

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KATHLEEN A. BREEN, <u>et al.</u> ,)	
)	
Plaintiffs,)	Case No. 1:05CV00654-RWR
v.)	
)	
MARY E. PETERS, <u>et al.</u> ,)	
)	
Defendants.)	
)	

**ANSWER TO FIRST AMENDED
CLASS ACTION COMPLAINT**

Defendants Mary E. Peters, Secretary, United States Department of Transportation, and Marion C. Blakey, Administrator, Federal Aviation Administration (FAA), by and through undersigned counsel, submit the following Answer to Plaintiffs' First Amended Class Action Complaint ("Complaint"):

The following defenses are applicable, where appropriate, to any and all of Plaintiffs' claims for relief.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs cannot establish a prima facie case of discrimination.

THIRD AFFIRMATIVE DEFENSE

Defendants had legitimate, non-discriminatory reasons for taking the allegedly discriminatory actions complained of.

FOURTH AFFIRMATIVE DEFENSE

The Court lacks jurisdiction over the subject matter of plaintiffs' disparate impact claim.

FIFTH AFFIRMATIVE DEFENSE

The alleged discriminatory actions were based on reasonable factors other than age. While specifically denying that plaintiffs' age motivated the employment practice alleged to be unlawful, defendants aver as an alternative defense that if plaintiffs' age were a motivating factor, defendants would have taken the same action in the absence of such factor.

SIXTH AFFIRMATIVE DEFENSE

Certain of Plaintiffs' claims are barred by the applicable statute of limitations.

Answering the specific numbered paragraphs of the Complaint, defendants state:

1. Defendants admit that the FAA is an agency of the Department of Transportation.

As to the fifth sentence of paragraph one of the Complaint, defendants admit the averments of this sentence only to the extent that the relief requested therein is sought by the plaintiffs but deny that plaintiffs are entitled to such relief or to any other relief. The remainder of paragraph one of the Complaint constitutes Plaintiffs' characterization of their action and conclusions of law as to which no response is required but to the extent a response is required, they are denied.

2. Defendants admit the averments of paragraph two of Plaintiff's Complaint only to the extent that the relief requested therein is sought by plaintiffs but defendants deny that plaintiffs are entitled to such relief or to any other relief. The remainder of paragraph two of the

Complaint constitutes Plaintiffs' characterization of their action and conclusions of law as to which no response is required but to the extent a response is required, they are denied.

Parties¹

3. Defendants admit the averments of paragraph three of the Complaint except deny that the named individual plaintiff is a class representative.

4. Defendants admit the averments of paragraph four of the Complaint except deny that the named individual plaintiff is a class representative.

5. Defendants admit the averments of paragraph five of the Complaint except deny that the named individual plaintiff is a class representative and aver that the named individual plaintiff was 46 years old as of the date of filing of the Complaint.

6. Defendants admit the averments of paragraph six of the Complaint except deny that the named individual plaintiff is a class representative.

7. Defendants admit the averments of paragraph seven of the Complaint except deny that the named individual plaintiff is a class representative.

8. Defendants admit the averments of paragraph eight of the Complaint except deny that the named individual plaintiff is a class representative.

9. Defendants admit the averments of paragraph nine of the Complaint except deny that the named individual plaintiff is a class representative and aver that the named individual plaintiff was 64 years old as of the date of filing of the Complaint.

¹ All headings and subheadings herein come from the Complaint. Defendants use them herein for clarity but do not admit the substance of any of Plaintiffs' headings or subheadings.

10. Defendants admit the averments of paragraph ten of the Complaint except deny that the named individual plaintiff is a class representative and aver that the named individual plaintiff was 47 years old as of the date of filing of the Complaint.

11. Defendants admit the averments of paragraph eleven of the Complaint except deny that the named individual plaintiff is a class representative.

12. Defendants admit the averments of the first sentence of paragraph twelve of the Complaint except deny that all 825 individual plaintiffs are over the age of forty. The remainder of the paragraph constitutes conclusions of law as to which no response is required but to the extent a response is required, they are denied.

13. Defendants deny the averments in paragraph thirteen of the Complaint to the extent that Norman Y. Mineta resigned as Secretary of Transportation in July 2006. The Honorable Mary E. Peters is the current Secretary of Transportation; otherwise Defendants admit the averments made in paragraph thirteen.

14. Defendants admit the averments in paragraph fourteen of the Complaint except deny that Marion C. Blakey, Administrator, Federal Aviation Administration, is a proper party to this action.

Jurisdiction and Venue

15. The averments of paragraph fifteen of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

16. The averments of paragraph sixteen of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

Exhaustion of Administrative Remedies

17. Defendants admit the averments made in paragraph seventeen of the Complaint.

18. Defendants admit the averments made in paragraph eighteen of the Complaint.

Definition of the Class

19. Defendants deny the averments in paragraph nineteen of the Complaint except as to the third sentence. The third sentence of paragraph nineteen is not susceptible of a reasoned construction, and is therefore denied.

20. Defendants admit the averments made in paragraph twenty of the Complaint only to the extent that this is the class proposed by plaintiffs but deny that such a class is appropriate.

Class Allegations

21. The allegations contained in paragraph twenty-one of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

22. The allegations contained in paragraph twenty-two of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

23. The allegations contained in paragraph twenty-three of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

24. The allegations contained in paragraph twenty-four of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

25. Defendants deny that any plaintiffs have been subjected to age discrimination. The remainder of paragraph twenty-five of the Complaint constitutes conclusions of law as to which no response is required but to the extent a response is required, they are denied.

26. The allegations contained in paragraph twenty-six of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

27. The allegations contained in paragraph twenty-seven of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

28. The allegations contained in paragraph twenty-eight of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

29. The allegations contained in paragraph twenty-nine of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

30. The allegations contained in paragraph thirty of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

31. The allegations contained in paragraph thirty-one of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

Facts

32. In response to each separate sentence of paragraph thirty-two of the Complaint:

Defendants deny the first sentence of the paragraph.

Defendants deny the second sentence of the paragraph.

Defendants admit the third sentence of the paragraph.

Defendants deny the fourth sentence of the paragraph.

Defendants admit the fifth sentence of the paragraph.

Defendants admit the sixth sentence of the paragraph to the extent it alleges that Flight Service Specialists maintain communications with pilots in the air, but deny the sixth sentence to the extent that Flight Service Specialists “provide up-to-the-minute route adjustments to avoid these severe weather conditions as well as prohibited, restricted or special use airspace.”

Defendants deny the seventh sentence of the paragraph.

33. In response to each separate sentence of paragraph thirty-three of the Complaint:

Defendants admit the first sentence to the extent that the events of September 11, 2001, demonstrated the role that Flight Service Specialists play in the nation’s aviation system, but deny the characterization of that role as “vital.”

Defendants deny the second sentence, including the footnote.

Defendants admit the third sentence to the extent that Flight Service Specialists were a “human link between pilots in the air and the FAA,” but deny the characterization of the link as “essential.”

34. Defendants deny the averments of paragraph thirty-four of Plaintiff’s Complaint.

35. Defendants deny the averments of paragraph thirty-five of Plaintiff's Complaint and the Court is referred to the cited case for the terms thereof.

36. Defendants deny the averments of paragraph thirty-six of Plaintiff's Complaint and the Court is referred to the cited document for the terms thereof.

37. In response to each separate sentence of paragraph thirty-seven of the Complaint: Defendants admit the first sentence of the paragraph and aver that the referenced document is now available at http://www.faa.gov/about/office_org/headquarters_offices/ato/aca/afss/perf_decision/media/Dennis%20DeGaetano.pdf, and refers the Court thereto for the terms thereof.

Defendants deny the second sentence of the paragraph except admit to the extent that the selected contractor, Lockheed Martin, plans to consolidate the fifty-eight (58) Automated Flight Service Stations (AFSSs) in existence as of February 1, 2005, into twenty (20) facilities. Defendants further deny the averment that the twenty (20) consolidated facilities will be "new" and aver that Lockheed Martin plans to utilize seventeen (17) existing facilities.

Defendants admit the averment in the third sentence of the paragraph except aver that, as of the date of this Answer, no former FAA Flight Service Specialists who accepted employment with Lockheed Martin have relocated due to the planned consolidation of facilities.

Defendants deny the fourth sentence of the paragraph except admit to the extent that, as a result of the February 1, 2005, decision, the FAA required fewer Flight Service Specialists in its employ.

Defendants deny the averment in the fifth sentence of the paragraph except admit that these "soon-to-be former federal employees have been asked to give up a "federal career" to the

extent that Flight Service Specialists separated from the FAA as a result of the October 3, 2005, reduction-in-force who have sought and not found other employment with the federal government no longer have "federal careers." Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment that all Flight Service Specialists separated from the FAA as a result of the reduction-in-force have suffered a "significant" reduction in retirement benefits.

Defendants deny the averment in the sixth sentence of the paragraph except admit that many Flight Service Specialists "will likely have to move to new locations" to the extent that former FAA Flight Service Specialists who accepted employment with Lockheed Martin may have to relocate to another AFSS as part of the planned consolidation. Defendants further aver that, as of the date of this Answer, no former FAA Flight Service Specialists who accepted employment with Lockheed Martin have relocated due to the planned consolidation of facilities. Defendants further deny the averment in the sixth sentence of the paragraph that some former FAA Flight Service Specialists who accepted employment with Lockheed Martin "will not receive the moving assistance benefits currently available to federal employees" and aver that Lockheed Martin has offered relocation benefits to its employees who may have to relocate due to the planned consolidation of facilities.

38. In response to each separate sentence of paragraph thirty-eight of the Complaint:

Defendants deny the averment in the first sentence of the paragraph that "the FAA will be separating from federal service 1,935 Flight Service Controllers," and aver that the FAA RIF separated 1,648 AFSS employees including, but not limited to, Flight Service Specialists as a result of the October 3, 2005 reduction-in-force. Defendants are without knowledge or

information sufficient to form a belief as to the truth of the averment in the first sentence of the paragraph that "approximately 92 percent" of the 1,935 Flight Service Specialists Plaintiffs predicted would be separated from federal service are over the age of forty (40).

Defendants deny the second sentence of the paragraph and aver that Lockheed Martin hired approximately 1,700 former FAA employees, most of whom are former FAA Flight Service Specialists, to operate the AFSS function under its contract with the FAA.

Defendants deny the third sentence of the paragraph except admit to the extent that it applies to FAA Flight Service Specialists.

39. In response to each separate sentence of paragraph thirty-nine of the Complaint:

Defendants deny the first sentence of the paragraph and aver that Lockheed Martin hired approximately 1,700 former FAA employees, the bulk of whom are former FAA Flight Service Specialists, to operate the AFSS function under its contract with the FAA.

Defendants deny the second sentence of the paragraph except admit to the extent that there is a maximum entry age of thirty (30) for FAA Air Traffic Control Specialists (ATCSs) in the Terminal and En Route options (as opposed to the Flight Service option where Plaintiff Flight Service Specialists were employed), and aver that the FAA established a policy to permit AFSS employees, including Flight Service Specialists, designated as surplus/displaced to be considered for ATCS positions subject to the maximum entry age of thirty (30) even if they were older than thirty (30) years of age, provided they met certain qualifications. As to the cited document following the second sentence, defendants refer the Court thereto for the terms thereof.

Defendants deny the third sentence of the paragraph except admit that there is a maximum entry age of thirty (30) for FAA Air Traffic Control Specialists (ATCSs) in the

Terminal and En Route options (as opposed to the Flight Service option where Plaintiff Flight Service Specialists were employed), and aver that the FAA established a policy to permit AFSS employees, including Flight Service Specialists, designated as surplus/displaced to be considered for ATCS positions subject to the maximum entry age of thirty (30) even if they were older than thirty (30) years of age, provided they met certain qualifications. Defendants further aver that the FAA also published three separate nationwide vacancy announcements prior to the reduction-in-force for ATCS positions in the Terminal option for which the area of consideration was limited to only surplus/displaced AFSS employees, including Flight Service Specialists.

Defendants deny the averment in the fourth sentence of the paragraph except admit in 2004 that the FAA began recruiting ATCSs for the Terminal and En Route options from outside the FAA.

Defendants deny the averment in the fifth sentence of the paragraph that the FAA plans to hire 12,500 ATCSs over the next ten years and aver that the FAA plans to hire approximately 11,800 ATCSs in the Terminal and En Route options from fiscal year (FY) 2006 to FY 2015.

See "A Plan for the Future, 2006-2015, The Federal Aviation Administration's 10-Year Strategy for the Air Traffic Controller Workforce (June 2006)," available at

http://www.faa.gov/airports_airtraffic/air_traffic/controller_staffing/media/workforce_plan_0600

06.pdf. Defendants deny the averment in the fifth sentence of the paragraph that the FAA is supplementing its ATCS workforce with "new, younger Controllers," except admit to the extent that the newly hired ATCSs will likely be younger than the existing workforce because: 1) the maximum entry age is thirty (30) for ATCSs in the Terminal and En Route options; and 2) they are replacing ATCSs who are retiring or separating from the FAA.

40. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments made in paragraph forty of the Complaint because the term “workforce unit” is not defined. Defendants deny the remainder of the averments in paragraph forty of the Complaint.

41. The allegations contained in paragraph forty-one of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied, including the footnote.

42. In response to each separate sentence of paragraph forty-two of the Complaint: Defendants deny the first sentence except admit that Flight Service Specialists in the Federal Employees Retirement System (FERS) who occupy positions covered by 5 U.S.C. § 2109(1) contribute 1.3 percent of their salary to the Civil Service Retirement and Disability Fund. Defendants deny the averment in the first sentence that “other federal government employees . . . contribute only .08 percent,” and aver that federal government employees in FERS who do not occupy positions covered by 5 U.S.C. § 2109(1) contribute 0.8 percent of their salary to the Civil Service Retirement and Disability Fund. Defendants further deny the first sentence in its entirety with regard to Flight Service Specialists in the Civil Service Retirement System (CSRS) who occupy positions covered by 5 U.S.C. § 2109(1).

Defendants deny the second sentence except admit that Flight Service Specialists in both FERS and CSRS who occupy positions covered by 5 U.S.C. § 2109(1) are eligible for retirement: 1) at age fifty (50) with twenty (20) years of creditable service in a covered position; or 2) at any age with twenty-five (25) years of creditable service in a covered position (hereinafter “special retirement eligibility criteria”).

Defendants deny the third sentence except admit that Flight Service Specialists in FERS who occupy positions covered by 5 U.S.C. § 2109(1) and meet the special retirement eligibility criteria are eligible to receive an annuity calculated as 1.7 percent of “high three” for the first twenty (20) years of service and 1.0 percent of “high three” for all other years of service. Defendants deny the third sentence in its entirety with regard to Flight Service Specialists in CSRS who occupy positions covered by 5 U.S.C. § 2109(1).

Defendants deny the fourth sentence except admit that Flight Service Specialists in FERS who occupy positions covered by 5 U.S.C. § 2109(1) and meet the special retirement eligibility criteria are eligible to receive an annuity calculated as 1.7 percent of “high three” for only the first twenty (20) years of service and 1.0 percent of “high three” for all other years of service. Defendants deny the fourth sentence in its entirety with regard to Flight Service Specialists in CSRS who occupy positions covered by 5 U.S.C. § 2109(1).

Defendants deny the fifth sentence and aver that Flight Service Specialists in FERS who occupy positions covered by 5 U.S.C. § 2109(1) but do not meet the special retirement eligibility criteria receive an annuity calculated as 1.7 percent of “high three” for all years of service in a covered position and 1.0% of “high three” for all other years of service, provided they have at least five (5) years of service in a covered position and otherwise meet the eligibility requirements of 5 U.S.C. § 8412(a). Defendants deny the fifth sentence in its entirety with regard to Flight Service Specialists in CSRS who occupy positions covered by 5 U.S.C. § 2109(1).

Defendants deny the sixth sentence and aver that Flight Service Specialists in both FERS and CSRS who are not eligible for an immediate annuity may withdraw all of their contributions

from the Civil Service Retirement and Disability Fund, including the additional 0.5% contributed by Flight Service Specialists in FERS who occupy positions covered by 5 U.S.C. § 2109(1).

43. In response to each separate sentence of paragraph forty-three of the Complaint:

Defendants deny the first sentence and aver that Flight Service Specialists who are not eligible for an immediate annuity may apply for another position in the federal government and, if selected, they can continue to work until they reach eligibility for an immediate annuity.

Defendants further aver the Flight Service Specialists who are not eligible for an immediate annuity may withdraw all of their contributions from the Civil Service Retirement and Disability Fund, including the additional 0.5% contributed by Flight Service Specialists in FERS who occupy positions covered by 5 U.S.C. § 2109(1).

Defendants deny the second sentence except admit that Flight Service Specialists who are not eligible for an immediate annuity and elect either a discontinued service retirement or a deferred retirement may receive less retirement income (attributable to their federal government service) than if they qualified for an immediate annuity. Defendants further aver that the annuity of Flight Service Specialists in FERS who elect a discontinued service retirement is not reduced if they are below the minimum retirement age.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in the third sentence except admit to the extent that employees who elect a deferred retirement do not carry health and life insurance benefits into retirement.

44. In response to each separate sentence of paragraph forty-four of the Complaint:

Defendants admit the first sentence.

Defendants deny the second sentence.

Defendants deny the third sentence.

45. The first sentence in paragraph forty-five of the Complaint purports to describe Office of Management and Budget (“OMB”) Circular A-76 (revised May 2003), and the Court is referred thereto for the terms thereof, and the sentence is otherwise denied. The allegations contained in the remainder of paragraph forty-five of the Complaint are denied.

46. Defendants deny the allegations in sentences one and two of paragraph forty-six of the Complaint.

Defendants admit the averments contained in sentence three of paragraph forty-six of the Complaint except deny that Lockheed Martin is utilizing the software referenced therein.

The allegations contained in sentence four of paragraph forty-six of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

47. Defendants deny the allegations in paragraph forty-seven of the Complaint.

48. The allegations contained in paragraph forty-eight of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

Causes of Action

49. The allegations contained in paragraph forty-nine of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required, they are denied.

50. The allegations contained in paragraph fifty of the Complaint constitute conclusions of law as to which no response is required but to the extent a response is required,

they are denied.

Prayer for Relief

51. Plaintiffs' Prayer for Relief consists of Plaintiffs' requests for relief, to which no response is required but to the extent a response is required, they are denied.

Jury Trial Demand

52. The allegations contained in paragraph fifty-two of the Complaint constitute Plaintiffs' jury demand, as to which no response is required but to the extent a response is required, they are denied.

WHEREFORE, Defendants respectfully request that this action be dismissed with prejudice and that the Court grant Defendants such other relief as may be appropriate.

Dated this 5th day of February, 2007.

Respectfully submitted,

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s/ Marcia Berman (Electronic Filing)
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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2007, a true and correct copy of the foregoing Answer of Defendants to First Amended Complaint was served upon plaintiffs' counsel of record at the address listed below:

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s/ Marcia Berman
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