diersen retired because GAO did not reassign him to OSI. However, Diersen resigned primarily because GAO gave him two alternatives if he did not retire – accept a constructive demotion or an n adverse transfer – and because GAO made it clear to him that if he did not retire, the rest of his GAO employment would be a living hell.

### **3. GAO's Explanation For Why Diersen Retired Is Pretext**

The district court erroneously accepted GAO's disputed explanation why Diersen retired, namely, that he retired early because early retirement was available and because GAO refused to transfer him to OSI.

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.

Diersen has shown that GAO's explanation for his decision to take early retirement is a lie and a phony reason offered by GAO to cover its tracks. Diersen has shown that GAO made the workplace intolerable for Diersen not only because he was over age 40, white, male who had a position and an office that GAO wanted to give to those who were minority, female, and/or younger, but because he opposed GAO's AA goals and because he actively participated in *Chennareddy*.

### **III. 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**

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.

Diersen has shown that GAO's investigation of his discrimination complaint was conducted differently from GAO employees who did not oppose GAO's AA goals or participate in *Chennareddy*. Diersen has shown that the affidavits that Trop, Herman, and Aronovitz gave Ruskin contained many false statements. Diersen has shown that GAO ignored the statements that Dolan, Zbylski, Koenigs, and Jakab made in their affidavits in support of Diersen's claims. Diersen has shown that GAO sabotaged his job search when it refused to provide him with its promised strong letter of recommendation and when on at least five occasions it knowingly, intentionally, and willfully failed to follow its procedures for responding to inquiries from prospective employers about his job performance. Diersen has established a *prima facie* post-retirement case of retaliation.

## **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: June 3, 2004

Respectfully submitted,

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David John Diersen  
Plaintiff-Appellant, pro se

**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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David John Diersen,  
Plaintiff-Appellant, pro se

**PROOF OF SERVICE**

I hereby certify that on June 3, 2004, I delivered 15 copies of this brief and 10 copies of its attached appendix to the Clerk of the United States Court of Appeals, Seventh Circuit, and 2 copies of this brief and 1 copy of its appendix to counsel for GAO:

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**CIRCUIT RULE 30(d) STATEMENT**

I hereby certify that the attached appendix contains the following and complies with Circuit Rule 30(d).

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David John Diersen,  
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<u>Doc. No.</u>	<u>Document</u>
37.	Plaintiff David John Diersen (Diersen) April 25, 2001 fifth amended complaint and affidavit
107.	Magistrate Judge Nan R. Nolan June 5, 2003 order denying Diersen May 19, 2003 motion for sanctions for spoliation of relevant documents, to compel discovery, and to extend discovery
110.	Diersen June 25, 2003 objections to Magistrate Nolan June 5, 2003 order
117.	Diersen July 21, 2003 reply to GAO July 14, 2003 response to Diersen June 25, 2003 objections to Magistrate Nolan June 5, 2003 order
118.	Judge Amy J. St. Eve July 28, 2003 order overruling Diersen June 25, 2003 objections to Magistrate Nolan June 5, 2003 order
119.	Diersen August 18, 2003 opposition to GAO July 3, 2003 motion for summary judgment
120.	Diersen August 18, 2003 memorandum of law in support of his opposition to GAO July 3, 2003 motion for summary judgment
121.	Diersen August 18, 2003 affidavit and statement of additional material facts in support of his opposition to GAO July 3, 2003 motion for summary judgment
122.	Diersen August 18, 2003 response to GAO July 3, 2003 statement of material facts
123.	Diersen August 18, 2003 index of exhibits in support of his August 18, 2003 affidavit and statement of additional material facts
128.	Diersen October 3, 2003 response to GAO September 16, 2003 motion to strike his affidavit and statement of additional material facts and his response to GAO's statement of material facts
129.	Judge St. Eve November 3, 2003 order granting GAO July 3, 2003 motion for summary judgment and constructively granting GAO September 16, 2003 motion to strike Diersen August 18, 2003 affidavit and statement of additional material facts and his August 18, 2003 response to GAO's statement of material facts