



Department of Energy

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

SECURITY AND CONTINUITY OF OPERATIONS

September 3, 2013

In reply refer to: NN-1

Patrick Barton

Ex 6

FOIA #BPA-2013-01443-F

Dear Mr. Barton:

This is the final response to your request for records that you made to the Bonneville Power Administration (BPA), under the Freedom of Information Act (FOIA), 5 U.S.C. 552.

You requested the following:

“All legal filings and transcripts associated with pretrial events, the trial itself, and any settlement agreements associated with the age bias class action lawsuit heard in 1999 before U.S. District Court Magistrate John Jelderks.”

Response:

BPA was represented in this case by the U.S. Attorney's Office and as a result, BPA is not the agency of record. These records are not required to be maintained, and have not been maintained by BPA. One document was found and is released in its entirety.

To obtain a copy of these records please contact:

U.S Attorney's Office
District of Oregon
1000 SW Third Ave, Suite 600
Portland, Oregon 97204
(503)727-1000

Pursuant to 10 CFR 1004.8, if you are dissatisfied with this determination, or the adequacy of the search, you may appeal this FOIA response in writing within 30 calendar days of receipt of a final response letter. The appeal should be made to the Director, Office of Hearings and Appeals, HG-1, Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585-1615. The written appeal, including the envelope, must clearly indicate that a FOIA Appeal is being made.

Fees are being waived for this request.

I appreciate the opportunity to assist you. Please contact Kim Winn, FOIA Specialist, at 503-230-7305 with any questions about this letter.

Sincerely,

/s/Christina J. Munro

Christina J. Munro

Freedom of Information Act/Privacy Act Officer

Enclosure: Responsive document

RECEIVED

JUN 21 1999

U.S. ATTORNEY
PORTLAND, OR

JUN 21 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PATRICK J. FOX, PATRICIA E. WEBER,)
DOUGLAS G. MONTGOMERY, and all)
other similarly situated,)

Plaintiffs,)

v.)

WILLIAM RICHARDSON, Secretary)
of Energy, BONNEVILLE POWER)
ADMINISTRATION, an agency of)
the United States Department)
of Energy,)

Defendants.)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Civil No. 95-1873-JE

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JELDERKS, Magistrate Judge:

Patrick Fox, Patricia Weber, and Douglas Montgomery are the class representatives in this age discrimination action brought against defendants William Richardson, United States Secretary of Energy, and the Bonneville Power Administration (BPA). The class consists of those current and former BPA employees who were 50 years of age or older anytime during 1994, unsuccessfully applied for a promotion during the BPA reorganization carried out during that year, and who did not opt out of this action.

This action is based upon the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a. Plaintiffs originally asserted both a disparate treatment claim, alleging that BPA intentionally discriminated against them on account of their age in the selection of employees for promotion during the reorganization, and a disparate impact claim alleging that they were harmed by a facially neutral policy that "forcefully emphasized the promotion of women, minorities, and younger workers" during the transformation. I dismissed this latter claim before trial because it failed to allege that plaintiffs were disparately affected by a policy that was in fact facially neutral: A policy that "forcefully emphasized" the promotion of particular groups,

specifically including "younger workers" cannot be characterized as facially neutral, and cannot be analyzed as a disparate impact claim. See, e.g., Rose v. Wells Fargo & Co., 902 F.2d 1417, 1424 (9th Cir. 1990) (plaintiff must identify facially neutral policy or practice in order to state prima facie disparate impact claim).¹

Plaintiffs' claim of intentional discrimination was presented to the court during a seven-day trial that began on May 3, 1999, and ended on May 12, 1999. Pursuant to Fed. R. Civ. P. 52(a), my factual findings and legal conclusions are set out below.

FINDINGS OF FACT

BPA, a federal agency within the Department of Energy, is a major producer, distributor, and marketer of electricity in

¹Dismissal of this claim makes it unnecessary to reach the question whether disparate impact cases are viable in actions brought pursuant to the ADEA following the Supreme Court's decision in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993). Though the Ninth Circuit has not directly addressed this issue, five other circuits have either answered that question negatively or cast doubt upon the continued applicability of disparate impact analysis in age discrimination actions. See Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999); Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir.), cert. denied, 116 S. Ct. 2500 (1996); EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994); Lyon v. Ohio Educ. Ass'n & Professional Staff Union, 53 F.3d 135 (6th Cir. 1995); DiBiase v. Smith Kline Beecham Corp., 48 F.3d 719 (3d Cir. 1995). Two circuits continue to recognize disparate impact claims in actions brought pursuant to the ADEA. District Council 37 v. New York City Dep't of Parks and Recreation, 113 F.3d 347 (2nd Cir. 1997); Houghton v. SIPCO, Inc., 38 F.3d 953 (8th Cir. 1994). In a recent opinion issued in this district, the Honorable Garr King concluded that "the disparate impact theory of liability is not cognizable under the ADEA...." EEOC v. Forest Grove School Dist. No. 15, No. 98-497, slip op. at 9 (D. Or. Feb. 3, 1999).

several states in the western United States. This class action arises from a major reorganization of BPA known as the "Transformation" which was conducted during 1994. BPA officials who planned and initiated the reorganization thought that the Transformation was necessary in order for the agency to operate more efficiently and to carry out its mandated objectives in a de-regulated electric utility industry. In carrying out the Transformation, BPA sought to reassign its employees into positions more like those associated with private industry, and attempted to adopt an organizational structure that was more like that employed in the private sector.

BPA began to implement the Transformation in early 1994 with a reorganization of Senior Executive Service (SES) level positions. These are the highest level positions in BPA, and are held by persons who are technically not BPA employees, but instead are employees of the United States Department of Energy. The SES positions in the reorganized BPA were filled by transferring a number of existing SES-level personnel into new positions, and by recruiting and promoting several General Services (GS) level-15 employees to SES status. The highest level SES employees, known as "senior vice presidents" in the reorganized BPA, reported to Sue Hickey, who was selected by Randy Hardy, BPA Administrator at the time, as BPA's Chief Operating Officer. The second tier SES employees, known as "vice presidents" in the reorganized BPA, reported to the senior vice presidents. The SES positions in the new

organizational structure were filled by late March 1994, with the SES level employees assuming new responsibilities and also functioning in their old positions until the Transformation was completed.

After the new SES positions were filled, the Transformation proceeded on a grade-by-grade basis. Most of the positions from SES down to the GS-13 level were assigned new titles. Some of the "new" positions were very similar to existing positions, while the functions of other positions were significantly altered. A few positions were exempted from these changes, and were not opened for a competitive application process during the Transformation. Almost all employees in GS-13 level and higher positions were placed in positions with new titles, many of which had new functions. All employees were assured that they would be offered positions with pay and grade at least equal to those that they held before the Transformation was instituted. No employees were involuntarily terminated as part of the Transformation, though some accepted an offer to leave the agency through a Voluntary Separation Incentive (VSI) program that was instituted to help attain the goal of reducing the total number of employees.

During the Transformation process, the newly-created and/or newly-titled positions were publicized to the BPA work force through Vacancy Announcements. These announcements were circulated internally, because virtually all of the positions were filled from within the organization. The announcements

specified the skills, knowledge, and abilities sought for each position. Employees were encouraged to apply for new positions, and could apply for as many positions as they wished. Some employees applied for many positions. Some applied for only one position or for a few positions. With the knowledge that everyone had secure employment, some employees filed no applications. Applications were screened so that only those applicants satisfying the minimum qualifications established for each position would be considered. Because BPA chose not to use a rating system, the names of all applicants who met the minimum qualifications for a position were presented to the relevant selecting officer.

The vacancies to be filled during the Transformation were not announced as lateral appointments or promotions, but instead were simply announced by job title and GS level. Therefore, whether selection for a given position constituted a promotion or a lateral transfer for the selected candidate depended on the successful applicant's pre-selection GS level. BPA management did not instruct the managers making the selection decisions to consider whether or not the position would be a promotion for any particular applicant, and there is no evidence that managers considered whether appointments would constitute promotions in considering the applicants. Approximately 816 positions were filled from the GS-13 through GS-15 levels during the Transformation. Approximately 249 of the appointments were promotions for the individuals selected.

The employees who were not promoted retained their GS level and rate of compensation.

During the Transformation, designated "selecting officials"--generally supervisory employees who had themselves been recently selected into positions during an earlier stage of the Transformation--chose the employees who would be working under their supervision. Under this system, those selected to fill the SES positions became the selecting officers for the new positions created at the GS-15 level. The managers selected at the GS-15 level in turn selected the successful applicants for the GS-14 positions, and GS-14 level managers in turn selected the applicants who filled the new GS-13 positions. The selecting officials were provided with the candidates' application materials and a job description setting out the essential knowledge, skills, and abilities required for the positions. The ages of the applicants were not compiled or made available to the selecting officials. The selecting officials typically interviewed applicants. They were often assisted by advisory panels, and sometimes sought information about the applicants from other sources within BPA. More than 150 individual selecting officials chose the applicants to fill the vacancies created during the Transformation.

After selection of GS-13 level employees was completed, all the remaining positions below that level, including all of the secretarial positions, were moved into the various organizations that made up the newly-reorganized BPA. During

this process, some employees were reassigned, some employees were promoted, and other employees retained their old positions, but were technically shifted into a new organizational structure in a transition referred to as a "realignment."

Because many employees applied for more than one of the new positions that were announced during the Transformation, a particular candidate was sometimes the preferred applicant for more than one position. In order to address this situation, BPA instituted a process known as "Collaboration," applicable to the selection of candidates at the GS-13 and higher levels, through which selecting officials at each level were able to learn if other selecting officials had also chosen their preferred applicant for a given position. Officials conferred to determine whether the same applicant had been selected for more than one position, and to determine which position was more appropriate for the applicant where such conflicts existed. The SES selecting officials engaged in "Collaboration" to resolve conflicts in selection of GS-15 level employees. Before finalizing their selections for the new GS-14 level positions, the GS-15 level managers conducted a "Collaboration." Successful candidates for GS-14 level management positions subsequently conducted a "Collaboration" in making final selections for GS-13 level positions.

During the Transformation and the phases of Collaboration, high-level BPA managers reminded selecting officials to fully and carefully consider applications from

ethnic minority and female employees. These instructions were consistent with an effort to increase the representation of women and minorities in management positions that had been going on for a number of years as BPA sought to redress what the agency recognized as a long standing under-representation of these groups in management.

The objective of increasing the advancement opportunities for women and minorities was never stated in terms of numerical targets or quotas, and did not compel the selection of any female or minority candidates for positions for which males or non-minority applicants were found to be more qualified. Selecting officials were not told to give preference to minority and female candidates over other more qualified candidates, and were never told that a particular position should be filled by a female or minority applicant. Likewise, there is no evidence that selecting officials were ever instructed or urged, directly or indirectly, to give any preference to younger workers in filling vacancies during the Transformation. The selecting officials who testified at trial and whose declarations were admitted into evidence uniformly stated that they filled the vacancies by choosing the candidates who they thought were most qualified without regard to race, gender, or age. These witnesses included former as well as current BPA employees. That testimony was credible and is consistent with the documentary evidence, and I find that the selection process carried out during the Transformation was merit-based. In making this finding,

I need not conclude that the candidate who was truly the most qualified was selected in every placement decision. "Merit" cannot always be quantified with scientific precision, and it is likely that some errors were made in evaluating the relative merits of applicants. However, the evidence clearly establishes that BPA intended that selections be made on the basis of merit, and that selecting officials attempted to make their selections on that basis.

The Transformation was carried out in several phases, starting with selection of the SES level candidates in March 1994, and concluding with the reassignment, promotion, and realignment of the positions lower than GS-13 that was largely completed by the end of September of that year. In a report to the Department of Energy dated September 8, 1994, BPA Administrator Hardy stated that the restructuring was nearly complete, and that the reorganization would be effective on October 2, 1994.

At trial, the named plaintiffs and several other class members presented evidence that they unsuccessfully applied for positions that would have been promotions for them during the Transformation, and that the successful applicants for some of those positions were less than 50 years old at the time. In response, BPA produced credible and persuasive evidence that the selection for each of the positions in question was based upon merit, and established that the selecting officials had valid, non-discriminatory reasons for their decisions. I find that the specific selections that

class representatives and other class members directly challenged at trial were made upon the basis of merit, and that plaintiffs have not established that age was a motivating factor in selecting the successful candidates for these positions.

BPA does not have complete information concerning all of the applicants and applications for the positions filled during the Transformation. The parties therefore could not determine the characteristics of all the successful and unsuccessful candidates for each of the hundreds of positions filled. Plaintiffs' expert statistician created data sets for the employees for whom information was available. Statistical analysis of this data shows that more employees under age 50 than would be expected under plaintiffs' model were selected for positions that constituted promotions for those individuals. Conversely, the analysis showed that fewer employees over the age of 50 than would be expected under plaintiffs' model were selected for positions that constituted promotions. Plaintiffs' statistician presented data for the GS-13 through GS-15 levels showing that gender and minority status correlated positively to being selected for a position that was a promotion for the successful candidate. Plaintiffs' statistician found that age correlated even more positively, with the likelihood of being selected to a position constituting a promotion increasing by a factor of two for employees less than 50 years old.

announce and fill promotions, but instead announced and filled vacancies. Applicants often applied both for lateral positions and positions that would be promotions if they were selected. The selecting officials were not concerned as to whether particular selections were promotions for the applicants involved, but instead had every incentive to simply select the candidate whom they considered best qualified. From the perspective of a selecting official, any applicant selected for a position was the "successful" candidate regardless of whether the position was a promotion for that individual. The fact that both selections constituting promotions and selections constituting lateral transfers reflected successful applications greatly complicates analysis of the treatment of class members, and is not accounted for in plaintiffs' statistical analysis. That analysis simply makes no provision for the important fact that a class member's selection for a position that was a lateral transfer could evidence a preference for the class member over a younger worker.

In sum, I find that plaintiffs' statistical model is not adequately responsive to the complexities and realities of the selection process that BPA used during the Transformation. It is not clear that a statistical model could be devised that would adequately address all of the factors--including the effect of successful applications for lateral positions--that need to be considered in order to draw reliable inferences regarding BPA's treatment of plaintiffs' class during the

Transformation. However, it is clear to me that plaintiffs' statistical analysis does not.

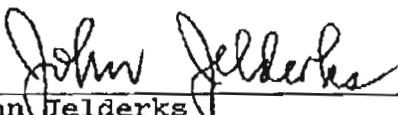
CONCLUSIONS OF LAW

The ADEA requires employers to evaluate their employees on their merits and not on their age. Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 422 (1985). In order to prevail in this action, plaintiffs must establish that BPA intentionally discriminated against employees who were more than 50 years old on the basis of their age in carrying out the 1994 Transformation. See e.g., Hazen Paper Co. v. Biggins, 507 U.S. 604, 608 (1993). Circumstantial, direct, and statistical evidence can be used to make that showing. Sengupta v. Morrison-Knudsen Co., Inc., 804 F.2d 1072, 1075 (9th Cir. 1986).

Based upon my review of the evidence, I conclude that plaintiffs have not established that BPA intentionally discriminated against the class representatives or the class on the basis of age. Plaintiffs presented minimal and unpersuasive nonstatistical evidence supporting their intentional discrimination claim. Although plaintiffs' statistical evidence provides some support for plaintiffs' claim, it is insufficient to support the conclusion that BPA intentionally discriminated against class members on the basis of their age, because the analysis failed to address the complex and highly unusual nature of the transformation process, or to account for the effect of lateral transfers.

Even if I concluded that plaintiffs' statistical evidence was sufficient to create a prima facie case of intentional discrimination, I would find in BPA's favor because it has established through substantial, credible, and convincing evidence that selections were based upon factors other than age during the transformation. BPA is entitled to judgment in its favor.

DATED this 21st day of June, 1999.



John Jelderks
U.S. Magistrate Judge