Appeal No. 15-1140

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD FINNEY

Plaintiff-Appellant

v.

LOCKHEED MARTIN CORPORATION

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
THE HONORABLE MARCIA S. KRIEGER, JUDGE
DISTRICT COURT CASE NO. 13-CV-869-MSK-NYW

BRIEF OF APPELANT RICHARD FINNEY

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF PRIOR OR RELATED APPEALS

Pursuant to Rule 28.2(C)(1) of the Rules of Court for the United States Court of Appeals for the Tenth Circuit, counsel for appellee hereby certifies that no other appeal in or from the same civil action in the lower Court was previously before this or any other appellate Court under the same or similar title. Additionally, no cases are known to this counsel to be pending in this or any other Court that will directly affect this Court's decision in the pending appeal.

/s Mathew S. Shechter

Mathew S. Shechter

STATEMENT OF JURISDICTION

Plaintiff-Appellant Richard Finney (hereinafter "Finney") filed his Complaint against Lockheed Martin Corporation (hereinafter "LMC" or "Lockheed") alleging unlawful discrimination and retaliation in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq*. (Aplt. App. at 7-15). Plaintiff is a former employee of Lockheed's Space Systems division, and alleges that Lockheed engaged in a pattern of discriminatory and retaliatory conduct against him ultimately culminating in his layoff in April of 2012. *Id*. Pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1337, the United States District Court for the District of Colorado had jurisdiction over Finney's Complaint.

Following discovery, Lockheed filed a Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56, arguing, *inter alia*, that Finney was not entitled to relief under the ADEA and that Finney could not demonstrate a genuine issue of material fact necessitating a trial. (Aplt. App. at 27-61). On March 24, 2015, the United States District Court for the District of Colorado entered an Order on Defendants' Motion for Summary Judgment granting Defendants' Motion and dismissing all claims. (Aplt. App. at 784-797). The Clerk entered Final Judgment in Response to the Court's Order on the next day. (Aplt. App. at 798-799). On April 21, 2014, within 30 days of the District Court's Final Order, Plaintiffs filed

their Notice of Appeal. (Aplt. App. at 800-801). This Court has jurisdiction over Plaintiffs' appeal pursuant to 28 U.S.C. §1291.

ISSUES ON APPEAL

1. Whether the District Court erred in granting Summary Judgment to Lockheed on Finney's claim of age discrimination by concluding Finney presented insufficient evidence of pretext?
2. Whether the District Court erred in granting Summary Judgment to Lockheed on Finney's claim of retaliation by concluding Finney presented insufficient evidence of pretext?

STATEMENT OF THE CASE

Richard Finney, a former employee of Lockheed Martin Corporation filed the underlying action alleging that Lockheed terminated his employment as a result of discrimination and retaliation prohibited by the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq*. Finney, a distinguished electrical engineer with a master's degree and over thirty years of service at Lockheed, spent his career designing and building dozens of successful space flight articles. (*See* Aplt. Appx. at 335-363). Throughout this time, Finney's performance reviews and

evaluations from his superiors bore out Finney's successes. (*Id*.; Aplt. Appx. at 594-597).

However, everything changed for Finney in 2009, when, at the age of 50, he came under the management of Timothy Linn and Stuart Spath. Spath immediately sought to have Finney reassigned, then, when unsuccessful, manipulated Lockheed's performance review process to issue Finney a below-average performance review rating while Finney's younger colleagues were not similarly marked down. (*Id*.) In mid-2010, Finney filed the first of a series of Charges of Discrimination with the Equal Employment Opportunity Commission, in addition to internal complaints of discrimination, alleging age discrimination by Linn and Spath. (*See e.g.* Aplt. Appx. at 592-593; 606-608; 649-660; 669-671). By early 2011, Finney was laid off from the GRAIL program. (Aplt. Appx. at 594-597).

In the months that followed Finney was effectively demoted into a position on the GPS-III program. (*Id*.) When, Finney came under the management of Timothy Halbrook in late 2011, Finney, who had recently filed a second EEOC Charge against Lockheed, immediately sought to explain the circumstances of the discriminatory demotion to Halbrook and request reinstatement to his former position. (Aplt. Appx. at 608). Within days, and with Halbrook not having reviewed any of Finney's work product, Halbrook responded by placing Finney on

an error-filled Performance Improvement Plan, and, shortly thereafter issuing Finney a second negative review in three years. (Aplt. Appx. at 614-615).

In early 2012, Halbrook was instructed to eliminate a single engineering position. However, rather than look at the entire field of engineers, Halbrook selected only Level 4 engineers as eligible for layoff, ensuring Finney would be among the candidates for layoff. (Aplt. Appx. 619). Lockheed uses a mathematical formula to determine who is to be laid off. *Id*.

At the same time this layoff process was, unbeknownst to Finney, taking place, Finney again made a detailed internal complaint of age discrimination to Halbrook and another supervisor. (Aplt Appx. at 802-811). Shortly thereafter, Halbrook and the other supervisor provided subjective inputs into the mathematical layoff formula. (Aplt. Appx. at 642, 661-662, 674). These inputs, along with the two prior negative reviews, ensured Finney would be laid off from the program while his younger colleagues would remain employed. Days later, Halbrook told David Chang, a Lockheed manager responsible for managing the layoff, "I…would like to remove [Finney] ASAP." (*Id.*; Aplt. Appx. at 802-811).

Finney was laid off from the GPS-III project. Before being laid off from Lockheed in the days that followed, Chang violated Lockheed policy by failing to place Finney in an open position for which Finney was qualified. (Aplt. Appx.

629-631, 665, 667). Finney timely filed a Charge of Discrimination with the EEOC over his layoff and the underlying litigation was timely commenced. (*See* Aplt. Appx. at 335-363).

The District Court granted Summary Judgment to Lockheed on both of Plaintiff's claims, finding that although Finney had established *prima-facie* cases of both age discrimination and retaliation, there was insufficient evidence of pretext to sustain either of Mr. Finney's claims. (Aplt. App. at 793, 796.)

STATEMENT OF FACTS

Plaintiff Richard Finney ("Finney") (53 years old at the time of his 2012 layoff) brings this action in response to discriminatory and retaliatory treatment at the hands of his former employer, Lockheed Martin Corporation ("Lockheed"). (Aplt. Appx. at 7-15). Finney, a distinguished electrical engineer with a master's degree and over thirty years of service at Lockheed, spent his career designing and building space flight articles. Many dozens of these articles have successfully completed their mission onboard NASA spacecraft, and a wide variety of other space vehicles built by Lockheed. Thus, it came as quite as surprise to Finney, when, after a career of award-winning service for the company, he was subjected to a pattern of unremitting discrimination and retaliation beginning in 2009 and culminating in a layoff on April 26, 2012. (Aplt. Appx. at 594-598).

Finney's career had been smooth through 2008, as for nearly thirty years, he had been rated by the company as a successful contributor, and had worked for numerous managers who ensured Finney was rewarded for his loyal service to the company. (*Id*.) Prior to 2009, as Finney would complete a job assignment, his management team would transition him to a new assignment. Only once since 1980 had Finney even bothered to fill out an application when moving on to a new post at Lockheed. (*Id*.)

In 2008, Finney was winding down his work on the Ares I-X rocket, and was assigned to a ¼ time assignment on the GRAIL program, working for manager Stuart Spath and team lead Tim Linn. (*Id*.; Aplt. Appx. at 425). In the months that followed, Linn and Spath demanded more and more of Finney's time, driven by an unrealistic project schedule. (*Id*.; Aplt. Appx. at 435-444). Despite working long hours, Finney was finally able to transition to GRAIL at the end of April 2009. (*Id*.) That very day, Spath attempted to remove Finney from the program, who was saved only by the involvement of HR. (*Id*.) At the end of 2009, Spath issued Finney the worst performance review he had ever received in his career, and cherry-picked comments of others to make them appear worse. (*Id*.) Finney immediately complained both internally and to the EEOC of age discrimination. (*Id*.)

A year later, after successfully concluding his hardware work on GRAIL, Finney was transitioned on a part-time basis to a test engineering position on the GPS-III program. (Aplt. Appx. at 626-628). Management for the program had been unable to find anyone with skill-set to complete the job, and Finney was ultimately asked to take it on, although at a lower grade than he had enjoyed in many years. (*Id*.)

Later that year, Tim Halbrook took over as Finney's direct supervisor. (Aplt. Appx. at 594-598). After complaining that he had been discriminated against by others, and asking for Halbrook's help in returning to his previous grade, Finney was met immediately with a performance improvement plan. (*Id*.) A month later, Halbrook issued Finney another discriminatory performance review, despite having not experienced Finney's work product first-hand. (Aplt. Appx. 594-597, 615, 617-618). Just as Spath had two years earlier, Halbrook issued the report while including negative comments made by reviewers while excluding many positive remarks. (*Id*.) When Finney complained this review was discriminatory and retaliatory, he was placed on a second PIP. (Aplt. Appx. 596-597, 609-610, 651-652).

By early 2012, Lockheed was cutting back its workforce. Halbrook made a decision to cut back an electrical engineering position, and instead of taking the least qualified engineer from any of the 5 grades, Halbrook chose to cut only in

Finney's grade 4. (Aplt. Appx. 619). Excluded from contention from elimination were all individuals who had received above average performance reviews during the prior 3 years. This group included all of the employees in Finney's grade under the age of 40. (Aplt. Appx. at 642, 661-662, 674).

Then, when choosing between the remaining candidates, Halbrook rated him Finney equal to or worse than all of the other employees being considered in *every* category. (Id.) Shortly after this rating was completed and Finney had again complained of discrimination, Halbrook responded to Finney's complaint, telling Chang and HR rep Sally Kirchen that he wanted Finney gone ASAP. (Aplt. Appx. 802-811).

Sure enough, less than five weeks later, Finney had been laid off from his employment. In its haste to eliminate Finney, Lockheed failed to follow its own RIF policy in determining, without even speaking to Finney, that he was unqualified to assume several open positions, and failing to assign him to positions for which it did not determine he was unqualified. (Aplt. Appx. 629-631, 665, 667).

SUMMARY OF ARGUMENT

The Court below erred by granting summary judgment to Lockheed on Finney's claims for age discrimination and retaliation. As the Court below

correctly determined, Finney is able to make out a *prima facie* case of discrimination with respect to his April 2012 layoff. However, the Court below failed to consider all of the relevant facts Mr. Finney presented in concluding he could not establish his layoff was pretextual. In so finding, the Court below engaged in improper weighing of the facts, did not draw inferences in Mr. Finney's favor, and failed to consider all of the evidence supporting Finney's age discrimination claims.

The evidence, when considered in a light most favorable to Finney, shows that Finney was placed on an error-filled performance improvement plan, targeted for layoff by Mr. Halbrook, and, at the same time as Halbrook was providing subjective scores that would lead to Finney's layoff, told another Lockheed manager that Halbrook wanted Finney removed from his team ASAP. After Finney had been selected for layoff, the manager on the receiving end of Halbrook's e-mail ensured Finney's layoff was effectuated by failing to follow Lockheed procedure concerning other open positions at the company.

In addition to the strong pretext facts that support his discrimination claim, which are equally applicable to his retaliation claim, Finney can also demonstrate a pattern of retaliation closely following Finney's internal complaints of discrimination. This pattern, starting with a performance improvement plan issued by Halbrook in the fall of 2011 and ultimately culminating in Finney's April 2012

layoff links the pretextual actions of Halbrook and Chang in support of the layoff to Finney's ongoing complaints of discrimination. Thus, the Court below also erred in dismissing Finney's retaliation claim for a lack of pretext evidence.

ARGUMENT

I. Standard of Review

The Court below's grant of Summary Judgment is reviewed de novo. *Eisenhour v. Weber County*, 744 F.3d 1220, 1226 (10th Cir. 2014). Moreover, on appeal, the evidence and the reasonable inferences therefrom, are examined in a light most favorable to the non-moving party. *Smothers v. Solvay Chems., Inc.*, 740 F.3d 530 (10th Cir. 2014). Summary Judgment is only appropriate "where the evidence reflects the absence of a genuine issue of material fact." *Eisenhour*, 744 F.3d at 1226. In making this assessment, the Court is bound to view the evidence in a light most favorable to Mr. Finney. *Id*. As the Supreme Court has recently explained:

> A "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."

Tolan v. Cotton, 572 U.S. ____, 134 S. Ct. 1861, 1868 (2014) (internal citations omitted). "Credibility determinations, the weighing of evidence, and the drawing

of legitimate inferences from the facts are jury functions, not those of a Judge." *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1107-1108 (10th Cir. 2001).

The burden of showing that no genuine issue of material fact exists rests with the moving party. *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000).

II. The District Court erred by concluding Lockheed was entitled to Summary Judgment on Plaintiff's Age Discrimination claim.

The Court below erred by failing to consider the evidence in a light most favorable to Mr. Finney, by failing to draw reasonable inferences in Mr. Finney's favor, and, most critically, by requiring Mr. Finney to provide direct evidence of discrimination in its *McDonnell-Douglas* analysis.

When there is no direct evidence of discrimination, the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) is utilized to analyze a case of age discrimination under the ADEA. Under that framework, Mr. Finney first bears the burden of establishing a *prima facie* case for his claim of age-based discrimination. If he is successful, the burden shifts to Lockheed to articulate a legitimate, non-discriminatory reason for his termination. If Lockheed does so, Mr. Finney then bears the ultimate burden of demonstrating that Lockheed's proffered reason is a pretext for discrimination.

As the Court below correctly determined, Mr. Finney can establish a *prima-facie* case of age discrimination. While the undersigned will not belabor the *prima-facie* analysis, the facts supporting a prima-facie case can also be relevant to an analysis of pretext, thus they are important to review. R*eeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148 (2000) ("a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.") As Mr. Finney was laid off from his position at Lockheed, his claims can be analyzed under the test set forth in *Beaird v. Seagate Technology, Inc.* Under that test, Finney must show: (1) that he is within the protected age group; (2) that he was doing satisfactory work; (3) that he was discharged despite the adequacy of her work; and (4) that there is some evidence the employer intended to discriminate against him in reaching its RIF decision. 145 F.3d 1159, 1165 (10th Cir. 1998). See also *Eke v. CaridianBCT, Inc.*, 490 Fed App'x 156, 162-63 (10th Cir. 2012) (applying same test). Lockheed conceded, and the evidence shows, that Mr. Finney was over forty years of age at the time of these incidents, and thus within the protected age group, and that it discharged Finney from his employment.

With respect to the second element, although Lockheed claimed Finney was not performing satisfactory work, there is sufficient evidence in the record that

meets the low burden imposed in the *prima facie* test. As this Court has previously noted,

> [A] plaintiff may make out a prima facie case of discrimination in a discharge case by credible evidence that she continued to possess the objective qualifications she held when she was hired, or by her own testimony that her work was satisfactory, even when disputed by her employer, or by evidence that she had held her position for a significant period of time.

MacDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115 (10th Cir. 1991). (internal citations omitted). Here, Finney possessed the same, if not greater, qualifications to perform his job than he did at the time he was hired at Lockheed. He had been performing the same electrical engineering functions for which he had been employed for thirty years, and had been performing as a test engineer for over a year. Finney also can present significant evidence about the quality of his work performance. (See e.g. Aplt. Appx. at 540, 594-597). Indeed, as Finney testified in his deposition, "I was doing a good job." *Id.*

With respect to the fourth prong of the analysis, Finney is able to present significant evidence of discrimination. As discussed in *Beaird*, all Plaintiff need demonstrate is that one of the individuals retained was younger than he was in

order to satisfy the final element of this test. Finney can identify a number of younger individuals who were retained at Lockheed when he was reduced (Aplt. Appx. 663).

As Finney can clearly make out a *prima-facie* case, the burden shifts to Lockheed to put forward a legitimate, non-discriminatory reason for Plaintiff's discharge. In this case, the allegedly non-discriminatory reason is highly relevant to Mr. Finney's evidence of pretext, and is critical to understand. As part of an overall staff reduction plan, Lockheed management determined that an engineering position needed to be eliminated from its testing and launch operations program (known internally by the acronym ATLO). Lockheed employs a variety of engineers, and it divides them up into five different levels, according to the level of responsibility in the position the engineer holds. Timothy Halbrook, an ATLO manager, to whom Finney reported[1], decided that only the 34 Level 4 engineers, including Finney, would be considered for the layoff, and that engineers at other levels, would not be eligible for layoff. (Aplt. Appx. at 619).

Lockheed then engaged in a two-step process to choose one of approximately 34 level 4 test engineers to eliminate. First, Lockheed eliminated the 22 employees who had an average performance rating of lower than 3.0 from consideration for the RIF. (Aplt. Appx. at 642, 661-662, 674). This step

[1] Lockheed has a divided reporting structure. Finney reported to Halbrook for purposes of his substantive work. Finney reported to David Chang for administrative purposes.

eliminated all of the employees under the age of 40 from consideration for layoff. (*Id*.) Then, Lockheed asked its managers to rate the remaining 12 employees at risk, including Finney, on three subjective factors. (*Id*.) In this case, the subjective factors were provided by Finney's management, namely, Halbrook, in March of 2012. (*Id*.) These three subjective factors (worth up to 10 points each), are combined with an average of prior performance reviews (worth up to 5 points), and a length of service credit benefiting longer-serving employees (subtracting a fraction of a point). (*Id*.) Chang, the administrative manager, had no discretion and was required by Lockheed policy to select the employee with the highest score for layoff. (Aplt. Appx. at 673). Constituting up to 30 out of a possible 35 points, Halbrook's subjective evaluation of Finney was by far the single most important factor in deciding Finney's layoff. (Aplt. Appx. at 642).

For example, in Finney's case, Finney received the worst score among the twelve eligible employees in the category "average skill", Halbrook rated Finney worst, despite Finney's prior designation as a Level 5 engineer, assigning him 9.25 points. On breadth, Halbrook rated Finney tied for the worst among all eligible employees, assigning him 9 points. Finally, Halbrook rated Finney's job complexity tied for the worst among all eligible employees, with 8 points. (*Id*.) Lockheed has attempted to use its mathematical formula and the fact that Halbrook's rankings were provided during a Talent Differentiation Ranking (TDR)

session in an attempt to cover up the truly subjective nature of the process and Halbrook's influence over the process.

To survive summary judgment, a plaintiff must show:

> "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons."

Jaramillo v. Colo. Judicial Dep't, 427 F.3d 1303, 1308 (10th Cir. 2005) (internal citations omitted).

> When evaluating the sufficiency this evidence, we look to several factors, "includ[ing] the strength of the [employee's] prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered" on a motion for summary judgment. *Reeves*, 530 U.S. at 148-49.
>
> *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1165 (10th Cir. 1998).

Moreover, where subjective decision making is involved, as in this case, "Because 'subjective decision making provides an opportunity for unlawful discrimination,' we 'view with skepticism subjective evaluation methods…' *Apsley v. Boeing Co.*, 691 F.3d 1184, 1204-1205 (10th Cir. Kan. 2012) (internal citations omitted).

Finney can present significant evidence of pretext with respect to his treatment by Halbrook in the months leading up to the selection of a Level 4 test engineer for layoff, and Halbrook's subjective rankings which unquestionably led to Finney's layoff. The most critical piece of evidence Finney has is a March 24,

2012 e-mail, in which Halbrook wrote to Chang, McCaa and Kirchen, telling them in no uncertain terms that he would like to "remove [Finney] from our team ASAP." (Aplt. Appx. 802-811[2]). While this e-mail was sent following an e-mail from Finney complaining of age discrimination, and is thus perhaps most probative of retaliatory intent, it is nonetheless critical for understanding Mr. Halbrook's mindset at the time he provided the rankings that would ensure Mr. Finney's departure.

Moreover, there is significant factual dispute over Lockheed's attacks on Finney's performance in late 2011 and early 2012. For example:

-- The PIP initially issued by Halbrook to Finney was filled with errors. (Aplt. Appx. 594-597, 615).

-- Just as Spath had done before him, Halbrook never observed Finney's work performance directly, but in creating Finney's performance review, Halbrook failed to include a number of positive comments about Finney and instead focused on the negative remarks. (Aplt. Appx. at 617-618, 632-641).

-- Halbrook cannot remember the initial performance rating he assigned to Finney. (Aplt. Appx. at 617-618).

[2] This document was specifically identified and discussed as an exhibit in Plaintiff's Summary Judgment Response, but was inadvertently not filed with the Court. Nonetheless, the document was referenced by both parties in their briefing on Summary Judgment, as well as the Court below in its Order.

-- Halbrook cannot remember anything that was said in the validation session that resulted in Finney being issued a "basic contributor" rating. (*Id*.)

-- The parties dispute whether Finney successfully completed his PIP. (Aplt. Appx. 41,609-610, 616).

Finally, there is the evidence of Lockheed's failure to follow its own written policies in the days that followed the designation of Mr. Finney for layoff. Lockheed policy requires "The manager", in this case, Mr. Chang, to (1) determine if there are any current or imminent openings, (2) to assess whether the employee being reduced can perform the work with "minimal training or job familiarization", which Lockheed defines as less than six months. (Aplt. Appx. at 665, 675). If the employee cannot perform the work, the manager is required to document what skills or requirements the employee cannot meet. Otherwise, the manager is to offer the position to the employee (*Id*.)

In April of 2012, within weeks of Halbrook's e-mail telling Chang in no uncertain terms that Halbrook wanted Finney gone, Chang identified two such positions. (Aplt. Appx. 629-631, 667). For one position, Chang listed several reasons he believe Finney was not qualified for the position. (*Id.*) However, Chang never contacted Finney to determine whether Finney was, in fact, so qualified. (*Id*.) With respect to a second position, Chang did not list any reasons Finney was unqualified, and wrote only that Finney could apply for such a

position. (*Id.*) However, Chang never informed Finney that he could or should apply for the position. (*Id.*) Moreover, according to the plain language of Lockheed's policy, if he could not identify a reason why Finney was not qualified for the position, Chang should have placed Finney directly into the position. (Aplt. Appx. at 665). Instead of following policy, Chang carried out Halbrook's expressed desire to see Finney gone.

These facts, the subjective nature of Lockheed's decision-making process, and disputed facts which the Court is required to construe in Finney's favor, are more than sufficient evidence to permit the age discrimination claim to proceed to trial so that the fact finder can make the credibility determinations necessary to resolve this matter.

Indeed, under similar circumstances this Court has reversed a district court's grant of summary judgment to an employer. In *Paup v. Gear Prods.*, 327 Fed. App'x 100, 111-14 (10th Cir. June 19, 2009) (unpublished), the plaintiff brought a discrimination claim after she was laid off from her employment with defendant. In that case, the central piece of evidence relied upon by the employer was a matrix allegedly created to select a candidate for layoff, although there was some evidence it was created after litigation had commenced. *Id*. Admittedly, there are many differences between *Paup* and this litigation, both favorable and unfavorable. However, the rationale used in that case, namely that among the evidence of

pretext presented by the employee was the fact that an unidentified group made the decision to select plaintiff for layoff is equally applicable to Mr. Finney. In concert with the other evidence concerning Halbrook's mindset at the time of the TDR session, Chang's actions following Finney's selection for layoff, and the inconsistencies in the performance review and performance improvement plans issued to Finney, this is more than sufficient evidence of pretext to survive summary judgment.

Moreover, in its Order granting Summary Judgment to Lockheed, the Court below required that Finney present direct evidence of age-related animus. (Aplt. Appx. at 792). The Court below wrote, "What is missing is evidence that there was manipulation motivated by age-related animus. There is no evidence of age-related animus on the part of Mr. Holbrook or any of the TDR participants." (*Id.*) Nowhere in this Court's jurisprudence is the requirement that in making a showing based on pretext, a plaintiff is required to provide evidence of age-related animus. Indeed, as the Supreme Court has made clear, evidence of the falsity of a defendant's purportedly non-discriminatory rationale can, standing alone, be sufficient evidence of pretext to survive summary judgment. *Reeves*, 530 U.S. at 147. The Supreme Court noted this is particularly so because, "once the employer's justification has been eliminated, discrimination may well be the most

likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."

Here, the decision of the Court below must be reversed because Mr. Finney is able to demonstrate sufficient evidence of pretext to necessitate a trial so that the conflicting evidence may be resolved by a jury.

III. The District Court erred by concluding Lockheed was entitled to Summary Judgment on Plaintiff's retaliation claim.

In addition to its finding that Lockheed was entitled to summary judgment on Finney's age discrimination claim, the Court below also erred by granting Lockheed summary judgment on Finney's retaliation claim.

The ADEA prohibits an employer from retaliating against an employee because he or she "has opposed any practice made unlawful" by the statute, 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. 29 U.S.C. § 623(d). ADEA retaliation claims are also analyzed under the *McDonnell Douglas* framework. *See Pastran v. K-Mart Corp.*, 210 F.3d 1201, 1205 (10th Cir. 2000). To establish a *prima facie* claim of retaliation a plaintiff must show: 1) he was engaged in opposition to ADEA discrimination; 2) he was subjected to an adverse employment action; and 3) a causal connection existed between the protected activity and the adverse employment action. *See id.*

Lockheed concedes that Finney has made numerous complaints both internally and to the EEOC that he has been subjected to a pattern of discrimination based upon his age. (*See e.g.* Aplt. Appx. at 56). However, Lockheed has argued, that Mr. Finney cannot present sufficient evidence to establish a causal connection between his complaints and the decision to lay him off. The timing of allegedly retaliatory acts alone can support a Plaintiff's retaliation claim. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999); *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 596 (10th Cir. 1991) (six week period between protected activity and adverse action may, by itself, constitute a causal connection). Moreover, just as with the pretext analysis on his discrimination claim, where the Plaintiff can present evidence that calls into question the credibility of Defendant's actions or decision makers, a jury is entitled to disbelieve the employer's legitimate, non-discriminatory reason, and, thus, summary judgment is wholly inappropriate. *Tyler v. Re-Max Mt. States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000).

In *Piercy v. Maketa*, 480 F.3d 1192, 1999 (10th Cir. 2007), this court considered whether a pattern of retaliatory conduct could be sufficient to establish the third element of a *prima-facie* case, causal connection. In *Piercy*, although many months passed between plaintiff's first internal complaint and ultimate termination, because she was able to show a pattern of complaints followed closely

by more limited retaliatory actions culminating in discharge, Plaintiff established a prima-facie case of retaliation. *Id*. Mr. Finney can make a similar showing here.

Plaintiff first complained to Halbrook of discrimination, both orally and in writing, at, and immediately prior to, their first meeting in October 2010. (Aplt. Appx. 471-472, 476, 606-608). Less than a month later, Halbrook responded to Finney by placing him on a performance improvement plan. (Aplt. Appx. 609-610). This plan, which contained numerous errors, was later modified by Halbrook. (Aplt. Appx. 596-597, 614).

One month later, Halbrook issued Finney with a discriminatory performance review. This review, which was comprised entirely with the observations of others, was, like Finney's 2009 review, purged of statements provided by observers who praised Finney's work, while comments criticizing Finney remained. (Aplt. Appx. 632-641).

When Finney complained in December, his complaint was again met a few weeks later by a second PIP (Aplt. Appx. 596-597, 609-610, 651-652). After Finney complained in January 2012, Halbrook, in consultation with Chang, decided to lay off a Level 4 Electrical Engineer, as opposed to either a Level 5 or Level 3 Engineer. (Aplt. Appx. 619). On March 23, two days after Finney again complained to Halbrook, Chang and others of discrimination and retaliation, a talent differentiation ranking session was held, and Finney was ranked the lowest

of all of the engineers to which he was compared (*See* pp. 13 above for detailed discussion).

This pattern of complaints followed closely by retaliatory action is more than sufficient for Plaintiff to set forth his *prima-facie* case. *Piercy*, 480 F.3d at 1192. Moreover, the numerous facts supporting the prima-facie case, when combined with the evidence of pretext previously articulated in support of Finney's age discrimination claim, all of which applies with equal force to his retaliation, and is only buttressed by the independent evidence of retaliation, is more than sufficient to allow a reasonable jury to conclude that Lockheed's actions are pretext to cover discrimination. *See e.g. Wirtz v. Kan. Farm Bureau Servs.*, 274 F.Supp. 2d 1198 (D. Kan. 2003) (denying summary judgment where plaintiff demonstrated pattern of retaliation following complaints along with evidence of pretext); *Ky. Dept. of Corr. v. McCullough*, 123 S.W.3d 120 (Ky. 2003) (accord); *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858 (8th Cir. 2006) (upholding jury verdict for plaintiff on retaliation claim based in part on company's failure to follow own policy).

CONCLUSION

The District Court erred by granting summary judgment to Lockheed on Finney's claims for age discrimination and retaliation. By failing to consider all of the relevant evidence of pretext, and failing to draw reasonable inferences in

Finney's favor, the District Court should be reversed. Plaintiff-Appellant seeks an Order of this Honorable Court reversing the decision of the District Court and remanding the case to the District Court with instructions to deny Defendant-Appellee's Motion for Summary Judgment.

ORAL ARGUMENT IS REQUESTED

Oral argument is requested in this case due to the important issues of Federal law at issue, as well as to address any questions the Panel may have after reviewing the briefs and the record submitted.

Respectfully Submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Vipre Business, Version 42170, Updated July 20, 2015, and according to the program are free of viruses.

/s/ Mathew S. Shechter

Mathew S. Shechter, Esq.

CERTIFICATE OF SERVICE

I, Mathew S. Shechter, Esq., hereby certify that on July 20, 2015 I served a copy of the foregoing **Appellant's Opening Brief** to the following via CM/ECF:

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/s/*Mathew S. Shechter*
Signature

July 20, 2015
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 13-cv-00869-MSK-BNB

RICHARD FINNEY,

Plaintiff,

v.

LOCKHEED MARTIN CORPORATION,

Defendant.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court pursuant to the Defendant Lockheed Martin Corporation's ("Lockheed") Motion for Summary Judgment (**#29**), the Plaintiff Richard Finney's Response (**#37**), and Lockheed's Reply (**#38**).

ISSUES PRESENTED

Mr. Finney asserts two claims related to his termination from Lockheed in 2012: (1) age discrimination and hostile work environment in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*; and (2) retaliation in violation of the ADEA. The Court exercises subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

MATERIAL FACTS

Based upon the evidence submitted by the parties, which the Court construes most favorably to Mr. Finney, the basic material facts are as follows. As needed, additional evidence and facts will be discussed as part of the Court's analysis.

Mr. Finney is currently 56 years old, and holds a master's degree in electrical engineering. He began working for Lockheed in 1980. Through 2008, Mr. Finney's superiors consistently gave him positive performance evaluations.

In 2008, Mr. Finney was working on the Aerial Reconfigurable Embedded System (ARES). As the ARES project began winding down, Mr. Finney began working part time with the Gravity Recovery and Interior Laboratory (GRAIL) program. He transitioned to full-time work on the GRAIL program in April 2009. While working on GRAIL program, Mr. Finney's manager, Stuart Spath, tried to have him removed from the program and then rated him as a "basic contributor" in his annual review.[1] This was the first negative review Mr. Finney had received in his career with Lockheed. In response to his 2009 performance review, on June 22, 2010, he filed a Charge of Discrimination against Lockheed with the EEOC.[2]

In December 2010, Mr. Finney was notified that his work on the GRAIL project was coming to an end. He and his supervisors began looking for another assignment for him. David Chang, the manager of the Global Positional System III (GPS-III) program, agreed to "borrow" Mr. Finney for the GPS-III program for a trial period. After three months, Mr. Finney applied for an open "Grade 3 engineer" position[3] with the GPS-III program and Mr. Chang approved his transfer. Mr. Finney was a Grade 5 engineer before joining the GPS-III project, but he was reduced to a Grade 4 engineer in June 2011, although there was no pay reduction. In an email

[1] Lockheed's review procedure is known as the Performance Assessment and Development Review (PADR). At the time it used a five-tier rating system: exceptional was a "1"; high contributor was a "2"; successful contributor was a "3"; basic contributor was a "4"; and unsatisfactory was a "5".

[2] The claims asserted in Mr. Finney's Complaint in the instant action are not based on this Charge of Discrimination.

[3] The engineering positions are divided into five grades, with Grade 5 being the highest.

dated June 28, 2011, Mr. Finney complained about his reduction in status to Mr. Chang and stated that he believed he was "singled out for discrimination, and subsequently retaliation actions." On August 23, 2011, Mr. Finney filed a second Charge of Discrimination based on age with the EEOC.

In September 2011, Timothy Halbrook became Mr. Finney's direct supervisor in the GPS-III project. Mr. Finney contacted Mr. Halbrook to request assistance with becoming a Grade 5 engineer, again. On October 10, 2011, Mr. Finney presented Mr. Halbrook with his "Formal Request for Reinstatement as Senior Staff Engineer." It outlined Mr. Finney's experience and stated that "Mr. Finney has been subject to various discrimination and retaliation actions by Mr. Tim Linn and Mr. Stu Spath, as properly and fully reported to Ethics and EEO." Mr. Halbrook advised Mr. Finney that he would be placed on a performance improvement plan (PIP). Mr. Halbrook issued the PIP in November 2011, but later issued a second PIP to correct errors in the first one. Mr. Halbrook rated Mr. Finney as a basic contributor in his annual PADR review for 2011. On December 20, 2011, by email Mr. Finney complained to human resources personnel that the review "serve[d] no purpose but to do purposeful, malicious, irreparable harm to one of this company's best employees." The email also stated that the assessment was an "additional directed act of retaliation." Copies were sent to Mr. Halbrook and Mr. Chang.

In 2012, as part of a reduction in force (RIF) implemented by Lockheed, Mr. Halbrook and Mr. Chang made the decision to eliminate one electrical engineering position.[4] Mr. Halbrook and Mr. Chang decided to consider Grade 4 engineers for the RIF. Mr. Finney was still a Grade 4 engineer.

[4] When he began working on the GPS-III program, Mr. Halbrook supervised eighty employees. The Vice President of the GPS-III program instructed Mr. Halbrook to reduce his department to fifty employees. Mr. Halbrook did so through a combination of layoffs, eliminating overtime, and reducing the number of part-time employees assigned to the program.

For a RIF, Lockheed used a Talent Differentiation Ranking Sheet to evaluate and compare employees. Managers and supervisors of the employees potentially affected held a Talent Differentiation Ranking (TDR) session, and then submitted their assessments to HR. During the TDR session, the managers and supervisors rated all employees being considered according to a number of factors including as job complexity and breadth, and the employee's skill level. These scores were combined with the employee's average performance review ratings and adjusted for length of service to calculate the employee's score on the Talent Differentiation Ranking Sheet. The employee with the highest score was selected for layoff.

The TDR for Grade 4 engineers in the GPS-III program was held on March 23, 2012. At the end of that session, Mr. Finney had the highest score. On April 12, 2012, Mr. Chang notified Mr. Finney that he would be laid off on April 26, 2012, unless he could find another position within Lockheed before that date. Mr. Finney was unsuccessful in locating another position within Lockheed and consequently was laid off.

On August 3, 2012, Mr. Finney filed a third Charge of Discrimination with the EEOC, alleging that Lockheed laid him off because of his age and in retaliation for the complaints of discrimination he filed internally and with the EEOC. He received a Notice of Right to Sue on January 4, 2013. Mr. Finney filed this lawsuit on April 4, 2013 asserting two claims against Lockheed (1) age discrimination and hostile work environment in violation of the ADEA; and (2) retaliation for engaging in protected activity under the ADEA.

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure facilitates the entry of a judgment only if no trial is necessary. *See White v. York Intern. Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary adjudication is authorized when there is no genuine dispute as to any material fact and

a party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). Substantive law governs which facts are material and what issues must be determined. It also specifies the elements that must be proved for a given claim or defense, sets the standard of proof, and identifies the party with the burden of proof. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Kaiser–Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 565 (10th Cir. 1989). A factual dispute is "genuine" and summary judgment is precluded if the evidence presented in support of and opposition to the motion is so contradictory that, if presented at trial, a judgment could enter for either party. *See Anderson*, 477 U.S. at 248. When considering a summary judgment motion, a court views all evidence in the light most favorable to the non-moving party, thereby favoring the right to a trial. *See Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002).

If the moving party does not have the burden of proof at trial, it must point to an absence of sufficient evidence to establish the claim or defense that the non-movant is obligated to prove. If the respondent comes forward with sufficient competent evidence to establish a prima facie claim or defense, a trial is required. If the respondent fails to produce sufficient competent evidence to establish its claim or defense, then the movant is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

ANALYSIS

Lockheed moves for summary judgment on both of Mr. Finney's claims.

1. Age Discrimination

The ADEA broadly prohibits discrimination in the workplace based on age. 29 U.S.C. § 623(a). Mr. Finney's first claim asserts Lockheed discriminated against him by laying him off and subjecting him to a hostile work environment because of his age.

a. **Termination**

When there is no direct evidence of discrimination, the Court applies the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under that framework, Mr. Finney first bears the burden of establishing a *prima facie* case for his claim of age-based discrimination. If he is successful, the burden shifts to Lockheed to articulate a legitimate, non-discriminatory reason for his termination. If Lockheed does so, Mr. Finney then bears the ultimate burden of demonstrating that Lockheed's proffered reason is a pretext for discrimination. Lockheed asserts that Mr. Finney cannot establish a *prima facie* case of discrimination and, even if he can, that he has not presented sufficient evidence to show that Lockheed's proffered reason is pretext.

For a *prima facie* case of age discrimination under the ADEA, Mr. Finney must come forward with evidence to prove that (1) he belongs to the class protected by the ADEA; (2) he suffered an adverse employment action; (3) he was qualified for his position; and (4) he was treated less favorably than others not in the protected class. *Jones v. Oklahoma City Public Schools*, 617 F.3d 1273, 1279 (10th Cir. 2010).

For purposes of this motion there is no dispute that Mr. Finney has presented sufficient evidence to establish the first and second elements of a *prima facie* age discrimination claim under the ADEA. However, Lockheed argues that Mr. Finney cannot establish that he was qualified for his position or treated less favorably than others not in the protected class.

Construing the evidence most favorably to Mr. Finney, the Court finds it sufficient for a *prima facie* case. Mr. Finney has testified that his work on the GPS-III program was satisfactory, which is sufficient to satisfy the third element. *See Hodgson v. U.S. Air Force*, 999 F.2d 547, 3 (10th Cir. 1993). Additionally, a plaintiff who has been terminated because of a RIF

can establish the fourth element by pointing to circumstances that show that the employer instead chose to retain a younger employee. *See Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1167 (10th Cir. 1998). Mr. Finney has satisfied this element because he has submitted evidence that several of the Grade 4 engineers retained by Lockheed were younger than he was.

In response to Mr. Finney's *prima facie* case, Lockheed argues that the RIF and its implementing criteria demonstrate that its decision to lay Mr. Finney off was based on a nondiscriminatory reason: the RIF implemented in 2012. This is sufficient to meet its burden under the second step of the *McDonnell Douglas* framework and, accordingly, the burden shifts back to Mr. Finney to demonstrate why such reason is pretextual. *See Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007).

A plaintiff can demonstrate pretext by producing evidence of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the employer's proffered reason that a reasonable trier of fact could rationally conclude that the proffered reason is untrue. *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005). More specifically, in cases involving a RIF, a plaintiff can demonstrate pretext by presenting evidence that (1) his termination does not accord with the RIF criteria supposedly used, (2) his evaluation under the defendant's RIF criteria was deliberately falsified or manipulated to secure the plaintiff's dismissal, or (3) the RIF was generally pretextual. *See Beaird*, 145 F.3d at 1168. Here, Mr. Finney argues that Mr. Halbrook deliberately falsified his 2011 PADR score and manipulated the RIF process in order to ensure that Mr. Finney would be laid off.

With regard to the 2011 PADR score, the evidence shows that Mr. Halbrook gave him a negative score after placing him on an inaccurate PIP that was later revised. There is also evidence that Mr. Halbrook relied on other employees' observations rather than his own. Viewed

in the light most favorable to Mr. Finney, such evidence could show an erroneous 2011 PADR score.

However, this evidence is insufficient to establish pretext for two reasons. First, in the pretext context, "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." *Young v. Cobe Labs., Inc.*, 141 F.3d 1187 (10th Cir. 1998). In other words, 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. *See Beaird*, 145 F.3d at 1168. Mr. Finney has produced no evidence of this kind.

Second, when determining whether the proffered reason for a decision was pretextual, the Court examines "the facts as they appear to the person making the decision, not the plaintiff's subjective evaluation of the situation." *Lobato v. New Mexico Environment 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.* In other words, although Mr. Finney believes he was a good performer, it is the decision-maker's perception rather than Mr. Finney's perception that is relevant. *See Pippin v. Burlington Res. Oil and Gas Co.*, 440 F.3d 1186, 1196-97 (10th Cir. 2006). Even if Mr. Halbrook erroneously relied on other employees' observations or gave credence to an inaccurate PIP, Mr. Finney's claim fails unless he can show that Mr. Halbrook believed that Mr. Finney was deserving of a higher performance score, but nevertheless chose to give him a negative score because of age-related animus. Mr. Finney has not identified any

evidence that would suggest either that Mr. Halbrook did not actually believe Mr. Finney deserved a negative score on his 2011 PADR or that he harbored any particular age-related animus.

Mr. Finney also argues that Mr. Halbrook deliberately manipulated the RIF process in order to ensure that Mr. Finney would be laid off by (1) determining, in consultation with Mr. Chang, that a Level 4 engineer would be selected for a RIF; and (2) sending an email to the participants in the TDR session that influenced them to give Mr. Finney poor ratings.

Taking such evidence in the light most favorable to Mr. Finney it also is insufficient to establish pretext. At most, they show that, because of Mr. Halbrook's actions, the TDR participants had the opportunity to manipulate the rankings of Level 4 engineers in a manner unfavorable to Mr. Finney. However, opportunity for manipulation does not, by itself, establish pretext. *See Beaird*, 145 F.3d at 1169. What is missing is evidence that there was manipulation motivated by age-related animus. There is no evidence of age-related animus on the part of Mr. Holbrook or any of the TDR participants. *See id.* at 1168. There is no evidence that any of the TDR participants believed that Mr. Finney's performance was the same as or better than other level 4 engineers but rated him lower than others. Accordingly, the Court finds that Mr. Finney has failed to show that Lockheed's proffered nondiscriminatory reason for terminating Mr. Finney was pretextual.

b. **Hostile work environment**

Mr. Finney also claims that he was subject to a hostile work environment in violation of the ADEA. To prevail on a hostile environment claim, he must show that a rational jury could find that the workplace was permeated with discriminatory intimidation, ridicule, and insult that were sufficiently severe or pervasive to alter the terms, conditions, or privileges of employment,

and the harassment stemmed from age-related animus. *See Mackenzie v. City and County of Denver*, 414 F.3d 1266, 1280 (10th Cir. 2005); *Lanman v. Johnson Cnty., Kansas*, 393 F.3d 1151, 1155 (10th Cir. 2004). To evaluate whether a working environment is sufficiently hostile or abusive, the Court examines the totality of the circumstances, including the frequency of the conduct, the severity of the conduct, whether the conduct was physically threatening or humiliating or a mere offensive utterance, and whether the conduct unreasonably interfered with the employee's work performance. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). The environment must be both subjectively and objectively hostile. *Id.* Additionally, the Supreme Court has instructed that courts judging hostility should filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of age-related jokes, and occasional teasing, especially offhand comments and isolated incidents, "unless extremely serious." *See Mackenzie*, 414 F.3d at 1280.

Applying these principles, the Court concludes that the evidentiary record falls short of showing age-related harassment. Most of Mr. Finney's allegations of harassment relate to the employment decisions made by Mr. Halbrook, such as placing him on performance improvement plans and issuing a negative performance review. Even taken in the light most favorable to Mr. Finney, there is no evidence that such decisions rise to the level of being severe or pervasive in the work environment. Furthermore, there is no evidence that such decisions were the product of age-related animus or were undertaken for the purpose of intimidation, ridicule, or insult.

Mr. Finney points to the conduct of Tim Linn, his former manager on the GRAIL project, as "background evidence" to support his hostile environment claim. Mr. Finney states that Mr. Linn referred to younger employees as "doctor" to show that they were more special to the company than older employees such as Mr. Finney. After Mr. Finney reported this behavior, Mr.

Linn would walk around Mr. Finney's workspace "just to show snobbery" or would stomp past Mr. Finney's desk. In addition, Mr. Finney asserts that Mr. Linn would interrupt telephone calls between Mr. Finney and various vendors and dominate those meetings for five to ten minutes at a time. As offensive as such actions may have been, they are not relevant to Mr. Finney's current claim because Mr. Linn worked on an entirely different project than Mr. Halbrook, and they fall short of demonstrating pervasive or severe harassment. *See Mackenzie,* 414 F.3d at 1280. Accordingly, summary judgment is appropriate on Mr. Finney's hostile work environment claim.

2. Retaliation

Mr. Finney's second claim asserts that he suffered adverse employment actions in retaliation for filing several Charges of Discrimination alleging age discrimination.

The ADEA forbids an employer from retaliating against an employee because he or she "has opposed any practice made unlawful" by the statute, 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. 29 U.S.C. § 623(d). ADEA retaliation claims are also analyzed under the *McDonnell Douglas* framework. *See Piercy*, 480 F.3d at 1198. To establish a *prima facie* claim of retaliation a plaintiff must show: 1) he was engaged in opposition to ADEA discrimination; 2) he was subjected to an adverse employment action; and 3) a causal connection existed between the protected activity and the adverse employment action. *See id.*

For purposes of this motion there is no challenge as to the sufficiency of evidence for the first two elements. However, Lockheed argues that Mr. Finney cannot present sufficient evidence to establish a causal connection between his complaints and the decision to lay him off.

A plaintiff may rely solely on temporal proximity to establish the third element of a *prima facie* claim "if the termination is *very closely* connected in time to the protected activity."

See Metlzer v. Federal Home Loan Bank of Topeka, 464 F.3d 1164, 1171 (10th Cir. 2006) (internal quotations omitted). In an email dated March 21, 2012, Mr. Finney complained about "younger less experienced individuals" being selected instead of him for numerous positions and stated that had "observed discrimination and retaliation actions . . . which have been reported to the EEOC." Mr. Finney states that two days after the email was sent the GPS-III managers and supervisors held the differentiation ranking session (TDR) in which they had him "singled out for termination." Lockheed notified Mr. Finney that he was being laid off on April 12, 2012. Taken in the light most favorable to Mr. Finney, the proximity of these events is sufficient to establish a causal connection.

Again, Lockheed identifies a legitimate reason for Mr. Finney's termination — the RIF. The burden shifts back to Mr. Finney to demonstrate why the stated reasons are pretextual. *See Piercy*, 480 F.3d at 1200. At this stage of the *McDonnell Douglas* analysis it is insufficient to rely solely on temporal proximity between the complaints and the RIF decision. *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1138 (10th Cir. 2005). In addition to temporal proximity, Mr. Finney must present at least circumstantial evidence of retaliatory motive. *See Metzler*, 464 F.3d 1164, 1172 (10th Cir. 2006).

Mr. Finney offers two items circumstantial evidence. First, he points to an email from Mr. Halbrook to two mangers who participated in the TDR, in which Mr. Halbrook states that he "would like to remove him from our team ASAP." There are several difficulties in the circumstantial inferences that can be drawn from this email relative to Mr. Finney's pretext argument. The email does not refer to any complaints made by Mr. Finney. Instead, it states that Mr. Halbrook wants to remove Mr. Finney because "[h]is conduct is insubordinate and his continued presence on [the team] is not fair to those who have performed well." More

importantly, however, this email was sent on Saturday March 24, 2012, the day *after* the TDR session. Indeed, Mr. Chang's response to Mr. Halbrook's email that "[W]e did hold a TDR session on Friday", confirms that the TDR occurred before Mr. Halbrook's email was sent and it suggests that Mr. Halbrook was not present at the TDR. Even considering Mr. Halbrook's email most favorably to Mr. Finney, no circumstantial inference can be reasonably drawn that the TDR rankings were the result of retaliatory motive.

Second, Mr. Finney points to the fact that he was rated "as bad or worse than every other employee being evaluated in every category." Mr. Finney does not elaborate on the significance of this point, but the Court interprets the crux of Mr. Finney's argument to be that the consistency of these poor ratings implies that there was concerted effort by the participants in the TDR session to ensure that Mr. Finney had the highest score. Again, assuming such to be the case, there is no evidence that links the poor rankings to Mr. Finney's prior complaints. Accordingly, Mr. Finney has failed to present circumstantial evidence sufficient to create an inference of pretext in the formulation of the TDR rankings.

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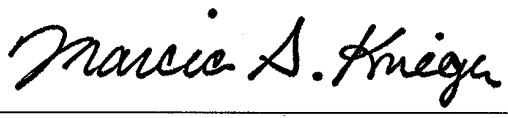
CONCLUSION

IT IS HEREBY ORDERED that the Defendant's Motion for Summary Judgment (**#29**) is **GRANTED**. The Clerk shall enter judgment in favor of the Defendant and against the Plaintiff on all claims and close this case.

Dated this 24th day of March, 2015.

BY THE COURT:



Marcia S. Krieger
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 13-cv-00869-MSK-NYW

RICHARD FINNEY,

Plaintiff,

v.

LOCKHEED MARTIN CORPORATION,

Defendant.

FINAL JUDGMENT

In accordance with orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P 58(a)(1), the following Final Judgment is hereby entered.

Pursuant to the Opinion and Order by Chief Judge Marcia S. Krieger (**Doc. #40)** filed on March 24, 2015, granting the Defendant's Motion for Summary Judgment (**Doc. #29**), it is

ORDERED that:

Judgment is entered in favor of defendant and against the plaintiff on all claims.

ORDERED that costs are awarded to the defendant and against the plaintiffs upon the filing of a bill of costs within 14 days of entry of judgment, in accordance with the procedures set forth in Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1

The case is closed.

Dated this 25th day March, 2015.

ENTERED FOR THE COURT:
JEFFREY P. COLWELL, CLERK

s/Patricia Glover
Deputy Clerk

General Information

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