

United States District Court  
Robert W. Gettleman

**FILED**  
APR 25 2001

Judge Robert W. Gettleman  
United States District Court

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

David John Diersen, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 David M. Walker, )  
 Comptroller General of the )  
 United States of America, )  
 )  
 Defendant. )

Docket No.: 00cv2437  
Assigned Judge: Robert W. Gettleman  
Magistrate Judge: Nan R. Nolan  
JURY DEMAND

**DOCKETED**  
APR 27 2001

**FIFTH AMENDED COMPLAINT OF  
EMPLOYMENT DISCRIMINATION AND RETALIATION**

Plaintiff, David John Diersen (Diersen), files this fifth amended complaint against Defendant, the United States General Accounting Office (GAO), by and through its Chief Executive Officer, David M. Walker, the Comptroller General of the United States of America, and states as follows:

**Nature of the Action**

1. Diersen brings this action pursuant to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634, *et seq.* and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e, *et seq.*
2. Diersen claims that GAO's practice of giving preferential treatment to its employees who are younger, minority, and female resulted in discrimination against him as well as other GAO employees who are older, white, and male.
3. Diersen claims that GAO knowingly and willfully retaliated against him, including denying him pay increases and forcing him into early retirement because he opposed GAO's practice of giving preferential treatment to its employees who are younger, minority, and female and because he participated in a class action lawsuit against GAO that claims age discrimination resulted from that practice.
4. Diersen claims that GAO continues to knowingly and willfully retaliate against him, including sabotaging his job search, because he filed an administrative

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discrimination complaint, because he contacted many elected officials about his claims, because he filed this lawsuit, and because he posted his claims on the internet.

### **Parties**

5. Diersen is a white male who was born in 1948. He has resided at all relevant times in the City of Wheaton and State of Illinois.

6. GAO is a federal agency headquartered in Washington, DC that employed Diersen as an Evaluator (position title since changed to Analyst) in its Chicago Field Office between January 27, 1980 and September 30, 1997.

### **Jurisdiction and Venue**

7. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 because it involves a federal question.

8. Judge James Robertson of the United States District Court for the District of Columbia ruled that pursuant to 28 U.S.C. § 1391, proper venue for this lawsuit is in the United States District Court for the Northern District of Illinois, Eastern Division.

### **Procedural Prerequisites**

9. Diersen has exhausted his administrative remedies. He filed a written discrimination complaint with GAO's Civil Rights Office on September 30, 1997. In connection with that complaint, he made it clear to GAO and its investigator that a) his complaint included class action and individual claims of age discrimination, reverse discrimination, and retaliation; b) the violations had continued for many years; c) the adverse employment actions GAO took against him were a linked series, cumulative, and part of a pattern; and d) his fear of suffering greater retaliation prevented him from filing a written discrimination complaint any sooner than he did.

10. GAO refused to investigate Diersen's class action claims and any event that occurred before August of 1997. Diersen advised GAO of serious defects in its investigation on March 19, 1998, but GAO nevertheless denied his complaint on April 29, 1998.

11. Attorney Walter T. Charlton filed this lawsuit on July 30, 1998 in the United States District Court for the District of Columbia. He withdrew after Judge Robertson dismissed Diersen's class action claims (without prejudice) and transferred Diersen's individual claims to this Court on April 11, 2000. Judge Gettleman granted GAO's

motion to strike Diersen's 35 page fourth amended complaint because of its length on March 21, 2001 and granted Diersen leave to file a fifth amended complaint by April 25, 2001 limited to 15 pages.

### **Facts**

12. No court has ever found that GAO's Chicago Field Office discriminated against its Analysts because they were minority or female.

13. Even if GAO had discriminated against its Analysts because they were minority or female, Diersen was not responsible for any such discrimination and he did not benefit from any such discrimination.

14. Even if GAO had discriminated against its minority or female Analysts, they should be made whole by those managers and executives who discriminated against them and not by innocent lower level employees like Diersen.

15. GAO's giving preferential treatment to its younger employees means that it is by definition discriminating against its older employees. GAO's giving preferential treatment to its minority employees means that it is by definition discriminating against its white employees. GAO's giving preferential treatment to its female employees means that it is by definition discriminating against its male employees.

16. For GAO's Analyst position, being under age 40, being a minority, and being female are not bona fide occupational requirements reasonably necessary for GAO's normal operations.

17. Since at least the 1970s, GAO's employment statistics, and especially its statistics for its Chicago Field Office, show that it gives its Analysts who are younger, minority, and female disproportionately more leadership roles, higher performance appraisals, more frequent and larger bonuses and pay increases, and more frequent and faster promotions.

18. GAO routinely boasts that in terms of pay increases, bonuses, and promotions, its younger Analysts do better than its older Analysts, its minority Analysts do better than its white Analysts, and its female Analysts do better than its male Analysts.

19. GAO 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 for the American people. Nearly all GAO's work is done at the request of the Chairmen and the Ranking Members of Congressional Committees and Subcommittees.

20. One of the Democratic Party's main strategies to get in power and to stay in power is to give preferential treatment to minorities and females who now account for approximately 70 percent of the voters in America. Since at least the 1970s, many Democratic Chairmen and Ranking Members have advocated that federal agencies should recruit, retain, and promote as many young people, minorities, and females as possible. They applied special pressure on GAO to engage in race and gender based preference giving because GAO's employment policies and practices often serve as models for other federal agencies. Many Republican Senators and Representatives oppose race and gender based preference giving and some have voiced their opposition, but advocates of race and gender based preference giving have called them racists and sexists.

21. Charles Bowsher served as Comptroller General between 1981 and 1996, James Hinchman served as Acting Comptroller General between 1996 and 1998, and David Walker has served as Comptroller General since 1998. All three have publicly and forcefully advocated that GAO should recruit, retain, and promote as many young people, minorities, and females as possible.

22. GAO's executives and managers frequently make positive comments about what younger, minority, and female Analysts bring to the agency while they rarely, if ever, make positive comments about what older, white, and male Analysts bring to the agency. All three Comptroller Generals have made statements that place the primary blame for GAO's problems on its older Analysts, most of whom are white males.

23. At least since the 1970s, as part of its affirmative action and diversity programs, GAO has advocated that its employees engage in an extremely high level of demographic consciousness. GAO routinely provides its Analysts with written, oral, and visual information that encourages them to view other Analysts in terms of their demographics and that information is almost always positive toward young people, minorities, and females and neutral or negative toward older people, whites, and males.

24. GAO's Chicago Field Office encourages its Analysts to disclose their demographic information to their superiors, coworkers, and subordinates and it encourages its Analysts to share their beliefs about giving preferential treatment to those who are younger, minority, and female.

25. As part of its ongoing affirmative action and diversity programs, GAO's Chicago Field Office routinely reminds its Advisors of the Holocaust and Slavery. One speaker GAO invited stated that all those who immigrated to America before the Emancipation Proclamation did so primarily to take advantage of slavery.

26. Substantially more public administration degree holders are minority and female than accounting degree holders. Before 1981, GAO's emphasis was on hiring, retaining, and promoting accounting degree holders (especially CPAs) and other business degree holders. After 1981, GAO's emphasis was on hiring, retaining, and promoting public administration degree holders. During fiscal year 2000, 86 percent of the Analysts GAO hired majored in public administration. Analysts who hold accounting degrees, and especially those who are CPAs, are predominately older, white, and male.

27. Shortly after Charles Bowsher came to GAO from Arthur Andersen, GAO instituted a modified form of Arthur Andersen's "up-or-out" practice for GAO's Analysts. GAO instituted what constructively is an "up-or-down" practice in that if you were not promoted to certain levels by certain ages (GS-13 by age 25, GS-15 by age 30, and Senior Executive Service by age 35), you were required to accept the fact that if you did not leave the agency, you would in all likelihood not receive any additional promotions, you would receive constructive demotions and adverse transfers, you would retire as you became eligible, and you would be retaliated against if you complained.

28. In 1989, GAO instituted "Bands" by combining its GS-7, 9, 11, and 12 Analyst positions into Band I; its GS-13 and 14 Analyst positions into Band II; and its GS-15 Analyst positions into Band III. Being ready, willing, and able to implement GAO's practice of giving preferential treatment to younger, minority, and female Analysts is a requirement for promotion beyond Band II.

29. In 1989, GAO instituted Pay-For-Performance (PFP) and began giving Analysts PFP rankings primarily based on performance appraisals for purposes of granting pay increases and bonuses.

30. During the mid-1990s, Republican Senators and Representatives complained about GAO's objectivity and required GAO to suffer severe budget reductions. To cope with those reductions, rather than instituting a reduction-in-force or RIF for its Analysts, GAO offered early retirement to all its Analysts who had 25 or more years of federal service.

31. Analysts who were eligible for early retirement during the mid-1990s and who took early retirement, including Diersen, were predominately white and male. Most Analysts become eligible to retire at age 55 and virtually all of those who GAO did not promote beyond Band II retire soon after they become eligible to retire. The average age of GAO's Chicago Field Office Analysts is the lowest of all its offices and divisions.

32. While GAO has elaborate procedures in place to assure that its minority and female Analysts are not discriminated against because of their race or gender, it has few if any procedures to assure that over age 40, white, male, or Republican Analysts are not discriminated against because of their age, race, gender, or political affiliation. The number of Republicans hired or promoted beyond Band II by GAO's Chicago Field Office is extremely small. GAO Chicago Field Office managers condone if not encourage ridicule of Republicans.

33. Throughout his GAO career, Diersen made it clear to his superiors, coworkers, and subordinates that he opposed GAO's practice of giving preferential treatment to its employees who are younger, minority, and female. Beginning in 1988, Diersen made it clear to his superiors, coworkers, and subordinates that he was participating in Chennareddy, et al v. Bowsher, Case No. 87-3538, a class action lawsuit against GAO that claims such preference giving resulted in age discrimination.

34. If Diersen did not accept GAO's early retirement offer which expired on September 30, 1997, he would not be eligible again to retire for six years or until he became 55 years old on September 29, 2003.

35. In September of 1997, Diersen's superiors took many actions to force him to retire. First, even though Diersen was meeting and exceeding his superiors' legitimate performance expectations, his superiors gave him a performance appraisal that was very low in relative terms and unfairly critical of his written communication and teamwork skills. They told him they would not change that appraisal no matter what

additional information he might provide and they failed to offer Diersen any training to correct his alleged performance deficiencies.

36. Second, Diersen's superiors made it clear to him that they had made many false and extremely negative oral statements about his character and job performance and that if he did not retire, they would make additional such statements about him that would be even worse.

37. Third, Diersen's superiors gave him two alternatives if he did not retire -- accept a constructive demotion or an adverse transfer. They told Diersen if he did not retire and if he did not accept an adverse transfer, he would spend the rest of his career working for Analysts who he formerly supervised -- Analysts who were substantially less qualified than him in terms of education, professional certifications and activities, and work experience. If Diersen accepted an adverse transfer to another issue area, constructively, Diersen would have had to start all over again and all the knowledge of the financial markets issue area that he had gained since 1990 from job assignments and graduate courses would have been wasted. Given his education, professional certifications and activities, and work experience, if Diersen had accepted either alternative, it would have been devastating for him.

38. Fourth, as an inducement to retire, GAO Chicago Field Office Manager Leslie Aronovitz promised to give Diersen a strong letter of recommendation and to recommend him very highly to prospective employers. Diersen relied on that inducement to his detriment.

39. During September of 1997, Diersen told his superiors that their words and actions were illegal discriminatory and retaliatory acts and that they should immediately retract them, but they refused. Diersen's superiors never told him that his understanding of the alternatives they had given him was not correct. Diersen asked his superiors that if he accepted a transfer rather than retiring, that it be to GAO's Office of Special Investigations where he could use his Certified Fraud Examiner certification and the knowledge he gained during three years of auditing IRS's Criminal Investigation Division, but they refused.

40. On September 30, 1997, at age 49, Diersen a) retired "under protest" not only because of the adverse employment actions GAO had taken against him during

September of 1997, but also because of adverse employment actions GAO had taken against him throughout his GAO career, including denying him pay increases and b) filed an administrative discrimination complaint with GAO's Civil Rights Office.

41. Shortly after Diersen retired, GAO replaced him with Analysts including Patrick Ward and Barry Kirby who were substantially younger and substantially less qualified; gave leadership roles that Diersen should have received to Analysts who were minority, female, and/or substantially younger; and assigned Diersen's highly visible office to a substantially younger minority female who is an outspoken advocate of affirmative action. GAO rehired Patrick Ward shortly after Diersen retired. Patrick Ward's wife was an Analyst in GAO's Chicago Field Office. GAO was extremely concerned that she would leave GAO unless GAO rehired her husband.

42. Within 12 months after Diersen retired, GAO's Chicago Field Office hired 5 Analysts, all of whom were under age 40, minority, and/or female; it promoted to Band II 7 of the office's 16 Band I Analysts – all 7 were under age 40, minority, and/or female and gave many of them leadership roles, but failed to promote any of the 5 who were over age 40, white, and/or male; and it promoted an under age 40 female to Band III.

43. Diersen made it clear to GAO's Civil Rights Counselor and its investigator that that a) his complaint included class action and individual claims of age discrimination, reverse discrimination, and retaliation; b) the violations had continued for many years; c) the adverse employment actions GAO took against him were a linked series, cumulative, and part of a pattern; and d) his fear of suffering greater retaliation prevented him from filing a written discrimination complaint any sooner than he did. GAO sent its investigation report to Diersen on February 19, 1998. In his March 19, 1998 letter, Diersen cited numerous deficiencies in the investigation and asked that they be corrected, but GAO refused and denied his complaint on April 29, 1998.

44. In connection with GAO's investigation of Diersen's September 30, 1997 discrimination complaint, Leslie Aronovitz submitted affidavits concerning Diersen dated November 10, 1997 and December 8, 1997. Stewart Herman provided a similar affidavit dated December 2, 1997. Cecile Trop provided a similar affidavit dated December 8, 1997.



45. GAO never did recommend Diersen "very highly" to any prospective employers. While GAO subsequently provided Diersen with letters of recommendation dated October 28, 1997, October 30, 1997, and July 23, 1998, GAO did so only reluctantly and none of the letters contained a "strong" recommendation.

46. Diersen has contacted many elected officials and others about his claims. On July 30, 1998, Diersen's attorney filed this suit. Since April 12, 1999, Diersen has posted his claims against GAO on the internet at [www.Adversity.Net](http://www.Adversity.Net).

47. To Diersen's detriment, on at least five occasions since September 30, 1997, GAO knowingly, intentionally, and willfully failed to follow its procedures set forth in GAO Order 2294.3 for responding to inquiries about its former employees. GAO failed to respond to inquiries about Diersen's GAO employment, it refused to acknowledge that Diersen was eligible to be rehired by GAO, and it failed to keep its agreement with Diersen to respond to inquiries about his GAO employment in a manner consistent with its promised letter of recommendation.

48. Diersen has set forth many additional facts in support of his claims in a) previous filings including the statements of points and authorities in support of his first and second amended complaints and their supporting exhibits (12 for his first amended complaint and 33 for his second amended complaint) and b) his April 25, 2001 affidavit which is attached to this complaint.

#### **AS AND FOR A FIRST CAUSE OF ACTION**

(Preferential Treatment Resulted in Disparate Treatment and Reverse Discrimination)

49. GAO's admission that it gives preferential treatment to its Analysts who are younger, minority, and female is direct evidence that it knowingly and willfully discriminates against its Analysts who are older, white, and male, including Diersen.

50. No justification exists for GAO's discriminatory acts.

#### **AS AND FOR A SECOND CAUSE OF ACTION**

(Facially Neutral Policies and Practices Had Disparate Impact)

51. Since at least the 1970s, GAO has given preferential treatment to its Analysts who are younger, minority, and female because that is what the Democratic Party and many Democratic Chairmen and Ranking Members want GAO to do.

52. GAO's affirmative action and diversity based demographic consciousness practices have resulted in age-based, race-based, and gender-based stereotyping that adversely impacted Diersen and other Analysts who are older, white, and male.

53. GAO's shift in its emphasis to hiring, retaining, and promoting Analysts who hold public administration degrees adversely impacted Diersen and other Analysts who hold accounting degrees because the shift fostered the erroneous perception that their education, professional certifications, and experience were no longer needed.

54. GAO's Arthur Andersen style "up or down" practice adversely impacted Diersen and other Analysts who are older. The practice wastes the experience that Diersen and other older Analysts have -- it wastes a tremendous amount of human capital. The adverse impact of the practice was especially severe on those Analysts like Diersen who are white and/or male because GAO applies the practice most vigorously to them.

55. Bands adversely impacted Diersen and other Analysts who are older, white, and male because GAO uses the flexibility in Bands primarily to constructively and literally promote Analysts who were younger, minority, and female and to constructively and literally demote Analysts who were older, white, and male.

56. PFP adversely impacted Diersen and other Analysts who are older, white, and male because GAO uses the flexibility in PFP to constructively and literally promote Analysts who were younger, minority, and female and to demote Analysts who were older, white, and male.

57. Using early retirement offers rather than RIFs to deal with budget reductions adversely impacted Diersen and other Analysts who are older because it sends a clear message that GAO values "youth" far more highly than it values "experience."

58. The primary reason GAO instituted the aforesaid facially neutral policies and practices was to help achieve its goals of retaining and promoting Analysts who were younger, minority, and female and driving out its older white male Band II Analysts, including Diersen.

59. The aforesaid facially neutral employment practices encouraged GAO's older white male Analysts to leave the agency, to give up their aspirations for

promotions, to more readily accept constructive demotions and adverse transfers, and to retire as soon as they became eligible.

60. The primary reason why older white male Band II Analysts do not complain more about age discrimination and reverse discrimination and why virtually all of them retire soon after they become eligible is age discrimination, reverse discrimination, and fear of retaliation. The primary reason why the average age of Analysts in GAO's Chicago Field Office is the lowest of all GAO's offices and divisions is that GAO's Chicago Field Office engages in the highest level of age discrimination, reverse discrimination, and retaliation of all GAO's offices and divisions.

**AS AND FOR A THIRD CAUSE OF ACTION**

(Prima Facie Case of Age Discrimination, Reverse Discrimination, and Retaliation)

61. Diersen is a member of a protected class who is equally or better qualified in terms of job performance, education, professional certifications, pre-GAO work experience, and GAO work experience than the younger, minority, and female Analysts who GAO hired, retained, and promoted over him as well as those who received job assignments, leadership roles, pay increases, and bonuses that he was denied.

62. GAO took adverse employment actions against Diersen, including denying him pay increases and forcing him into early retirement, because he engaged in protected opposition and because he participated in an age discrimination lawsuit.

63. GAO replaced Diersen with Analysts who were substantially less qualified than him, substantially younger than him, minority, and/or female.

64. GAO took additional adverse actions against Diersen after he retired, including sabotaging his job search, because he filed a discrimination complaint, he contacted many elected officials and others about his claims, he caused this lawsuit to be filed, and he posted his claims against GAO on the internet.

65. Diersen has established a prima facie case of age discrimination, reverse discrimination, and retaliation and he has established a causal connection between his protected opposition and participation activities and the adverse employment actions and other retaliatory acts GAO took against him.

66. The severe criticisms GAO made of Diersen's performance during September of 1997 and in affidavits submitted during its investigation of his

discrimination complaint were a pretext. Even if GAO's criticisms of Diersen's performance were valid, they did not justify the very low performance appraisal GAO gave him let alone forcing him to accept constructive demotion or adverse transfer if he did not retire.

**AS AND FOR A FOURTH CAUSE OF ACTION**

(Retaliation for Opposition and Participation Between 1980 and 1997)

67. Between 1980 and 1997, GAO, took the following adverse personnel actions against Diersen in retaliation because he opposed giving preferential treatment to younger, minority, and female Analysts and because since 1988, he has participated in Chennareddy, a class action lawsuit against GAO that claimed age discrimination resulted from that practice:

68. Permitted if not encouraged Diersen's superiors, coworkers, and subordinates to make derogatory statements about him thereby permitting if not encouraging the creation of a hostile work environment for him; delayed his promotions to GS-11, 12, and 13 and discouraged him from applying for additional promotions; denied him leadership roles; denied him assignments to audits in which he could contribute the most to GAO; assigned him Analysts to supervise who limited if not harmed his career advancement; assigned Diersen problem employee Fred Schmidt in 1987 to encourage Diersen to leave the agency and problem employee Gwen Poole in 1995 to force Diersen to retire; gave Diersen unrealistic performance expectations and unfair performance appraisals and PFP rankings, especially for 1989, 1996, and 1997; gave him no bonuses and either no or smaller pay increases; and paid him less than it paid similarly and lesser qualified minorities and females, including Gwen Poole, for performing similar work.

69. The aforesaid adverse employment actions were retaliatory, a linked series, cumulative, and part of a pattern. Fear of suffering greater retaliation prevented Diersen from filing a written discrimination complaint until September 30, 1997.

**AS AND FOR A FIFTH CAUSE OF ACTION**

(Constructive Discharge in September of 1997 for Opposition and Participation)

70. During September of 1997, Diersen's superiors, especially Cecile Trop, Stewart Herman, and Leslie Aronovitz, took many actions that made him believe that he had no real choice but to retire by September 30, 1997. Diersen understood from his

superiors' words and actions as described above that if he did not retire, they would assure that the rest of his GAO career would be a "living hell." Diersen's superiors gave him every reason to believe that if he did not retire, they would soon terminate him and cause him to lose his retirement benefits. Nothing GAO has subsequently done has indicated that Diersen's belief was not correct.

71. The timing of the adverse employment actions GAO took against Diersen during September of 1997 is extremely suspicious and evidences GAO's intent to force him into early retirement.

72. The alternatives GAO offered Diersen during September of 1997 as a condition of continued employment were onerous, intolerable, and demeaning and constituted a constructive discharge.

73. The adverse employment actions GAO took against Diersen, especially during September of 1997, were a mere pretext to force him to accept early retirement. Even if GAO's criticisms of Diersen's performance were valid, they did not justify the very low performance appraisal GAO gave him let alone forcing him to accept constructive demotion or adverse transfer if he did not retire.

74. A primary reason GAO did not force Diersen to retire sooner than September 30, 1997 was that since October 1, 1992, GAO had been under a self-imposed agency-wide hiring freeze that it knew it would lift on October 1, 1997. If Diersen left before September 30, 1997, GAO could not replace him until after October 1, 1997.

75. The aforesaid adverse employment actions were retaliatory, a linked series, cumulative, and part of a pattern. Fear of suffering greater retaliation prevented Diersen from filing a written discrimination complaint until September 30, 1997.

#### **AS AND FOR A SIXTH CAUSE OF ACTION**

(Retaliation After September of 1997 for Filing Administrative Discrimination Complaint, Contacting Elected Officials, Filing This Suit, and Posting Claims on the Internet)

76. GAO and its investigator did not fairly or fully investigate Diersen's September 30, 1997 administrative discrimination complaint. GAO and its investigator wrongly a) refused to investigate Diersen's class action claims of age discrimination, reverse discrimination, and retaliation; b) refused to investigate Diersen's claim that the discriminatory and retaliatory violations had continued for many years and that the

adverse employment actions GAO took against him were a linked series, cumulative, and part of a pattern; c) ignored the support for Diersen's claims that four retired GAO Band II Analysts provided in affidavits; d) refused to correct serious deficiencies in its investigation; and e) issued a report that was biased and a pretext thereby denying Diersen the benefit of due process in the administrative processing of his complaint.

77. The aforesaid affidavits that Cecile Trop, Stewart Herman, and Leslie Aronovitz gave GAO's investigator contain extremely negative statements about Diersen that are false and were knowingly and willfully made to retaliate against Diersen for filing an administrative discrimination complaint.

78. GAO knowingly and willfully sabotaged Diersen's job search to retaliate against him for filing an administrative discrimination complaint, for contacting elected officials about his claims, for filing this lawsuit, and for posting his claims on the internet.

79. GAO took the aforesaid adverse employment actions against Diersen in retaliation because he opposed giving preferential treatment to younger, minority, and female Analysts; because he participated in Chennareddy; because he filed an administrative discrimination complaint; because he contacted elected officials about his claims; because he filed this lawsuit, and because he posted his claims on the internet. The aforesaid adverse employment actions were retaliatory, a linked series, cumulative, and part of a pattern.

#### **Count I: Age Discrimination**

80. Diersen realleges and incorporates paragraphs 1-79.

81. Diersen claims that his age was a determining factor that motivated GAO to take the adverse employment actions as set forth above, especially during September of 1997, and that therefore, GAO knowingly and willfully discriminated against Diersen on the basis of his age in violation of ADEA.

#### **Count II: Reverse Discrimination**

82. Diersen realleges and incorporates paragraphs 1-81.

83. Diersen claims that his race and gender were determining factors that motivated GAO to take the adverse employment actions as set forth above, especially during September of 1997, and that therefore, GAO knowingly and willfully

discriminated against Diersen on the basis of his race and gender in violation of Title VII.

### **Count III: Retaliation**

84. Diersen realleges and incorporates paragraphs 1-83.

85. Diersen claims that GAO violated ADEA and Title VII when it knowingly and willfully retaliated against him while he was employed by GAO as set forth above because he opposed GAO's practice of giving preferential treatment to its employees who are younger, minority, and female and because he participated in a lawsuit that claimed age discrimination resulted from that practice.

86. Diersen claims that GAO also violated ADEA and Title VII when it knowingly and willfully retaliated against him after he left GAO as set forth above because he filed an administrative discrimination complaint, because he contacted elected officials about his claims, because he filed this lawsuit, and because he posted his claims on the internet.

### **Relief Sought**

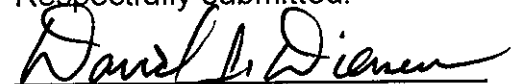
87. **Wherefore**, Diersen respectfully requests the following relief: Preliminary and permanent injunction against GAO to stop its retaliation against Diersen including its sabotage of his job search; entry of judgment in favor of Diersen and against GAO; back pay; reinstatement, or in the alternative, front pay; liquidated damages of not less than \$300,000; reiteration and restoration of benefits; punitive damages; attorney's fees and costs; and other such relief as may be appropriate to effectuate the purposes of ADEA and Title VII.

### **Jury Demand**

88. Diersen hereby demands a jury trial for those claims for which jury trial is allowed under present law.

Dated: April 25, 2001

Respectfully submitted:



David John Diersen, Pro Se  
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Phone: 630-653-0462  
Fax: 630-653-9665  
Email: [diersen@aol.com](mailto:diersen@aol.com)

**Certificate of Service**

I certify that on April 25, 2001, I delivered a copy of my FIFTH AMENDED COMPLAINT OF EMPLOYMENT DISCRIMINATION AND RETALIATION and its attached affidavit to the following named individual.

Jack Donatelli  
United States Department of Justice  
219 South Dearborn Street, Room 506  
Chicago, Illinois 60604  
Phone: 312-353-4220  
Fax: 312-886-4073



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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

David John Diersen,	)	
	)	
Plaintiff,	)	Docket No.: 00cv2437
	)	
v.	)	Assigned Judge: Robert W. Gettleman
	)	
David M. Walker,	)	Magistrate Judge: Nan R. Nolan
Comptroller General of the	)	
United States of America,	)	
	)	
Defendant.	)	

**AFFIDAVIT OF DAVID JOHN DIERSEN**

I, David John Diersen, hereby declare and affirm under penalty of perjury that the following facts are true and correct to the best of my knowledge, information, and belief:

1. I am the plaintiff in the above captioned lawsuit.
2. During his March 21, 2001 status call, Judge Gettleman granted defendant U.S. General Accounting Office's (GAO) motion to strike my Fourth Amended Complaint because of its 35 page length and granted me until April 25, 2001 to file a Fifth Amended Complaint, but limited to 15 pages. During that status call, Judge Gettleman stated that I had included too many facts in my Fourth Amended Complaint. This affidavit contains some of the facts that the 15 page limit prevented me from including in my Fifth Amended Complaint.
3. I am a white male who was born on September 29, 1948. My political affiliation is Republican, my religion is Lutheran, and my national origin is 100 percent German. I am not a veteran and I am not disabled. I have always been a social conservative. I have been a contributing member of the Republican Party since 1976 and a Republican Precinct Committeeman since 1999. I have been married since April 1, 1978. My wife has always been gainfully employed and we do not have children. My ancestors immigrated to America in the 1840s.

4. I transferred to GAO from IRS at age 31 on January 27, 1980 and worked in GAO's Chicago Field Office as an Evaluator (position title since changed to Analyst) until I retired on September 30, 1997.

5. I earned a Bachelor of Science in Management from Northern Illinois University in 1970, an MBA from Loyola University in 1976, and a Master of Science in Accounting from DePaul University in 1980.

6. Because GAO officially encourages its Analysts to take job-related graduate courses and because GAO assigned me to audits of financial regulators in 1990, I began taking graduate courses at the Illinois Institute of Technology (IIT), and in May of 1997, I earned a Master of Science in Financial Markets and Trading.

7. The courses I completed at IIT made me especially well qualified for audits of financial regulators and for leadership roles on such audits.

8. I passed the CPA examination on my first attempt in 1979. Because GAO officially encourages its Analysts to acquire job-related professional certifications, I passed the Certified Internal Auditor examination on my first attempt in 1981, I became a licensed CPA in Illinois in 1982, I became a Certified Fraud Examiner in 1990, I became a Certified Government Financial Manager in 1994, I became a Certified Financial Services Auditor in 1996, and I became a Forensic Accountant in 1997.

9. I joined the Association of Government Accountants (AGA) and the Illinois CPA Society in 1979. Because GAO officially encourages its Analysts to join and be active in job-related professional associations, I joined many additional associations including the Institute of Internal Auditors and I continue to be a member. I served on AGA Chicago Chapter's executive committee between 1983 and 1996 and I served on the Illinois CPA Society's membership committee between 1989 and 1998.

10. I was employed by IRS as a GS-7, 9, and 11 Revenue Office in its Harvey and Joliet offices between 1971 and 1974, as a GS-12 Revenue Officer in its Chicago office between 1974 and 1976, and as a GS-12 Special Procedures Staff Advisor in its Chicago office between 1976 and 1980.

11. My pre-GAO work experience at IRS made me especially well qualified to work on audits of IRS and especially on audits of IRS's Collection Division.

12. Throughout my employment at GAO, as I had done at IRS, I freely disclosed my demographic information as well as my opposition to giving preferential treatment to those who are younger, minority, and female. I advised my superiors, coworkers, and subordinates that I opposed giving preferential treatment to employees because of their age, race, or gender because giving preferential treatment to one group meant that another group was discriminated against. Very few of my superiors, coworkers, or subordinates voiced any similar such opposition for fear of retaliation.

13. Soon after I transferred to GAO and throughout my GAO career, certain of my superiors, coworkers, and subordinates made it clear to me that GAO viewed my career prospects to be extremely limited because of my demographics and because of my opposition to giving preferential treatment to Analysts who are younger, minority, and female.

14. Throughout my GAO career, certain of my superiors made false and extremely negative statements about my judgment, motives, and abilities and they encouraged my supervisors, coworkers, and subordinates to share these derogatory statements.

15. Certain of my superiors, coworkers, and subordinates have stated or implied to me and to others that my educational achievements were not relevant and/or merely a distraction, that my professional certifications and activities were not relevant and/or merely a distraction, and that my knowledge of IRS was stale and/or I could not be objective about IRS.

16. I have never considered the aforesaid false and derogatory statements to be "stray remarks." I believe that they were designed to encourage me to leave GAO. GAO does not permit such derogatory statements to be made about its Analysts who are younger, minority, or female.

17. In 1980, to transfer to GAO as an Analyst from IRS, GAO required me to accept a downgrade to GS-9 and therefore, a reduction in pay of approximately \$6,000, even though I had been a GS-12 at IRS for 5 1/2 years. Subsequently, I learned that GAO did not require similarly qualified minority and female IRS employees to accept downgrades to transfer to GAO as Analysts.

18. GAO did not promote me back to GS-11 until 1981 and not back to GS-12 until 1982. GAO did not promote me to GS-13 until 1986, over 12 years after I had first been promoted to GS-12.

19. Throughout my GAO career, because of the low performance appraisals GAO gave me, I felt as though GAO did not want me to apply for promotions and I advised my superiors, coworkers, and others of that.

20. Before I accepted GAO's job offer in 1980, the GAO Chicago Field Office Staff Manager and his assistant assured me that I would soon be assigned to audits of IRS, that I would soon be given leadership roles, and that I would be promoted rapidly.

21. GAO officially encourages its Analysts to apply the work experience they gained prior to joining GAO to their GAO audit assignments.

22. In GAO's Chicago Field Office, prior to 1980 and continuing through 1997, audits of IRS and especially leadership roles on audits of IRS's Collection Division were preferred high-visibility assignments. Subsequent to my transfer to GAO, I learned that GAO made every effort to give those assignments and roles to its Analysts who were younger, minority, and/or female.

23. Throughout my entire GAO career, I requested my superiors to a) assign me to audits of IRS's Collection Division so that I could apply the knowledge of IRS that I had gained from working there for almost 9 years and b) give me leadership roles. However, between 1980 and 1986, GAO did not assign me to any audits of IRS and instead, assigned me to audits of various federal agencies and programs. While GAO did assign me to two audits of IRS's Criminal Investigation Division between 1986 and 1988, GAO never assigned me to audits of IRS's Collection Division.

24. GAO denied me assignments on audits of IRS even though many of my superiors, coworkers, and subordinates acknowledged that I could contribute the most to GAO on such audits and especially on audits of IRS's Collection Division.

25. GAO gave me only one real leadership role and that was during 1987 and 1988.

26. GAO requires its supervisors to give preferential treatment to their subordinates who are younger, minority, and/or female. While such preferential treatment helps those who receive it, it typically comes at the expense the supervisor

who gives it. GAO assigned me many Analysts to supervise during my 18 years with the agency. Virtually all of them were younger, minority, female, and/or had a disability.

27. GAO makes every effort to avoid requiring its younger, minority, and female Analysts to supervise Analysts with performance problems. During 1987 and 1988, GAO required me to supervise Fred Schmidt, a young white male GS-11 Analyst with a disability and serious performance problems. My superiors made it clear to me that I had to give Mr. Schmidt "accurate" performance appraisals because his previous supervisors had failed to do so. The situation was extremely difficult and time consuming.

28. My GAO superiors had tremendous flexibility in setting performance expectations for me. The higher that expectations are set, the easier it is to be critical of the recipient's performance. I periodically complained to my supervisors that the performance expectations they set for him were unrealistically high. I also periodically complained to my supervisors that they set performance expectations for younger, minority, and female Analysts that were lower to facilitate giving those Analysts higher performance appraisals.

29. I periodically complained to my GAO superiors that they were abusing the subjectivity in GAO's performance appraisal system to give me unfair performance appraisals, to deny me pay increases, to discourage me from applying for promotions, and to delay and deny my promotions.

30. I always met or exceeded the legitimate performance expectations my supervisors and superiors gave me.

31. Because of my demographics and because of my complaints about reverse discrimination, my superiors, and therefore my coworkers and subordinates, frequently unfairly blamed me for things that went wrong during audits including missed deadlines. As a result of that unfair blame, with rare exception, the performance appraisals that my superiors gave me were lower than those they gave my coworkers who were younger, minority, and female.

32. The lower performance appraisals GAO gave me resulted in my receiving smaller or no pay increases, delayed promotions, and lost promotion opportunities.

33. On or about September 29, 1988, the date I became 40 years old, I advised my superiors, coworkers, and subordinates that I had become an active participant in Chennareddy, et al v. Bowsher, Case No. 87-3538, a class action age discrimination lawsuit against GAO that continues to be pending before Senior Judge John G. Penn in the United States District Court for the District of Columbia.

34. Throughout the remainder of my GAO employment, several of my superiors, coworkers, and subordinates asked me about the status of the Chennareddy litigation. I continue to be one of the most active participants in Chennareddy. Very few of my coworkers disclosed their participation in Chennareddy for fear of retaliation.

35. During November of 1988, because I had become an active participant in Chennareddy, and for the purpose of forcing me to leave GAO, my superiors abruptly took me off audits of IRS and put me on GAO Chicago Field Office's worst assignment – the annual review of DOD's ammunition budget request in distant Rock Island, Illinois.

36. GAO assigned me to the DOD audit for the first six months of 1989 and during that time, my supervisor, Pete Konjevich, did everything he could to force me to leave GAO including giving me extremely unrealistic performance expectations and an extremely unfair performance appraisal. I filed a grievance over that appraisal, but GAO denied it.

37. After June of 1989, because I had complained about GAO's retaliatory actions to my U.S. Representative, Henry Hyde, GAO backed off somewhat from its efforts to force me to leave GAO.

38. GAO assigned me to an audit of a Railroad Retirement Board program for the last six months of 1989 and between 1990 and my retirement in 1997, GAO assigned me to audits of financial regulators.

39. The Pay-For-Performance rankings GAO gave me between 1989 and 1997 (Acceptable in 1989, Commendable 1990-1994 and 1996-1997, and Meritorious in 1995) placed me in the bottom 5 percent of all Analysts.

40. I first became eligible to take early retirement on October 1, 1993 when I was 45 years old.

41. GAO makes every effort to avoid requiring its younger, minority, and female Analysts to supervise Analysts with performance problems. Between 1995 and my

retirement, for the purpose of forcing me to retire, GAO assigned me Gwen Poole, an older minority female Band II Analyst with serious performance problems (See Poole v. Hinchman, Docket No. 98cv3977). My superiors made it clear to me that I had to give Ms. Poole "accurate" performance appraisals because her previous supervisors had failed to do so. The situation was extremely difficult and time consuming.

42. On February 21, 1997, I shared my complaints about discrimination and retaliation in an 8-page single-spaced letter with Charles W. Woodward, the Chairman of GAO's Mid-Level Employee Council, and sought his help.

43. On June 26, 1997, GAO gave me a written "Feedback and Coaching Checklist" that stated I was exceeding performance expectations in all areas.

44. When GAO forced me into early retirement on September 30, 1997, GAO was paying me \$72,460 per year. I subsequently learned that at that time, GAO was paying Gwen Poole \$75,811 or \$3,351 (4.6 %) more per year than me.

45. Cecile Trop was my immediate supervisor between 1993 and my retirement on September 30, 1997 and she was one of my superiors since 1990. Cecile Trop is female, younger than me, and a Band III Analyst. Stewart Herman, who was one of my superiors since 1980, is male, older than me, and a Band III Deputy Manager. Leslie Aronovitz, who was one of my superiors since 1989, is female, younger than me, and a Manager in the Senior Executive Service. Patrick Dolan was my immediate supervisor between 1989 and 1993. Pete Konjevich was my immediate supervisor during the first six months of 1989. Thomas Venezia was my immediate supervisor between 1986 and 1988. Since 1986, my higher level superiors included Richard Stana, Thomas McCool, John Finch, John Luke, Joan Dodaro, Charles Bowsher, and James Hinchman.

46. The four most favorable events in my GAO career were my being offered employment in 1980, my being assigned to two audits of IRS between 1986 and 1988, my being promoted to GS-13 in 1986, and my being given a leadership role in 1987. However, none of those events would have occurred were it not for the actions of just one of my superiors -- Bill Schad. Sadly, GAO forced Mr. Schad into early retirement in 1987 and I believe that a primary reason why GAO did that was his refusal to discriminate or retaliate against me or any other employee.

47. Immediately after I retired on September 30, 1997, GAO dissolved its Chicago Field Office group that did audits of IRS and transferred its manager, Thomas Venezia who had led the group since the 1970s, to the group that I had been assigned to. Mr. Venezia is an over age 40 white male who played a major role in keeping me off GAO's audits of IRS.

48. GAO's Chicago Field Office retaliates severely against its employees who complain -- the stronger you complain, the stronger GAO's Field Office retaliates against you.

49. Because of GAO's discriminatory and retaliatory acts against me, I have suffered, I am suffering, and I will continue to suffer tremendous economic damages and tremendous irreparable emotional and psychological damages.

50. Those damages began when GAO forced me to accept a downgrade and an approximate \$6,000 reduction in pay in 1980 as a condition of allowing me to transfer to GAO from IRS.

51. Those damages grew each time GAO delayed or denied my pay increases, bonuses, and promotions.

52. Those damages grew each time GAO ignored or denigrated my education, professional certifications and activities, and pre-GAO work experience.

53. Those damages grew each time GAO gave me unrealistic performance expectations, denied me assignments on audits of IRS, denied me leadership roles, gave me unfair performance appraisals, and allowed my superiors, coworkers, and subordinates to make false and extremely negative statements about my abilities, performance, and character.

54. Economic damages I suffered during the 18 years I was employed by GAO easily exceeded \$300,000.

55. Because GAO forced me to retire at age 49 in 1997 instead of allowing me to work for 6 more years until the normal retirement age of 55 in 2003, my income during those 6 years will be at least \$40,000 less for each year totaling at least \$240,000 in damages (\$40,000 X 6).



56. If GAO had not delayed and denied my pay increases and promotions, both my \$72, 460 salary when he retired and my salary during the 3 years before that which was used to calculate his pension would have been substantially higher.

57. Further, because GAO forced me to retire 6 years before the normal retirement age of 55 in 2003, I am forced to suffer a substantial early retirement penalty for the rest of my life. Because of that, my pension will be at least \$14,000 less each year for the rest of my life. Resultant economic damages I will suffer between after 2003 and 2033 will total at least \$420,000 (\$14, 000 X 30).

58. I have taken reasonable efforts to mitigate damages by seeking employment commensurate with my education, professional certifications and activities, and work experience; by posting my resume on the internet at [www.diersen.com](http://www.diersen.com), by becoming an arbitrator for the National Association of Securities Dealers arbitrator; and by offering my services as a consultant.

59. GAO's retaliation against me and especially its sabotage of my job search continue to cause me unemployment.

60. Because GAO refused to promote me beyond GS-13 and because GAO forced me into early retirement, my prospects for finding employment commensurate with my education, professional certifications, and work experience are extremely poor. That problem is aggravated by GAO's refusal to agree to either mediation or settlement negotiations.

61. To pursue this litigation, I have paid substantial attorney fees and related costs and I have devoted substantial amounts of my personal time.

62. However, as great as the tremendous economic loss is that I have suffered, I am suffering, and I will suffer because of GAO's discriminatory and retaliatory acts against me, the emotional and psychological damages that I have, I am, and I will suffer are far greater.

I hereby declare and affirm under penalty of perjury that the aforesaid facts are true and correct to the best of my knowledge, information, and belief.

Signed the 25<sup>th</sup> day of APRIL, 2001

David J. Diersen

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STATE OF ILLINOIS

COUNTY OF DuPage

On this 25 day of April, 2001, David John Diersen  
personally appeared before me. I know him to be the individual described herein and  
he executed the forgoing instrument before me.

SUBSCRIBED AND SWORN TO

before me this 25 Day of

April, 2001.

Janelle Marie Avelsgaard  
Notary Public

