IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

SHELDON JACOBSON,

Plaintiff,

vs. **Civ. No. 08-0156 JP/RLP**

QWEST CORP.,
ALBERT MACALUSO,
SHARON W. MONTGOMERY,

Defendants.

MEMORANDUM OPINION AND ORDER

On December 18, 2008, Defendants Qwest Corp., Sharon Montgomery and Albert Macaluso filed Defendants' Motion for Summary Judgment (Doc. No. 50) (the "Motion"). On December 19, 2008, Plaintiff Sheldon Jacobson, filed Plaintiff's Response to Motion for Summary Judgment (Doc. No. 52).[1] Defendants filed a Reply brief on January 5, 2009 (Doc. No. 57). After ruling that Plaintiff's Response was insufficient to allow additional discovery under Fed. R. Civ. P. 56(f), the Court allowed Plaintiff's counsel to file a supplemental response to the Motion, and the Court allowed Defendants additional time to file a reply brief. Plaintiff filed a supplemental Response on February 19, 2009 (Doc. No. 84), and Defendants filed a supplemental Reply on March 9, 2009 (Doc. No. 89). Having reviewed the briefs and the

[1] In this Response, Plaintiff asked the Court to deny the Motion or to order a continuance under Fed. R. Civ. P. 56(f) to allow Plaintiff to take the deposition of a Qwest representative under Fed. R. Civ. P. 30(b)(6). At the Pre-Trial Conference held on February 5, 2009, the Court ruled that the Plaintiff's Rule 56(f) affidavit was insufficient because the affidavit did not identify specific facts Plaintiff sought to uncover that would produce a genuine issue of fact in rebuttal to Defendants' Motion.

arguments of counsel, the Court will deny the Motion.

On January 9, 2008, Plaintiff filed this case in the Second Judicial District Court, Bernalillo County, New Mexico. Defendants removed this case on February 11, 2008 asserting both federal question and diversity jurisdiction. Notice of Removal (Doc. No. 1); 28 U.S.C. §§ 1331, 1332(a)(1). Only two counts of the complaint remain before the Court.[2] In Count I, Plaintiff alleges that Defendants Qwest, Montgomery and Macaluso violated the New Mexico Human Rights Act ("NMHRA"), N.M. Stat. Ann. § 28-1-1 et seq. (2005). In Count II, Plaintiff alleges that Defendant Qwest violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. In the Motion, Defendants ask the Court to grant summary judgment and dismiss both of these counts.

Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56©. The movant bears the initial burden to show the absence of a genuine issue of material fact entitling the movant to judgment as a matter of law. *Libertarian Party of NM v. Herrera*, 506 F.3d 1303, 1309 (10th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the movant meets this initial burden, the burden then shifts to the nonmovant to "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). To accomplish this, the nonmovant must submit or reference affidavits, deposition transcripts, or specific exhibits. *Libertarian*

[2] The court dismissed the Count IV claim for breach of fiduciary duty under ERISA. *See* Memorandum Opinion and Order (Doc. No. 65). Plaintiff stipulated to the dismissal of Count III for breach of an implied employment contract under New Mexico law. *See* Stipulation Of Dismissal With Prejudice (Doc. No. 88).

Party, 506 F.3d at 1309 (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir.1998)). In addressing the Motion, the court must "view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Asbury v. Geren*, 582 F. Supp. 2d 1323, 1327 (D.N.M. 2008) (quoting *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Serv.*, 165 F.3d 1321, 1326 (10th Cir.1999)). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Gamez v. Country Cottage Care & Rehab.*, 377 F. Supp. 2d 1103, 1115 (D.N.M. 2005) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)).

Background

Plaintiff worked for Qwest as a Senior Global Account Manager in Qwest's New Mexico Government-Education sales unit (the "government sales unit") from 2000 until Plaintiff's employment was terminated on June 15, 2007.[3] As a Senior Global Account Manager, Plaintiff managed a team of Global Account Managers in the government sales unit.

The evidence in the record that is most favorable to Plaintiff is the following. From 2001 until 2006, Defendant Sharon Montgomery was the Sales Director for the government sales unit and was Plaintiff's direct supervisor. Between May 2003 and August 2004, Defendant Montgomery made several age-related comments to Plaintiff such as "How's the old guy doing today?"; "How are you, old timer?"; "Why aren't you applying for other positions of note within the company – feeling too old?" (Mot. Ex. I, Plaintiff's Answers to Interrogatories at 4.) On or

[3] Plaintiff also worked for Qwest's predecessor, Mountain Bell from 1969 to 1982 as an account executive. Plaintiff returned to work for Qwest's predecessor, US West, as a team leader on January 2, 2000. (Compl. ¶¶ 20, 21.)

about May 6, 2003 at a sales meeting, Defendant Montgomery commented that Plaintiff, "was too old or incapable of handling the latest in technology." *Id.* On May 17, 2005, Defendant Montgomery commented on Plaintiff's mismatched socks and stated that Plaintiff must be getting too old and senile to dress himself. *Id.* On or about June 26, 2006, Defendant Montgomery suggested to Plaintiff, "Maybe you are losing steam and should consider your future plans." *Id.* In 2006, Defendant Montgomery was promoted to Vice President in charge of government-education sales.

In April 2006 after Defendant Montgomery's promotion, Defendant Albert Macaluso became Plaintiff's direct supervisor. In February 2007, during a yearly performance evaluation Defendant Macaluso asked Plaintiff if he had thought about retiring. And again, in April 2007, one month before Plaintiff was removed from his management position, Defendant Macaluso asked Plaintiff about retiring. (Jacobson Dep. 219:2-9; 85:17– 86:7.) Qwest management routinely discusses the retirement plans of retirement age employees. (Macaluso Dep. 38:4-15.) Defendant Macaluso told Ms. Vigil-Herrera, a member of the government sales unit, that he was concerned about how many members of the unit were eligible for retirement (Vigil-Herrera Dep. 43:9-22.) Ms. Vigil Herrera, however, could not remember when this conversation took place. (Vigil-Herrera Dep. 43:23-25.)[4]

In 2006, Qwest learned that its business relationship with the State of New Mexico was

[4] Defendants presented evidence that Plaintiff referred to himself as "an old guy." (Mot. Ex. J, e-mail from Plaintiff to Fermin Perez.) Plaintiff admitted that he forwarded e-mails containing age jokes to his home. (Jacobson Dep. 221:10 – 227:11.) Plaintiff testified that he did not find these jokes funny. (Jacobson Dep. 221:20.) Plaintiff admitted, however, that he never lodged a complaint against the persons who sent him e-mail age jokes. (Jacobson Dep. 222: 2-9; 223:3-5; 223:18-21.) In this case, comments by anyone other than decision makers are irrelevant. *See Cone*, 14 F.3d at 531 (stating that age-related comments by non-decision-makers are not material in showing that employer's action was based on age discrimination).

in serious jeopardy. New Mexico was considering construction of its own telecommunications facilities with a plan called "Wire New Mexico." Qwest's loss of New Mexico's business would result in a large loss of monthly revenue. In order to retain New Mexico's business, Defendants Montgomery and Macaluso decided to restructure the government sales unit, which was the unit responsible for the New Mexico account. Defendant Macaluso testified that the key component of the restructuring plan was "to create . . . vertical markets K through 12, cities, counties, state agencies, 911, as we were doing that year in Colorado." (Macaluso Dep. 18:4-7.) (*See also* Horne Dep. 29:12-21 (testimony of former Qwest employee and member of the government sales unit describing Qwest's reorganization of the government sales unit)).

Defendant Macaluso described the planning behind the restructuring.

> . . . I called in a vice president, I called on legal, pricing offer management, people from network, to come together to strategize about what we were going to do – there was an initiative in the state called Wire New Mexico; which, if implemented, would result in a large loss of revenue for Qwest. . . . I believe the reason that they were building that is because we didn't offer them the right products and services that we had; fiber-based Ethernet services, MPLS services, and so on.
>
> I brought [Plaintiff's] team along with that account manager, [Plaintiff]. From that meeting, . . . we developed action items, milestones, things that we could act upon if everybody did their roles. . . . I brought people from around the region, engineers and so on, to play on this. We needed to act and we needed to act upon this quickly.

(Macaluso Dep. 25:23 – 26:24.)

> Defendant Macaluso described Plaintiff's response to the restructuring plan,
>
> Repeated requests for action items and milestones and roles they played and due dates were ignored, both by the account manager and requests to [Plaintiff].

(Macaluso Dep. 26:21-24.)

> When I created these vertical markets, as I did at the same time in Colorado, . . . the leadership there met it with success, inspired the workers to deliver on that, and saw the positive. In New Mexico, it was adversarial. . . . And there was no support in these initiatives that were critical to our success in New Mexico.

(Macaluso Dep. 26:21 – 27:14.)

According to Defendant Macaluso, in early 2006, the New Mexico government sales unit was failing to address customer concerns, failing to respond to customer requests, and failing to respond to Defendant Macaluso's internal requests for information. Defendant Macaluso testified that these problems stemmed from Plaintiff's lack of leadership,

> Q Any other reasons why [Plaintiff] should have been terminated?
> . . .
> A It all falls under the category of leadership and management skill sets. We needed someone who was more strategic, who drove more accountability down to the rep level, the sales rep level. We were faced with huge revenue losses in the state. There was growing customer dissatisfaction. We thought there was [sic] control issues. We just needed somebody who was more strategic and a stronger manager.

(Macaluso Dep. 23:23 – 24:18.)

Defendant Macaluso explained,

> Q What do you mean by "control issues"?
> A As far as driving accountability for job performance of the sales representatives and their tasks that they were required to do in that role.
> Q So, in other words, [Plaintiff] should have exerted more control? Is that what you're saying?
> A Yes.
> Q How could [Plaintiff] have done that?
> A Held people to task, had people be more accountable for action items, more responsive. . . .

(Macaluso Dep. 24:19 – 25:7.)

Defendant Macaluso also testified about the lack of customer satisfaction with Plaintiff's government sales unit,

> A . . . Customer satisfaction was an issue, yes.
> Q In what ways did [Plaintiff] fail to provide adequate service to the customers?
> A I had almost monthly, maybe weekly – I had numerous complaints from customers from lack of response from the sales team. I felt we were getting into adversarial relationships with our customers.
> Q What customers were those?
> A State customers, school districts.
> Q What State customers?
> A The State of New Mexico.

(Macaluso Dep. 28:13– 29:1.)

On May 17, 2007, Defendants Montgomery and Macaluso held two key meetings, one with Plaintiff and one with the entire government sales unit. During the meeting with the government sales unit, Defendants Montgomery and Macaluso accused the unit of not attaining its sales goals for the preceding five years. Plaintiff and two unit members testified that this was false. (Jacobson Dep. 91:11-18, Horne Dep. 30:19–31:4, Vigil-Herrera Dep. 22:11-20.) Fran

Horne, a member of the government sales unit, testified about the meeting,

> Q. Did [Macaluso] mention any performance issues?
> A. Yes, that we, as a team, had not performed.
> Q. Did he give any specifics on how you had not performed?
> A. That we had not made our numbers, I believe he said, which was not accurate at all. Because in our company, if you don't make numbers, you don't get commission checks.
> Q. And you made your commission check?
> A. Yes.

(Horne Dep. 30:19–31:4.) According to Plaintiff and one unit member, when the unit challenged this accusation, it was taken "off the table." (Plaintiff Dep. 91:11-16, Vigil-Herrera Dep. 58:1-60:21.) Defendant Macaluso testified, however, that Plaintiff's job performance was not taken "off the table." (Macaluso Dep. 35:8-11.) During the meeting with Plaintiff individually, Defendants Montgomery and Macaluso offered Plaintiff the choice of a sales position within the government sales unit or a severance package. Plaintiff refused both. On June 15, 2007, Plaintiff met with Qwest's Human Resources representative Deena Ulrich, who informed Plaintiff that his employment was terminated and who offered Plaintiff a retirement package. Plaintiff rejected the retirement package. (Mot. Ex. G.) Plaintiff was 62 years old when he was discharged. (Compl. ¶ 12.)

Kim Marona, the manager of the Arizona's government sales unit, took over Plaintiff's management duties in New Mexico. At the time, Ms. Marona was under 40 years old. Defendant Macaluso testified that after Plaintiff's employment was terminated, the government sales unit experienced ". . . increased sales; better attitudes from the people, . . . a more receptive, positive, enthusiastic sales group who [were] meeting their objectives and exceeded them; and an increase in customer satisfaction." (Macaluso Dep. 61:2-9.) New Mexico abandoned its efforts to build its own telecommunications facility, and revenues in the government sales unit increased. (Montgomery Dep. 52:14 – 53:2.)

Discussion

Age Discrimination Claims

Plaintiff alleges in Count I that all Defendants violated the NMHRA,[5] and in Count II, Plaintiff alleges that only Defendant Qwest violated the ADEA. The legal analysis relevant to this decision on summary judgment is the same as under both the ADEA and the NMHRA. *Perry v. Woodward*, 199 F.3d 1126, 1141 (10th Cir. 1999).[6] The ADEA prohibits an employer from "failing or refusing to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A plaintiff in an age discrimination case must prove that the employer acted, at least in part, on a motivation based on age. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) ("[T]he plaintiff's age must have actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.").

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[5] It is an unlawful discriminatory practice for:

> A. an employer, unless based on a bona fide occupational qualification or other statutory prohibition, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of race, age, . . .

N.M. Stat. Ann. § 28-1-7 (2005). "'[E]mployer' means any person employing four or more persons and any person acting for an employer." N.M. Stat. Ann. § 28-1-2 B. "Person" includes individuals. N.M. Stat. Ann. § 28-1-2(A). Even though Defendants Montgomery and Macaluso cannot be held personally liable under the ADEA, the New Mexico courts have not foreclosed the possibility for personal liability under the NMHRA. *See Sonntag v. Shaw*, 22 P.3d 1188, 1193 (N.M. 2001) (rejecting the proposition that there can exist no individual liability under the NMHRA but noting that plaintiff must exhaust administrative remedies against an individual before bringing an action under the NMHRA).

[6] *See also Mirzai v. State of New Mexico General Services Dept.*, 506 F. Supp. 2d 767, 781 (D.N.M. 2007) ("Both the Tenth Circuit and the Supreme Court of New Mexico have acknowledged that the *McDonnell Douglas* framework is appropriate for discrimination claims brought under the [NM]HRA involving indirect evidence of discrimination.").

1. The *McDonnell Douglas* Analysis

Under the burden shifting framework that the Supreme Court established in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), if the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to come forward with a legitimate nondiscriminatory reason for its employment-related decision. *Id.* at 802. A plaintiff whose employment was terminated establishes a prima facie case of age discrimination when he proves that (1) plaintiff is member of a protected group; (2) plaintiff was qualified for the position; (3) plaintiff's employment was terminated; and (4) plaintiff' was replaced by a younger person. *See Miller v. Eby Realty*, 396 F.3d 1105, 1111 (10th Cir. 2005); *Asbury*, 582 F. Supp. 2d at 1333. Persons over forty years old are within the protected age group. *Faulkner v. Super Valu Stores*, Inc., 3 F.3d 1419, 1425 (10th Cir. 1993) (stating that to be in protected age group, plaintiff must be at least 40 years old). A prima facie showing by plaintiff creates the presumption of discrimination. *Miller*, 396 F.3d at 1111.

Once a plaintiff presents a prima facie case, the employer must produce evidence of a legitimate, nondiscriminatory reason for its action. *Gamez*, 377 F. Supp. 2d at 1119. If the employer presents a legitimate, nondiscriminatory reason for its action, the presumption of discrimination established by the prima facie case "simply drops out of the picture." *Id.* (citation omitted). In response, plaintiff must either show that his age was a determinative factor in defendant's employment decision, or show that defendant's explanation for its action was merely pretext. *Adamson v. Multi Community Diversified Services, Inc.*, 514 F.3d 1136, 1145 (10th Cir. 2008). "This burden merges with the plaintiff's ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1455 (10th Cir. 1994) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256

(1981)). A plaintiff demonstrates pretext by showing either "that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." *Rea*, 29 F.3d at 1455. The Tenth Circuit stated,

> The plaintiff need not prove the defendant's reasons were false, . . . or "that age was the sole motivating factor in the employment decision," . . . . Rather, the plaintiff must show that age actually played a role in the defendant's decisionmaking process and had a determinative influence on the outcome.

Id. (citations omitted). "Pretext can be shown by 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" *Gamez*, 377 F. Supp. 2d at 1119-20 (citations omitted). A plaintiff must produce specific facts showing pretext because "mere conjecture that their employer's explanation [was] a pretext for intentional discrimination is an insufficient basis for denial of summary judgment." *Id.* at 1120 (citation omitted).

2. *Prima Facie Case of Age Discrimination*

Defendants do not dispute that Plaintiff was within the protected age group, that his employment was terminated and that he was qualified for the position. Defendants argue that Plaintiff has failed to establish the fourth element, that Plaintiff was discharged under circumstances raising an inference of discrimination. *See Plotke v. White*, 405 F.3d 1092, 1100 (10th Cir. 2005) (stating in gender discrimination case that fourth element of prima facie case is met by showing that the circumstances around the employer's action raise an inference of discrimination). In this case, however, the requirements for a prima facie case of age

discrimination, are those found in *Miller*.[7] In *Miller* the fourth element is whether the plaintiff was replaced by a younger employee. 396 F.3d at 1111. The record shows that Plaintiff's management duties were taken over by his counterpart in Arizona, Kim Marona, who at the time was under forty years old. Because Plaintiff's burden at the prima facie case stage is not onerous, the Court finds that Plaintiff has proffered a prima facie case of age discrimination. *McCowan v. All Star Maintenance, Inc.*, 273 F.3d 917, 922 (10th Cir. 2001); *Maughan v. Alaska Airlines, Inc.*, 281 Fed. Appx. 803, 806 (10th Cir. 2008). Thus, the burden shifts to Defendants to produce evidence that they had one or more legitimate non-discriminatory reasons to discharge Plaintiff.

3. *Non-Discriminatory Reason*

Plaintiff admits that Defendants have articulated a legitimate nondiscriminatory reason for discharging him: Defendants restructured the government sales unit to stop the State of New Mexico from building its own telecommunications facilities, and in the process, removed Plaintiff from his management position, which led to the termination of Plaintiff's employment. In addition, Defendants offered evidence that Plaintiff was removed from his management position because he lacked effective management skills. Defendants, therefore, have produced a legitimate nondiscriminatory explanation for the termination of Plaintiff's employment: Plaintiff's lack of effective management skills. Summary judgment is warranted "unless the

[7] Both sides misstate the prima facie case applicable here. Plaintiff cites *Hinds v. Sprint/United Management Co.*, 523 F.3d 1187 (10th Cir. 2008), a case involving a reduction in force (RIF), which provides that the fourth element of a prima facie case is whether some evidence is presented showing that the employer intended to discriminate against the plaintiff in its RIF decision. *Id.* at 1195. *Miller* is the proper analysis for this case. However, even under the more general standard stated by Defendants, Plaintiff presents sufficient evidence to proffer a prima facie case.

employee can show there is a genuine issue of material fact as to whether the proffered reasons are pretextual." *Asbury*, 582 F. Supp. 2d at 1334 (quoting *Plotke*, 405 F.3d at 1099). In order to meet this burden, "the plaintiff must present enough evidence to support an inference that the employer's reason was merely pretext, by showing either 'that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." *Id.* at 1334 (quoting *Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 530 (10th Cir. 1994)).

4. *Pretext or Discriminatory Reason*

At the summary judgment stage,

> if a plaintiff advances evidence establishing a prima facie case and evidence upon which a factfinder could conclude that the defendant's alleged nondiscriminatory reasons for the employment decisions are pretextual, the case should go to the factfinder.

Bryant v. Farmers Ins. Exchange, 432 F.3d 1114, 1125 (10th Cir. 2005) (quoting *Ingels v. Thiokol Corp.*, 42 F.3d 616, 622 (10th Cir. 1994)). The inference of discrimination permitted by evidence of pretext must be resolved in favor of the plaintiff, and if plaintiff presents a factual dispute regarding the veracity of a defendant's nondiscriminatory reason, the court presumes the jury could infer that the employer acted for a discriminatory reason and must deny summary judgment. *Id.* As a general rule, an employee must proffer evidence that shows each of the employer's justifications is pretextual. *Bryant*, 432 F.3d at 1126. If, however, plaintiff casts substantial doubt on the dominant reason, the jury could reasonably find that the employer lacks credibility. *Id.*

Here, the dominant reason for discharging Plaintiff proffered by Defendants was that he lacked effective management skills to lead the government sales unit. Plaintiff argues that he has presented a fact issue that this reason was false and thus, pretextual. Plaintiff offers evidence of

pretext in three areas: Defendants' inconsistent testimony, Defendants' use of subjective standards for evaluating Plaintiff's performance, and Defendants' ageist comments.

Plaintiff contends that Defendants' inconsistent and contradictory testimony regarding the restructuring and Plaintiff's discharge is evidence of pretext. Plaintiff points to Defendant Macaluso's initial testimony that Plaintiff's employment was not terminated (Macaluso Dep. 18:1-13) and contrasts it with later testimony that Plaintiff's employment was terminated (Macaluso Dep. 20:9-25). Macaluso also testified that he did not know whether Plaintiff was told he was terminated for performance reasons (Macaluso Dep. 23:5-8.), but in the next breath Macaluso testified that Plaintiff's performance did have something to do with Plaintiff's termination (Macaluso Dep. 23:9-14.) Similarly, Defendant Montgomery answered the question of whether "Qwest terminate[d] Mr. Jacobson[]" by stating, "[w]e did a reorganization" (Montgomery Dep. 21:4-6), and when asked again, Defendant Montgomery admitted that Qwest terminated Plaintiff's employment. (Montgomery Dep. 21:7-10.) Defendant Montgomery then explained that during the May 2007 meeting, Plaintiff "gave, very emphatically, the indication that he wanted to get a package and leave." (Montgomery Dep. 21:14-15.) Defendant Montgomery then described the offer of a sales position or a severance package to Plaintiff. (Montgomery Dep. 22:1-25.) Later, Defendant Montgomery admitted that Plaintiff was discharged under the restructuring (Montgomery Dep. 23:16-21.). Defendant Montgomery further testified that Plaintiff was discharged because he lacked management and leadership skills, he did not act strategically, customers of the government sales unit complained and employees in the unit were disgruntled. (Montgomery Dep. 25:19-22; 26:23-25; 27:6-25; 28:23-25; 29:1-16; 27: 6-25; 30:3-21.)

Plaintiff compares this case to *Hare v. Denver Merchandise Mart, Inc.*, 255 Fed. Appx.

198, 305 (10th Cir. 2007). In *Hare*, the Tenth Circuit reversed a grant of summary judgment for defendants concluding that the plaintiff's evidence showing inconsistencies in the employer's explanations for plaintiff's discharge was sufficient to raise a fact issue on pretext. One of the decision makers testified that the plaintiff's discharge had nothing to do with his performance but was due to an elimination of an unnecessary position. *Id.* at 304. Other decision makers, however, testified that the plaintiff was terminated for poor performance, lack of work ethic, and poor attitude. *Id.* The court held that "a reasonable jury could conclude that the inconsistency in these statements are evidence that all of the reasons proffered are merely pretextual." *Id.* at 305. Significantly, the court stated that individual participants in a collective termination decision might provide a variety of reasons for discharging an employee, and the variety of reasons would not alone undermine their credibility. *Id.* A fact issue on pretext arises when the reasons are "mutually inconsistent" or contradictory. *Id.* The court compared the inconsistent explanations against defendants' weak evidence that no discrimination occurred and concluded that plaintiff satisfied his burden of production on pretext. *Id.* at 306.

Plaintiff argues that Defendants' contradictory testimony on whether Plaintiff chose to leave followed by their description of the restructuring and removal of Plaintiff from his position cannot be reconciled with their later assertions that Plaintiff was discharged for poorly managing the government sales unit. Plaintiff also argues that the reasons given by Defendants are contradicted by good evaluations, positive comments by Defendants and other employees, and internal sales statistics. Defendant Montgomery complimented Plaintiff's leadership abilities in e-mails written approximately one year prior to his termination. (Resp. Exs. 7-11, e-mails from early 2006.) Sales statistics from March and April 2007 show that Plaintiff was ranked 44th of 150 sales managers nationwide, while Kim Marona, Plaintiff's replacement, was ranked 111th.

(Resp. Ex. 13.) On May 31, 2007, Plaintiff and three members of the government sales unit were rated in the top 400 in a sales incentive program. (Resp. Ex. 12.) In March 2007, Plaintiff was ranked 33rd of 156 Qwest sales managers nationwide (Resp. Ex. 15), and in April of 2007, three members of Plaintiff's unit were ranked 244 of 943 Qwest sales teams nationwide (Resp. Ex. 14.).

In a performance evaluation, Defendant Macaluso rated Plaintiff's performance in 2006 as "meets expectations." Plaintiff testified that Defendant Macaluso told him in February 2007 that he wanted to rate him as "outstanding," but Defendant Montgomery would not allow this rating. (Jacobson Dep. 84:15–85:10.) Defendant Macaluso testified, however, that Plaintiff's performance did not meet expectations, and that he rated his performance as "meets expectations" because it was the lowest ranking. (Macaluso Dep. 49:6-17.) Plaintiff also points out that he received a merit pay increase in early 2007. Defendant Macaluso testified that every employee received an annual merit increase, and it was not really based on merit. (Macaluso Dep. 50:23 – 51:16.) Defendant Montgomery, however, agreed that the yearly merit increase was reflective of "doing a good job." (Montgomery Dep. 41:4-8.) Plaintiff argues that at the unit meeting in early 2007, Defendants Montgomery and Macaluso, took performance "off the table." Plaintiff attacks Defendants' reason that he was discharged for lack of strategic thinking skills with evidence from a co-worker that his primary strength was strategic thinking. (Vigil-Herrera Dep. 35:4-10.) Plaintiff challenges Defendants' statement that employees in his unit were "disgruntled" with testimony from co-workers that he "held the team together" and was "very cordial and professional with" the unit. (Horne Dep. 13:13-14, Vigil-Herrera Dep. 35:4-8.)

Defendants argue that this case is distinguishable from *Hare* because the testimony by Montgomery and Macaluso is not contradictory. Defendants argue that whether Montgomery

and Macaluso agreed that Plaintiff's employment was "terminated" was a matter of semantics, and both Defendants stated that Plaintiff lacked effective management skills. Defendants further argue that their positive evaluations and comments occurred several months to a year prior to Plaintiff's discharge. But when questioned whether they noticed a sudden downturn in Plaintiff's performance, both answered in the negative. (Montgomery Dep. 40:6-8; Macaluso Dep. 49:6-10.)

Defendants correctly point out that the wisdom of an employment decision is not the issue. "The relevant inquiry is not whether [the employer's] proffered reasons were wise, fair or correct, but whether [the employer] honestly believed those reasons and acted in good faith upon those beliefs." *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1318 (10th Cir. 1999). "An articulated motivating reason is not converted into pretext merely because, with the benefit of hindsight, it turned out to be poor business judgment." *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998). The evidence must present an issue as to whether Defendants honestly believed that the restructuring was necessary and that removal of Plaintiff from management was an effective way to restructure the government sales unit. Defendants are also correct that *Hare* does not stand for the proposition that multiple reasons for an employment decision support a finding of pretext. Defendants contend that Montgomery and Macaluso explained a series of events culminating in the termination of Plaintiff's employment because he lacked management ability.

Plaintiff argues that the elimination of only his position is suspect because it defies reason to assert that an important customer, New Mexico, cancelled a large capital outlay project, the plan to build its own telecommunications facility, just because Qwest reorganized one sales unit and eliminated Plaintiff's position. However, the evidence shows that Kim Marona

took over Plaintiff's management duties raising doubt as to whether his position was eliminated. And, the record shows that Plaintiff's unit was responsible for the New Mexico account making it the logical place to solve problems with that account. Moreover, contrary to Plaintiff's argument that he was singled out, Defendants point to evidence that all of the employees in the government sales unit were affected by the restructuring. Fran Horne, a member of the government sales team, testified concerning the restructuring: "Before we were a team. After [the restructuring], we were vertical. So that means I lost education, lost 911. . . . So it was totally different." (Horne Dep. 29:14-18.)

Defendants' explanations regarding the events surrounding Plaintiff's discharge were somewhat vague. First they said Plaintiff wanted to leave, next that Plaintiff was a victim of restructuring, and then that Plaintiff was terminated for lack of management ability. Defendants' testimony raises doubt as to whether they honestly believed that Plaintiff lacked the management ability to lead the government sales unit.

Plaintiff next argues that Defendants' reasons for removing him from management were subjective and indicative of pretext. *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1218 (10th Cir. 2002) (noting that "[c]ourts view with skepticism subjective evaluation methods . . ."). While the subjective nature of an employee's evaluation may not be sufficient by itself to establish pretext, it is a significant factor to consider. *Green v. Sears, Roebuck & Co.*, 434 F. Supp. 2d 1025, 1034 (D. Colo. 2006). In *Garrett*, Hewlett-Packard's only reason for the employment action was that plaintiff was at the bottom of its employee ranking system. The court found that summary judgment in favor of Hewlett-Packard was not appropriate because the ranking system was "wholly subjective" and subject to manipulation by Hewlett-Packard. *Id.*

Defendants Montgomery and Macaluso have presented some evidence in addition to their

subjective opinions. Defendants testified that they received complaints from government sales unit customers. Defendants point to evidence that Plaintiff failed to respond to customer and internal requests for information. Defendants also testified that the government sales unit experienced increased sales and improved attitude and performance after Plaintiff left. (Montgomery Dep. 52:8-53:2; Macaluso Dep. 60:11-24, 61:2-9.) The subjective criteria by which Defendants judged Plaintiff's management skills, however, is directly refuted by Plaintiff's evidence of positive sales statistics. Although the subjective evaluation of Plaintiff's performance alone may be insufficient evidence of pretext, when added to the inconsistent explanations and age-related comments by both Defendants, the subjective criteria add to the overall factual dispute on pretext.

Age-related comments referring directly to the plaintiff may support an inference of age discrimination. *Cone*, 14 F.3d at 531. Age-related comments are considered evidence of discrimination only when the plaintiff can demonstrate a nexus between the discriminatory statements and the decision to terminate plaintiff's employment. *Id.* The necessary causal nexus may be shown if the allegedly discriminatory comments were directed at the plaintiff. *See, e.g. Barnes v. Foot Locker Retail, Inc.*, 476 F. Supp. 2d 1210, 1215 (D. Kan. 2007) (stating that ageist comment made to plaintiff had the necessary nexus to the challenged employment decision that a reasonable jury could conclude that defendant's stated reason for terminating plaintiff was pretextual).

Plaintiff argues that age-related comments by Defendants Montgomery and Macaluso, the two key persons responsible for his discharge, raise a fact issue on pretext sufficient to support an inference that age was a determinative factor in his discharge. *Cone*, 14 F.3d at 531; *Baucom v. Amtech Systems Corp.*, No. 96-2130, 1997 WL 748668, *3 (10th Cir. Dec. 3, 1997).

In ruling on summary judgment, the Court will assume that Defendants Montgomery and Macaluso made the comments in the contexts asserted by Plaintiff. *Cone*, 14 F.3d at 531.

Defendants argue that the comments proffered by Plaintiff are abstract and ambiguous and that Plaintiff fails to demonstrate a nexus between the discriminatory statements and Defendants' decision to discharge Plaintiff. Defendants point out that Montgomery's comments were made a year or more before Plaintiff was discharged. Defendants further argue that Defendant Macaluso's statements should not be interpreted as discriminatory because one comment was made during Plaintiff's annual performance review, during which future retirement plans can be discussed.

The record shows that Defendant Montgomery's comments were made from 2003 until 2006, the time period in which she was Plaintiff's direct supervisor. On June 26, 2006, after Defendant Montgomery was promoted to Vice President, she said to Plaintiff "Maybe you are losing steam and should consider your future plans." (Mot. Ex. I.) In April 2006, Defendant Macaluso became Plaintiff's supervisor, and he asked about Plaintiff's retirement plans twice in the one-year period during which he supervised Plaintiff. A single age-related comment, even if made by a decisionmaker, may not be "sufficient to infer discriminatory intent." *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1141 (10th Cir. 2000). And, reasonable inquiries into retirement plans are not necessarily indicative of pretext. *Maughan*, 281 Fed. Appx. at 807. However, the record shows that Defendant Montgomery made several comments to Plaintiff about his age. Notably, Defendant Montgomery's comment in June 2006, made when she was a Vice President in charge of government sales, challenged Plaintiff to consider his future plans. Defendant Montgomery's comments were not stray remarks, but were directed at Plaintiff and the June 2006 comment specifically related to Plaintiff's age and employment status. The record shows that in 2006,

Defendants learned of New Mexico's plan and in early 2007 Defendants restructured the government sales unit. A reasonable jury could infer from these comments, particularly the comments made in 2006 and 2007, that Defendants' allegation about Plaintiff's lack of leadership skill was a pretextual reason for discharging him.

In sum, the inconsistent testimony from Defendants Montgomery and Macaluso, the subjective nature of Defendants' evaluations compared with Plaintiff's favorable sales statistics, and Defendants' age-related comments, in combination are enough to raise doubts about the true motivation behind removing Plaintiff from his position. *See Cone*, 14 F.3d at 530 (noting that summary judgment is not ordinarily appropriate for settling issues of intent or motivation). Although this is a close case, summary judgment in favor of Defendants is not appropriate.

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment (Doc. No. 50) is denied.

UNITED STATES SENIOR DISTRICT JUDGE