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United States Court of Appeal
Tenth Circuit

October 15, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KEITH K. MUEGGENBORG,

Plaintiff - Appellant,

v.

NORTEK AIR SOLUTIONS, LLC,

Defendant - Appellee.

No. 20-6147
(D.C. No. 5:19-CV-01008-SLP)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HOLMES**, **BALDOCK**, and **MATHESON**, Circuit Judges.

In this age discrimination case, Keith K. Mueggenborg appeals from a district court order entering summary judgment in favor of his former employer, Nortek Air Solutions, LLC (Nortek). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

Nortek or its predecessor employed Mueggenborg for over 40 years as a Senior Sales Application Engineer (SAE). In that role, Mueggenborg sold custom HVAC units to Nortek's customers. Nortek has four grades of SAEs with the lowest grade classified as SAE 1 and the highest grade classified as SAE 4. Each grade has its own defined sales goals. Nortek classified Mueggenborg as an SAE 3.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

In March 2019, Nortek implemented a reduction in force (RIF). At the time of the RIF, Nortek employed a total of 20 SAEs; there were four SAE 1s, three SAE 2s, nine SAE 3s, and four SAE 4s. Nortek determined it needed to reduce the SAE role by two positions due to advances in IT tools which "allowed [SAEs] to perform more efficiently based on less waste and better tools." Nortek identified the following criteria to govern its RIF decision: "job skills, job performance, job elimination and duplication and organizational needs" (RIF criteria). Ultimately, the goal of the RIF was "to evaluate employee performance and eliminate the two lowest performing employees' positions."

Nortek made the RIF decision through Mark Brady and Pierre Ronkart, the manager and vice president of the SAEs, respectively. Brady and Ronkart were both under forty years old.[1] They evaluated every SAE, regardless of grade, to determine which two positions would be eliminated. This included evaluating four SAE 1s, who were all at least twenty years younger than Mueggenborg, that were hired in 2018. Brady and Ronkart reviewed sales data and performance evaluations for 2017, 2018, and the sales data available for 2019.[2] This information is summarized in the appendix. The sales data contains three categories of sales performance numbers. The quoting number is the dollar value of the quotes provided to potential customers,

[1] One of Mueggenborg's arguments on appeal is circumstantial evidence suggests age discrimination motivated Nortek's RIF decision. We will incorporate this circumstantial evidence into the factual background of this case, but we ultimately find this circumstantial evidence insufficient to establish pretext.

[2] Because the SAE 1s were hired in 2018, there is no 2017 sales data or performance evaluations for the SAE 1s.

the booking number is the dollar value of business actually booked to be produced, and the released number is the dollar value of business ultimately sold to the customer. At the end of the year, the amount of business released is understandably the most important number. Nortek's sales goals were:

- SAE 1s – no specific sales goals (but were expected to demonstrate an ability to quote and book releasable sales and to work on building new sales).
- SAE 2s – quote at least $12,000,000, book $4,000,000, release $4,000,000.
- SAE 3s – quote at least $24,000,000, book $8,000,000, release $8,000,000.
- SAE 4s – quote at least $30,000,000, book $10,000,000, release $10,000,000.

Nortek's performance evaluations were done on a 1 to 4 scale, with 1 being the lowest performance and 4 being the highest performance.

After reviewing the sales data and performance evaluations, Brady and Ronkart selected two SAE 3s, Michael Spaeth and Mueggenborg, for termination. Mueggenborg (age 63) and Spaeth (age 78) were two of the three oldest SAEs. After Brady and Ronkart made their selections, Lisa Smith, Nortek's human resources manager, asked Brady to complete a form providing 2017 and 2018 sales data and performance evaluations to review the RIF for potential legal risk and to ensure that the sales numbers and performance evaluations supported the decision.[3] Nortek terminated Mueggenborg on April 26, 2019. As part of the termination, Nortek

[3] We will not infer discriminatory animus from Lisa Smith's compliance inquiry. *See Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1199 (10th Cir. 2008) ("[Using] a tool to scrutinize hiring and firing decisions (albeit after the fact) for signs of potential problems such as discrimination, and inferring discriminatory animus under these circumstances would, if anything, risk undermining, rather than furthering, the ADEA's purposes.").

provided Mueggenborg with an Older Workers Benefit Protection Act (OWBPA) disclosure which stated that he was selected for termination based on the RIF criteria.

Mueggenborg filed suit in federal district court, alleging unlawful age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a), and the Oklahoma Anti-Discrimination Act (OADA), Okla. Stat. tit. 25, § 1302. Nortek filed a motion for summary judgment which the district court granted. The district court held: (1) Mueggenborg established a prima facie case of discrimination, (2) Nortek articulated a legitimate, nondiscriminatory reason for termination, and (3) Mueggenborg failed to establish any reasonable inferences showing Nortek's legitimate, non-discriminatory reasons were pretextual. Therefore, the district court held Nortek was entitled to summary judgment on both the ADEA and OADA claims.[4]

We review the grant of summary judgment de novo, "viewing the facts, and all reasonable inferences those facts support, in the light most favorable to" the nonmovant. *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1195 (10th Cir. 2008). A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

[4] The district court concluded, and the parties have not disputed, that claims under the OADA are evaluated under the same standards as the ADEA. Therefore, the following discussion will focus on the ADEA claim, but the reasoning applies equally to the OADA claim.

II.

The ADEA prohibits an employer from "discharg[ing] any individual or otherwise discriminat[ing] against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). "To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). In other words, "a plaintiff must prove that his or her discharge was motivated, at least in part, by age." *Hinds*, 523 F.3d at 1195 (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000)).

A plaintiff can prove age discrimination with direct or circumstantial evidence. *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1145 (10th Cir. 2008). "Where a plaintiff relies on circumstantial evidence, the Supreme Court has established a three step burden-shifting framework for determining whether a plaintiff's evidence raises an inference of invidious discriminatory intent sufficient to survive summary judgment." *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973)). Mueggenborg presents no direct evidence of age discrimination, so we apply the burden-shifting framework of *McDonnell Douglas*. "Under *McDonnell Douglas*, the plaintiff first bears the burden of establishing a prima facie case of age discrimination." *Hinds*, 523 F.3d at 1195. "If the plaintiff carries this burden, the employer must then come forward with some legitimate, non-discriminatory reason for the adverse employment action." *Id.* "If the employer

succeeds in this showing, the burden shifts back to the plaintiff to show that the employer's proffered justification is pretextual." *Id.*

The district court concluded: (1) Mueggenborg established a prima facie case of age discrimination, (2) Nortek provided a legitimate, non-discriminatory reason for terminating Mueggenborg, and (3) Mueggenborg failed to show the employer's proffered justification was pretextual. Mueggenborg concedes the first two steps of the district court's *McDonnell Douglas* analysis, so the only issue on appeal is whether Mueggenborg presents a genuine dispute of material fact regarding whether Nortek's justifications were pretextual.

"A plaintiff can show pretext by revealing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action such 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 reason." *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1217 (10th Cir. 2002) (cleaned up). "When reviewing a plaintiff's contention of pretext, we examine the facts as they appear to the person making the decision to terminate the plaintiff." *Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1307 (10th Cir. 2017) (cleaned up). In a RIF case, a plaintiff will usually establish pretext in one of three ways. The plaintiff can show: (1) the plaintiff's termination does not accord with the RIF criteria supposedly employed, (2) the RIF criteria were deliberately falsified or manipulated to secure the plaintiff's termination, or (3) the RIF was more

generally pretextual.[5] *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1168 (10th Cir. 1998). A plaintiff can establish pretext by accumulating circumstantial evidence which on its own may be insufficient, because "we are required to consider the totality of such circumstantial evidence." *Id.* at 1174.

When we scrutinize an employer's legitimate, non-discriminatory reason for pretext, we are limited by the business judgment doctrine. Under the business judgment doctrine, we do not "ask whether the employer's reasons were wise, fair or correct; the relevant inquiry is whether the employer honestly believed its reasons and acted in good faith upon them." *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1118–19 (10th Cir. 2007). "The reason for this rule is plain: our role is to prevent intentional discriminatory hiring practices, not to act as a 'super personnel department,' second guessing employers' honestly held (even if erroneous) business judgments." *Id.* at 1119 (quoting *Young v. Dillon Cos.*, 468 F.3d 1243, 1250 (10th Cir. 2006)). "Thus, we consider the facts as they appeared to the person making the decision, and we do not second-guess the employer;'s decision even if it seems in hindsight that the action taken constituted poor business judgment." *Id.*

"But this principle does not immunize all potential 'business judgments' from judicial review for illegal discrimination." *Beaird*, 145 F.3d at 1169. "Such a doctrine would defeat the entire purpose of the ADEA." *Id.* "There may be circumstances in which a claimed business judgment is so idiosyncratic or

[5] These are not the only ways to prove pretext in a RIF case, but most cases will fall into one of these categories. *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1168 n.6 (10th Cir. 1998).

questionable that a factfinder could reasonably find that it is a pretext for illegal discrimination." *Id.* Therefore, when an employer articulates a business reason for the employee's termination, the employee can raise an inference of pretext by showing: (1) the employer did not honestly believe the reasons given, (2) the employer did not act in good faith on those beliefs, or (3) the business reason is so idiosyncratic or questionable that a factfinder could reasonably find that it is a pretext for illegal discrimination.

Mueggenborg makes five arguments on appeal.[6] First, Mueggenborg alleges Nortek's decision to retain still-in-training SAE 1s over more-skilled SAE 3s is so idiosyncratic or questionable that a factfinder could reasonably find that it is pretext for illegal age discrimination. Second, Mueggenborg contends Nortek did not actually apply the RIF criteria before making its termination decisions. Third, Mueggenborg asserts Nortek manipulated the RIF criteria to secure Mueggenborg's dismissal. Fourth, Mueggenborg claims the goal to retain a "balanced workforce" was a late-blooming explanation by Nortek suggesting a pretextual post-hoc justification. Fifth, Mueggenborg argues the consideration of customer complaints was a pretextual post-hoc justification because Mueggenborg was the only SAE with a customer complaint.

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[6] Mueggenborg makes two additional arguments. First, Mueggenborg claims the district court improperly applied the summary judgment standard by failing to credit the evidence of the nonmovant and failing to draw reasonable inferences in favor of the nonmoving party. Second, Mueggenborg believes additional circumstantial evidence suggests discriminatory motive. Because our analysis necessarily rejects these arguments, we do not review these issues separately.

A.

Mueggenborg's first argument on appeal is Nortek's decision to retain less-skilled, still-in-training SAE 1s over higher-skilled, more-experienced SAE 3s "is so idiosyncratic or questionable that a factfinder could reasonably find that it is a pretext for illegal discrimination." *Id.* Nortek's stated goal was to eliminate the two "lowest performers" and "to retain the best performing group of employees." Mueggenborg believes that if Nortek actually sought to eliminate the lowest performers, he would have been retained over junior SAEs because he possessed greater skills and experience than any of the SAE 1s.

While we recognize Mueggenborg was a highly skilled, and experienced SAE, we do not find a triable issue of pretext when Nortek decided to retain promising, still-in-training SAE 1s over underperforming, but highly-skilled SAE 3s. Nortek decided that the SAE 1s were better performers than Mueggenborg. This was a business judgment, so we cannot infer pretext by "ask[ing] whether the employer's reasons were wise, fair or correct." *Riggs*, 497 F.3d at 1118. Instead, we need to examine whether: (1) the "employer honestly believed its reasons and acted in good faith upon them," *id.* at 1119, or (2) the decision is so "idiosyncratic or questionable that a factfinder could reasonably find that it is a pretext for illegal discrimination." *Beaird*, 145 F.3d at 1169.

Mueggenborg fails to present any evidence suggesting Nortek did not honestly believe Mueggenborg was one of the two lowest performers or that Nortek did not act in good faith on this belief. In 2018, the only full year in which sales data and

performance ratings exist for Mueggenborg and the SAE 1s, Mueggenborg received a lower performance rating than any of the SAE 1s; he received a "2" on his performance evaluation while the SAE 1s all received a "3." Mueggenborg's sales numbers for 2018—despite being absolutely higher than the SAE 1s' sales numbers—were far below Nortek's sales goals for an SAE 3 and showed a decline in performance from 2017. Moreover, Mueggenborg had the lowest quoted and released numbers of any SAE in 2019.[7] Based on these undisputed facts, no reasonable factfinder would doubt Nortek believed, in good faith, that Mueggenborg was one of the two lowest performing SAEs.

Mueggenborg's main argument—that the decision to terminate higher-skilled SAE 3s over lower-skilled, still-in-training SAE 1s is so idiosyncratic or questionable to suggest pretext—is without merit. Even though the SAE 1s had lower absolute sales numbers than Mueggenborg in 2018 and two of the SAE 1s were still in training at the time of the RIF, no reasonable factfinder could find that the decision to terminate Mueggenborg was so idiosyncratic or questionable to suggest pretext. The 2017–2019 sales data and performance evaluations clearly show that designating Mueggenborg as one of the two lowest performers was reasonable. The sales data and performance evaluations show a downward trend in Mueggenborg's performance, while the SAE 1s showed improvement in sales from 2018 to 2019.

[7] The RIF decision was made in the spring of 2019. While making the RIF decision, Brady and Ronkart considered the then-available sales numbers for 2019. Any reference to the 2019 sales data in this Order and Judgment is a reference to this partial-year data.

Mueggenborg believes his greater skillset and his ability to perform the SAE 1 job functions should permit a reasonable factfinder to infer pretext because the SAE 1s had less skills and could not perform his job. But this decision alone is not idiosyncratic or questionable enough to suggest pretext. There is no inference of foul play when an employer looks at a stratified workforce and concludes less-skilled but improving junior employees are better performers than more-skilled but underperforming senior employees. The sales numbers and performance evaluations speak for themselves; the data does not suggest Mueggenborg's designation as one of the two lowest performing SAEs was idiosyncratic or questionable.

B.

Next, Mueggenborg argues the testimony was ambiguous and conflicting regarding whether Nortek considered all the RIF criteria before making its termination decisions. Nortek intended to eliminate the two lowest performing SAEs. To make that decision, Nortek considered "job skills, job performance, job elimination and duplication and organizational needs." Mueggenborg argues Nortek did not consider all the RIF criteria before making its termination decisions and that this is evidence of pretext. Specifically, Mueggenborg alleges Nortek did not consider "job skills," "duplication," or "organizational needs."

An employee can show pretext by producing evidence that the employer did not consider all the RIF criteria prior to making its termination decision. In *Juarez v. ACS Government Solutions Group, Inc.*, 314 F.3d 1243 (10th Cir. 2003), the employer had to eliminate five of its computer operator positions. To accomplish

this RIF, the employer used a spreadsheet compiled by the Human Resources Department to determine which employees would be terminated. *Id.* at 1244–45. The evidence conflicted as to what the spreadsheet contained. *Id.* The employer claimed the spreadsheet had six merit-based categories which they relied on to make their decision, but the employee presented evidence "that the original merit spreadsheet provided by Human Resources had two additional categories." *Id.* at 1245. Based on the employee's evidence, we held a "jury could determine that the merit spreadsheet was used merely in an attempt to justify the termination of certain individuals. Even though eight categories were supplied by Human Resources, ACS chose to use only six of those categories in rating employees." *Id.* at 1247. The jury could infer that the two additional categories "were intentionally excluded in an attempt to justify terminating" the plaintiff. *Id.*

Relying on *Juarez*, Mueggenborg first alleges Nortek did not consider "job skills" when making its RIF selections. To support this argument, Mueggenborg points to the testimony of Lisa Smith—Nortek's human resources manager. During Smith's deposition, she was asked: "What about job skills, that's one of the things to be considered. Was there an evaluation at any point during the reduction in force about the job skills that Mr. Mueggenborg had in comparison to any of the other employees?" Smith testified: "No, there was not." At first glance, this testimony appears to support Mueggenborg's argument that job skills were not considered. But upon further inquiry, this testimony is insufficient to raise a genuine dispute

regarding whether job skills were considered because Brady and Ronkart made the decision and Smith lacks personal knowledge to testify on this issue.

"It is well settled in this circuit that we can consider only admissible evidence in reviewing an order granting summary judgment." *Wright-Simmons v. City of Okla. City*, 155 F.3d 1264, 1268 (10th Cir. 1998) (quoting *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1541 (10th Cir. 1995)). "[T]he nonmoving party need not produce evidence 'in a *form* that would be admissible at trial,' . . . but the content or substance of the evidence must be admissible." *Thomas v. Int'l Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995) (emphasis in original) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602.

After reviewing Smith's deposition, we conclude Smith lacked any personal knowledge regarding whether Nortek considered job skills as part of its RIF decision. Shortly after making the statement Mueggenborg relies on to show job skills were not considered, the following exchange occurred:

> Q: Were you ever provided any information to allow you to see if job skills were actually considered?
> A: I would have assumed that that was part of the job performance evaluation.
> Q: Okay. You would assume that but you don't know that?
> A: I do not know that.

Smith's testimony shows she lacked any personal knowledge regarding whether job skills were considered, therefore it is inadmissible. Without Smith's testimony no genuine dispute exists regarding whether job skills were considered.

Next, Mueggenborg alleges Nortek did not consider "duplication" and "organizational needs" as part of its RIF decision. This argument also stems from Smith's deposition. Smith was asked: "In determining who the lowest performers were, what criteria was used for that?" In response, Smith testified: "I was told it was their sales performance, plus we would look at their last two years [of] performance reviews to make sure that that was consistent." Mueggenborg contends this testimony creates a triable issue regarding whether "duplication" and "organizational needs" were manipulated to secure his termination.

If we could consider Smith's testimony, then Mueggenborg would be correct. But Smith lacks personal knowledge to testify on this issue because she was not a decisionmaker. Later in the deposition, Smith was asked: "Okay in terms of job elimination and duplication of organizational needs, was there a determination about whether or not the duties that Mr. Mueggenborg performed were being performed by other persons or were unique to him?" Smith testified: "I don't know." Mueggenborg's reliance on Smith's testimony is misplaced; Smith lacked personal knowledge regarding how the RIF decision was made because she was not a decisionmaker.

Mueggenborg's argument that Nortek manipulated "job skills," "duplication," and "organizational needs" relies on the inadmissible testimony of Smith. Because

we cannot consider inadmissible evidence when deciding summary judgment, we hold Mueggenborg fails to present a genuine dispute of material fact regarding whether Nortek manipulated the RIF criteria to secure his termination. The record clearly shows Nortek considered "job skills," "duplication," and "organizational needs." Mueggenborg admits the SAE levels "follow a progression of increasing skill, experience and performance from Level 1 to Level 2 to Level 3 to Level 4 with each higher level having more skill and ability than the levels below." The record establishes each grade of SAE was subject to its own defined sales goals. When Nortek evaluated the sales data and concluded the SAE 1s "were performing better than [Plaintiff] as overall performance in their job duties," that evaluation was a consideration of "job skills" because job duties reflected the difference in skill of the various SAE grades. The record also shows Nortek considered "duplication" when it decided to "reduce the Sales Application Engineer role by two positions" to "optimize operations and reduce duplication." Finally, "organizational needs" were considered because "Nortek determined there was a redundancy in the sales application engineering function . . . because advances in IT tools allowed sales application engineers to perform more efficiently based on less waste and better tools." Mueggenborg fails to present any admissible evidence sufficient to question whether "job skills," "duplication," and "organizational needs" were actually considered. Therefore, Mueggenborg fails to raise an inference of pretext based on a theory of selective application of RIF criteria.

C.

We now consider Mueggenborg's argument that Nortek used a different set of RIF criteria than the RIF criteria set out in the OWBPA disclosures. Mueggenborg alleges Nortek made its decision based solely on "sales over the 2017/2018 period, and performance appraisals over that same 2017/2018 period," rather than looking at "job skills, job performance, job elimination and duplication and organizational needs." According to Mueggenborg, making the RIF decision based on this information alone would omit consideration of some of the RIF criteria including "job skills," "duplication," and "organizational needs." Furthermore, Mueggenborg says this "second" RIF criteria was discriminatory in its application or suggests pretext because Nortek would have actually terminated the SAE 1s if they followed this "second" RIF criteria.

Mueggenborg's allegations that Nortek only considered sales and performance appraisals over the 2017/2018 period lack evidentiary support. The source for Mueggenborg's argument is testimony by Lisa Smith. Like we previously stated, Smith was not a decisionmaker and no evidence suggests she had personal knowledge regarding how the RIF decisions were made. Because her testimony is inadmissible, Mueggenborg fails to present any evidence creating a genuine dispute that Nortek only considered sales and performance appraisals over the 2017/2018 period.

Within this meritless argument, Mueggenborg takes issue with evaluating employees' performance "within their grade." Mueggenborg believes "applying a more lenient standard in evaluating younger employees and a more rigorous standard

for older employees, is itself evidence of age discrimination." In other words, because SAE 3s have higher sales goals than SAE 1s, Nortek held older workers to a higher standard of performance. We previously foreclosed this argument in *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743 (10th Cir. 1991). In *Fallis*, the employee alleged age discrimination because the employer, while conducting a RIF, did not take into account the higher standard to which he was held as a high-level geologist compared to the "lower-level, presumably younger, geologists." *Id.* at 745. We held the employer's "evaluation of plaintiff on a higher standard than that used on younger, less experienced geologists who were not in plaintiff's position . . . does not raise an inference of age discrimination." *Id.* We then went on to explain evaluating senior employees based on a higher standard could suggest age discrimination if evidence exists that "it was a sham to hold plaintiff to such higher expectations," or if the plaintiff had "some right to compete" with all the geologists for the lower-level geologist positions that remained following the RIF. *Id.*

Applying our reasoning in *Fallis*, Mueggenborg fails to raise an inference of age discrimination based on his higher sales goals. Mueggenborg produces no evidence suggesting it was a sham to hold him to higher expectations. After all, Nortek held every SAE 3 to the same sales goals as Mueggenborg. Mueggenborg also fails to show he had "some right to compete" with all the SAEs for the SAE 1 or SAE 2 positions. Just because Mueggenborg could perform the job duties of an SAE 1 or SAE 2 does not mean he had the right to compete for those positions. In sum, Mueggenborg's "performance was measured against the yardstick appropriate for that

job, and he failed to measure up. This does not evidence age discrimination." *Id.* at 746.

Finally, Mueggenborg argues that if Nortek had actually applied the "second" RIF criteria—sales and performance evaluations over the 2017/2018 period—he would have been retained over the SAE 1s. Mueggenborg bases this argument on the fact the SAE 1s were not hired until 2018, so they lacked any sales data or performance evaluations for 2017. Therefore, if Nortek based its decisions on two years of sales and performance evaluations, the SAE 1s should have been automatically terminated before Mueggenborg because they only had one year of sales data and performance evaluations. We want to reiterate that Mueggenborg failed to present evidence that this "second" RIF criteria was actually used in lieu of "job skills, job performance, job elimination and duplication and organizational needs." But even if Nortek had made its RIF decisions based on 2017/2018 sales and performance evaluations, there is no inference of pretext when an employer excludes from consideration the lack of sales and performance evaluations of an employee for a period prior to their employment. In *Fallis*, we recognized not evaluating "first-year employees when there is no basis upon which to assess their performance does not suggest age discrimination." 944 F.2d at 745. Extending that logic here, we hold nothing suggests age discrimination when an employer decides to evaluate employees based on a certain time frame, and the employer does not count against newly-hired employees their failure to register sales or performance evaluations during a period prior to their employment.

D.

Next, Mueggenborg contends Nortek's late-blooming explanation of a need to retain a balanced workforce is intended to hide Nortek's discriminatory RIF decision. As support for Nortek's motion for summary judgment, Mark Brady executed an affidavit where, according to Mueggenborg, the explanation of a need for a balanced workforce surfaced for the first time. Brady stated: "Nortek considered the need for entry level SAEs to perform entry level work and the need for senior SAEs to perform more complex work, and was mindful of having an appropriately balanced workforce of SAEs with varying degrees of experience." Mueggenborg believes the need for a balanced workforce is a post-hoc justification evidencing pretext, because without this explanation, there is no reason the SAE 1s would have been retained over Mueggenborg.

We have recognized "[p]ost-hoc justifications for termination constitute evidence of pretext." *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1059 (10th Cir. 2020). "One can reasonably infer pretext from an employer's shifting or inconsistent explanations for the challenged employment decision." *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 579 (7th Cir. 2003). But "the mere fact that the [employer] has offered different explanations for its decision does not create a genuine question of pretext." *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1311 (10th Cir. 2005) (per curiam). "[W]e have recognized that inconsistency evidence is only helpful to a plaintiff if 'the employer has changed its explanation under circumstances that suggest dishonesty or bad faith.'" *Twigg v.*

Hawker Beechcraft Corp., 659 F.3d 987, 1002 (10th Cir. 2011) (quoting *Jaramillo*, 427 F.3d at 1310). We have also differentiated between shifting or inconsistent explanations, which can be evidence of pretext, and explanations that are merely elaborations of prior justifications, which do not support a finding of pretext. *See Matthews v. Euronet Worldwide, Inc.*, 271 F. App'x 770, 773 (10th Cir. 2008) (unpublished) ("[T]here is no support for a finding of pretext if the employer does not give inconsistent reasons, but instead merely elaborates on the initial justification for termination.").

We conclude that Nortek's stated goal of retaining a balanced workforce was an elaboration of the RIF criteria, not a post-hoc justification suggesting pretext. Nortek's balanced workforce explanation, despite appearing for the first time after significant legal proceedings had occurred, does not raise an inference of pretext because it is not a shifting or inconsistent explanation. One of Nortek's RIF criteria was "organizational needs." When a company decides to conduct a RIF and includes "organizational needs" as one of the RIF criteria, the commonsense understanding is the company will look at the needs of the company and retain the positions the organization needs the most. For Nortek, it evaluated its organizational needs and determined it needed to retain "an appropriately balanced workforce of SAEs with varying degrees of experience." This explanation seems entirely consistent with considering "organizational needs" as part of the RIF criteria.

Even if we assumed the goal of retaining a balanced workforce was an inconsistent explanation, the circumstances of this case do not suggest Nortek

changed its explanation under circumstances that suggest dishonesty or bad faith. If Nortek would have been justified designating Mueggenborg as one of the two lowest performers without reference to any need for a balanced workforce, then the circumstances do not suggest dishonesty or bad faith. Looking at Mueggenborg's sales numbers and performance evaluations, Nortek could reasonably conclude Mueggenborg was one of the two lowest performing SAEs. This is true even though Mueggenborg possessed more skills and achieved higher absolute sales numbers than some of the junior SAEs. Because Nortek would have been justified terminating Mueggenborg without reference to any need for a balanced workforce, Nortek's balanced workforce explanation was not an inconsistent explanation evidencing pretext.

E.

Finally, Mueggenborg argues Nortek's consideration of customer complaints was a post-hoc, tailored explanation to secure his termination. Mueggenborg was the only SAE with a customer complaint, so, according to Mueggenborg, a "trier of fact could reasonably infer that the incident was trivial and merely a pretext to move [him] out for someone younger." *Kendall v. C.F. Indus., Inc.*, 624 F. Supp. 1102, 1109 (N.D. Ill. 1986). Nortek, on the other hand, contends customer complaints were properly considered as part of the RIF criteria of "job performance."

The facts of this case make this issue unique. Normally, we would agree with Nortek that consideration of customer complaints does not suggest pretext because customer satisfaction would be one of the core components of the "job performance"

of a sales employee. Especially since Nortek has consistently maintained that it considered customer complaints as a component of job performance. But Mueggenborg was the only SAE with a customer complaint, so we must be mindful of "the reality that an employer asked to justify its actions after the fact has an incentive to claim that the 'real' [RIF] criteria were those on which the [retained] employee[s] happen[] to perform best relative to the plaintiff." *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 646 n.2 (4th Cir. 2002).

Even though we recognize Mueggenborg's customer complaint would be a convenient vehicle for Nortek to hide discriminatory animus, we conclude Nortek's consideration of the customer complaint does not support a finding of pretext. "Pretext" means a "false or weak reason or motive advanced to hide the actual or strong reason or motive." *Pretext*, Black's Law Dictionary (8th ed. 2004). In other words, consideration of the customer complaint would only suggest pretext if—in the absence of the customer complaint—"a reasonable factfinder could rationally . . . infer that the employer did not act for the asserted non-discriminatory reason." *Frappied*, 966 F.3d at 1059 (quoting *Garrett*, 305 F.3d at 1217). Nortek contends Mueggenborg was one of the two lowest performers. Even if we ignored Mueggenborg's customer complaint, Mueggenborg's sales numbers and performance evaluations were so low that no reasonable factfinder could infer that Nortek did not terminate him for being one of the two lowest performers. The customer complaint does not hide some discriminatory motive by Nortek. Instead, the customer

complaint is additional support for Nortek's determination that Mueggenborg was one of the two lowest performing SAEs.

III.

We can understand how frustrating it must be to be terminated after 40 years of service to your employer while the company retains junior, still-in-training employees. This situation alone, however, does not raise an inference of age discrimination. Mueggenborg presented a strong prima facie case of age discrimination; two of the three oldest SAEs were terminated as part of the RIF. But he failed to show that Nortek's proffered justifications are pretextual. Nortek believed Mueggenborg was one of the two lowest performing SAEs, and the evidence presented by Mueggenborg is insufficient for a reasonable factfinder to find Nortek's belief unworthy of credence.

For the reasons stated herein, we AFFIRM the district court's judgment.

Entered for the Court

Bobby R. Baldock
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

November 15, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KEITH K. MUEGGENBORG,

Plaintiff - Appellant,

v.

NORTEK AIR SOLUTIONS, LLC,

Defendant - Appellee.

No. 20-6147
(D.C. No. 5:19-CV-01008-SLP)
(W.D. Okla.)

ORDER

Before **HOLMES**, **BALDOCK**, and **MATHESON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk