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

REPLY BRIEF OF APPELANT RICHARD FINNEY

ORAL ARGUMENT REQUESTED

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SUMMARY OF ARGUMENT

Lockheed contends that Richard Finney, an employee with nearly thirty years of demonstrated performance, was laid off in 2012 through an unbiased and fair process that revealed his performance deficiencies and thus resulted in a non-discriminatory layoff. In reality, Finney's supervisor, Timothy Halbrook, had almost singlehanded control over the layoff process, and took actions to ensure that Finney would be the one terminated from Lockheed. At the time he took these actions, Halbrook also e-mailed his colleagues, telling them in no uncertain terms that he wanted Finney removed "ASAP".

These actions by Halbrook, in reality the culmination of a series of events which followed Finney's first complaint of age discrimination to Halbrook some nine months earlier, in concert with his e-mail statement, lead to the inescapable conclusion that Halbrook was using the rigid process in place at Lockheed to ensure that Finney would be laid off, and that all of his younger, non-complaining colleagues would remain employed.

The District Court, when faced with these facts, failed to draw the reasonable inferences from this evidence that discrimination or retaliation could have been the basis for Halbrook's animus towards Finney, and instead erred by granting Lockheed summary judgment on Finney's claims.

ARGUMENT

I. Standard of Review

In its brief, Lockheed complains that this appeal is nothing more than an attempt by Finney to have this Court second-guess the District Court's findings on the summary judgment proceedings below. (Resp. Brief at 14-15). Indeed, as conceded by Lockheed, that is precisely the analysis this Court must undertake, as review of the District Court's ruling is *de novo*. *Id.*; *see e.g. Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1215 (10th Cir. 2013).

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

From Lockheed's brief, it is clear that the parties agree on the applicability of the traditional *McDonnell-Douglas* burden-shifting framework used to analyze this case for purposes of summary judgment. (Resp. Brief at 17). Lockheed contends that Finney cannot make out a *prima-facie* case and thus this Court need not even reach a pretext analysis. Although Lockheed cites only to the framework as articulated in *Jones v. UPS*, 502 F.3d 1176, 1186 (10th Cir. 2007) in its brief, because Finney was laid off, the test set forth in *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1165 (10th Cir. 1998) is more appropriate.[1] Indeed, the

[1] Finney discussed the *Beaird* test, and the application of the facts at bar to the *Beaird* requirements extensively in his Opening Brief (Op. Brief at 12-14), and because

District Court essentially applied the *Beaird* test in its Order on summary judgment. (Aplt. Appx. at 790-91).

Even under the *Jones* test however, Finney can still make out a prima-facie case, as the District Court correctly found. Although Lockheed contends that Finney cannot establish the second element of being qualified for the position and the fourth element of being treated less favorably than others in his protected class, the record demonstrates these contentions are untrue.

With respect to the second element, Lockheed, in arguing Finney's work performance over the final three years of his employment had deteriorated, and that this made him unqualified for his position, asks this Court to ignore the fact that Finney had been an electrical engineer at Lockheed for nearly thirty years[2], and that even as he was being laid off, articles which Finney had designed were being launched into space. (See e.g. Aplt. Appx. at 540, 594-597). Indeed, Tenth Circuit precedent has long made clear that for tenured employees, meeting this element of the prima-facie test is a low burden. *MacDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115 (10th Cir. 1991).

Neither of the cases cited by Lockheed actually supports their contention that Finney does not meet this element of the prima-facie test. Indeed *Kelly v.*

Lockheed did not refute those allegations in the Response Brief, Finney will not discuss them further here.

[2] In its Brief, Lockheed incorrectly asserts Finney worked on the Arial Reconfigurable Embedded System (ARES). Finney actually worked on the ARES 1-X rocket project.

Goodyear Tire & Rubber Co., 220 F.3d 1174 (10th Cir. 2000) and *Arambru v. Boeing Co.*, 112 F.3d 1398 (10th Cir. 1997), involve no *prima-facie* analysis and the *prima-facie* elements were assumed or agreed to in both cases.

With respect to the fourth prong of the analysis, Lockheed cites no cases to support its assertion this Court should reject the holding in *Beaird*, cited with approval by the District Court, that 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. As noted, Finney can identify a number of younger individuals who were retained at Lockheed when he was reduced (Aplt. Appx. 663).

With Finney able to amply set forth a prima-facie case, and Lockheed has alleged a purportedly non-discriminatory basis for his termination, the burden again shifts to Finney to demonstrate evidence of pretext. Contrary to the allegations in Lockheed's brief, virtually the entire layoff process was infected with discrimination and retaliation. Once higher ups had determined a layoff was necessary from the ATLO organization in which Finney worked, it was Timothy Halbrook, an ATLO manager, to whom Finney reported, who decided that only the 34 Level 4 engineers, including Finney, would be considered for the layoff, and that engineers at other levels, including Level 5 or Level 3, would not be eligible for layoff. (Aplt. Appx. at 619).

Although Lockheed contends in its Brief that Chang played a role in this decision (Resp. Br. at 21), Chang indicated only Halbrook made this decision. (Aplt. Appx. at 161). At the time he made this decision, Halbrook had already received complaints of discrimination from Finney and had issued Finney a substandard performance review.

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 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). As discussed at length in the Opening Brief, Halbrook's subjective evaluation of Finney gave him the worst scores of any of the employees, including those substantially younger, who were being rated.

If anything is clear about Lockheed's supposedly non-discriminatory process, it is that Halbrook had the ability, by himself, to influence the process to ensure Finney's departure, and make sure none of Finney's younger colleagues would be similarly at risk. Halbrook was the one who chose a Level 4 Engineer for layoff, ensuring Finney would be included. That selection effectively eliminated anyone under the age of 40 from consideration for layoff. Then Halbrook rated Finney so low as to ensure he would be the one laid off. At the same time he rates Finney, in response to an e-mail wherein Finney complains of age discrimination, Halbrook makes it crystal clear to Chang and other Lockheed managers that he wants Finney gone "ASAP".

Lockheed argues that Halbrook's statement is too "vague" to constitute evidence of pretext. However, under the circumstances, Halbrook's statement is anything but vague. Halbrook tells his superiors, key subordinates including Chris McCaa, and fellow managers, "I…would like to remove [Finney] from our team ASAP." (Aplt. Appx. at 802). Halbrook does this within days of his submission of Finney's scores on the talent differentiation rating sheet. Lockheed attempts to

cloak its decision in math and try and pretend that Finney's removal was simply a matter of performance. However, the actions Halbrook took, in concert with the e-mail demonstrating animus towards Finney, are more than enough to support inferences in Finney's favor which must preclude summary judgment. Why Halbrook felt animus towards Finney and took the actions he did to ensure Finney's removal, is a matter that must be committed to the sound discretion of a factfinder, because what is clear is that Lockheed's supposed non-discriminatory rationale, namely that this was simply a calm and cool-headed performance based layoff, is clearly untrue. *See e.g. EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 855-56 (4th Cir. 2001) (evidence of pretext alone is sufficient, a plaintiff need not provide any direct evidence of animus based on the protected class to survive summary judgment and citing cases holding same).

Finally, although Lockheed argues that it is also entitled to summary judgment based on the "same actor inference", any such inference is completely and totally inapplicable to this case. Lockheed alleges that the inference applies because Chang hired Finney onto the program in 2011 and Finney was subsequently removed by Chang in 2012. (Resp. Brief at 24). Even Lockheed's own arguments make clear that Chang was in no way the decision maker with respect to Finney's layoff. As Lockheed argues just ten pages later, Lockheed's policies provided Chang with "no discretion" as to who would be selected for the

layoff. (Resp. Brief at 34). Chang's own deposition testimony reflects Chang did not have input into selecting either the Level 4 position for layoff nor did he provide input into the talent differentiation rating sheet. (Aplt. Appx. at 159-161). Thus, although it may have been Chang's name on the letter terminating Finney, it is clear that it was Halbrook, and not Chang, who had the influence over the process which makes him the effective termination decision-maker.

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.

For much the same reasons that Lockheed is not entitled to summary judgment on Finney's discrimination claim, Finney is also entitled to a trial on his retaliation claim. Indeed, although virtually all of the facts supporting his discrimination claim also support his retaliation claim, there are even more facts which necessitate reversal for Finney on the retaliation claim.

Although Lockheed spends little time discussing Finney's retaliation claim, and instead chooses to argue that Finney's only evidence is the temporal proximity from the March 23 Halbrook e-mail, there is significant evidence to support

Plaintiff's claims, and it is important to review just some of the additional facts which support the retaliation claim.

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).

These facts, in concert with the evident animus displayed in Halbrook's March 24 e-mail, and the other facts which strongly support Finney's evidence of pretext on his discrimination claim, are more than sufficient to create an inference that retaliation was what motivated Halbrook's animus and submit this matter to trial.

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;

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/s/ Mathew S. Shechter

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CERTIFICATE OF SERVICE

I, Mathew S. Shechter, Esq., hereby certify that on September 21, 2015 I served a copy of the foregoing **Appellant's Reply Brief** to the following via CM/ECF:

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