

No. 04-1012

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAVID JOHN DIERSEN,
Plaintiff-Appellant,

v.

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

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

PETITION FOR REHEARING EN BANC OF
PLAINTIFF-APPELLANT, DAVID JOHN DIERSEN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
I. The panel erroneously overlooked and misapprehended many material facts.....	2
II. The panel erroneously overlooked and misapprehended many points of law.....	6
III. GAO subjected Diersen to many adverse actions.....	6
A. Adverse employment actions and hostile work environment prior to September of 1997.....	7
B. Adverse employment actions, hostile work environment, and constructive discharge during September of 1997.....	7
C. Adverse actions subsequent to September of 1997.....	9
IV. GAO treated similarly situated employees more favorably who did not oppose its affirmative action “goals” or participate in a class action lawsuit over those goals.....	9
V. The reasons GAO gave for forcing Diersen to take early retirement were a pretext.....	11
VI. GAO lied about its reasons for the performance appraisal it gave Diersen.....	12
VII. GAO lied about its reasons for the alternatives it gave Diersen if he did not retire.....	13
VIII. Diersen exhausted his administrative remedies for his disparate treatment claims and his disparate impact claims.....	13
IX. Diersen’s disparate treatment claims and his disparate impact claims are reasonably related.....	14
X. The adverse actions that GAO took against Diersen since 1980 were a linked series, cumulative, and part of a pattern.....	14
CONCLUSION.....	16
RULE 32 CERTIFICATION.....	17
PROOF OF SERVICE.....	17

TABLE OF AUTHORITIES

<i>Chennareddy v. Bowsher</i> , Case No. 87-3538, United States District Court for the District of Columbia.....	2,4,6,7,9,10,11,15,16
<i>Davis v. Con-Way Transportation Central Express</i> , 368 F.3d 776 (7 th Cir. 2004).....	12
<i>Johnson v. Cambridge Indus., Inc.</i> , 325 F.3d 892 (7 th Cir. 2003).....	8
<i>McDonald v. Village of Winnetka</i> , 371 F.3d 992 (7 th Cir. 2004).....	10
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 729 (1973).....	6,12,13
<i>National Railroad Passenger Corp. v. Morgan</i> , 536 U.S. 101 (2002).....	14
<i>Noreuil v. Peabody Coal Co.</i> , 96 F.3d 254 (7 th Cir. 1996).....	14
<i>Sitar v. Indiana Dept. of Transp.</i> , 344 F.3d 720 (7 th Cir. 2003).....	13,14
<i>Smart v. Ball State University</i> , 89 F.3d 437 (7 th Cir. 1996).....	8
<i>Volovesek v. Wisconsin Dept. of Agr., Trade and Consumer Protection</i> , 344 F.3d 680 (7 th Cir. 2003).....	6,12,13

INTRODUCTION

This petition presents questions of exceptional importance: (1) Were the affirmative action (AA) “goals” implemented by federal agencies like Defendant UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE (GAO) justified? (2) Did the actions that GAO took to achieve its AA goals in its Chicago office constitute illegal quotas and result in discrimination against Plaintiff DAVID JOHN DIERSEN (Diersen)? and (3) Did GAO retaliate against Diersen and ultimately constructively discharge him because since 1980 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 those actions resulted in age discrimination?

If the district court’s decision is affirmed, employers in the Seventh Circuit will be free to implement AA goals as though they were illegal quotas, to discriminate against older white male employees to achieve those quotas, and to retaliate against older white employees who oppose those quotas and especially against those who participate in lawsuits. Another words, if this court affirms the decision in this case, this court affirms Jesse Jackson’s claim that it is the “law of the land” to discriminate against white males, especially against those who are older, and to retaliate against those who complain about it.

On July 3, 2003, GAO filed a motion for summary judgment in the district court against Diersen. On November 3, 2003, the district court judge nominated by Senator Peter Fitzgerald granted that motion. On June 2, 2004, Diersen filed his brief in this court. On July 20, 2004, GAO filed its response brief. On September 2, 2004, Diersen filed his reply brief. On November 4, 2004, Circuit Judges Bauer, Posner, and Easterbrook (the panel) issued a 3-page 6-paragraph unpublished order that concluded that oral argument was not necessary and that the district court’s grant of summary judgment should be affirmed.

The length, content, and tone of the panel’s order make clear that the panel erroneously overlooked and misapprehended many material facts and points of law that Diersen presented that show that a reasonable jury could return a verdict for him. The panel erroneously overlooked the definite competent evidence that Diersen submitted to rebut GAO’s motion. The panel erroneously did not consider the evidentiary record in

the light most favorable to Diersen. The panel erroneously did not draw any reasonable inferences in Diersen's favor. The panel erroneously a) accepted as being fact only those facts that GAO admitted to, b) accepted GAO's arguments as being facts, and c) accepted the district court's findings as being facts.

I. The panel erroneously overlooked and misapprehended many material facts

The panel erroneously overlooked and misapprehended many material facts that Diersen cited in pages 4 through 18 of his brief including the following:

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 were 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. He continues to believe that GAO orchestrated those statements to create a hostile work environment to prompt him to leave GAO. (R. 121, par. 27, 33, 35) GAO 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 pay-for-performance (PFP) rankings for 1989. (R. 121, par. 95, 103, 105)

On June 26, 1997, GAO 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)

On September 17, 1997, GAO gave Diersen a performance appraisal that was extremely low in relation to those it gave its other Chicago office employees. The average performance appraisal that GAO gave its Chicago office employees for 1997 was 4.5 on a scale of 5. For 1997, Diersen's supervisor appraised the performance of Diersen and only four other employees. The overall rating she gave Diersen of 4 was

extremely low in relation to the other 4 ratings she gave. She gave Cody Goebel an overall rating of 4.8, Roger Kolar (Kolar) 4.9, Melvin Thomas (Thomas) 5, and Richard Tshara 5. With an overall rating of 4, the appraisal GAO 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 GAO gave Diersen for 1995 was 4.6, for 1996 it was 4.4. Between 1996 and 1997, GAO 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 it had just given Diersen, GAO gave him two alternatives if he did not retire by September 30, 1997 -- 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 he had given, but GAO denied his appeal. (R. 121, par. 151)

On September 17, 1997, GAO made it clear to Diersen that if he did not take early retirement by September 30, 1997, GAO would terminate him long before he could take regular retirement on September 29, 2003. Diersen considered the timing of GAO's actions during September of 1997 to be extremely suspicious. Diersen continues to believe that the conditions that GAO 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)

On September 18, 1997, because GAO had refused to change the alternatives it had given Diersen on September 17, 1997 if he did not retire by September 30, 1997, Diersen asked GAO to transfer him to its Office of Special Investigations (OSI) group, but GAO denied his request. (R. 121, par. 151)

On September 19, 1997, because GAO had given him two alternatives if he did not retire by September 30, 1997 – accept a constructive demotion or an adverse transfer -- Diersen contacted GAO's Civil Rights Counselor by phone. In that phone conversation and subsequent ones, Diersen complained about many discriminatory acts that GAO had taken against him since he transferred to GAO from IRS because of his race, because of his gender, because of his age and many retaliatory acts that GAO had taken against him to force him to leave the agency because of his opposition to GAO's AA goals and because of his participation in *Chennareddy*. Diersen told GAO that fear of greater retaliation had prevented him contacting GAO's Civil Rights Counselor sooner. GAO advised Diersen against claiming reverse discrimination because his immediate supervisor was taking a major adverse employment action at the time against an older minority female employee who GAO had assigned to Diersen to supervise. GAO also advised Diersen against claiming retaliation because he had not previously filed a discrimination complaint. (R. 121, par. 146-159)

On September 30, 1997, 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 were GAO's efforts to constructively discharge him and retired "under protest" and filed a discrimination complaint. He retired because he believed the alternatives GAO had given him were unbearable, because GAO 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 GAO had convinced him that it would ultimately deny any administrative discrimination complaint that he might file. (R. 121, par. 146-159) The primary adverse employment action that Diersen cited in his September 30, 1997 written discrimination complaint was that GAO 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 disparate treatment and disparate impact 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 and in his four attachments to that letter (R. 123, ex. Q, p. 375-423).

Immediately after September 30, 1997, GAO gave Diersen's 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).

Shortly after September 30, 1997, GAO replaced Diersen with two white males who are substantially younger and substantially less qualified than him (R. 121, par. 166).

Since September 30, 1997, 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 -- GAO did not follow its procedures set forth in its Order 2294.3 for responding to inquiries from prospective employers about Diersen's job performance. According to the reports, GAO failed to respond to inquiries about his GAO employment, refused to acknowledge that he was eligible to be rehired by GAO, and failed to keep its promise to him to respond to inquiries about his GAO employment in a manner consistent with a promised strong letter of recommendation. (R. 121, par. 163)

Since September 30, 1997, GAO destroyed most of its most crucial AA documents including reports by Diersen's Chicago office superiors of actions they took to achieve the AA goals they were given. (R. 42-128) Nevertheless, Diersen was still able to obtain and provide many AA documents (R. 123, ex. E, p. 168-262; ex. H, W, X, AA, EE, and GG).

On December 23, 1997, Patrick Dolan, who had been Diersen's immediate supervisor between 1989 and his retirement in 1993, submitted an affidavit in support of Diersen's claims. (R. 123, ex E, p. 611-614)

On December 26, 1997, Frank Zbylski, one of Diersen's coworkers who retired in January of 1997, submitted an affidavit in support of Diersen's claims. (R. 123, ex. E, p. 623-626)

On December 27, 1997, Melvin Koenigs, one of Diersen's coworkers who retired in 1993, submitted an affidavit in support of Diersen's claims. (R. 123, ex. E, p. 618-620)

On December 29, 1997, David Jakab, one of Diersen's coworkers who retired in 1996, submitted an affidavit in support of Diersen's claims. (R. 123, ex. E, p. 615-617)

On April 25, 2001 (R. 37) and August 18, 2003 (R. 121), Diersen provided additional detailed affidavits in support of his claims and many additional documents in support of his claims.

GAO admits that Diersen was the only employee in its Chicago office who opposed its AA goals or participated in *Chennareddy* and that it never gave any of its Chicago office employees, let alone any of those whose job performance was adequate like Diersen's, alternatives if they did not take early retirement such as accepting a constructive demotion or an adverse transfer. (R. 121, p. 41)

The district court found that Diersen met the first two requirements of the *McDonnell Douglas Corp. v. Green*, 411 U.S. 729 (1973) and *Volovsek Volovesek v. Wisconsin Dept. of Agr., Trade and Consumer Protection*, 344 F.3d 680 (7th Cir. 2003) indirect methods – he is a member of a protected group who engaged in a protected activity and his job performance was adequate. (R. 129)

II. The panel erroneously overlooked and misapprehended many points of law

The record clearly shows that Diersen provided direct evidence that the actions that GAO took to achieve its AA goals in its Chicago office constituted illegal quotas that resulted in discrimination against Diersen and that GAO retaliated against Diersen because he opposed those goals and participated in *Chennareddy*.

The record clearly shows that Diersen provided sufficient evidence that he met the third and fourth requirement of the *McDonnell Douglas* and *Volovsek* indirect methods concerning discrimination and retaliation; that GAO's reasons for the adverse actions it took against him were a pretext; that his disparate impact claims are reasonably related to his disparate treatment claims; and that the continuing violation doctrine applies.

III. GAO subjected Diersen to many adverse actions

The panel knows full well that courts have to look at the totality of the circumstances. Nevertheless, the panel erroneously overlooked and misapprehended

many material facts that Diersen presented. The panel erroneously accepted GAO's clearly false arguments that it never subjected Diersen to any adverse action and that he retired merely because GAO gave him a "lukewarm" performance appraisal and denied his request for a transfer. Most significantly, the panel erroneously overlooked the fact that on September 17, 1997, GAO gave him two alternatives if he did not retire by September 30, 1997 – accept a constructive demotion or an adverse transfer.

A. Adverse employment actions and hostile work environment prior to September of 1997

Diersen presented many facts on pages 4 through 10 of his brief and many arguments on pages 31 through 45 of his brief that showed that prior to September of 1997 GAO took many adverse employment actions against him and created a hostile work environment to force him to leave the agency.

For example, on pages 8 and 9 of his brief, Diersen showed that 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 *Chennareddy*. He soon saw the derogatory statements that his superiors, coworkers, and subordinates made about his motives, judgment, and ability become more frequent and more harsh. He continues to believe that his superiors orchestrated those statements to create a hostile work environment to prompt him to leave GAO. GAO 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.

B. Adverse employment actions, hostile work environment, and constructive discharge during September of 1997

Diersen presented many facts on pages 10 through 13 of his brief and many arguments on pages 31 through 45 of his brief that showed that during September of 1997 GAO took many adverse employment actions against him, created an especially hostile work environment to force him to retire, and constructively discharged him.

For example, on pages 10, 33, and 34 of his brief, Diersen showed that on September 17, 1997 GAO gave him a performance appraisal that was not merely “lukewarm,” it was one of the lowest in the office.

For example, on pages 11 through 13 and 31 through 45 of his brief, Diersen showed that on September 17, 1997, based on that appraisal, GAO gave him two alternatives if he did not retire by September 30, 1997 – accept a constructive demotion or an adverse transfer – and that GAO’s giving him those alternatives, in conjunction with other factors, constituted constructive discharge. Obviously, forcing an employee to accept a constructive demotion or an adverse transfer if he does not retire in less than two weeks is an adverse employment action.

The panel erroneously overlooked the fact that Diersen presented many facts in support of his retaliation claims, not just the performance appraisal and the transfer denial. Further, the panel erroneously misapprehended *Smart v. Ball State University*, 89 F.3d 437 (7th Cir. 1996). In *Smart*, the court found that “‘Adverse job action,’ which is required to support Title VII retaliation claim, is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well” and that “The dispositive question in our case is not whether (Smart’s) performance evaluations were undeservedly negative, but whether even undeserved poor evaluations can alone constitute the second element of her prima facie case.”

The only evidence that Smart presented in support of her retaliation claim was her poor performance appraisals. Her employer did not even use those evaluations to take any adverse employment action against her and “she completed the training program on time and is currently working at Ball State as a full-fledged tree surgeon.”

However, Diersen’s employer used its 1997 evaluation of his performance to force him to accept one of two adverse employment actions – a constructive demotion or an adverse transfer – if he did not retire by the end of the month.

The panel also erroneously misapprehended *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892 (7th Cir. 2003). In *Johnson*, the court found that the plaintiff had to show that he had been subjected to an adverse employment action because he failed to “show some quantitative or qualitative change in terms or condition of employment.” However, Diersen showed on pages 34 through 36 of his brief that GAO’s denial of his

request for transfer to OSI was a tangible adverse employment action because GAO had given him two alternatives if he did not retire – accept a constructive demotion or an adverse transfer. If Diersen did not accept a constructive demotion, any transfer would have been adverse because the specialized financial education and experience he had acquired auditing financial regulators since 1990 would have been rendered useless. 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 that office, GAO did offer the possibility of transfer to OSI. Further, GAO had every reason to expect that Diersen would ask to be transferred to the OSI group because the manager of that group was the only group manager in GAO’s Chicago office who had not overtly discriminated and/or retaliated against Diersen in the past. Diersen would not have retired if GAO had transferred him to OSI, therefore, GAO’s refusal to transfer him did change his employment status. If a minority, female, or younger employee in GAO’s Chicago office with qualifications similar to Diersen’s had requested transfer to OSI in 1997, GAO would have transferred that employee to OSI without hesitation.

C. Adverse actions subsequent to September of 1997

Diersen presented many facts on pages 13 through 18 of his brief and many arguments on pages 45 and 46 of his brief that showed that GAO continues to take adverse actions against him after he retired. For example, on pages 17, 18, 45, and 46 of his brief, Diersen showed that GAO did not follow its procedures for responding from prospective employers about his job performance.

IV. GAO treated similarly situated employees more favorably who did not oppose its affirmative action “goals” or participate in a class action lawsuit over those goals

Diersen presented many facts on pages 4 through 18 and of his brief and many arguments on page 39 of his brief that showed that GAO treated its employees more favorably than Diersen who were similarly situated to him who did not oppose its AA goals or participate in *Chennareddy*.

Diersen showed that GAO did not require minorities or females with similar qualifications to accept downgrades to transfer to GAO from other federal agencies. Diersen showed 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.

GAO admits that it did not force any of its Chicago office employees to retire, including those employees who were most similarly situated to Diersen – over age 40 white males. That is not surprising because GAO admits that Diersen was the only Chicago office employee who opposed its AA goals or participated in *Chennareddy*.

Further, Diersen’s comparison between himself and Thomas is relevant because he and Thomas have “similar attributes, experience, education, and qualifications.” Diersen and Thomas are both CPAs, both have substantial pre-GAO employment experience, both asked to assigned to audits in which they could use their pre-GAO work experience.

The panel erroneously misapprehended *McDonald v. Village of Winnetka*, 371 F.3d 992 (7th Cir. 2004). In *McDonald*, the court found that the plaintiff “failed to identify someone who was similarly situated but intentionally treated differently than he, and thus failed to establish ‘class of one’ equal protection claim.” However, GAO admits that Diersen was the only employee in its Chicago office who opposed its AA goals or participated in *Chennareddy* and Diersen showed that GAO treated virtually all its employees substantially better than it treated him. Thomas is only one of many examples that Diersen presented. The average rating that GAO employees received in 1997 was 4.5 on a scale of 5. The 1997 appraisals that Diersen provided showed that GAO gave Thomas an overall rating of 5 on a scale on 5 while GAO gave Diersen an overall rating of 4 on a scale of 5.

The record shows that GAO treated its over age 40 white male Chicago office employees who did not oppose GAO’s AA goals and who did not participate in *Chennareddy* far more favorably than it treated Diersen. For example, the following over age 40 white male Chicago office employees and many others never claimed that they opposed GAO’s AA goals, they never claimed that they participated in *Chennareddy*, and they never claimed that GAO did anything to force them to retire:

David Utzinger, John Rose, Pete Konjevich, Thomas Venezia, Stewart Herman, Stewart Seman, Roger Kolar, and Mark Egger.

V. The reasons GAO gave for forcing Diersen to take early retirement were a pretext

Diersen showed on pages 39 through 41 of his brief that based on statements his superiors made in their affidavits, GAO's primary reason for the adverse employment actions it took against him is that he has mental problems that severely impede his job performance. Diersen has shown with direct and circumstantial evidence that that reason is a pretext and that the true explanation is discrimination and retaliation and that GAO is attempting to hide that true explanation. To argue that a person creates his own problems is to argue that person has mental problems. Diersen has shown that GAO has failed to articulate any legitimate nondiscriminatory reason for any of the adverse employment actions that it took against him. He has done far more than raise doubts about GAO's explanations for its actions, he has refuted all of them. He has shown that GAO's explanations have no real basis in fact, that GAO's explanations did not actually motivate the actions that GAO took against him, and that GAO's explanations were insufficient to motivate the actions that GAO took against him. He has shown that each of GAO's explanations is a pretext, a lie, a phony explanation, dishonest explanation, and deceit used to cover its tracks. He has shown that GAO did not and could not have sincerely believed its explanations for the actions it took against him. He has shown that GAO believes that "the end justifies the means." He has shown that GAO really believes that achieving AA goals justifies both discriminating against its older white male employees and retaliating against those who complained. He has shown that GAO really believes that achieving AA goals justifies falsely arguing that those who oppose its AA goals, and especially those who participate in *Chennareddy*, have mental problems that severely impede their job performance.

Diersen's claims rest on the many AA and other documents that GAO issued since 1980 that clearly show GAO's motivations are to drive employees like Diersen out of the agency who oppose giving preference to young minorities and to young women and to especially drive employees like Diersen out of the agency who participate in *Chennareddy*.

The panel erroneously misapprehended *Davis v. Con-Way Transportation Central Express*, 368 F.3d 776 (7th Cir. 2004). In *Davis*, the court found that the “employer terminated 40 other employees in the same state, employee was senior to no one within his job category, employer’s failure to recall employee was because it eliminated his position.” The panel erroneously overlooked the fact that Diersen was the only employee in its Chicago office who GAO forced to take early retirement by September 30, 1997 and that GAO admits that it never forced any other employee in its Chicago office to retire.

VI. GAO lied about its reasons for the performance appraisal it gave Diersen

GAO admits that Diersen met the second requirement of the *McDonnell Douglas* and *Volovsek* indirect methods – his job performance was adequate. If Diersen’s job performance was adequate, his performance could not justify the extremely low performance appraisal that GAO gave him or the alternatives GAO gave him if he did not retire.

Diersen showed on pages 41 through 43 of his brief that to justify the adverse employment actions GAO took against him on September 17, 1997, GAO argues that Diersen’s job performance deteriorated rapidly since June 26, 1997 because he intentionally created many stressful situations in his personal life that he was suddenly unable to deal with beginning June 27, 1997. However, Diersen has shown that GAO’s criticisms of his performance were subjective, unwarranted, and unfair.

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 Diersen’s superiors, coworkers, and subordinates inflicted a tremendous amount of stress on him 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.

VII. GAO lied about its reasons for the alternatives it gave Diersen if he did not retire

Diersen showed on pages 43 through 44 of his brief that GAO argues that he found only two things a “living hell” in 1997 -- a lower-than-expected performance evaluation and the denial of his request for transfer to OSI. However, the primary adverse employment action that Diersen complained of on September 19, 1997 to GAO’s Civil Rights Counselor was that GAO had given 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 on September 18, 1997 or on any other date for that matter if GAO had not given him those two alternatives on September 17, 1997.

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

GAO admits that Diersen met the second requirement of the *McDonnell Douglas* and *Volovsek* indirect methods – his job performance was adequate. If the appraisal that GAO gave Diersen was as good as GAO says it is, it could not justify the alternatives GAO gave him if he did not retire.

VIII. Diersen exhausted his administrative remedies for his disparate treatment claims and his disparate impact claims

Diersen showed on pages 21 through 31 of his brief that he exhausted his administrative remedies for his disparate treatment claims and his disparate impact claims. The panel erroneously misapprehended *Sitar v. Indiana Dept. of Transp.*, 344

F.3d 720 (7th Cir. 2003). The court found in *Sitar* that the plaintiff failed to include her disparate impact claims in her administrative complaint. However, Diersen included both his disparate treatment and his disparate impact claims in his administrative complaint.

IX. Diersen’s disparate treatment claims and his disparate impact claims are reasonably related

Diersen showed on pages 21 through 26 of his brief that he included the same disparate impact claims in his administrative discrimination complaint that he included as his second cause of action (facially neutral policies and practices had disparate impact) in his fifth amended complaint.

The panel argues that the court’s decision in *Noreuil v. Peabody Coal Co.*, 96 F.3d 254 (7th Cir. 1996) supports its argument that Diersen’s disparate impacts claims are substantially different from his disparate treatment claims. However, while the plaintiff in *Noreuil* did not include disparate impact claims in his administrative complaint, the record clearly shows that Diersen did and that GAO refused to investigate them. Further, the record clearly shows that Diersen’s claims implicate not only his Chicago office superiors who implemented GAO’s AA goals but GAO’s Comptroller Generals who established those goals.

The panel also erroneously misapprehended *Sitar*. The court found in *Sitar* that the plaintiff’s sex discrimination and sexual harassment charges were not reasonably related to her retaliation charge because they “involved separate set of incidents, conduct, and people than her retaliation charge.” However, all of Diersen’s claims involve GAO’s AA goals, the same individuals (his GAO Chicago office superiors and GAO’s Comptroller Generals), and similar conduct (performance appraisals, job assignments, etc.).

X. The adverse actions that GAO took against Diersen since 1980 were a linked series, cumulative, and part of a pattern

The panel erroneously misapprehended *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). In *National Railroad*, the court found that “employee could recover on hostile work environment theory for acts occurring more than 300 days before charge was filed with EEOC, as long as acts were part of same hostile work

environment and at least one occurred within 300-day period.” Diersen presented many facts that showed that the acts that GAO took against him in September of 1997, including extremely low performance appraisal, denial of supervisory assignments, adverse transfer, threats, and intimidation, were part of the same hostile work environment that GAO had subjected him to since 1980.

GAO admits that Diersen engaged in “protected activity” prior to September of 1997. Diersen showed on pages 26 through 31 of his brief that his discrimination complaint included his continuing retaliation claims and that the continuing violation doctrine applies and his pre-1997 claims are not time barred. Diersen showed that “he was treated differently than similarly situated” employees who did not engage in protected activities. Diersen showed that GAO had retaliatory motive. Diersen rebutted GAO’s noninvidious reasons for its adverse employment actions. Diersen showed a “causal link” his protected activities and GAO’s unlawful acts. Diersen showed that GAO’s alleged nonretaliatory motives were actually a pretext.

Diersen included his pre-1997 claims in his administrative complaint, in his initial complaint in this litigation, and in all subsequent amended complaints. Even if Diersen had not included his pre-1997 claims in his complaints, he identified many actions that GAO took that prevented those claims from being filed sooner and from being investigated. Diersen alerted each and every one of his supervisors to the hostile environment he suffered because he opposed GAO’s AA goals and because he participated in *Chennareddy*. Sadly, all of Diersen’s supervisors either agreed with GAO’s AA goals or lacked the power or motivation to protect him from the hostile environment. Even if Diersen had ceased his opposition or even if he had ceased his participation, it is now very clear that GAO would have still wasted his career, forced him into early retirement, and sabotaged his post retirement job search because GAO had selected him be an example of how GAO retaliates against those who fail to go along with its discriminatory and retaliatory actions to meet its AA goals. Diersen has shown that some of GAO’s discriminatory and retaliatory acts did not appear to be discriminatory or retaliatory at the time they occurred. Diersen has shown the timing of the adverse employment 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.

CONCLUSION

For the reasons set forth above, Diersen respectfully requests this Court to reverse the decision of the district court that granted GAO summary judgment, reverse the decision of the panel that affirmed that decision, and remand this case to the district court for further proceedings, or in the alternative, restore this case to the calendar for oral argument.

Dated: December 17, 2004

Respectfully submitted,

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

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

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2004, I delivered 30 copies of this petition for rehearing en banc to the Clerk of the United States Court of Appeals, Seventh Circuit, and 2 copies to counsel for GAO:

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