**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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| RICHARD FINNEY, | ) | |
| | ) | |
| Plaintiff/Appellant, | ) | |
| | ) | |
| v. | ) | Case No. 15-1140 |
| | ) | |
| LOCKHEED MARTIN CORP., | ) | |
| | ) | |
| Defendant/Appellee. | ) | |

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On Appeal from the United States District Court
for the District of Colorado

The Honorable Marcia S. Krieger
District Court Judge
District Court No. 13-cv-00869-MSK-NYW

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# ANSWER BRIEF OF APPELLEE, LOCKHEED MARTIN CORPORATION

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**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellee Lockheed Martin Corporation states the following: Lockheed Martin Corporation, a/k/a Lockheed Martin Space Systems Company, has no parent corporation and State Street Corporation and Capital World Investors are the only publicly held companies holding more than ten percent (10%) of its stock.

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## STATEMENT OF RELATED CASES

There are no prior or related appeals.

Appellee-Respondent Lockheed Martin Corporation, a/k/a Lockheed Martin Space Systems Company ("Lockheed" or the "Company") respectfully submits this Answer Brief in response to Appellant Richard Finney's ("Appellant" or "Finney") Opening Brief ("Opening Brief" or "Op. Brief").

## STATEMENT OF JURISDICTION

Lockheed does not dispute the Statement of Jurisdiction contained in Finney's Opening Brief or that this Court has jurisdiction over this appeal.

## STATEMENT OF THE ISSUES

I. DID THE DISTRICT COURT ERR WHEN IT GRANTED LOCKHEED'S MOTION FOR SUMMARY JUDGMENT ON FINNEY'S AGE DISCRIMINATION CLAIM BECAUSE FINNEY FAILED TO IDENTIFY EVIDENCE OF PRETEXT?

II. DID THE DISTRICT COURT ERR WHEN IT GRANTED LOCKHEED'S MOTION FOR SUMMARY JUDGMENT ON FINNEY'S RETALIATION CLAIM BECAUSE FINNEY FAILED TO IDENTIFY EVIDENCE OF PRETEXT?

## STATEMENT OF THE CASE

### Nature of the Case

This is an appeal from the District Court's grant of summary judgment in favor of Lockheed on Finney's claims alleging discrimination and retaliation in violation of the Age Discrimination in Employment Act ("ADEA"). (Aplt. Appx., Vol. V:784-97.) Judge Marcia Krieger (the "District Court") granted summary judgment on both of Finney's claims for relief, finding the undisputed material

facts show Lockheed had legitimate, non-discriminatory, and non-retaliatory reasons for laying Finney off, and Finney failed to offer sufficient evidence that Lockheed's reasons for its actions were pretext for either discrimination or retaliation. (Aplt. Appx., Vol. V:789-92, 794-96.) The District Court also granted summary judgment on Finney's hostile work environment allegations because the evidence in the record failed to establish any age-related harassment (Aplt. Appx., Vol. V:792-94), but Finney does not challenge that ruling in his Opening Brief.

In this appeal, Finney challenges the District Court's well-reasoned ruling by arguing that Judge Krieger did not focus on the right evidence, should have interpreted the evidence differently, and should have ruled in his favor. He essentially just reargues his response to Lockheed's motion for summary judgment without explaining why this Court should reverse Judge Krieger's order.

**Procedural History**

Finney initiated this lawsuit by filing his Complaint against Lockheed on April 4, 2013, alleging two claims under the ADEA: (1) age discrimination (and hostile work environment) and (2) retaliation. (Aplt. Appx., Vol. I:12-14.) Finney's first claim asserts Lockheed created and condoned a hostile work environment on the basis of his age, discriminated against him by failing to place him into various internal positions for which he claims he was qualified, and ultimately laid him off from his position on the GPS-III program. (Aplt. Appx.,

Vol. I:8-13.) Finney's second claim alleges Lockheed retaliated against him by laying him off after he filed a Charge of Discrimination with the Equal Employment Opportunity Commission and submitted internal complaints to Lockheed about conduct he believed to be inappropriate and potentially unlawful. (Aplt. Appx., Vol. I:8-11, 13-14.)

Lockheed moved for summary judgment on both of Finney's claims on April 28, 2014 (the "Motion"). (Aplt. Appx., Vol. I:27-148, Vol. II:149-238, Vol. III:239-334.) The District Court granted Lockheed's Motion in its entirety on March 24, 2015, and entered judgment in favor of Lockheed and against Finney the very next day. (Aplt. Appx., Vol. V:784-99.) Finney filed his Notice of Appeal on April 21, 2015 (Aplt. Appx., Vol. V:800-01) and his Opening Brief on July 20, 2015. Finney's Opening Brief does not address the District Court's ruling on his hostile work environment allegations (part of his first claim for relief). Therefore, the only issues on appeal are whether the District Court erred when it granted Lockheed's Motion on Finney's claims for discrimination (as they relate to his layoff) and retaliation in violation of the ADEA.

## STATEMENT OF FACTS[1]

### I. GENERAL BACKGROUND.

Lockheed designs, develops, tests, and manufactures a variety of sophisticated technology systems for space and defense customers, and it expressly prohibits discrimination and retaliation against employees based on age. (Aplt. Appx., Vol. I: 64 at ¶2, 117-25.) Finney (53 years old at the time he was laid off), holds a master's degree in electrical engineering and started working for Lockheed on September 3, 1980. (Aplt. Appx., Vol. I:87 at 11:12-14, 88 at 39:15-18.) In 2008, Finney was working on the Aerial Reconfigurable Embedded System ("ARES"), and as the project was winding down, he started working part-time as a hardware engineer on the Gravity Recovery and Interior Laboratory ("GRAIL") project. (Aplt. Appx., Vol. I:69 at 21:18-23:19, 89 at 46:21-47:19, 90 at 49:11-15, 91 at 55:8-14, 131 at 35:5-14.) Finney spent a majority of his time in 2008 on ARES and approximately a quarter of his time on GRAIL. (Aplt. Appx., Vol. I:69 at 21:18-23:19, 90 at 49:11-15, 131 at 35:5-14.)

Finney reported to Stuart Spath (46 years old at the time Finney was laid off), Chief Systems Engineer, on GRAIL. (Aplt. Appx., Vol. I:68 at 13:5-21 and

[1] Lockheed disagrees with Finney's Statement of Facts. Therefore, Lockheed submits its separate Statement of Facts, which largely reflects the Statement of Facts authored by Judge Krieger in her order granting summary judgment. Lockheed disputes many of these allegations but treats them as true for purposes of this appeal.

14:4-7, 70 at 25:25-26:2, 92 at 59:25-60:5, 93 at 61:2-3.) Spath interviewed Finney and was one of the managers who recommended that Finney be hired for GRAIL. (Aplt. Appx., Vol. I:69 at 23:8-24:5.) While Spath was Finney's matrix manager on GRAIL, Buddy Hayes (49 years old at the time Finney was laid off) was Finney's functional manager.[2] (Aplt. Appx., Vol. I:84 at ¶9, 92 at 59:25-60:5, 92-93 at 60:24-61:1, 140 at ¶20.) Timothy Linn (41 years old when Finney was laid off) was the Guidance, Navigation, and Control lead ("GN&C"), responsible for both the cost management and technical aspects of the GRAIL spacecraft's subsystems. (Aplt. Appx., Vol. I:127 at 13:9-11 and 15:10-15, 129 at 25:25-26:3, 130 at 31:3-8.)

Spath and Linn produced a staffing plan for GRAIL in the summer of 2008, during which time they determined they needed a hardware engineer for more than a quarter of the time. (Aplt. Appx., Vol. I:71 at 36:13-24, 129-30 at 26:12-27:6.) As a result, they planned to ramp up Finney's position from quarter-time to full-time over several months. (Aplt. Appx., Vol. I:72 at 37:2-4 and 38:22-25, 131 at 35:23-36:1.)

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[2] Under Lockheed's matrix organization, functional managers are responsible for hiring, training, personnel-related questions, and other issues relating to the program as a whole. (Aplt. Appx., Vol. I:70 at 28:7-22, 83-84 at ¶6, 93 at 61:4-9.) Matrix managers, on the other hand, are responsible for day-to-day supervision and are usually responsible for a smaller group than functional managers. (Aplt. Appx., Vol. I:83-84 at ¶6.)

## II. FINNEY'S WORK STARTED TO DETERIORATE, AND HE RECEIVED A BASIC CONTRIBUTOR RATING IN 2009.

In early 2009, Linn became concerned that some of the hardware work assigned to Finney was not being completed on time, and Linn thought the delays could impact deliveries of flight hardware to the spacecraft. (Aplt. Appx., Vol. I:65 at ¶7, 76-77 at 71:11-73:10.) Finney was not meeting project milestones, his work was late, and he often required additional support to complete it. (Aplt. Appx., Vol. I:77 at 74:14-75:1, 132 at 38:2-16, 133-34 at 43:18-45:3, 135 at 51:5-15.) Finney was so far behind that Spath and Linn were concerned the hardware work assigned to Finney was not going to "get to the finish line per the schedule . . . ." (Aplt. Appx., Vol. I:65 at ¶7, 78 at 78:14-19, 84 at ¶7.) Spath and Linn met with Finney to discuss their concerns. (Aplt. Appx., Vol. I:65 at ¶8, 78 at 79:2-4.)

In 2009, Spath recommended that Finney be removed from GRAIL because he did not believe Finney was able to work successfully on both ARES and GRAIL at the same time, but after Finney met with Human Resources, he transitioned to GRAIL full-time so he could remain on the program. (Aplt. Appx., Vol. I:65 at ¶8, 69 at 22:4-11 and 23:1-7, 93 at 61:13-21.) Spath and Linn met with Finney after he transitioned to full-time, and they provided him a list of tasks to help him focus. (Aplt. Appx., Vol. I:93 at 64:1-24, 132 at 39:22-40:19.)

Lockheed uses a Performance Assessment and Development Review ("PADR") process to annually evaluate employee performance. (Aplt. Appx., Vol.

I:84 at ¶10.) The PADR process uses a five-tier rating system: exceptional is a "1", high contributor is a "2", successful contributor is a "3", basic contributor is a "4", and unsatisfactory is a "5". (Aplt. Appx., Vol. I:74 at 49:8-20, 84 at ¶10, 142-47.) Spath participated in a validation session with other GRAIL managers in 2009, during which time the managers discussed each employee on the program to determine his or her PADR rating for that year. (Aplt. Appx., Vol. I:80 at 99:3-11, 84 at ¶12.) Spath originally planned to rate Finney as a successful contributor, but it was decided at the validation session that Finney should receive a basic contributor rating. (Aplt. Appx., Vol. I:79 at 94:4-7, 143.) In 2010, Spath believed Finney's performance improved, and he rated Finney a successful contributor for that year. (Aplt. Appx., Vol. I:81 at 117:14-20, 144.)

## III. FINNEY COMPLETED A MAJORITY OF HIS WORK ON GRAIL IN JANUARY 2011 AND ACCEPTED A POSITION ON LOCKHEED'S GPS-III PROGRAM.

Finney understood when he started working on GRAIL that his position had a life cycle defined by the fact that the vehicle needed to be completed and launched in 2011. (Aplt. Appx., Vol. I:94 at 68:5-21.) He admits that regardless of his age, his work on GRAIL would have ended, at the latest, "towards September 2011." (Aplt. Appx., Vol. I:96 at 75:21-25.) But, Finney's work on GRAIL was actually completed in January 2011, and he was notified he was going to be laid off from the program. (Aplt. Appx., Vol. I:136 at 62:8-23.) When a

Lockheed employee is notified that he or she is going to be laid off, it is the employee's responsibility to look for and find work on another program to avoid the layoff. (Aplt. Appx., Vol. I:85 at ¶15; Vol. II:151 at ¶20.) No one was hired to replace Finney on GRAIL, and no one told Finney his age had anything to do with why he was laid off from GRAIL. (Aplt. Appx., Vol. I:96 at 74:23-75:2, 136 at 64:15-22.)

Finney began looking for a new assignment in December 2010 after he was first notified his work on GRAIL was coming to an end. (Aplt. Appx., Vol. I:96 at 74:14-16.) Both Hayes and Spath searched for positions to help Finney avoid being laid off. (Aplt. Appx., Vol. I:85 at ¶16, 96 at 76:1-23.) Hayes located a position on the Global Positioning System III ("GPS-III") program, and he contacted David Chang (50 years old at the time Finney was laid off), functional manager for GPS-III, to determine whether Finney would be a good fit for the position. (Aplt. Appx., Vol. II:149 at ¶8, 153 at 10:24-11:1, 154 at 16:3-7, 155 at 19:11-14.) After interviewing Finney, Chang was concerned that Finney did not possess sufficient test engineering experience for the position, and the available position was for a Level 3 test engineer, not a Level 5, which was Finney's level at the time. (Aplt. Appx., Vol. I:99 at 86:22-87:2; Vol. II:156 at 22:11-25, 156-57 at 24:13-27:2.) Chang agreed to borrow Finney from Hayes' organization for a trial period to see if Finney was able to perform the job. (Aplt. Appx., Vol. II:149 at ¶8,

156 at 22:6-13.) These types of "borrowing" arrangements are common to allow one Lockheed organization to borrow an employee from another organization to make sure the employee is a good fit before he or she is formally transferred to the new position. (Aplt. Appx., Vol. II:149 at ¶9.)

After Finney worked on GPS-III for three months, Chang invited him to apply for the open job requisition, which was for a Level 3 position, and approved Finney's transfer to GPS-III. (Aplt. Appx., Vol. I:100 at 91:2-17; Vol. II:149-50 at ¶11, 155 at 18:13-16, 156 at 25:1-4.) Chang then worked with Lockheed's Corporate Talent Acquisition Department to approve Finney to be hired onto GPS-III as a Level 4 Senior Staff Engineer, despite the fact that the position was posted as a Level 3. (Aplt. Appx., Vol. II:150 at ¶12, 156 at 24:17-24.) Finney accepted the Level 4 position. (Aplt. Appx., Vol. I:100 at 92:21-25; Vol. II:167.)

Chang was Finney's functional manager on GPS-III, and Timothy Halbrook (51 years old when Finney was laid off) was Finney's matrix manager. (Aplt. Appx., Vol. I:98 at 82:4-9; Vol. II:154 at 15:25-16:23 and 18:9-12, 169 at 11:23-25, 173 at 25:15-26:6.) Shortly after Halbrook started working on GPS-III, Finney met with Halbrook to discuss how he might be able to return to a Level 5 position. (Aplt. Appx., Vol. I:101 at 95:9-23; Vol. II:175 at 43:11-25.) Halbrook then set out to determine how Finney was performing to decide whether, in his opinion, Finney was performing the work expected of a Level 5 engineer on GPS-III.

(Aplt. Appx., Vol. II:176 at 47:20-48:4, 177 at 49:3-14.) In Halbrook's opinion and based on conversations with Finney's peers and other managers on GPS-III, Finney was not even performing as a Level 3 and was not on track to return to Level 5. (Aplt. Appx., Vol. II:178 at 55:2-7, 188 at ¶5.)

## IV. FINNEY RECEIVED A BASIC CONTRIBUTOR RATING IN 2011 AND WAS LAID OFF AS PART OF A REDUCTION IN FORCE IN APRIL 2012.

Halbrook rated Finney as a basic contributor in 2011 based on his own observations of Finney, the observations of Finney's peers, and his review of the Leader Workfile and inquiries into Finney's performance. (Aplt. Appx., Vol. I:103 at 103:17-104:3, 146; Vol. II:174 at 34:22-24, 182 at 79:21-80:15.) Halbrook also placed Finney on a Performance Improvement Plan ("PIP") on November 2, 2011 because he rated Finney a basic contributor and believed the PIP would help Finney improve his performance. (Aplt. Appx., Vol. I:101 at 96:5-13; Vol. II:158 at 36:2-8 and 37:2-4, 177 at 49:15-50:6, 178 at 55:8-10, 191-92.) By the time he issued the PIP, Halbrook had observed Finney's performance, saw him struggling to complete tasks, several of which were overdue, and viewed the PIP as a way to help Finney improve so he could work towards returning to Level 5. (Aplt. Appx., Vol. II:177 at 50:19-51:9.) Halbrook also met with Finney to discuss the PIP on November 2, 2011. (Aplt. Appx., Vol. II:180 at 62:5-24.)

Halbrook issued Finney a second PIP on November 16, 2011 because the first PIP included deadlines that would have been too difficult to meet, and Halbrook believed it was unfair to hold Finney to those deadlines. (Aplt. Appx., Vol. II:178 at 55:24-56:18, 181 at 67:5-13, 188 at ¶8.) Finney met with Halbrook weekly to review his tasks and discuss his progress towards meeting the requirements of the PIP, but Finney did not successfully complete his PIP and did not show significant improvement in the performance of his job. (Aplt. Appx., Vol. I:102 at 97:4-7; Vol. II:188 at ¶9.) Finney never asked Halbrook for assistance or training to help him improve his job performance. (Aplt. Appx., Vol. II:189 at ¶16.) Finney even started looking for a new position as early as 2011, and Halbrook tried to help him find a position that was a better fit for his skill set. (Aplt. Appx., Vol. I:104 at 106:14-21; Vol. II:183-84 at 92:8-94:11.)

Halbrook's boss, the GPS-III Vice President, instructed Halbrook to reduce his department from approximately eighty employees (or full-time equivalents "FTEs") to fifty employees because of budget constraints. (Aplt. Appx., Vol. I:104 at 105:10-13; Vol. II:172 at 23:1-7, 173 at 26:13-15, 185 at 98:21-99:8, 187 at ¶3.) Halbrook was able to reach the goal of reducing his department's headcount from eighty to fifty through a combination of layoffs, eliminating overtime, and reducing the number of part-time employees assigned to the program. (Aplt. Appx., Vol. II:188 at ¶11.)

Lockheed follows its Reduction in Force Directive when a layoff is necessary because of a mandatory reduction in the number of employees working on a given program. (Aplt. Appx., Vol. I:138 at ¶7; Vol. II:164-66.) A Talent Differentiation Ranking ("TDR") Data Sheet is used to rank employees in the job category to be reduced to determine who is selected for layoff. (Aplt. Appx., Vol. II:159-60 at 49:24-50:25, 196-98.) The TDR Data Sheet's factors include average performance review ratings, the employee's most recent performance review rating, performance rating count, and length of service. (Aplt. Appx., Vol. I:138-39 at ¶10; Vol. II:160 at 51:1-15, 194 at 19:24-20:15.) Functional and matrix managers work together to calibrate employee performance ratings to be used on the TDR Data Sheet. (Aplt. Appx., Vol. II:160 at 53:16-25.) Human Resources then prepares the TDR Data Sheet, and the employees with the highest scores are selected for layoff. (Aplt. Appx., Vol. I:138-39 at ¶10; Vol. II:195 at 23:12-20.)

Lockheed's policies and procedures for layoffs, including its Reduction in Force Directive and the detailed process its Human Resources Department and managers follow with respect to layoffs, including the use of TDR Data Sheets and validation sessions, were applied to 260 layoffs in 2012, including Finney's layoff on April 26, 2012. (Aplt. Appx., Vol. I:139 at ¶15.) Halbrook, in consultation with Chang, determined which positions to eliminate and how many employees in each position to eliminate based on the program's budget and needs at that time.

(Aplt. Appx., Vol. II:150 at ¶16, 157 at 26:16-27:12, 189 at ¶12.) Halbrook and Chang decided to eliminate one Level 4 test engineer position in April 2012 because they determined that doing so would not have an adverse impact on the program's performance. (Aplt. Appx., Vol. II:161 at 63:6-10, 186 at 114:22-115:1, 189 at ¶12.)

Human Resources prepared a TDR Data Sheet for thirty-four Level 4 test engineers on GPS-III, and Finney had the highest score out of all of the engineers listed. (Aplt. Appx., Vol. I:139 at ¶13; Vol. II:196-98.) Four engineers who were considered for the layoff and ranked on the TDR Data Sheet had more years of service than Finney, but they were not selected because their scores were lower on all of the other criteria. (Aplt. Appx., Vol. II:196-98.) It is important to note that employees' ages are not considered when determining who will be laid off. In fact, years of service worked in an employee's favor in 2012 by reducing the overall TDR score and making it less likely an employee would have the highest score if he or she worked for Lockheed for a long time. (Aplt. Appx., Vol. I:139 at ¶16; Vol. II:196-98.) Based on the information provided on the TDR Data Sheet, Chang approved Finney's layoff and notified Finney on approximately April 12, 2012, that he would be laid off on April 26, 2012 if he did not find another position within Lockheed before that time. (Aplt. Appx., Vol. I:105 at 109:11-21; Vol. II:150 at ¶16, 159 at 49:22-50:14.) Chang did not have any discretion to vary from

the results of the TDR Data Sheet. (Aplt. Appx., Vol. II:150 at ¶18.)

According to Lockheed's Reduction in Force Directive, "[w]hen the availability date is within a three-month timeframe, it is the joint responsibility of both leadership and the affected employee to search for a new assignment if there are no additional tasks to be performed within the manager's area of responsibility." (Aplt. Appx., Vol. II:165 at Section 1.2.) Both Chang and Halbrook tried to assist Finney in locating another position within Lockheed, but they were unsuccessful. (Aplt. Appx., Vol. II:150 at ¶19, 162 at 69:21-71:12, 189 at ¶15.) Finney was also unable to locate another position and was laid off on April 26, 2012. (Aplt. Appx., Vol. I:8 at ¶6; Vol. II:196-98.) Finney does not know what Halbrook, Chang, or anyone else discussed or considered when they completed the TDR Data Sheet and ultimately decided to lay him off. (Aplt. Appx., Vol. I:105 at 109:22-110:2.) In fact, Finney has no evidence his age was even considered when the layoff decision was made. (Aplt. Appx., Vol. I:105 at 110:3-12.)

## SUMMARY OF THE ARGUMENT

The District Court properly granted Lockheed's motion for summary judgment on Finney's discrimination and retaliation claims because he has not carried his burden of establishing that Lockheed's legitimate, non-discriminatory, and non-retaliatory reasons for its actions were pretextual. Discrimination and

retaliation had nothing to do with the reasons why Lockheed laid Finney off, and the District Court correctly recognized that Finney has not identified any evidence that anyone at Lockheed was ever motivated by his age or complaints of discrimination when he was laid off.

This appeal is nothing more than Finney's attempt to have this Court second guess not only the District Court's ruling but also Lockheed's reasons for its actions in the absence of any evidence of pretext. In summary, Finney's claims alleging Lockheed discriminated and retaliated against him when it laid him off fail for the simple reasons that (a) they are unsupported by any evidence of discrimination or retaliation, and (b) the undisputed facts demonstrate Lockheed did not discriminate or retaliate against Finney in any manner whatsoever. Accordingly, the District Court properly granted summary judgment and dismissed Finney's case with prejudice, and this Court should affirm the District Court's decision.

## ARGUMENT

### I. THE APPLICABLE STANDARD OF REVIEW SUPPORTS THE DISTRICT COURT'S SUMMARY JUDGMENT ORDER.

Finney appeals the propriety of the District Court's grant of summary judgment to Lockheed on his first and second claims for relief for discrimination and retaliation under the ADEA. This Court describes the standard to be applied in reviewing such a grant as follows:

> We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the moving party. Although the movant must show the absence of a genuine issue of material fact, he or she need not negate the nonmovant's claim. Once the movant carries this burden, the nonmovant cannot rest upon his or her pleadings, but must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which [he or she] carries the burden of proof. The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is genuine[. A]n issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant. If there is no genuine issue of material fact in dispute, we determine whether the district court correctly applied the substantive law.

Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir. 1999) (internal quotations and citations omitted); see also Kosak v. Catholic Health Initiatives of Colo., 400 F. App'x. 363, 365 (10th Cir. 2010).

## II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF LOCKHEED ON FINNEY'S AGE DISCRIMINATION CLAIM.

Finney bears the burden of proving actual intentional discrimination on the basis of his age. See Simmons v. Sykes Enter., Inc., 647 F.3d 943, 947 (10th Cir. 2011) (affirming summary judgment on plaintiff's ADEA claim); Kosak, 400 F. App'x. at 365 (same). It is no longer enough for a plaintiff, like Finney, to defeat

summary judgment simply by showing his age was "a" factor his employer considered in its decision to lay him off. Rather, he *must* show his age was the "but-for" cause of Lockheed's decision to lay him off from GPS-III. See Eke v. Ceridian BCT, Inc., 2012 WL 3089714, at n.4 (10th Cir. July 31, 2012) (affirming summary judgment), see also Doyle v. Nordam Group, Inc., 2012 WL 2820222, at *2 (10th Cir. July 11, 2012) ("The ADEA requires 'but-for' causation, therefore, a plaintiff claiming age discrimination must establish by a preponderance of the evidence that his employer would not have taken the challenged employment action but for the plaintiff's age.") (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177-78 (2009)). In other words, Finney "**must show that** '**age was the factor that made a difference**'" in Lockheed's decisions. Eke, 2012 WL 3089714, at n.4 (emphasis added).

In the absence of direct evidence of discrimination by Lockheed, which does not exist, this Court, like the District Court, will apply the burden-shifting analysis outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to Finney's claims. See Kosak, 400 F. App'x. at 365; Jones v. Okla. City Pub. Schs., 617 F.3d 1273, 1278 (10th Cir. 2010) (affirming that the McDonnell Douglas framework applies to ADEA claims post-Gross). Under McDonnell Douglas, Finney must first establish a *prima facie* case, which requires him to demonstrate: (1) he is a member of the class protected by the ADEA, (2) he was qualified for the position

he held, (3) he suffered an adverse employment action, and (4) he was treated less favorably than others not in his protected class. Armstead v. Wood, 2012 WL 2298495, at *9 (D. Colo. June 15, 2012) (Arguello, J.); see also Jones v. U.P.S., Inc., 502 F.3d 1176, 1186 (10th Cir. 2007). For the purposes of its summary judgment motion, Lockheed conceded Finney was 53 years old at the time of his layoff (making him a member of the protected class) and that he was laid off (which constitutes an adverse employment action). (Aplt. Appx., Vol. I:45.) Lockheed argued, however, that Finney cannot establish the second and fourth elements of his *prima facie* case because his record of poor performance on GPS-III shows he was not qualified for his position, and there is no evidence he was treated less favorably than similarly situated younger employees. (Id.) The District Court held that Finney met his *prima facie* case requirement by "[c]onstruing the evidence most favorably to Mr. Finney. . ." and finding he identified evidence that his performance on GPS-III was at least satisfactory and that Lockheed retained at least one younger employee when it laid Finney off. (Aplt. Appx., Vol. V:789-90.)

Once the District Court found that Finney established a *prima facie* case, the burden of production shifted to Lockheed "to articulate some legitimate, nondiscriminatory reason" for its actions. Kosak, 400 F. App'x. at 365; Jones, 617 F.3d at 1278. Because Lockheed articulated nondiscriminatory reasons for

Finney's layoff, the burden of persuasion returned to Finney to show by a preponderance of the evidence that Lockheed's stated reasons were pretext for discrimination. Kosak, 400 F. App'x. at 365 (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)). Throughout the burden-shifting analysis, "[t]he plaintiff . . . carries the full burden of persuasion to show that the defendant discriminated on [an] illegal basis." Bryant v. Farmers Ins. Exch., 432 F.3d 1114, 1125 (10th Cir. 2005).

### A. Finney Has Not Established a *Prima Facie* Case Because He Was Not Qualified for His Position, and Younger Employees Did Not Receive More Favorable Treatment.

As stated above, Finney cannot establish he was qualified for his position or that Lockheed treated younger employees more favorably than him. Finney's only arguments that he was qualified for his position are that he "possessed the same, if not greater, qualifications to perform his job than he did at the time he was hired," and he "was doing a good job." (Op. Brief, p. 13; Aplt. Appx., Vol. III:351-52.) But, that is simply not true, and the Court cannot assume Finney was more skilled at the jobs he performed in 2009-2012 than he was at the jobs he performed when he first started at Lockheed in 1980 merely because he worked for the Company for over thirty years. After all, Finney was not performing the same type of work on GPS-III as he did on GRAIL or ARES, he admits he had no prior experience performing the test engineering work he performed on GPS-III, and he has not

identified any evidence that he was performing his work on GPS-III in a satisfactory manner. (Aplt. Appx., Vol. I:99 at 86:22-87:2; Vol. II:156 at 22:11-25, 156-57 at 24:13-27:2, 178 at 55:2-7, 188 at ¶5.) Finney's own personal belief that he "was doing a good job" does not overcome the fact that his supervisors believed his performance on GPS-III fell below their expectations and resulted in a basic contributor rating and a PIP. (Aplt. Appx., Vol. I:101 at 96:5-13, 102 at 97:4-7, 103 at 103:17-104:3, 146; Vol. II:158 at 36:2-8 and 37:2-4, 174 at 34:22-24, 177 at 49:15-50:6 and 50:19-51:9, 178 at 55:2-10, 181 at 67:5-13, 182 at 79:21-80:15, 188 at ¶¶5, 8 and 9, 189 at ¶16, 191-92.) See Kelley v. Goodyear Tire & Rubber Co., 220 F.3d 1174, 1177-78 (10th Cir. 2000) (holding it is "the manager's perception of the employee's performance that is relevant, not the plaintiff's subjective evaluation of his own relative performance."), Aramburu v. Boeing Co., 112 F.3d 1398, 1413 n. 7 (10th Cir. 1997) (recognizing employee's "subjective belief of discrimination is not sufficient to preclude summary judgment.").

Finney has also failed to show that similarly situated younger employees received more favorable treatment. The District Court gave Finney the benefit of the doubt and found this element was satisfied simply because younger employees remained on GPS-III after Finney was laid off. (Aplt. Appx., Vol. V:789-90.) That may be true, but neither Finney nor the District Court identified any evidence

that the unidentified younger employees were otherwise similarly situated to Finney with respect to their job duties, their supervising managers, their experience working and tenure on GPS-III, their job performance, or the specific criteria used on the TDR Data Sheet to determine who would be selected for layoff. After all, it cannot be the case that a plaintiff can meet the final element of the *prima facie* case simply by asserting younger employees remain employed after a reduction in force without any effort to show the younger employees are similarly situated; otherwise, the final element of the *prima facie* case will always be met unless the employer lays off the youngest employees first every time there is a reduction in force involving an employee over the age of 40.

### B. Finney Has Not Identified Any Credible Evidence to Show Lockheed's Legitimate Nondiscriminatory Reasons for Laying Him Off Were Pretextual.

Lockheed has presented undisputed evidence that Finney was laid off as part of a reduction in force in April 2012 (nondiscriminatory) (Aplt. Appx., Vol. I:104 at 105:10-13, 138 at ¶7, 138-39 at ¶10, 139 at ¶15; Vol. II:159-60 at 49:24-50:25, 160 at 51:1-15 and 53:16-25, 164-66, 185 at 98:21-99:8, 188 at ¶11, 194 at 19:24-20:15, 195 at 23:12-20, 196-98; Vol. V:787), Halbrook and Chang decided to eliminate one Level 4 Test Engineer position out of thirty-four because the program could operate without it (nondiscriminatory) (Aplt. Appx., Vol. II:161 at 63:6-10, 186 at 114:22-115:1, 189 at ¶12, 196-98; Vol. V:786), Halbrook relied on

his own observations as well as the observations of his employees and others on GPS-III to evaluate Finney's performance because he did not have a prior work history with Finney (nondiscriminatory) (Aplt. Appx., Vol. II:176 at 47:20-48:4, 177 at 49:3-14, 178 at 55:2-7, 188 at ¶5), Finney did not have previous test engineering experience before he worked on GPS-III (nondiscriminatory) (Aplt. Appx., Vol. I:99 at 86:22-87:2), Finney received the highest score out of thirty-four Level 4 Test Engineers on Lockheed's TDR Data Sheet (nondiscriminatory) (Aplt. Appx., Vol. I:139 at ¶13; Vol. II:196-98), the same ranking criteria was used for all thirty-four engineers considered for layoff (nondiscriminatory) (Aplt. Appx., Vol. I:139 at ¶13; Vol. II:196-98), older employees than Finney were not laid off of GPS-III (nondiscriminatory) (Aplt. Appx., Vol. I:48; IV:690), and there is no evidence Halbrook or Chang ever considered Finney's age when they completed the TDR Data Sheet and submitted his name for layoff (nondiscriminatory) (Aplt. Appx., Vol. I:105 at 110:3-12).

Finney does not even attempt to rebut the above undisputed and nondiscriminatory reasons and instead spends considerable time in his Opening Brief outlining the various scores he received on the TDR Data Sheet and opines without any supporting evidence whatsoever that Halbrook's rankings were made during a TDR meeting session "in an attempt to cover up the truly subjective nature of the process and Halbrook's influence over the process." (Op. Brief at 15-

16.) Finney also focuses on a March 24, 2012 email from Halbrook to Chang in which Halbrook states he wanted to "remove [Finney] from our team ASAP" as evidence of pretext, but he cites the email out of context. (Op. Brief at 16-17.) Halbrook's email expressed his frustration over Finney's insubordinate refusal to participate in Lockheed's annual performance evaluation process by failing to enter appropriate commitments into the Company's LM Commit system (a process each and every Lockheed employee is required to complete each year). (Aplt. Appx., Vol. V:774.) Finney's conduct indicated to Halbrook:

> that [Finney] is clearly not interested in improving his performance and helping the GPS program. Rather, he is myopically interested in the rewards that come from solid performance . . . . As such, I will not approve his Commitments unless directed otherwise and would like to remove him from our team ASAP. His conduct is insubordinate and his continued presence on GPSIII is not fair to those that have performed well but are moving off because of the directed headcount reductions.

(Id.) Finney then extrapolates that Halbrook wanted Finney to be laid off and terminated from Lockheed, but there is no evidence Halbrook wanted Lockheed to fire Finney – all he said was that he did not want Finney on his team because of Finney's insubordinate conduct. (Id.) There is also no evidence Halbrook or Chang took any action to prevent Finney from working for Lockheed in some other capacity or made any decisions based on Finney's age. (Aplt. Appx., Vol. III:347 at ¶110; Vol. IV:684-85 at ¶110; Vol. V:795-96.) Moreover, a vague statement in a single email is legally insufficient to meet Finney's burden of identifying

evidence of pretext. See Ray v. Tandem Computers, Inc., 63 F.3d 429, 436 (10th Cir. 1995) (finding a vague statement that is "susceptible of several interpretations . . . insufficient to avoid summary judgment on discrimination claims").

Finney also conveniently ignores the fact that of the thirty-four Level 4 Test Engineers considered and identified on the TDR Data Sheet, at least six were over the age of 55 and twelve were the same age or older than Finney. (Aplt. Appx., Vol. II:196-98.) Finney also ignores the undisputed fact that older employees were *not* selected for layoff, which is entirely inconsistent with his theory that age was the reason why Lockheed laid him off. (Aplt. Appx., Vol. I:48; IV:690.) If Halbrook, Chang or anyone else intended to discriminate based on age, they would have presumably laid off the employees older than Finney before laying off Finney. (Aplt. Appx., Vol. IV:690.) See Bundy v. U.S. Bank Nat. Ass'n, 2013 WL 5230748, at *4 (D. Minn. Sept. 17, 2013), Paluh v. HSBC Bank USA, 409 F. Supp. 2d 178, 201 (W.D.N.Y. 2006). Therefore, Finney's own theory is inconsistent with the evidence and does not make sense.

Finney also ignores the fact that he was both hired onto GPS-III in May 2011 and eventually laid off in April 2012 by the same person – David Chang. (Aplt. Appx., Vol. II:149 at ¶¶8 and 10, 150 at ¶12, 155 at 18:13-16, 156 at 22:6-25 and 24:17-24, 156-57 at 24:13-27:2.) This fact alone shows Finney's age had nothing to do with Chang's decision because it means Chang (who is only two

years younger than Finney) hired Finney when Finney was 52 years old and then laid him off when he was only one year older. (Aplt. Appx., Vol. II:151 at ¶22.) See Antonio v. Sygma Network, Inc., 458 F.3d 1177, 1183 (10th Cir. 2006) (holding if "'the employee was hired and fired by the same person within a relatively short time span,' . . . there is a 'strong inference that the employer's stated reason for acting against the employee is not pretextual.'") (quoting Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991)); see also Coghlan v. Am. Seafoods Co. LLC, 413 F.3d 1090, 1096-98 (9th Cir. 2005) (affirming summary judgment where plaintiff failed to overcome the "same actor" inference); Schnabel v. Abramson, 232 F.3d 83, 91 (2d Cir. 2000) (finding that in such circumstances it would be difficult to impute to the decision-maker "an invidious motivation that would be inconsistent with the decision to hire."); Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 175 (8th Cir. 1992) (finding it highly doubtful that the person who hires an employee in a protected age group would fire the same employee as a result of a sudden "aversion to older people."). Furthermore, in cases where a plaintiff was both hired and fired while over forty, there is a presumption against age discrimination as a motivating factor in the decision. See McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1129 (10th Cir. 1998) (finding plaintiff's claim of bias against employees over forty was "undermined by the fact that plaintiff was fifty years old when hired."); see also Malloy v. Intercall, Inc., 2010 WL 5441658, at

*12 (D.N.J. Dec. 28, 2010) (citing Young v. Hobart West Grp., 897 A.2d 1063, 1070 (N.J. Super. App. Div. 2005)) ("Courts have rejected age discrimination claims when a plaintiff was both hired and fired while a member of the protected age group.") (citations omitted)). "[E]mployers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing." Proud, 945 F.2d at 798.

To show pretext, Finney must produce evidence of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in Lockheed's proffered reasons that a reasonable fact-finder could rationally conclude the reasons are not true. Plotke v. White, 405 F.3d 1092, 1102 (10th Cir. 2005). His mere conjecture and theories that Lockheed's explanation is pretextual are insufficient to oppose a properly supported motion for summary judgment. Furthermore, in this case and as explained above, even if Finney presented evidence that his age was "a" factor in the decision to lay him off from GPS-III, Lockheed is still entitled to summary judgment unless Finney produces evidence that "but for" his age the decision would not have been made. The facts in this case are directly analogous to those examined by the United States Supreme Court in Gross, 557 U.S. 167. In Gross, the plaintiff worked for FBL for thirty years when it removed him from his position and reassigned him to another job. Id. at 170. Gross argued FBL discriminated against him based on his age because it

transferred many of his duties to a younger employee. Id. The Supreme Court held it was not enough for Gross to present evidence that his age was "a" factor, or even a "substantial" factor. Rather, the Court required Gross to present evidence that if it were not for his age, FBL would not have demoted him. Id. at 180.

### C. This Court Should Affirm the District Court's Finding that Finney Failed to Identify Sufficient Evidence of Pretext to Meet His Burden.

The District Court correctly found that Finney failed to establish pretext. (Aplt. Appx., Vol. V:791-92.) It first examined Finney's argument that Halbrook gave him a negative PADR score in 2011 (based at least in part on other employees' observations) after issuing Finney an inaccurate PIP that was later revised and found such evidence, even if true, to be insufficient to establish pretext for two reasons. (Id. at 790-92.) First, the District Court recognized that "'a plaintiff cannot prevail by merely challenging in general terms the accuracy of a performance evaluation which the employer relied on in making an employment decision without any additional evidence (over and above that of the prima facie case) of age discrimination.'" (Id. at 791 (quoting Young v. Cobe Labs, Inc., 141 F.3d 1187 at *4 (10th Cir. 1998).) Therefore, the District Court found "it is not enough for Mr. Finney to show that his 2011 PADR was inaccurate, he must also show that the supervisor responsible for assessing his performance – here, Mr. Halbrook – displayed age-related animus toward him because of his age." (Id.

(citing Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1168 (10th Cir. 1998).) Finney produced no such evidence. Second, the District Court observed that when determining whether an employer's reason for some action is pretextual, it must look at "'the facts as they appear to the person making the decision, not the plaintiff's subjective evaluation of the situation.'" (Aplt. Appx., Vol. V:791 (quoting Lobato v. New Mexico Env't Dept., 733 F.3d 1283, 1289 (10th Cir. 2013)). "The relevant inquiry is not whether the employer's proffered reasons were wise, fair, or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs." (Id.) Even though Finney may believe he was a good performer, it is the decision-maker's perception that is relevant. See Pippin v. Burlington Res. Oil and Gas Co., 440 F.3d 1186, 1196-97 (10th Cir. 2006). Therefore, even if Halbrook erroneously and even mistakenly relied on other employees' observations or considered an inaccurate PIP, Finney's claims are still subject to summary judgment because he has not shown Halbrook believed Finney deserved a higher score but nevertheless chose to give him a lower score because of his age. (See Aplt. Appx., Vol. V:791-92.)

The District Court also correctly rejected Finney's argument that Halbrook deliberately manipulated the reduction in force process to ensure Finney was laid off. (Aplt. Appx., Vol. V:792.) The Court noted that, even if Finney could show Halbrook and others had the opportunity to manipulate the TDR scores leading to

the reduction in force decision, there is no evidence they actually did so. (Id. at 790-92.) There is also no evidence of age-related animus by Halbrook or anyone else involved in the TDR process.

Finney's conspiracy theories and unsupported beliefs that different managers and supervisors on different programs all discriminated against him because of his age are unsupported by any actual evidence. There is no evidence that "but for" Finney's age he would not have been laid off or that the relevant decision-makers ever considered Finney's age when they decided to lay him off.

## III. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF LOCKHEED ON FINNEY'S RETALIATION CLAIM.

The District Court correctly recognized that the ADEA forbids employers from retaliating against employees because they oppose practices that are unlawful "or because he or she 'has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation' under the statute." (Aplt. Appx., Vol. V:794 (quoting 29 U.S.C. § 623(d)). But, it is not enough for Finney to simply allege Lockheed retaliated against him without any actual evidence of both a causal connection between his protected activity and his layoff as well as pretext for his claim to survive summary judgment.

Courts analyze ADEA retaliation claims under the same McDonnell Douglas burden-shifting framework described above. See Hinds v. Sprint/United Mgmt.

Co., 523 F.3d 1187, 1201-02 (10th Cir. 2008). Finney first must demonstrate a genuine issue of material fact exists as to each of the following elements to establish a *prima facie* case: (1) he engaged in protected opposition to age discrimination, (2) he suffered an adverse employment action, and (3) a causal connection exists between the protected activity and adverse employment action. See, e.g., Hinds, 523 F.3d at 1201-02; MacKenzie v. City and County of Denver, 414 F.3d 1266, 1278-79 (10th Cir. 2005) (affirming summary judgment). If Finney meets this initial hurdle, the burden shifts to Lockheed to identify legitimate nonretaliatory reasons for its actions. Finally, Lockheed is entitled to summary judgment if Finney cannot identify evidence that Lockheed's reasons are really pretext for retaliation.

### A. Finney Cannot Establish a *Prima Facie* Case of Retaliation Because There Is No Evidence of a Causal Connection between His Protected Conduct and Lockheed's Decision to Lay Him Off.

Lockheed admits Finney engaged in protected conduct by filing internal complaints and a charge of discrimination with the Equal Employment Opportunity Commission and suffered an adverse employment action when he was laid off. (Aplt. Appx., Vol. I:57.) But, Lockheed argued and continues to contend that Finney cannot satisfy the third element of his *prima facie* case because there is no evidence of a causal connection between his complaints and the decision to select him for layoff. (Id.) On appeal, Finney's only argument to try to save his

claim from summary judgment is that the timing of various events leads to an inference of retaliation. (Op. Brief at 22.) That is neither factually correct nor an accurate statement of the law. "To establish the requisite causal connection between his protected conduct and termination, [Finney] must show that [Lockheed] was motivated to terminate his employment by a desire to retaliate for his protected activity." Hinds, 523 F.3d at 1203 (citing Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1218 (10th Cir. 2003)).

As explained in the following bulleted paragraphs, the record simply does not support Finney's allegations:[3]

- First, Finney asserts Halbrook responded to his October 2010 complaints by placing Finney on a PIP (Op. Brief at 3-4 (citing Aplt. Appx. at 614-615)), but the undisputed evidence shows that Halbrook took Finney's concerns about the level of his position seriously, investigated whether Finney was performing work expected of a Level 4 Engineer on GPS-III, and concluded Finney's performance was so far below the expectations of even a Level 3 Engineer that he needed to issue Finney a PIP to help him improve his performance and reach his goal of returning to a Level 5 position (Aplt. Appx., Vol. I:101 at 95:9-23 and 96:5-13, 102 at 97:4-7, 103 at 103:17-104:3; Vol. II:158 at 36:2-8 and 37:2-4, 174 at 34:22-24, 175 at 43:11-25, 176 at 47:24-48:4, 177 at 49:3-50:6 and 50:19-51:9, 178 at 55:2-10 and 55:24-56:18, 181 at 67:5-13, 182 at 79:21-80:15, 188 at ¶¶5 and 8, 191-92).

[3] Finney cites Piercy v. Maketa, 480 F.3d 1192 (10th Cir. 2007), to purportedly support his argument that he suffered a pattern of retaliatory conduct, which is sufficient to establish a causal connection and meet his *prima facie* case requirement. But, Piercy does not involve an ADEA claim, the factual allegations are entirely different than those at issue here, and this Court affirmed summary judgment in favor of the defendant on the plaintiff's retaliation claim in that case.

There is no evidence linking Finney's complaints to Halbrook's decision to issue him a PIP.

- Second, Finney contends that Halbrook issued him a discriminatory performance review that was based on Finney's coworkers' observations (Op. Brief at 7), but he has not identified any evidence Halbrook's process for drafting Finney's performance review was any different than the process Halbrook used for other employees or that Halbrook's conduct was linked to Finney's complaints in any way.

- Third, Finney alleges he was placed on a second PIP in December as a result of additional complaints (Op. Brief at 23), but Halbrook issued a second PIP because he acknowledged the first PIP included unrealistic deadlines and did not want to hold Finney responsible for deadlines that were too difficult for him to meet (Aplt. Appx., Vol. II:178 at 55:24-56:18, 181 at 67:5-13, 188 at ¶8). If anything, the fact that Halbrook issued a revised PIP shows he was trying to help Finney and not hold him to unrealistic expectations.

- Fourth, Finney claims Halbrook and Chang decided to lay off a Level 4 Engineer only after Finney complained in January 2012 (Op. Brief at 23), but Halbrook and Chang decided to eliminate one Level 4 Engineer after Halbrook was directed to reduce his headcount and they determined they could eliminate a Level 4 Engineer position without any adverse impact on the program (Aplt. Appx., Vol. I:104 at 105:10-13; Vol. II:150 at ¶16, 173 at 26:16-27:12, 185 at 98:21-99:8, 188 at ¶11, 189 at ¶12).

- Finally, Finney asserts he was ranked the lowest of all the engineers on the TDR Data Sheet in March 2012 after he complained about discrimination and retaliation (Op. Brief at 23-24), but he has not identified a single piece of evidence to show his work performance was not the lowest out of all thirty-four Level 4 Engineers considered for the layoff. All he offers are his own subjective beliefs that he performed his job better than anyone else – beliefs that remain contradicted by the fact that different supervisors on different programs (GRAIL and GPS-III) thought Finney underperformed compared to his peers. (Aplt. Appx., Vol. I:65 at ¶¶7, 11 and 12, 76 at 71:11-73:10, 77 at

74:14-75:1, 78 at 78:14-19, 79 at 94:4-7, 80 at 98:14-23 and 99:3-11, 84 at ¶7, 101 at 96:5-13, 103 at 103:17-104:3, 132 at 38:2-16, 133-34 at 43:18-45:3, 135 at 51:5-15, 143, 146, 148; Vol. II:158 at 36:2-8 and 37:2-4, 174 at 34:22-24, 176 at 47:20-48:4, 177 at 49:3-50:6 and 50:19-51:9, 178 at 55:2-56:18, 181 at 67:5-13, 182 at 78:21-80:15, 188 at ¶¶5 and 8, 191-92.)

For these reasons, Finney has not and cannot establish a *prima facie* case for retaliation because there is simply no evidence that a causal connection exists between his complaints and the adverse actions described above and in Finney's Opening Brief.

### B. Lockheed Had Legitimate Nonretaliatory Reasons for Laying Finney Off, and Finney Has Not Identified Any Evidence of Pretext to Save His Claim from Summary Judgment.

Even if Finney could establish a *prima facie* case based on the evidence in the record, Lockheed has identified legitimate nonretaliatory reasons for laying him off. It remains undisputed that the layoff was precipitated by a mandate to Halbrook to reduce his department from approximately eighty to fifty employees (Aplt. Appx., Vol. I:104 at 105:10-13; Vol. II:172 at 23:1-7, 185 at 98:21-99:8, 187 at ¶3), Halbrook and Chang determined the department could eliminate one Level 4 Engineer position because they could do so without it adversely affecting the program's performance (Aplt. Appx., Vol. II:150 at ¶16, 161 at 63:6-10, 173 at 26:16-27:12, 186 at 114:22-115:1, 189 at ¶12), and Chang was the ultimate decision-maker responsible for laying Finney off because Finney scored the highest on the TDR Ranking Data Sheet that was compiled according to

established Company policies used in at least 259 other reductions in force in 2012 – policies that did not provide Chang discretion to select another individual in place of Finney (Aplt. Appx., Vol. I:105 at 109:11-21, 139 at ¶13; Vol. II:150 at ¶16, 159-60 at 49:22-50:14, 196-98). There is no evidence Finney's complaints were the "but for" cause of his layoff or even that anyone at Lockheed considered his protected activity when decisions were made that led to his layoff.

Lockheed does not argue with Finney's repeated assertions in this case that he had a long career with the Company and worked as an Electrical Engineer on numerous programs throughout his tenure. Finney may have also enjoyed success on other programs during his career, but the fact he received higher performance ratings and perhaps even performed at a higher level on other programs performing other tasks for other supervisors has no bearing on Halbrook's evaluation of Finney's performance on GPS-III. Finney also still has not identified any evidence to show his work performance was not the lowest out of all thirty-four Level 4 Engineers on GPS-III considered for the layoff. All he offers are his own subjective beliefs that he performed his job better than anyone else. Finney's assumptions and beliefs, however, are contrary to his actual performance while on GPS-III. (Aplt. Appx., Vol. I:65 at ¶¶7, 11 and 12, 76 at 71:11-73:10, 77 at 74:14-75:1, 78 at 78:14-19, 79 at 94:4-7, 80 at 98:14-23 and 99:3-11, 84 at ¶7, 101 at 96:5-13, 103 at 103:17-104:3, 132 at 38:2-16, 133-34 at 43:18-45:3, 135 at 51:5-

15, 143, 146, 148; Vol. II:158 at 36:2-8 and 37:2-4, 174 at 34:22-24, 176 at 47:20-48:4, 177 at 49:3-50:6 and 50:19-51:9, 178 at 55:2-56:18, 181 at 67:5-13, 182 at 78:21-80:15, 188 at ¶¶5 and 8, 191-92.)

It is insufficient at this step of the analysis for Finney to rely solely on temporal proximity between his complaints and Lockheed's reduction in force decision to defeat summary judgment. See Medina v. Income Support Div., New Mexico, 413 F.3d 1131, 1138 (10th Cir. 2005). Moreover, Lockheed, through Halbrook or anyone else, cannot negligently or even recklessly retaliate against someone. A plaintiff must present at least some circumstantial evidence that the decision-makers intentionally retaliated against him for engaging in protected conduct, but he has not identified evidence that anyone harbored a retaliatory animus against him. See Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1172 (10th Cir. 2006). Finney instead relies almost entirely on Halbrook's March 24, 2012 email (quoted and discussed supra) expressing his desire that Finney be removed from his team to try to establish retaliatory intent and pretext, but it is undisputed that the context of the email was Finney's failure to follow instructions and complete his LM Commit performance evaluation obligations – not retaliation for engaging in protected activity. (Op. Brief at 12-13; Aplt. Appx., Vol. V:795-96.) See Ray, 63 F.3d at 436.

Finney has not identified any evidence that anyone at Lockheed possessed a retaliatory motive or that the Company's reasons for laying him off were pretext for retaliation, and therefore this Court should affirm the District Court's order granting summary judgment on this claim.

## CONCLUSION

For the reasons set forth above, Appellee Lockheed Martin Corporation requests that this Court affirm the District Court's Order granting summary judgment on both of Finney's claims in this case.

## REASON ORAL ARGUMENT IS NOT NECESSARY

The issues in this case present only garden-variety age discrimination and retaliation claims that have been addressed by this Court on numerous occasions in previous appeals. This is not a precedent-setting case, and oral argument is not necessary.

Respectfully submitted this 3rd day of September, 2015.

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned counsel certifies that this Answer Brief of Appellee, Lockheed Martin Corporation, complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i). According to the word-processing system used to prepare this brief, MSWord 2010, the word count for this brief, excluding the Corporate Disclosure Statement, the Table of Contents, the Table of Authorities, and the certificates of counsel, see Fed. R. App. P. 32(a)(7)(B)(iii), is 9,169.

The undersigned counsel further certifies that this Answer Brief of Appellee, Lockheed Martin Corporation, complies with the typeface requirements set forth in Fed. R. App. P. 32(a)(5) and the type style requirements set forth in Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MSWord 2010 in 14-point Times New Roman.

By: *s/ Austin E. Smith*

## CERTIFICATE OF COMPLIANCE WITH RULE 25(a)(5)

The undersigned counsel certifies that this Answer Brief of Appellee, Lockheed Martin Corporation, has been redacted for privacy pursuant to Fed. R. App. P. 25(a)(5).

By: *s/ Austin E. Smith*

## CERTIFICATE OF DIGITAL SUBMISSION

The undersigned counsel certifies that a copy of the foregoing **ANSWER BRIEF OF APPELLEE, LOCKHEED MARTIN CORPORATION**, as submitted in digital form, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Symantec Endpoint Protection and, according to the program, is free of viruses.

By: *s/ Austin E. Smith*

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of September, 2015, a true and correct copy of the **ANSWER BRIEF OF APPELLEE, LOCKHEED MARTIN CORPORATION** was electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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*s/ Linda R. Kerman*
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# General Information

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|---|---|
| **Court** | United States Court of Appeals for the Tenth Circuit; United States Court of Appeals for the Tenth Circuit |
| **Federal Nature of Suit** | Civil Rights - Employment[3442] |
| **Docket Number** | 15-01140 |