Filed 9/26/14 Arango v. Pratt & Whitney Rocketdyne CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JAIME ARANGO, Plaintiff and Appellant, v. PRATT & WHITNEY ROCKETDYNE, INC., Defendant and Respondent.	B247323 (Los Angeles County Super. Ct. No. BC474262)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ramona G. See, Judge. Reversed.

David Yeremian and Hugo Gamez for Plaintiff and Appellant.

Seyfarth Shaw, Lorraine H. O'Hara, James M. Harris and Jonathan L. Brophy for Defendant and Respondent.

The issue is whether a terminated employee in a disparate treatment age discrimination lawsuit raised a triable issue of fact in opposition to his employer's summary judgment motion. The employee submitted to the trial court various evidence, including a declaration by a statistical expert. The expert explained that the statistical evidence created a strong inference the employer had terminated the employee based on his age. A reasonable inference to be drawn from the expert's declaration and other evidence was that the employer had used a legitimate reduction in force as an opportunity to get rid of older workers by utilizing a subjective and potentially biased assessment method to select older employees for termination and that the employee's low score on the assessment merely was a pretext for terminating him. The trial court sustained objections to the expert's declaration and other evidence and found there was no triable issue of material fact. The court abused its discretion in sustaining the objections and erred in finding there was no triable issue of material fact. We reverse the judgment.

BACKGROUND

Jaime Arango (Arango) appeals from a judgment entered after the trial court granted summary judgment on his age discrimination action based on disparate treatment in favor of his employer, which we shall refer to as Pratt & Whitney Rocketdyne, Inc. (Pratt) for purposes of this appeal.[1]

A. The complaint

Arango was terminated in 2011 when he was 55. His complaint stated causes of action in violation of the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) for age discrimination (§ 12940); failure to prevent discrimination (§ 12940, subd. (k)); wrongful termination in violation of public policy; and violation of Business and Professions Code section 17200.

---

[1] In 1998, Arango was hired by Pratt's predecessor, Boeing Rocketdyne. Subsequently, Boeing sold the Rocketdyne division to United Technologies, which became known as Pratt. According to Pratt's brief, GenCorp Inc., acquired Pratt, which combined with another entity to form a company called Aerojet Rocketdyne of DE, Inc. We granted the parties' joint motion to substitute Aerojet Rocketdyne of DE, Inc. in place of Pratt. For simplicity, we refer to the defendant and respondent as Pratt.

The complaint alleged Arango had consistently received positive performance reviews and pay increases throughout his employment with Pratt. He was over 40 years of age when he was terminated from his position as principal consultant of information technology (IT) systems and development and analysis. Older and higher earning IT employees were terminated disproportionately to younger employees. Arango was replaced by a substantially younger employee. Arango's age was a motivating reason for Pratt's decision to terminate his employment.

B. The motion for summary judgment

Pratt filed a motion for summary judgment, asserting Arango could not establish discriminatory motive or that Pratt's reason for terminating him was pretextual. Pratt argued that in February 2010, Pratt instituted a voluntary separation program as a result of a downturn in business, and in August 2010 Pratt implemented a reduction in force (RIF), which did not affect Arango. In May 2011, Pratt implemented another RIF, selecting Arango, among others, for layoff.

In support of Pratt's motion for summary judgment, Angelica Guerrero, Pratt's human resources client manager, declared Pratt had suffered a severe downturn in business due to the completion of the space shuttle program and other United States government program cancellations. This required Pratt to reduce its workforce in order to cut costs. Employees are classified from L8 (entry level employees) to L4 (the highest level of nonexecutive management). Pratt instructed managers that legally protected classifications, such as age, were not to play a role in the 2010 RIF process. Arango was not selected for the 2010 RIF, but was ranked the lowest of the 29 L4 employees in the California IT organization who were not selected for layoff in the 2010 RIF. Pratt instituted another RIF in 2011, again instructing managers that legally protected classifications, such as age, were not to play a role in the 2011 RIF process. As in the 2010 RIF, Pratt managers used a five-part assessment method to select employees for termination. The categories were: "1) achieves results; 2) criticality of skills; 3) qualifications; 4) business orientation; and 5) interpersonal skills."

According to Guerrero, Arango's direct manager in 2011, Jason Mead, performed Arango's first of three levels of review for the 2011 RIF. Guerrero asserted Arango's "decisional unit" consisted of 51 persons, of whom 12 were under the age of 40. Thirty-nine people, or 76.5 percent of the unit, were 40 years of age or older. The ages of the six persons selected for the 2011 RIF in Arango's "decisional unit" were 51, 54, 54, 55, 60, and 63. On January 1, 2011, there were 76 employees in the IT organization in California, with an average age of 48.8 years. One year later, on January 1, 2012, there were 66 employees in the IT organization, with an average age of 49.2 years.

Pratt submitted the declaration of Mead, who declared he became Arango's manager in February 2011 and performed the first level of assessment for the 2011 RIF. He did not know Arango's birth date or age at the time Arango was laid off. When Mead notified Arango he had been laid off, Arango's age was not discussed. Arango's job duties "were partially assumed by remaining employees. . . . Arango's support on the virtualization technology assessment and deployment team was assumed by Ray Hernandez [10 years younger than Arango]. . . . Arango's support on the virtualization technology assessment and deployment team later also included Mika Suoanttila [11 years younger than Arango]. . . . Arango's job duties related to graphics processor evaluation were transitioned to Jon Swift [six months older than Arango]." As to Arango's duties providing hardware, software, and operating systems support to engineers, Mead declared, "The bulk of the remaining engineering end user support tasks were not reassigned and [Pratt] no longer provides this level of personalized support, although the company may use a contractor on occasion for this purpose. [¶] . . . No individual has been hired in the California IT organization to fill [Arango's] former job after his layoff."

Excerpts from Arango's deposition testimony were attached to Pratt's motion for summary judgment. Arango testified he was born in 1957 and had been hired by Pratt in 1998. He worked in the IT group, providing engineering user services throughout his employment. Arango testified his supervisor in 2010, Adele Lessin, told him in an e-mail he would not receive a raise because he "made too much money," but in a subsequent

meeting with Lessin and Dennis Cleveland, Arango's age did not come up. Nor did the subject of Arango's age come up in a meeting with Mead when he told Arango he was not going to receive a merit increase in 2011, or in a subsequent meeting with human resources. Arango was complimentary about the skills of Hernandez and Suoanttila.

C. The opposition to the motion for summary judgment

In opposition to the motion for summary judgment, Arango argued he had established a prima facie case of age discrimination based on disparate treatment because (1) he was over the age of 40, (2) he was qualified for his job as shown by his exemplary work history, and (3) he was fired under circumstances giving rise to an inference of discrimination, including being replaced by younger employees, the continuing need for his technological skills as they related to cutting edge virtualization projects, and an ongoing need for high-level technical support. He also argued he had raised triable issues of fact regarding whether Pratt's proffered reasons for termination were pretextual, relying on (1) his strong work history, (2) Pratt's use of subjective criteria to terminate him, (3) his replacement by younger employees, and (4) statistical evidence showing a significant adverse impact on older workers terminated in connection with the RIF. Arango also contended triable issues of fact existed as to the remaining causes of action and as to a newly raised disparate impact theory.[2]

In support of the opposition to the motion for summary judgment, Arango's attorney declared under penalty of perjury that he was "familiar with the files, pleadings, and facts in this case and could and would competently testify to the following facts on the basis of [his] own personal knowledge." He declared true copies were attached to the opposition to the summary judgment motion of excerpts from and complete deposition transcripts of Arango, Guerrero, Hawman, and Mead; and Arango's performance reviews, e-mails regarding innovative projects, Pratt's separation agreement and release,

---

[2] Arango has not addressed the disparate impact claim on appeal, and we do not consider it.

Lepowsky's report, Pratt's assessor training manual, and Pratt's responses to interrogatories.

Attached to Arango's opposition were performance reviews from 2007 to 2010. The most recent performance review was the December 31, 2010 performance review by his then-manager, Lessin. That review showed Arango had met the two highest ratings of "Target" and "Above Target" objective results in all categories that year. He did not receive the lower ratings of "Progressing" or "Below Target." He was rated as "fully competent" and described positively. With respect to the objective of being "inclusive of different points of view in meetings, projects and task assignments," Arango was rated at "Target," with the comment Arango "has made very good progress at listening to other people's ideas and points of view."

In support of the opposition to the motion for summary judgment, Arango declared as follows. In 1998, he was hired by Pratt in a technical support position and was eventually promoted to an L4 as a principal consultant, IT systems development and analysis. Arango supported several divisions. Arango worked in the Canoga Park facility, which was composed of more than 1,000 employees. He had displayed an exemplary record of employment, excelled in his position, was regarded as an expert in many areas, and had never received any written reprimand up until the time of his discharge. In 2009, he received praise from the vice-president of engineering for introducing cutting edge technologies. He received an award at a Pratt conference for publishing a poster and a "white paper" related to the benefits of virtualization techniques.

Arango implemented programs that advanced modeling techniques and a mobile computing project. As a result of his efforts, Pratt approved the virtualization project and its budget of about $200,000. Arango was a technical lead for the project and began leading a team of 15 individuals to move the project forward.

In 2010, Lessin informed Arango he would not be getting a merit increase because he "made too much money and because the only way [he] could get a raise was if [he] had performed like a superstar . . . ." Lessin also told Arango that because Arango "was

behind the virtualization, cloud computing, GPU, and mobile computing projects, there was no doubt in her mind that [his] performance was that of a superstar and that [he] was going to get a merit increase in the following year."

In February 2011, Mead became Arango's supervisor. That year, Arango discovered he was being excluded from important infrastructure implementation meetings even though he had worked six years to convince management to support the virtualization projects and gain funding. Mead told Arango he "made too much money and that [he] had not done anything worthwhile to receive a merit increase and that [he] would get a merit increase the following year." Arango requested and received a meeting with human resources, Ivelis Alday, and Mead to ensure there was no correlation between his performance and lack of a merit increase. During the meeting, Mead promised Arango "added responsibilities to allow [him] to advance [his] professional career, all of which turned out to be empty promises."

On May 25, 2011, Arango was notified in a meeting with Mead and Alday he had been selected for layoff; his job had been reclassified from an L4 to an L5, a demotion; his new job title would be "'staff analyst'"; he no longer had to report to work at the Canoga Park facility; and his last day of work would be July 31, 2011. The 11 people terminated between 2010 and 2011 were "older employees, including [Arango]." Arango's duties on the virtualization project were reassigned to Hernandez and Suoanttila, who were, respectively, 10 and 11 years younger than Arango. Arango declared "there was a continuing need for [his] skills given the business impact of the technologies [he] was spearheading and that [Pratt] invested hundreds of thousands of dollars into because of [his] efforts to implement out of the box ideas and cutting edge technologies."

Arango attached excerpts from Mead's deposition transcript to the opposition to the motion for summary judgment as follows. Mead stated Arango had provided specialized support to engineers "who had particularly complex problems with hardware, software, operating systems, interruptability [*sic*] . . . ." After Arango was laid off, "[t]here are some contractors that can do that and, from time to time, will perform the

type of tasks and, [*sic*] that [Arango] did in working with end users." Mead estimated the contractors' ages were mid-30's, mid-40's, and late 50's. The three contractors who performed Arango's end-user duties worked at the Canoga Park facility on a daily basis.

Arango attached the declaration of William Lepowsky, a statistical expert, to the opposition to the motion for summary judgment. Lepowsky's credentials included a bachelor's degree in mathematics, a master's degree in mathematics, a master's degree in statistics, and a college teaching position.

Lepowsky declared he had reviewed documents provided by Pratt that included lists of California IT employees employed as of January 1, 2011, and January 1, 2012; a list of the employees who were terminated; a summary of the assessments of employees grade L4 for 2010; a summary of the assessments of employees grade L5–L8 for 2010; a summary of the assessments of employees grade L4 for 2011; a summary of the assessments of employees grade L5–L8 for 2011; and Guerrero's declaration. The data he examined included the scores each employee had earned pursuant to the five-part assessment method Pratt had used to select employees for termination. These numerical scores were referred to as "total credits." He also was given the birth date of each employee and the employment grade of each employee. The employees with the lowest total credits were selected for layoff. The 11 terminated employees were age-protected, ranging from 50 to 63. Lepowsky prepared a spreadsheet analyzing data supplied by Pratt.

Lepowsky's declaration examined the age of the employees from the following three perspectives: (1) whether they were subject to the RIF, (2) their total credits, and (3) the change in their total credits from the assessment in 2010 to the assessment in 2011.

Lepowsky analyzed the first perspective from six points of view, based on (1) average age, (2) age ranks, (3) 40 or older versus 39 or younger, (4) 50 or older versus 49 or younger, (5) 50 or older versus 40's versus 39 or younger, (6) 60 or older versus 50's versus 40's versus 39 or younger. Lepowsky's declaration included a table showing the

point of view, the p-value ("'permutation test'" or statistical significance), and the number of standard deviations.

Lepowsky concluded that as to the first perspective—whether the employee was subject to the RIF analyzed as to age—"[f]or each of those six points of view, older employees were more adversely affected than younger employees by the RIFs. The disparity is statistically significant for five of those six points of view." Only the results of the analysis of employees 40 years of age or older versus those 39 years of age or younger were not statistically significant because "the high percentage of employees age 40 or older in the employee pool makes it a mathematical impossibility for statistical significance to be found."

Lepowsky analyzed the second perspective from four points of view, comprised of each job cluster (L4 or L5-L8) for each of the two RIF's. Lepowsky concluded that as to the second perspective—total credits compared to age—in three job grade clusters from which employees were selected to be terminated, older employees tended to have lower total credits by a statistically significant disparity. The only cluster for which statistical significance was not found (grade L4 in 2010) was the cluster from which no employees were terminated.

Lepowsky concluded that as to the third perspective— changes in total credits analyzed by age—older employees tended to have more of a decline in total credits from 2010 to 2011 than younger employees by a statistically significant disparity.

Lepowsky explained that the sample size, with two exceptions, was sufficiently large to obtain statistical significance and provide evidence of a disparity. One exception concerned an analysis of perspective 1 from the point of view of 40 or older versus 39 or younger. Because 100 percent of the employees terminated were 40 or older and 0 percent were 39 or younger, the result could not be statistically significant. The other exception concerned perspective 2, analyzing the 29 L4 employees in 2010. Because none of the L4 employees were terminated, the sample size was not sufficient to achieve statistical significance.

Lepowsky detailed how he calculated the probability of the disparities he determined existed between the "'expected'" average age of terminated employees and the actual age, the "'expected'" age rank and the actual age rank, and the "'expected'" percentage of employees in age groups to be selected for termination. Lepowsky also concluded the probability that these disparities occurred by chance was extremely low, ranging from 1 in 9 to 1 in 7,550.

Lepowsky explained that "[t]he term 'statistical significance' refers to the *results* of an analysis and not to the *sample size* which yielded it. [¶] . . . [¶] . . . '[S]tatistical significance' is a term that refers to the *observed data* and the *analysis* thereof, not to the sample size. . . . [A] finding of statistical significance, in and of itself, necessarily implies that the sample size was sufficiently large to permit finding evidence of a disparity. Statistical significance cannot be obtained without a sufficiently large sample size (and a disparity of sufficient magnitude), so if statistical significance is obtained, then the sample size necessarily does not suffer from the problem of being too small."

D. Pratt's objections to Arango's evidence submitted in support of his opposition to the motion for summary judgment

Pratt filed objections to Lepowsky's declaration, arguing it was speculative and conclusory, it did not address variables other than age in determining whether the 2011 RIF was discriminatory based on age, and it improperly distinguished between subgroups of employees over the age of 40, rather than limiting its comparison of employees 40 and over with those 39 and younger.

E. The trial court's ruling on the objections and motion for summary judgment

The trial court sustained Pratt's objection to Lepowsky's declaration, stating Lepowsky's declaration "fails to provide sufficient cogent information to support [Arango's] claims." The court stated, "Lepowsky . . . fails to provide a sufficient explanation of his methodology and employs circular logic in connection with the sufficiency of the sample size." The court stated Lepowsky referred to a table of data, "without any explanation." It also stated Lepowsky "fails to reconcile his own statement: 'the high percentage of employees age 40 and older in the employee pool makes it a

mathematical impossibility for statistical significance to be found.'" The court characterized as circular reasoning Lepowsky's statement "the fact of the finding of statistical significance (in all but two of the analyses) implies, as a necessary consequence, the fact that the sample size in each of those cases was sufficiently large."

The trial court did not rule on specific objections at the hearing. Rather, it took the matter under submission and issued a minute order after the hearing. Pratt had not objected to the declaration of Arango's attorney. The court, however, raised and sustained its own objection in the minute order, without warning to Arango, stating, "[Pratt's] objections to [Arango's attorney's] Declaration are sustained." The court stated Arango's attorney's declaration, "which purports to authenticate [Arango's] exhibits lacks personal knowledge, foundation, or identification."

Stating that Arango "offers unsupported speculation and statistics," the trial court concluded Arango had failed to set forth evidence sufficient to raise a triable issue of material fact as to whether Pratt's bases for terminating Arango were pretextual and granted Pratt's motion for summary judgment. Judgment was entered and this appeal followed.

DISCUSSION

A. Standard of review

Our review is de novo. "'The trial court must grant a summary judgment motion when the evidence shows that there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. [Citations.] In making this determination, courts view the evidence, including all reasonable inferences supported by that evidence, in the light most favorable to the nonmoving party. [Citations.]' [Citation.]" (*Hypertouch, Inc. v. ValueClick, Inc*. (2011) 192 Cal.App.4th 805, 818.)

The moving defendant must show that """"under no hypothesis is there a material issue of fact that requires the process of trial.""""" (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 106.)

The trial court's rulings on evidence are reviewed for abuse of discretion. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

B. The trial court abused its discretion in excluding Lepowsky's declaration and the declaration of Arango's attorney

The pivotal issue is whether Lepowsky's declaration was admissible to raise the inference that Arango was terminated because of his age. If so, there existed a triable issue of material fact and Pratt failed to show there was "no hypothesis" on which Arango could prevail.

We agree with Arango's contentions that the trial court abused its discretion in excluding Lepowsky's declaration and the declaration of Arango's attorney.

1. *Lepowsky's declaration*

"[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon Enterprises, Inc. v. University of Southern California*, *supra*, 55 Cal.4th at pp. 771–772.) In determining whether to exclude expert testimony, the court shall not choose between competing expert opinions; its focus "'must be solely on principles and methodology, not on the conclusions that they generate.' [Citation.]" (*Id.* at p. 772.) "The court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion." (*Ibid.*) The court determines whether, as a matter of logic, the information cited by the expert supports "the conclusion that the expert's general theory or technique is valid." (*Ibid.*)

"[O]bjections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility." (*Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174, 1188 (*Hemmings*).) "Vigorous cross-examination of a study's inadequacies allows the jury to appropriately weigh the alleged defects and reduces the possibility of prejudice." (*Ibid.*) A defendant "may not rest an attack on an 'unsubstantiated assertion of error,'" but "must 'produce credible evidence

that curing the alleged flaws would also cure the statistical disparity.' [Citations.]" (*Ibid.*)

In *Hemmings*, the Ninth Circuit Court of Appeals determined the expert's failure to include the employees' individual qualifications, preferences, and education in his statistical analysis did not render the analysis inadmissible because the employer did not show any of those factors were important to the promotion process. The court observed the expert used the best available data, which came from the defendant, and if the defendant believed other information would have explained the differences between promotions and compensations between male and female upper level employees, it should have provided that information to the expert. (*Hemmings*, *supra*, 285 F.3d at pp. 1188–1189.)

We conclude the trial court abused its discretion in excluding Lepowsky's declaration. The court excluded Lepowsky's declaration on the basis that it: (1) referred to a table of data, "without any explanation," (2) failed "to reconcile his own statement: 'the high percentage of employees age 40 and older in the employee pool makes it a mathematical impossibility for statistical significance to be found,'" and (3) employed circular reasoning by stating "the fact of the finding of statistical significance (in all but two of the analyses) implies, as a necessary consequence, the fact that the sample size in each of those cases was sufficiently large."

The reasons given by the trial court to exclude Lepowsky's declaration are unsound. First, the table of data criticized by the trial court as lacking explanation was merely a summary of the results regarding perspective 1. A reading of the pages following the table of data shows that Lepowsky provided a thorough explanation of the table of data and how he reached the results. Second, Lepowsky's statement, "the high percentage of employees age 40 or older in the employee pool makes it a mathematical impossibility for statistical significance to be found," is not irreconcilable with the conclusions reached. Rather, Lepowsky explained that even though all the terminated employees were over 40, in analyzing the data from the point of view of 40 or older versus 39 or younger, "the fact that there were only 11 RIFs (and not more) from a

workforce with such a high percentage of employees age 40 or older prevented even the most extreme possible disparity in the ages of those RIFd (100% were 40 or older; 0% were 39 or younger) from being statistically significant." Thus, Lepowsky's statements were reconcilable. Finally, Lepowsky's explanation that statistical significance has nothing to do with sample size, but everything to do with observed data and the analysis thereof, and that a finding of statistical significance implies that the sample size was sufficiently large to permit finding evidence of a disparity, is not circular.

Pratt did not establish that Lepowsky's declaration was "(1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon Enterprises, Inc. v. University of Southern California*, *supra*, 55 Cal.4th at pp. 771–772.)

Pratt's other arguments as to the purported inadequacies of Lepowsky's declaration address its weight, not its admissibility, and for that matter, seek to impose an impossibly high threshold for the admission of expert opinion. In effect, Pratt argues Arango did not bear his burden because the declaration fell short of being highly persuasive. The appropriate bar is far lower.

2. *Arango's attorney's declaration*

Arango's attorney's declaration in opposition to the motion for summary judgment purported to authenticate attached documents as true and correct copies of the originals. Although Pratt did not object to Arango's attorney's declaration, and the declaration's admissibility was not discussed at the hearing, the trial court's minute order stated the court was sustaining "[Pratt's] objections" to the attorney's declaration, observing the declaration, "which purports to authenticate [Arango's] exhibits lacks personal knowledge, foundation, or identification." Presumably, this meant that the court would not consider the attached documents, which it viewed as unauthenticated.

The attorney's statement that he possessed personal knowledge, however, was made under penalty of perjury. That the trial court disbelieved his representations under penalty of perjury did not justify its summary exclusion of the declaration or its exhibits without at least providing Arango any opportunity to make an offer of proof or show that

the documents could be authenticated otherwise. Moreover, Arango was entitled to rely on Pratt's failure to object as a concession there was no dispute as to the authenticity of the documents and, consequently, no further effort or expense needed to be expended to authenticate them. On motions for summary judgment, courts are required to view the evidence "in the light most favorable to the nonmoving party." (*Hypertouch, Inc. v. ValueClick, Inc.*, *supra*, 192 Cal.App.4th at p. 818.) The court failed to do so and abused its discretion in sustaining the objections.

C. A triable issue of fact existed as to disparate treatment and pretext

Arango contends the trial court erred in granting Pratt's motion for summary judgment because there were triable issues of fact as to whether Arango's score on the assessment method Pratt used to select employees for termination was a pretext for terminating Arango's employment on the basis of his age. We note Arango does not contend subjective assessments are per se unlawful, but rather that the assessment conducted here was used in a discriminatory manner. For instance, the "interpersonal skills" category might have been used to justify retaining more congenial young workers and terminating older workers. We conclude Arango has raised triable issues of fact as to disparate treatment and pretext.

1. *The three-stage burden-shifting analysis*

"Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) "California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination, including age discrimination, based on a theory of disparate treatment." (*Ibid.*) "Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Id.* at p. 355.) If "the plaintiff establishes a prima facie case, a presumption of discrimination arises." (*Ibid.*)

The burden then "shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason." (*Id*. at pp. 355–356.) "If the employer sustains this burden, the presumption of discrimination disappears. [Citations.] The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. [Citations.]" (*Id*. at p. 356.)

2. *Pretext*

The parties do not appear to dispute that Arango established a prima facie case of discrimination or that Pratt met its burden of presenting evidence that Arango was terminated pursuant to an assessment procedure that was nondiscriminatory on its face. Thus, we follow the parties' lead and focus on the issue of whether Arango established the existence of a triable issue of fact as to whether he was terminated for a discriminatory reason and Pratt's explanation for his termination was pretextual.

At the summary judgment stage, the employee's burden "is not high. He must only show that a rational trier of fact could, on all the evidence, find that [the employer's] explanation was pretextual and that therefore its action was taken for impermissibly discriminatory reasons." (*Pottenger v. Potlatch Corp.* (9th Cir. 2003) 329 F.3d 740, 746.) Although an employer has the "freedom to consolidate or reduce its work force," it may not "'use the occasion as a convenient opportunity to get rid of its [older] workers.' [Citations.]" (*Guz*, *supra*, 24 Cal.4th at p. 358.) But if the employer's reasons are nondiscriminatory, its "true reasons need not have been wise or correct." (*Ibid*.) "[A] plaintiff's showing of pretext, *combined* with sufficient prima facie evidence of an act motivated by discrimination, *may* permit a finding of discriminatory intent, and may thus preclude judgment as a matter of law for the employer." (*Id*. at p. 361.)

Arango does not claim the RIF itself was unnecessary or pretextual. Rather, he contends, to use the words of *Guz v. Bechtel*, that Pratt used the occasion of the RIF "'as a convenient opportunity to get rid of its [older] workers'" by adopting a subjective, potentially biased assessment method to select employees for termination. (24 Cal.4th at

p. 358.) Arango contends the following evidence shows a triable issue of fact exists as to whether the asserted reason for terminating him, his low score on the assessment, was pretextual: (a) Lepowsky's statistical evidence; (b) Pratt's continuing need for Arango's skills and services; (c) Mead's inconsistent statements; (d) Pratt's reliance on subjective evaluation systems to terminate Arango; and (e) Arango's positive job performance and accolades.

(a) Statistical evidence

Although the trial court sustained Pratt's objections to Lepowsky's declaration, it also addressed the declaration in ruling on the motion for summary judgment, stating the declaration failed to provide the court with evidence that would demonstrate pretext or evidence to overcome Pratt's showing. We examine Lepowsky's declaration to determine whether his statistical analysis raises a triable issue of fact as to whether Pratt's termination of Arango based on his low score on Pratt's assessment was a pretext for terminating him because of his age.

Statistical evidence may be used to support the employee's contention that the employer's action is pretextual by establishing that a general discriminatory practice exists, which creates an inference of discriminatory intent. (*Diaz v. American Telephone & Telegraph* (9th Cir. 1985) 752 F.2d 1356, 1363.)

Lepowsky's overall conclusions were (1) "older employees were more adversely affected than younger employees by RIFs" to a statistically significant degree, (2) "older employees tended to have lower Total Credits than younger employees" as a result of Pratt's assessment method, to a statistically significant degree, and (3) "older employees tended to have more of a decline in Total Credits" from the 2010 to 2011 RIF's to a statistically significant degree. In reaching these conclusions, Lepowsky relied on data supplied by Pratt to examine the relationship between the age of the employees from the following three perspectives: (1) whether they were subject to the RIF, (2) their total credits, and (3) the change in their total credits from 2010 to 2011.

Lepowsky analyzed the first perspective from six points of view, based on (1) average age, (2) age ranks, (3) 40 or older versus 39 or younger, (4) 50 or older versus

49 or younger, (5) 50 or older versus 40's versus 39 or younger, (6) 60 or older versus 50's versus 40's versus 39 or younger. Lepowsky concluded that by a statistically significant disparity, older employees were more adversely affected than younger employees by the RIF's; older employees tended to have lower total credits, making them far more likely to be selected for layoff; and older employees tended to have more of a decline in total credits than younger employees, making them more likely to be laid off in 2011. Lepowsky detailed how he calculated the probability of the disparities he determined existed between the "'expected'" average age of terminated employees and the actual age, the "'expected'" age rank and the actual age rank, and the "'expected'" percentage of employees in age groups to be selected for termination. He also concluded the probability these age differences occurred by chance was extremely low.

Pratt argues the statistical evidence does not show Pratt terminated Arango because of his age, claiming Lepowsky failed to show the total credits assigned to the employees in Arango's decisional unit were not legitimate and that he failed to eliminate nondiscriminatory explanations for the different scores and rankings. We are not persuaded by Pratt's argument. While Pratt contends Lepowsky should have accounted for nondiscriminatory explanations for the different scores and rankings, Pratt does not explain what other data would have been relevant or available to Lepowsky or how the outcome would have been affected by the other data.

This is not like *Pottenger v. Potlatch Corp.*, cited by Pratt, where the Court of Appeals affirmed the district court's grant of summary judgment in favor of the employer where the statistical analysis took into account only two variables, the employee's age at time of termination, and whether the employees had been terminated, even though the expert had "data about other relevant variables." (*Pottenger v. Potlatch Corp.*, *supra*, 329 F.3d at p. 748.) In that case, the expert's failure to take into account the factor of job performance that was available to him compelled the court to conclude that the statistical analysis was insufficient to raise a triable issue of fact regarding pretext. (*Ibid*.) Moreover, Arango and Pratt dispute what "decisional unit" should have included Arango, and Arango points out a flaw in Pratt's argument that the average age of employees after

the 2011 RIF increased, the flaw being that, one year later, all employees were necessarily one year older.

The trial court was persuaded by Pratt's argument that Arango had failed to show his termination was based on his age because the RIF was necessary due to "economic conditions" and the "depressed condition" of Pratt's business. Pratt's argument, however, missed the mark. Arango did not dispute the necessity of the RIF. Rather, he contended Pratt used a legitimate RIF to rid itself of older employees by utilizing a subjective and potentially biased assessment method to select older employees for termination. Pratt did not establish that Arango could not prove this hypothesis.

(b) Continuing need for employee's services

Where a discharge results from a RIF, an employee does not need to show he or she was replaced by younger workers. Rather, he or she must show merely that "'the discharge occurred under circumstances giving rise to an inference of age discrimination.' [Citation.]" (*Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1281.) "This inference 'can be established by showing the employer had a continuing need for [their] skills and services in that [their] various duties were still being performed,' [citation], or by showing 'that others not in [their] protected class were treated more favorably.' [Citation.]" (*Ibid*; *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1421 [failure to prove replacement by younger employee not fatal to age discrimination claim where discharge results from RIF; circumstantial, statistical, or direct evidence may show inference of age discrimination].)

Arango offered evidence that Pratt approved the virtualization project and its budget of $200,000 as a result of his publication of "white papers" that raised awareness of the productivity of virtualization technology. After he was terminated, Arango's duties on the virtualization project were assumed by Hernandez and Suonattila, 10 and 11 years younger than Arango, respectively. Arango also submitted evidence that he spent six years establishing the use of graphics card processing for mobile computing devices. Arango's duties regarding graphics processors were assumed by Swift, who was six months older than Arango. Arango's duties regarding support to engineers were assumed

by three contractors, aged in their mid-30's, mid-40's, and late 50's, respectively. Thus, because his duties were still being performed, Arango has raised a triable issue of fact as to whether Pratt had a continuing need for his services. Because four out of the six individuals who assumed his duties were substantially younger than he, a trier of fact could conclude that younger employees were treated more favorably than Arango.

Pratt cites *Holtzclaw v. Certainteed Corporation* (E.D.Cal. 2011) 795 F.Supp.2d 996 for the proposition that an inference of pretext does not arise when a company requires remaining employees to perform some of the duties of a terminated employee. (*Id*. at p. 1014.) The comment Pratt relies on was not the product of analysis, was not supported by citation, and was inconsistent with prior Ninth Circuit opinions. It is not persuasive or binding. (*Tully v. World Savings & Loan Assn*. (1997) 56 Cal.App.4th 654, 663.) Nor does Pratt advance its cause by citing *Smith v. International Brotherhood of Electrical Workers* (2003) 109 Cal.App.4th 1637 for the proposition that Arango was required "to demonstrate that he was replaced by a younger worker, not simply that some of his responsibilities were assumed by other workers." *Smith* involved a terminated employee, not an employee who had been subject to a RIF. (*Id*. at p. 1658.) A case involving a single termination is distinguishable from a case involving a RIF, where a downsizing employer would defeat its own purposes by making a full replacement.

(c) Mead's inconsistent statements

Arango submitted evidence that Mead made inconsistent statements concerning the elimination of Arango's job duties, from which a trier of fact could infer pretext.

An employer's """"shifting reasons""" for a layoff creates a genuine issue of material fact as to pretext. (*Coleman v. Quaker Oats Co., supra,* 232 F.3d at pp. 1286–1287; *E.E.O.C. v. Pape Lift, Inc*. (9th Cir. 1997) 115 F.3d 676, 680 [jury entitled to conclude that discrepant reasons for termination given by supervisory and personnel manager supported inference of pretext].)

Mead testified in his declaration that "[t]he bulk of the remaining engineering end user support tasks were not reassigned and [Pratt] no longer provides this level of personalized support, although the company may use a contractor on occasion for this

purpose." With regard to Arango's end-user support duties, Mead testified in his deposition, "There are some contractors that can do that and, from time to time, will perform the type of tasks and, [*sic*] that [Arango] did in working with end users." He also testified the three contractors who performed Arango's end-user duties worked at the Canoga Park facility on a daily basis.

A trier of fact could construe Mead's declaration that the "bulk" of the end-user tasks were not reassigned and that Pratt no longer provided "this level of personalized support" contradicted his deposition testimony that contractors who worked at the Canoga Park facility on a daily basis performed Arango's end-user tasks.

(d) Subjective evaluation systems

Arango argued that Pratt's use of subjective criteria to evaluate Arango for termination facilitated age discrimination.

"While a subjective evaluation system can be used as cover for illegal discrimination, subjective evaluations are not unlawful per se and 'their relevance to proof of a discriminatory intent is weak.' [Citation.]" (*Coleman v. Quaker Oats Co.*, *supra*, 232 F.3d at p. 1285.) However, even weak evidence may be considered in determining whether an issue of fact exists to defeat summary judgment.

(e) Positive job performance and accolades

Arango submitted evidence of his positive job performance and accolades to show his discharge was pretextual.

Pretext may be inferred from a terminated employee's job performance before termination. (*Flait v. North American Watch Corp*. (1992) 3 Cal.App.4th 467, 479.) Thus, in *E.E.O.C. v. Boeing Co*. (9th Cir. 2009) 577 F.3d 1044, an employee's poor RIF evaluation based on her two months as a trainee in a new department (after the employee was assured that she would be exempt from the RIF process during her training) rather than on specific positive evaluations by her managers was probative of pretext. (*Id*. at pp. 1050–1051.)

We conclude the most recent December 31, 2010 performance evaluation raises a triable issue of fact regarding pretext. Arango was rated at "Target" or "Above Target,"

with no ratings of "Progressing" or "Below Target." He was rated as "fully competent" and described positively. With respect to the objective of being "inclusive of different points of view in meetings, projects and task assignments," Arango was rated at "Target," with the comment Arango "has made very good progress at listening to other people's ideas and points of view."

Citing *Coleman v. Quaker Oats Co.*, *supra*, 232 F.3d at page 1286, Pratt contends Arango cannot use his own subjective evaluation of his qualifications to raise an issue of material fact and that his isolated positive performance reviews do not raise a question of pretext because previous performance evaluations showed Arango needed to improve his interpersonal skills. Although Arango's subjective evaluation of himself can be viewed as self-serving, a jury may give it whatever weight the jury determines it deserves. Arango's receipt of awards and commendations, as well as his latest positive performance review, also may be considered in determining whether Pratt's reason for terminating Arango was pretextual.

(f) Other material issues of fact

Other material issues of fact from which a trier of fact might infer pretext include the comments purportedly made by Lessin and Mead that Arango did not receive a merit raise for 2011 because he made too much money, but that he might receive a merit raise in the future. A trier of fact might infer from these comments that Pratt might have had an incentive to terminate an older, highly paid employee rather than pay him a merit raise.

We conclude "a rational trier of fact could, on all the evidence, find that [Pratt's] explanation was pretextual and that therefore its action was taken for impermissibly discriminatory reasons." (*Pottenger v. Potlatch Corp.*, *supra*, 329 F.3d at p. 746.) In other words, Pratt did not show that Arango could not establish he was terminated based on his age or that Pratt's explanation he was terminated because of a low score on the assessment was pretextual.

D. Other causes of action

All Arango's causes of action are based on age discrimination concealed by a pretextual explanation. Because we have concluded that Arango has raised a triable issue of fact as to age discrimination and pretext, reversal is required on the other causes of action as well.

DISPOSITION

The trial court's judgment in favor of Pratt & Whitney Rocketdyne, Inc. and against Jaime Arango is reversed. Arango is entitled to costs on appeal.

NOT TO BE PUBLISHED.

MILLER, J.*

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.