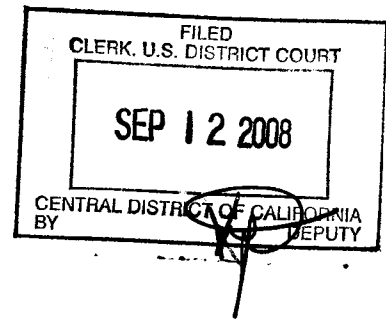


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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Mark D. Rome,

Plaintiff(s),

vs.

Glaxo Smith Kline, Inc., et al.

Defendant(s).

SA CV 04-00332 JVS(PJWx)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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2
3 *FINDINGS OF FACT AND CONCLUSIONS OF LAW*
4

5 THE COURT: This matter is before the Court for a
6 bench trial on Mark Rome's claim against SmithKline Beecham
7 Corporation, which has commonly been referred to in this
8 case as GSK, on two claims. One, a claim of violation of
9 Section 12940 of the California government code for age
10 discrimination, 12940(a), and a separate and distinct claim
11 for retaliation under 12940(h) of the government code.

12 In coming to my findings of fact and conclusions
13 of law, I have considered the evidence presented at trial,
14 including the deposition evidence. I have considered the
15 parties' memoranda of contentions of law and fact, and I
16 have also considered the parties' proposed findings.

17 I think the most appropriate place to start with
18 is with the parties' pretrial conference order, which I
19 believe provides a very good basic factual framework for the
20 case. So I am going to recite and adopt the facts stated in
21 the pretrial conference order. I find that the record
22 supports by a preponderance of the evidence each of the
23 following facts which the parties have stipulated to:

24 Mark Rome was born on September 9, 1953. Rome was
25 hired in 1977 by GSK's predecessor. At the time of his

1 termination in 2003, Rome was 49 years old. In October
2 2003, Ruth Christ was hired to replace Rome. Christ was 34
3 years old. Malia Owens, Rome's supervisor, was 36 years old
4 when Rome was terminated by GSK.

5 In 2003, GSK had a progressive discipline policy.
6 In 2003, Rome held the position with GSK of senior executive
7 sales representative in the Southern California Medical
8 Group Team. Rome's direct supervisor was Malia Owens.

9 In 2003, Owens held the position of medical group
10 development manager. In June 2003, GSK awarded La Vida
11 Foundation two educational grants in the amount of \$2,500
12 each.

13 Rome was terminated from his employment with GSK
14 on August 14, 2003. The reason given Rome for the
15 termination of his employment and set out in the separation
16 notice provided Rome that day was that he had, quote,
17 "violated GSK's employee conduct policy, specifically GSK's
18 grants policy and procedure, Section 6.3, procedure for
19 approving and processing grants," close quote.

20 In 2003, GSK's grants policy and procedure was set
21 forth in Chapter 6 of the GSK Commercial Policies and
22 Procedures Manual. In 2003, Section 6.3 of GSK's grants
23 policy and procedure stated, quote, "do not, single quote,
24 'promise,' close single quote, "a grant to a customer or
25 sign any agreement before a grant is fully processed and

1 approved through the GSK Grants Department," close quote.

2 In 2003, GSK's grants policy and procedure also
3 stated, quote, "Only expenses for meals for a specific event
4 are reimbursed, and the expenses are included in the entire
5 amount of the grants," close quote.

6 On June 11, 2003, a memo was distributed via
7 e-mail to GSK's field personnel and forwarded by Malia Owens
8 to Mark Rome and/or the members of the medical group which
9 stated, quote, in all caps, "Never promise a grant before it
10 has been approved by the Grants Department," closed quote.

11 In 2003, GSK's employee conduct policy provided
12 that, quote, "Certain violations of company regulations are
13 so serious that they may call for immediate discharge or
14 other appropriate action. Such actions include, but are not
15 limited to: No. 28, violation of commercial policies and
16 practices," closed quote.

17 On July 21, 2003, Owens met with Rome regarding
18 Dr. Richards' complaint. On July 22, 2003, Rome called
19 GSK's Employee Response Center to make a complaint about
20 Malia Owens. On July 31, 2003, Rome completed two
21 California Department of Fair Employment and Housing
22 Complaint of Discrimination Forms.

23 On July 31, complaints of discrimination were
24 received by the Department of Fair Employment and Housing,
25 DFEH, on August 11, 2003, in its Sacramento office. The

1 only written notice of the July 31, 2003, complaints of
2 discrimination issued to GSK were a Notice of Filing of
3 Discrimination Complaint and a Notice of Case Closure, both
4 of which were sent to GSK by the DFEH on August 20, 2003.

5 On August 15, 2003, GSK completed an Amended DFEH
6 Complaint of Discrimination Form, which GSK also received
7 notice of in correspondence dated August 20, 2003.

8 Between July 2002 and August 2003, Rome applied
9 for seven different positions within GSK -- four oncology
10 account manager positions and three HIV clinical specialist
11 positions. Rome was not offered any of these seven
12 positions.

13 In 2003, GSK maintained an equal opportunity
14 policy. In 2003, GSK maintained a harassment-free workplace
15 policy which, among other things, provided retaliation
16 against an employee by his supervisor or another employee
17 for bringing a complaint is prohibited.

18 It's conceded by all parties that with respect to
19 the DFEH discrimination claim, plaintiff has made out a
20 prima facie case. I am not going to recite the elements of
21 the prima facie case, but once a prima facie case has been
22 made, a burden shifting occurs under principles announced in
23 in McDonnell Douglas Corp. v. Green, 411 U.S., 792, and in
24 Guz v. Bechtel International, Inc., 24 Cal. 4th, 317, 2000.

25 Basically once the plaintiff has established a

1 prima facie case, it then becomes the burden of the employer
2 to establish a nondiscriminatory reason for the action
3 taken. If the employer comes forward with that, the
4 ultimate burden then shifts back to the plaintiff to prove
5 by a preponderance of the evidence that the plaintiff has
6 been discriminated against on an unlawful basis. In this
7 case, age.

8 I find that with respect to the discrimination
9 claim, plaintiff has made a prima facie case, and for
10 reasons which I will elaborate in a moment, GSK has come
11 forward with a legitimate nondiscriminatory reason for the
12 actions taken, which under the discrimination count include
13 termination, failure to offer him certain employment
14 opportunities, and alleged harassment.

15 With respect to the second claim, retaliation for
16 making a complaint with regard to conduct prohibited by the
17 DFEH, the parties concede that with the exception of one
18 element plaintiff has made out a prima facie case. That
19 element is whether the complaint which Mr. Rome made to the
20 GSK Human Resources Department on January 22, 2003, was in
21 fact a claim of age discrimination or conduct otherwise
22 protected under the statute.

23 Exhibit 66 is the Human Resources employee
24 relations intake sheet which records the complaint that Mr.
25 Rome made at the end of the day on July 22, 2003. He says

1 in part the reason for his call today is that he wants to
2 find out what his rights are as far as not feeling harassed
3 to find another job.

4 He also stated many times during the conversation
5 -- that is, with Ms. Owens -- he is afraid of retaliation,
6 that he's being harassed and discriminated against.

7 He also states on page 2 according to the report,
8 he said that she -- again referring to Owens -- makes
9 comments about how much money he makes, and this makes him
10 feel like she wants to get someone younger that would not be
11 paid as much.

12 Taking the entire context of this document, I
13 believe that a prima facie showing of having made a
14 complaint for discrimination on the basis of age and
15 harassment on the basis of age is made out. I believe that
16 the showing is weak, but I believe that one reading this
17 would come away with the view that Mr. Rome had reported
18 that adverse actions were being taken against him at least
19 in part on the basis of his age.

20 So for that reason, all other elements of the
21 claim for retaliation with respect to prima facie having
22 been conceded, I find that plaintiff has made a prima facie
23 case of retaliation. I specifically find, although the
24 showing is weak, that the claim made in Exhibit 65 is a
25 claim of discrimination and other conduct violative of the

1 DFEH statute.

2 Again, I find that GSK has come forward with a
3 legitimate nondiscriminatory reason for the negative action
4 which it took following this complaint, namely, his
5 termination. I believe that the record establishes that
6 discipline for violation of the grants policy is a
7 legitimate nondiscriminatory basis for taking disciplinary
8 action.

9 Because the grants policy figures so prominently
10 in this case, I think it's worthwhile, although I noted
11 those in the summary, to discuss in more detail the relevant
12 corporate policies. Exhibit 21 is GSK's corporate conduct
13 policy. That policy points out in paragraph A:

14 "Certain violations of company regulations are so
15 serious that they may call for immediate discharge or other
16 appropriate disciplinary action. Such actions include, but
17 are not limited to, No. 28, his violation of commercial
18 policies and practices."

19 Although GSK had a progressive discipline policy,
20 it was clear from the employee conduct policy that there was
21 certain conduct that fell outside the progressive discipline
22 policy and in and of itself warranted termination as a
23 sanction.

24 The grants policy is repeated in a number of
25 places in the record, including Exhibit 18, Commercial

1 Practices and Policies Resource Manual for U.S. Pharma. At
2 page GSK 0774, the following appears: "1. Do not 'promise'
3 a grant to the customer or sign any agreement before a grant
4 is fully processed and approved through the GSK grants
5 policy."

6 Arjun Rajaratnam gave testimony about the reasons
7 behind the policy and the seriousness of the policy. I find
8 Mr. Rajaratnam, who is the U.S. compliance officer based in
9 Chicago, to be credible and honest and knowledgeable in this
10 subject area. He explained in paragraph 7 of his direct
11 declaration the kickbacks were a potential problem,
12 potential significant problem for a pharmaceutical company
13 such as GSK.

14 He pointed out that depending on how grants were
15 given and in what manner, they could potentially violate 42
16 USC, Section 320a-7B(b). Violation of that statute held the
17 potential for a violator being excluded from federal health
18 care programs, which I find to be a significant potential
19 problem to a company such as GSK.

20 He also alluded to two specifics litigations which
21 were recently current in 2003 which resulted in major fines
22 being paid by pharmaceutical companies. One case involved
23 Tap Pharmaceuticals, Inc., and resulted in a payment of
24 \$875,000 to resolve civil and criminal charges. He also
25 recited another matter in June 2003 involving AstraZeneca

1 Pharmaceuticals, which resulted in a payment of \$355
2 million.

3 In each case, part of the alleged improper conduct
4 involved grants abuses. I find that enforcement of the
5 grants policy for the reasons stated by Mr. Rajaratnam
6 constitute a legitimate nondiscriminatory policy in terms of
7 the DFEH law.

8 It's probably worthwhile to go back and review Mr.
9 Rome's career. He began in 1977. He had a limited number
10 of promotions -- or 1973. He had a limited number of
11 promotions through the '70s and '80s. The trial testimony
12 of his supervisor immediately prior to going to the medical
13 sciences group was favorable to him. Greg Dial praised his
14 efforts. He gave him good reviews in his performance
15 appraisals for 1997, 1998, and 1999 -- those being Exhibits
16 199, 200, and 202.

17 In fact, at the age of approximately 44 or 45, an
18 age that would put him in the protected class for age
19 discrimination, he in fact received a promotion from GSK.

20 In 2000, the Medical Sciences Group was formed,
21 and he was hired into that group at the age of approximately
22 46. That hiring decision was made directly by Malia Owens.
23 That decision suggests at least at the time he was hired
24 into that group that there was no pattern or practice of
25 discrimination on the basis of age.

1 The nature of the activity in the medical sciences
2 group differed from the previous sales positions which Mr.
3 Rome had held in that he was now working with groups and
4 coordinating with other groups outside his own medical
5 services group. That activity required different skills
6 that he had engaged in in his prior activities.

7 As he continued from 2000 to 2003, it became clear
8 that there were from time to time problems with his
9 performance, problems with coordinating with other salesmen,
10 problems with coordinating with clients. At the same time,
11 he received praise from time to time from Owens, including
12 praise in written reviews or written reports in 2003, April
13 through July 2003, including Exhibits 215, 216, and 217.

14 The plaintiff has characterized this as a roller
15 coaster experience. On the contrary, I find that Owens was
16 a fair manager, demanding, who praised when she thought
17 praise was due and demanded improvement when she thought
18 improvement was due.

19 Her overall ratings for the year 2001 and 2002
20 were average as the scheme worked out in the 2001 report and
21 M or middle for the scheme used in the 2002 report. In each
22 instance, he was given the middle ranking of five possible
23 rankings.

24 The April 2003 dinner meeting is the genesis for
25 much of the dispute in this case. That meeting was attended

1 by Cassandra Richards, a consultant working as an
2 independent contractor for La Vida; Mr. Miller; and Niki
3 Guluchi.

4 Cassandra Richards testified in this court that
5 Mr. Rome made certain promises of grants. She testified
6 that he had made a promise of a grant in the amount of
7 \$20,000 to \$50,000, and it caused her to believe that
8 \$20,000 was the minimum amount. Ms. Richards was evasive;
9 she was combative and was one of the poorer witnesses to
10 appear before me in almost 10 years on the bench.

11 Having said that, there may have been a reason for
12 her definite lack of chemistry, if not antipathy, toward
13 plaintiff's counsel, Mr. Scott, given that she had been sued
14 for defamation and other alleged misconduct.

15 Notwithstanding her evasive manner, I find that in
16 words or actions Mr. Rome caused her to come away from the
17 meeting that she had a commitment of grant funds. Mr.
18 Miller testified that there were no mention of any grant
19 commitment in his presence. Mr. Miller wasn't present the
20 whole time, but I can infer that he was present for the
21 majority of the meeting. And I can also infer that he was
22 knowledgeable of the grants program and would have
23 recognized and testified to a grants violation had one in
24 fact occurred in his presence.

25 Richards also came away from that meeting

1 understanding that Mr. Rome could provide, in addition to
2 educational grants, payment for food in addition to grants.
3 As Mr. Rome clearly testified, he understood that the policy
4 prohibited making any promises of a grant. As he testified
5 at page 57 of the morning August 12th session at --
6 beginning at line 6:

7 "Question: And you can't suggest in any way to a
8 customer that you can get them a grant; isn't that true?

9 "Answer: You can't tell them it would be
10 successful, no.

11 "Question: Am I right in saying you can't say
12 anything that would imply in any way that you could get them
13 a grant? Is that true?

14 "Answer: If you could get them, no, you can't."

15 My conclusion is that Mr. Rome took actions at
16 that meeting that violated his clear understanding of the
17 policy either by making an express promise of a grant or by
18 causing Dr. Richards to believe that he had made a
19 commitment by implying such support.

20 Nothing further in terms of this dispute of
21 significance occurs until July 18 when Mr. Rome contacts his
22 supervisor, Malia Owens, to tell her that Dr. Richards is
23 concerned and wants to talk to his supervisor. I am not
24 clear on the record whether Mr. Rome gave Ms. Richards Ms.
25 Owens' telephone number or Ms. Owens called Dr. Richards. I

1 have seen it two ways in the evidence.

2 My suspicion from her notes is that Ms. Owens
3 called Dr. Richards. In that conversation, Dr. Richards
4 clearly made the allegation that a firm commitment of a
5 grant of at least \$20,000 had been made during the course of
6 the meeting, and she also indicated that a commitment for
7 food over and above grants had been made.

8 I believe Ms. Owens was entitled to regard that
9 communication as credible. Dr. Richards was acknowledged
10 within GSK to be a thought leader, and she was already a
11 speaker in programs for GSK.

12 Now, I asked Ms. Owens whether she gave those two
13 factors any weight in evaluating the statements of Dr.
14 Richards, and she said she did not. But it clearly
15 indicates to me that Dr. Richards was no stranger and that
16 there was no reason to distrust the allegations she made.

17 Ms. Owens also testified that she called Niki
18 Guluchi on the same day -- July 18th, 2003. Ms. Guluchi
19 according to Ms. Owens also confirmed that a promise had
20 been made of food outside of the amount of the grants. I
21 believe that Ms. Owens was entitled to take that as
22 corroborative evidence. She was aware -- I am not clear
23 whether she was aware of Ms. Guluchi's position, but I think
24 she was entitled to take that as corroborative evidence.
25 She had no reason, I believe and find, to doubt either

1 Richards or to doubt Guluchi.

2 In the days that followed, there were several
3 interactions between Mr. Rome and Ms. Owens. Those
4 interactions cause me to believe that in those conversations
5 Mr. Rome at least admitted in part a grants violation. I
6 believe that the manner in which Mr. Rome described the
7 nature of the complaint indicates that he understood that
8 the complaint was for making the promise.

9 On July 21, as reflected in Exhibit 22, Ms. Owens
10 counseled Mr. Rome with respect to the proper manner in
11 which to deal in grants. She again had a session with him
12 in Exhibit 64, a document called GSK coaching report. The
13 document reflects that she counseled Mr. Rome and discussed
14 grants policy.

15 On page GSK 1048, a portion of the form is filled
16 out by Mr. Rome. Ms. Owens testified that the manner of
17 preparation -- namely, that the document was generated off a
18 laptop with both Mr. Rome and Ms. Owens sitting side by side
19 and Mr. Rome keying input. One entry which he made is "make
20 no promise anymore except to look into customer's requests."
21 I believe on the basis of the testimony of Malia Owens that
22 the only discussion of promises in that meeting related to
23 grants, that Mr. Rome in fact did make an admission that he
24 had violated the policy and committed to do it no more.

25 There were inconsistencies in Mr. Rome's

1 recitation to Ms. Owens at various points as to what went on
2 at the April meeting. At one point, during the course of
3 their discussions he admitted that there had been discussion
4 of grants. At others, he denied that there had been any
5 discussion of grants at that meeting.

6 I believe that on the basis of Malia Owens'
7 discussions with Mr. Rome, the two telephone conversations
8 with Dr. Richards and Ms. Guluchi, that she had a reasonable
9 basis for concluding that the grants policy was violated. I
10 make that finding separate and apart from a finding that Mr.
11 Rome in fact said something or did something at the April
12 meeting to cause Dr. Richards to believe that she had been
13 made a commitment, a promise of a grant in some form or
14 another.

15 I think the key point for the analysis of GSK's
16 conduct is not necessarily whether misconduct in fact
17 occurred, but was a credible report made? I find that a
18 credible report was made, even if in fact the alleged
19 conduct did not occur, because I believe that Ms. Owens was
20 entitled to believe Dr. Richards for the reasons I have
21 indicated she was entitled to believe Dr. Richards, and I
22 believe she also had the admissions of Mr. Rome.

23 On July 22 at the end of the day, as I indicated,
24 Mr. Rome made a report to HR stating his complaints. I find
25 significant in that report that he did not state that he was

1 being set up for termination for a false violation of the
2 grants policy or that there was anything awry with regard to
3 his discussions on the 18th and the 21st with Ms. Owens.

4 It seems to me that if he thought he was being
5 dealt with unfairly by Malia Owens it would have figured in
6 his complaint on the 22nd. I also find somewhat suspect the
7 timing of the complaint, but in a sense, that's not relevant
8 here for reasons I will mention.

9 He had worked for almost four years for Ms. Owens
10 and had made no formal complaint to this point. Yet he
11 finds himself in the situation the day before where there is
12 a potential for some significant disciplinary action. That
13 may cause me to question the accuracy of the complaint. But
14 for purposes of the retaliation claim, the question is was
15 he retaliated for making the claim, whether the claim was
16 right or wrong?

17 I also note in his dealings with Ms. Stelling's
18 following up on his complaint, he again had an opportunity
19 to raise the issue of whether he was being set up for an
20 inaccurate or misleading set of discipline based on
21 violation of the grants claim. There is no mention of that
22 in Exhibit 56, Ms. Stelling's notes, of the conversation
23 with him.

24 From this point, the examination of the grants
25 violation claim within GSK took a number of different

1 directions. First of all, Ms. Stellings reported it to Mr.
2 Rajaratnam. It is true that Compliance didn't do any fact
3 finding on its own. Mr. Rajaratnam accepted the level of
4 fact finding as it had been conveyed to him by Ms.
5 Stellings.

6 I don't believe he did anything inappropriate. I
7 think for his purposes he was asked what the appropriate
8 form of discipline was, and he indicated in his declaration
9 here at trial that he found that a violation of the grants
10 policy in 2003 was sufficient to appropriately apply the
11 sanction of termination.

12 He also acknowledges that there could have been
13 other sanctions. He does not specifically recommend what
14 advice he conveyed back through Ms. Stellings. It appears
15 that there was discussion of both termination and
16 sanctioning him with a reprimand and a reduction in
17 incentive compensation. It's clear, I believe, in the
18 record that Ms. Stellings identified those two possibilities
19 as well.

20 The net of Mr. Rajaratnam's view was conveyed to
21 Mr. Romanowski. At that point, Mr. Romanowski was the
22 acting regional vice-president and the direct superior of
23 Malia Owens. I find that the decision to terminate Mr. Rome
24 was made by Mr. Romanowski with the input of a number of
25 different people: one, with the input of Malia Owens; two,

1 with the input of Ms. Stelling; three, with the input of
2 Mr. Rajaratnam; and potentially with the input of the senior
3 vice-president for HR, Mr. Sun.

4 The decision-making process was, I believe, fair
5 and had a factual basis. I also find that there were
6 imperfections in the decision-making process, and it could
7 have been a better one in a number of different ways. One,
8 Paul Miller was never interviewed. Two, conceivably
9 Compliance might have conducted its own factual
10 investigation. But it's clear to me that Mr. Rajaratnam
11 felt that he had the facts. HR might have contacted Mr.
12 Miller, or there might have been independent contact with
13 Ms. Guluchi and Dr. Richards, neither of which occurred.

14 But the issue in this case is not whether a
15 perfect disciplinary process was engaged in but rather
16 whether it was so flawed as to be incredible. I find it
17 flawed but not so flawed as to be incredible. As recognized
18 by Guz at 24 Cal. 4th, 358, if the employer's true reasons
19 for -- the employer's true reasons need not necessarily have
20 been wise or correct. While the objective soundness of an
21 employer's proper reason supports their credibility, the
22 ultimate issue is simply whether the employer acted with a
23 motive to discriminate illegally.

24 The level of investigation here does not rise in
25 my view to the point where it undermines the credibility and

1 believability of the stated reason -- violation of a grants
2 policy.

3 The facts as presented indicated that most of the
4 decision makers did not know what the subject matter of Mr.
5 Rome's complaint was. I believe when the complete passage
6 from Mr. Owens' testimony was read, it's clear that she did
7 not know that the claim was allegedly for one of
8 discrimination rather than harassment.

9 I find that even with a policy of confidentiality,
10 it was legitimate to inform her, because she was the alleged
11 harasser of the complaint, so that she would desist from
12 further alleged harassing conduct.

13 I also find it was appropriate for Ms. Stellings
14 to know, and I also find that from her notes that she was
15 aware of the complaint but not the nature.

16 I find that HR in fact received the notes which
17 Ms. Owens took on July 19 of her discussions, telephone
18 calls with -- July 18 of her telephone calls with Mr. Rome,
19 Dr. Richards, and Guluchi. I find that she did convey to HR
20 through the transmittal of that memo and her coaching memos
21 the essential facts, including the presence of Paul Miller.

22 While Paul Miller was not contacted, there wasn't
23 an effort to cover up the fact of his presence or to
24 discourage anyone from doing that on an independent basis.

25 So I find that the decision to terminate was not

1 pretextual, that it was supported by a good-faith
2 determination that Mr. Rome had violated the grants policy.
3 So I reject the claim for retaliatory termination.

4 There is other conduct that is alleged in this
5 case to support a DFEH violation. That principle rests on
6 how Mr. Rome was treated during the course of the number of
7 interviews he had for jobs in 2003. It was clear that by
8 March of 2003 he was looking for another job. He and Malia
9 Owens had had that discussion.

10 He talked with Eric Kimbro about regional oncology
11 positions. There were three positions available, none of
12 which went to Mr. Rome.

13 Mr. Kimbro testified that among his reasons for
14 not giving one of those positions to Mr. Rome was that the
15 others were more qualified. He also took into account the
16 commuting that Mr. Rome would have to engage in if he took
17 over territories in Glendale, Long Beach, or the hospital
18 region. He also noted that Mr. Rome was not familiar with
19 these territories. He testified that he had direct personal
20 knowledge of the capabilities of all three of the
21 individuals he hired.

22 Steve Rooney was in his mid 30s. However, Ms.
23 Janice Kerns, was 42 years old, in other words, an
24 individual in the protected class for age discrimination.
25 Moreover, Mr. Rome testified that she had the same

1 qualifications as he did. The third individual placed in
2 the Hospital Division, Daniel Dinnett (phonetic), was 53.

3 I find that no age discrimination occurred in
4 these hiring decisions, that no hiring decision occurred
5 when individuals in the protected class were hired, which
6 was the case in two out of three instances; and I find that
7 the reasons given for hiring Mr. Rooney and the criticisms
8 of Mr. Rome's qualifications for these particular jobs were
9 not pretextual.

10 Richard Esparza testified to three available HIV
11 positions. Mr. Esparza interviewed Mr. Rome for the first
12 position in Orange County. He testified that Mr. Rome did
13 not have a strong science background, he was not located in
14 the territory, and that he did not have a strong interest in
15 the subject matter of HIV although he had previously worked
16 in positions where he was selling HIV drugs. Mr. Esparza
17 stressed the need for a strong interest in the science
18 because of the rapidly evolving nature of the science for
19 treating HIV.

20 I find that these were nonpretextual reasons and
21 nondiscriminatory reasons for not offering that first
22 position to Mr. Rome. The position went to Crystal Robb,
23 who was in her 30s. Because of his evaluation of Mr. Rome's
24 capabilities, Mr. Esparza testified that he did not consider
25 him for the -- that he did not interview him for the

1 subsequent two positions -- an HIV position that came open
2 in the spring of 2003 in Los Angeles and another one that
3 became open in August 2003 in Los Angeles. Those positions
4 went to younger people.

5 The second L.A. position went to David Joe
6 Palazzio. Among the factors in hiring him were diversity.
7 Mr. Esparza testified that Mr. Palazzio was either in his
8 late 30s or early 40s. For the first L.A. position, June
9 Alphonso was offered the position, in his 30s, a premed with
10 a biology background, and brought diversity to the job. He
11 subsequently declined the job. The job was then offered to
12 Doleta Minix in her 30s.

13 I find that none of these hiring positions were
14 made adversely to Mr. Rome on the basis of age. I find that
15 the reasons offered for the reasons not to hire him and the
16 reasons to hire the individuals in fact hired were
17 legitimate, nondiscriminatory, and nonpretextual.

18 Mr. Rome was also considered by Scott Barnes in
19 June 2003 for a position, another oncology position, this
20 one in the San Diego territory. He did not interview Mr.
21 Rome. He testified that he had had an unfavorable exposure
22 to Mr. Rome while working for a competitor. He found that
23 -- he believed that Mr. Rome had poor work ethics and did
24 not participate and come to important lunches with doctors.

25 I think the evidence in this case is made clear

1 that one of the chief vehicles for getting to know doctors
2 is to go to lunches that are set up based around their
3 schedules or for dinner meetings. To me that goes as a
4 significant criticism based on this record.

5 Mr. Barnes also noted that Mr. Rome did not live
6 in the territory. The actual job went to Nancy Morrison, a
7 53-year-old who was doing the same job in another territory.
8 Mr. Barnes testified that there would be absolutely no
9 startup time since Ms. Morrison would perform the same
10 duties she had been performing.

11 I find that the reasons offered and the decision
12 made with respect to the San Diego position were not
13 pretextual and that the reasons offered were legitimate
14 nondiscriminatory reasons.

15 There is also testimony that Mr. Rome may have
16 been considered or mentioned for a possible position working
17 in David Cohen's group. Mr. Cohen testified that he
18 couldn't understand why Mr. Rome would be interested in a
19 lateral, basically downward, move. I believe he expressed
20 concerns about the reason and the motivation for an
21 individual wanting to take a lesser significant job. That
22 job offer was in fact extended to Natalie Hallet, a woman in
23 her mid 20s.

24 There is some indication that Mr. Rome never
25 actually applied for the job which Mr. Cohen had in the

1 Inland Empire. If you review the hiring decisions,
2 including the Inland Empire decision which may or may not
3 have involved an actual request for a job, one finds that
4 there was a wide variety of ages of individuals who received
5 the job. Hallet was in her mid 20s. Rooney was in his mid
6 30s. Robb was in her mid 30s. Alphonso was in his mid 30s.
7 Kerns was 42. Dinnett was 53. Morrison was 53. Palazzio
8 was in his mid 30s to early 40s.

9 This does not demonstrate to me a pattern of
10 disparate treatment of elderly people. It in fact reflects
11 that a range of people of different ages were hired for
12 various positions that were available in 2003.

13 I have already found that the reasons given for
14 the individual hiring decisions were neither pretextual nor
15 discriminatory. But apart from those individual decisions,
16 there is no basis on this record to infer disparate
17 treatment from the pattern of hiring decisions. I find no
18 basis of discrimination under the statute on the basis of
19 hiring discrimination.

20 There was other conduct alleged that's supposedly
21 reflective of discrimination on the basis of age.
22 Supposedly, Mr. Rome was criticized by Malia Owens in a
23 manner that put in question his age and criticized his age.
24 However, the only one that testified to such conduct at
25 trial was Mr. Rome.

1 Jason Shoup, an individual in the group, never saw
2 Owens demean Mr. Rome. Millie Reyes and Jason Shoup never
3 heard the comment by Malia Owens that Mr. Rome was getting
4 paid twice as much and he should be working twice as hard.
5 And one would expect that to -- at least someone to have
6 heard that.

7 In his direct testimony, Mr. Rome states that
8 those statements were made at district meetings. On the
9 afternoon of August 12th, at page 28, he testifies that that
10 statement was made at district meetings. Yet there is no
11 corroborative evidence.

12 I find to the extent that any statements were in
13 fact made with regard to Mr. Rome's age that they were
14 sporadic and did not rise to the level of harassment or
15 discrimination.

16 With respect to the several comments that were
17 corroborated about Ms. Owens having an old team, I find
18 those states innocuous. Apparently at a meeting, a lunch
19 meeting in Georgia, Ms. Owens said something to the effect
20 that her team was getting old because they weren't going to
21 go out that night. There is no evidence that anyone was
22 singled out for that claim, and there is no evidence of
23 anything other than a hard-working group of salesmen who
24 were wanting to get a good night's sleep and not go out.

25 A similar comment was made to the team in

1 San Francisco. It was reported in the testimony of Millie
2 Reyes. And the testimony was to the same effect -- Malia
3 Owens saying that her team was getting older, and she would
4 understand if they didn't want to go out after dinner. I
5 don't find that either of those amount to any form of
6 discrimination or harassment on the basis of age.

7 I believe that the harassment that Mr. Rome
8 principally referred to was captured in the part of his
9 deposition that was read into the record; namely, harassment
10 in the form of Ms. Owens being a demanding supervisor.

11 This passage from Mr. Rome's deposition was read
12 in during his examination at 423, beginning at line 21:

13 "Question: But the harassment you're complaining
14 of related to the performance of your job duties?

15 "Answer: The performance of my job duties and
16 specifically in pushing me since, like I said, the year
17 before, 'Mark, it's obvious that we're not getting along,
18 and what do you think about moving to a different manager?'
19 I said, 'Absolutely.' I was all for it."

20 The remark that Mr. Rome states is a remark he's
21 attributing to Ms. Owens in context. I don't believe this
22 record establishes that he was subjected to any harassment
23 violative of the DFEH statute.

24 I believe that in some instances there was reason
25 to question the veracity and credibility of Mr. Rome. Great

1 inflation or resume padding may be a small thing, but at
2 trial, Mr. Rome was confronted with at least three instances
3 in which he was representing himself contemporaneously to
4 this litigation with accomplishments that were belied by his
5 college transcript, which is in the record. As I say, I
6 found his explanations not credible. And while these are
7 small things, they cause me to question his truthfulness.

8 I also note that he was impeached a number of
9 times during his testimony, including on the question of
10 whether Owens told him that the allegation was a promise.

11 So in sum, as far as my factual findings go, I
12 find that he was not terminated as an act of retaliation for
13 making a protected complaint for age discrimination. I find
14 that he was not discriminated against in hiring decisions,
15 and I find that he was not harassed or discriminated on the
16 basis of age.

17 With regard to one additional episode brought out
18 of supposed discrimination -- namely, he wasn't given the
19 trip to Hawaii -- I think the record is clear that a number
20 of factors went into that decision and that others
21 contributed accomplishments other than simply sales.

22 A few other additional points. I find on this
23 record that there was a motive for Mr. Rome to make a
24 promise or a commitment of grants. It is clear that he was
25 interested in developing a relationship with La Vida. It is

1 indicated in Exhibit 164 that La Vida was becoming
2 increasingly important with its upcoming merger with
3 Prairie.

4 I also find that this record establishes that he
5 wasn't the only one who was terminated for grants
6 violations. Mr. Romanowski testified that he was aware of
7 others, although a number of district managers and other
8 managers testified that they weren't aware of anyone else
9 being terminated.

10 With regard to conclusions of law, number one, I
11 find that the Court has diversity jurisdiction under 28 USC
12 Section 1332. The parties are different citizenships, and
13 the amount in controversy is clearly more than \$75,000.

14 I find that a prima facie case of age
15 discrimination was made out. I find that the burden having
16 shifted to GSK to provide a nondiscriminatory, nonpretextual
17 reason for the actions it took that Mr. Rome thereafter
18 failed to carry his ultimate burden to establish that the
19 actions taken against him were on the basis of age.

20 With respect to the retaliation claim, I find that
21 Mr. Rome made out a prima facie case in each of the
22 elements, although weakly I believe on whether Exhibit 64
23 was in fact a protected complaint, but the burden having
24 shifted to GSK under McDonnell Douglas, I find that Mr. Rome
25 did not carry his burden to ultimately demonstrate that he

1 was retaliated against on the basis of the complaint that he
2 made.

3 I find that GSK is entitled to judgment, and I ask
4 counsel to submit a form of judgment within 10 days.

5 Anything further?

6 MS. WILSON: No, Your Honor. Thank you.

7 MR. SCOTT: No, Your Honor.

8 THE COURT: Let me add one concluding word.

9 Although I have not found for Mr. Rome, from my experience
10 in practicing in the bench, I am deeply aware of the
11 importance in this society of a job to an individual, not
12 only in terms of their ability to support themselves but in
13 terms of how they define themselves in life.

14 I have no doubt that Mr. Rome has sustained
15 economic harm. I have no doubt, although I need not make
16 any findings about the degree, that he has sustained some
17 emotional and psychological harm. I am appreciative of
18 those facts. I simply find at the end of the day that I
19 cannot attribute that harm to any unlawful conduct on the
20 part of GSK.

21 Anything further?

22 MR. SCOTT: No, Your Honor.

23 MS. WILSON: No, Your Honor.

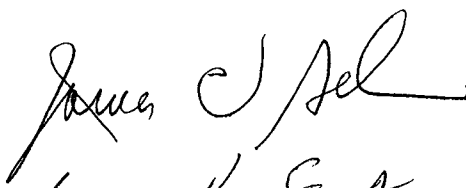
24 THE COURT: The argument was long today, but it
25 was helpful. I believe that I had a full and complete

1 canvass of the evidence from both sides. Given that this
2 trial was relatively short and I took detailed notes, I felt
3 with that detailed canvass of the evidence that I was in a
4 position to enter my findings of fact and conclusions of law
5 from the bench, and for that reason, I have done so. Thank
6 you.

7 *(Thereupon, the proceeding was concluded.)*

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11 *Dated: September 12, 2008*

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14 *JAMES V. SEARS*
15 *United States District Court*
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