

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

Equal Employment Opportunity  
Commission,

No. CV-06-1899-PHX-NVW

10

Plaintiff,

**ORDER**

11

vs.

12

13

TIN Inc., a Delaware corporation, dba  
Temple-Inland ,

14

Defendant.

15

16

17

Pending before the court is Defendant TIN’s Motion for Summary Judgment (doc. #110) and Plaintiff’s Motion to Strike and Motion for Leave to File Surreply (doc. #131).

18

19

Defendant’s request for oral argument will be denied because the parties have submitted memoranda thoroughly discussing the law and evidence and the court concludes that oral

20

21

argument will not aid its decisional process. *See Mahon v. Credit Bureau of Placer*

22

*County, Inc.*, 171 F.3d 1197, 1200 (9<sup>th</sup> Cir. 1999). The Plaintiff has not requested oral

23

argument.

24

**I. Plaintiff’s Motion to Strike**

25

LRCiv 56.1(a) requires the moving party to file a separate statement of facts with its summary judgment motion and memorandum of law. LRCiv 56.1(b) requires the

26

27

nonmoving party to file with its responsive memorandum in opposition a separate

28

statement indicating for each paragraph of the moving party’s statement of facts whether

1 the nonmoving party disputes it and any additional facts that establish a genuine issue of  
2 material fact. LRCiv 56.1(d) permits the moving party to file “a reply memorandum.”  
3 The rules do not permit the moving party to file a second statement of facts. This is  
4 consistent with the moving party’s need to show no genuine issue of material fact exists  
5 and that there is no need for a trier of fact to weigh conflicting evidence, assuming the  
6 nonmoving party’s evidence is true. The moving party is permitted to object to the  
7 admissibility of evidence submitted by the nonmoving party, but must present such  
8 objections in its reply memorandum in support of its motion for summary judgment and  
9 not in a separate memorandum. LRCiv 7.2(m)(2).

10 Motions to strike are permitted only in limited circumstances, such as where a  
11 filing or submission is not permitted or authorized by statute, rule, or court order. *See*  
12 LRCiv 7.2(m)(1). Defendant’s response to Plaintiff’s opposing statement of facts and  
13 supplemental appendix, separate from its reply memorandum, are not authorized by the  
14 federal and local court rules, and therefore Plaintiff’s motion to strike is proper.

15 The court will grant Plaintiff’s motion to strike Defendant TIN’s Response to  
16 Plaintiff EEOC’s Statement of Facts in Opposition to Defendant’s Motion for Summary  
17 Judgment (doc. #129) and Defendant TIN’s Supplemental Appendix of Materials in  
18 Support of Its Response to Plaintiff EEOC’s Statement of Facts in Opposition to TIN’s  
19 Motion for Summary Judgment (doc. #130). The court will not consider any portion of  
20 Defendant TIN’s Reply in Support of Its Motion for Summary Judgment (doc. #128) that  
21 cites to or relies on the stricken materials.

## 22 **II. Background**

23 Plaintiff Equal Employment Opportunity Commission (“EEOC”) filed this action  
24 under the Age Discrimination in Employment Act on behalf of a class of five former  
25 employees of Defendant TIN, Inc. d/b/a Temple Inland (“TIN”) who worked at TIN’s  
26 Phoenix, Arizona, plant and whose terminations EEOC asserts were the result of age  
27 discrimination. (Doc. #121, ¶ 1.) The terminations occurred in January 2003, May 2004,  
28 January 2005, January 2006, and February 2006.

1           TIN is a manufacturing company that makes containerboard, a type of heavy  
2 brown paper, which it converts into a complete line of corrugated packaging and specialty  
3 packaging products. (*Id.* at ¶ 3.) TIN operates corrugated packaging plants and  
4 converting plants across the United States and in Mexico. (*Id.*) TIN acquired the  
5 corrugated box plants, including the Phoenix plant, in approximately April 2002. (*Id.* at  
6 ¶ 4.)

7           TIN is organized in regions spanning the United States and parts of Mexico. (*Id.*  
8 at ¶ 7.) When TIN acquired the Phoenix plant, it assigned the plant to TIN's International  
9 Group. (*Id.* at ¶ 8.) At that time, management of the Phoenix plant reported to Birg  
10 Mishurda, Regional Vice President for the International Group. (*Id.* at ¶ 9.) During the  
11 summer of 2002, Mishurda created regions within the International Group and assigned  
12 the Phoenix plant to report to Juan Ramon Garza, who began managing the Pacific  
13 Frontier Region from Phoenix. (*Id.* at ¶¶ 11-12.)

14           In January 2006, TIN moved the Phoenix plant from the International Group to the  
15 Western Plains District within the Western Region. (*Id.* at ¶ 15.) At that time, the  
16 Phoenix plant reported to Larry Siebert, District Manager for the Western Plains District,  
17 who reported to Bruce Grube, Regional Vice President for the Western region. (*Id.* at  
18 ¶¶ 15-16.) After further reorganization in November 2006, the Phoenix plant reported  
19 directly to Grube. (*Id.* at ¶¶ 18-20.)

20           The Phoenix plant was not profitable between 1997 and the time TIN acquired it.  
21 (*Id.* at ¶ 38.) In Mishurda's initial assessment, he concluded that the plant's underlying  
22 problem was the internal inefficiency of manufacturing, which caused sales to be lower  
23 than the plant needed to be profitable. (*Id.* at ¶ 46.) Mishurda also concluded that the  
24 plant had very high costs, very high turnover, and low employee morale. (*Id.*) TIN's  
25 corporate office controlled several factors that affected financial reports of the Phoenix  
26 plant's profitability, such as depreciation of unused equipment, other fixed costs, and the  
27 cost of paper the Phoenix plant obtained from TIN's paper mills. (Doc. #120, ¶¶ 6-13.)  
28

1           **A.     David Neal**

2           David Neal was born on July 31, 1946. (Doc. #121, ¶ 32.) Neal was the General  
3 Manager of the Phoenix plant from June 1997, before TIN's April 2002 acquisition, until  
4 Mishurda (with Garza's input) terminated Neal's employment on January 10, 2003. (*Id.*  
5 at ¶¶ 34, 42, 62, 73.)

6           Following Neal's termination, Garza served as General Manager of the Phoenix  
7 plant. (*Id.* at ¶ 72.) Garza was born on August 19, 1961. (*Id.* at ¶ 11.) At the time of  
8 Neal's termination, Garza was Neal's direct supervisor. (*Id.* at ¶¶ 10-11.) In 2001, Garza  
9 was the interim General Manager of a different plant, which was not profitable during  
10 Garza's interim management. (Doc. #120, ¶ 2.)

11           **B.     Hector Flores**

12           Hector Flores was born on November 3, 1956. (Doc. #121, ¶ 32.) In 2003, Flores  
13 was terminated from a job with a TIN competitor. (*Id.* at ¶ 97.) In September or October  
14 2003, Mishurda hired Flores as a consultant at the Phoenix plant to help process orders  
15 more quickly and to manage plant inventory levels. (*Id.* at ¶¶ 98, 100.) In April or May  
16 2004, Mishurda and Garza moved Flores into the General Manager position. (*Id.* at  
17 ¶ 101.) Shortly after the Phoenix plant began reporting to Siebert and Grube in January  
18 2006, Siebert terminated Flores with Grube's approval on February 22, 2006. (*Id.* at  
19 ¶¶ 113-114.) Neither Mishurda nor Garza was involved in Flores's termination. (*Id.* at  
20 ¶ 124.)

21           After Flores's termination, Martin Monkewicz served as interim General Manager  
22 from March 2006 until October 2006 and then as General Manager after October 2006.  
23 (*Id.* at ¶¶ 131-132, 136.) Monkewicz was born on September 25, 1964. (Doc. #120-2 at  
24 4.) Monkewicz testified that in 2005 Garza said he wanted to groom Monkewicz for a  
25 general manager position. (Doc. #120, ¶ 95.)

26           **C.     Clifton McGraw**

27           Clifton McGraw was born on April 23, 1941. (Doc. #121, ¶ 153.) On November  
28 4, 2002, McGraw was hired as the Production Manager for the Phoenix plant. (*Id.* at

1 ¶ 158.) The Production Manager manages most of the hourly employees at the facility,  
2 facility maintenance, and product production, including creating the product and ensuring  
3 delivery of the product. (*Id.* at ¶ 23.) Both Neal and Mishurda interviewed McGraw  
4 before he was hired, and Mishurda cautioned Neal against hiring McGraw. (*Id.* at ¶¶ 155-  
5 157.) On January 5, 2004, McGraw was transferred to a new Logistics Manager position  
6 that Garza created. (*Id.* at ¶¶ 29, 165.)

7 Garza filled the vacant Production Manager position with Felipe Juarez. (*Id.* at  
8 ¶ 167.) In May 2004, Garza eliminated the Logistics Manager position with Mishurda's  
9 approval. (*Id.* at ¶¶ 31, 175.) Then Juarez and Monkewicz performed the duties  
10 previously assigned to the Logistics Manager. (*Id.* at ¶ 180.) Subsequently, Mishurda  
11 transferred Juarez to a plant in Mexico because he was having a "rough time" as a  
12 production manager in Phoenix and was not getting the results Mishurda had hoped for.  
13 (Doc. #120, ¶¶ 143-144.) Juarez was born on January 18, 1961. (*Id.* at ¶ 140.)

#### 14 **D. John Vanecko**

15 John Vanecko was born on April 24, 1944. (Doc. #121, ¶ 187.) Vanecko began  
16 his employment as the Controller for the Phoenix plant before TIN acquired the plant.  
17 (*Id.*) As the Phoenix plant Controller, Vanecko maintained the finances of the facility.  
18 (*Id.* at ¶ 188.) Garza was not aware of any performance problems of Vanecko. (Doc.  
19 #120-2 at 44.)

20 In approximately February 2003, Garza decided to promote Denise Cervantes to  
21 the position of Regional Controller with an office in Phoenix. (Doc. #121, ¶ 195.) As of  
22 January 20, 2005, the Regional Controller and Phoenix Plant Controller positions were  
23 replaced with a new consolidated position. (Doc. #120, ¶ 162.) Garza made the decision  
24 to hire Cervantes instead of Vanecko for the consolidated Controller position. (*Id.* at  
25 ¶ 167.) He chose Cervantes over Vanecko because he believed Cervantes had knowledge  
26 and expertise, *e.g.*, regarding Mexican tax laws and "the Mexican way of doing business,"  
27 that he thought were necessary for the regional controller part of the job. (Doc. #120-2 at  
28 46.) When Cervantes resigned from the consolidated Controller position near the end of

1 2005, TIN hired a Plant Controller instead of filling the consolidated Controller position.  
2 (Doc. #120, ¶¶ 184-186.) Cervantes was born on June 1, 1968. (Doc. #120, ¶ 160.)

3 **E. Paul Ives**

4 Paul Ives was born on April 6, 1947. (*Id.* at ¶ 192.) Ives was hired as  
5 Maintenance Supervisor for the Phoenix plant in 1993. (Doc. #121, ¶ 220.) His title  
6 later was changed to Maintenance Superintendent although his position and job did not  
7 change. (*Id.* at ¶¶ 221- 222.) On January 10, 2006, Ives was informed his employment  
8 would be terminated. (*Id.* at ¶ 274.) Garza approved Ives' termination. (*Id.* at ¶ 270.)  
9 Mishurda was not involved in the decision to terminate Ives. (*Id.* at ¶ 272.)

10 In May 2006, James Hawley was hired as the Maintenance Superintendent for the  
11 Phoenix plant. (*Id.* at ¶ 279.) TIN terminated Hawley for poor performance on January  
12 2, 2007. (*Id.* at ¶ 281.) Hawley was born on August 26, 1974. (Doc. #120, ¶ 241.)

13 **III. Analysis**

14 **A. Legal Standard for Summary Judgment**

15 The court should grant summary judgment if the evidence shows there is no  
16 genuine issue as to any material fact and the moving party is entitled to judgment as a  
17 matter of law. Fed. R. Civ. P. 56(c). The moving party must produce evidence and  
18 persuade the court there is no genuine issue of material fact. *Nissan Fire & Marine Ins.*  
19 *Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9<sup>th</sup> Cir. 2000). To defeat a motion for  
20 summary judgment, the nonmoving party must show that there are genuine issues of  
21 material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A material fact  
22 is one that might affect the outcome of the suit under the governing law. *Id.* at 248. A  
23 factual issue is genuine “if the evidence is such that a reasonable jury could return a  
24 verdict for the nonmoving party.” *Id.* When the moving party has carried its burden  
25 under rule 56(c), the nonmoving party must produce evidence to support its claim or  
26 defense by more than simply showing “there is some metaphysical doubt as to the  
27 material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
28

1 (1986). Where the record, taken as a whole, could not lead a rational trier of fact to find  
2 for the nonmoving party, there is no genuine issue of material fact for trial. *Id.*

3 In this context, the court presumes the nonmoving party's evidence is true and  
4 draws all inferences from the evidence in the light most favorable to the nonmoving party.  
5 *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1289 (9<sup>th</sup> Cir. 1987). If the  
6 nonmoving party produces direct evidence of a genuine issue of fact, the court does not  
7 weigh such evidence against the moving party's conflicting evidence, but rather submits  
8 the issue to the trier of fact for resolution. *Id.* "[T]he court should give credence to the  
9 evidence favoring the nonmovant as well as that 'evidence supporting the moving party  
10 that is uncontradicted and unimpeached, at least to the extent that that evidence comes  
11 from disinterested witnesses.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S.  
12 133, 151 (2000).

### 13 **B. Legal Standard for ADEA Claims**

14 The Age Discrimination in Employment Act ("ADEA") makes it unlawful to  
15 discharge any individual because of the individual's age. 29 U.S.C. § 623(a)(1).  
16 Liability for disparate treatment based on age depends on whether age "*actually*  
17 motivated" the employer's decision, that is, "the plaintiff's age must have actually played  
18 a role in the employer's decision-making process and had a determinative influence on  
19 the outcome." *Enlow v. Salem-Keizer Yellow Cab Co.*, 389 F.3d 802, 811 (9<sup>th</sup> Cir. 2004)  
20 (internal quotations, alterations, and citations omitted).

21 When an employee alleges disparate treatment based on direct evidence in an  
22 ADEA claim, the court does not apply the burden-shifting analysis set forth in *McDonnell*  
23 *Douglas Corp. v. Green*, 411 U.S. 792 (1973), to determine whether the evidence is  
24 sufficient to defeat a motion for summary judgment. *Enlow*, 389 F.3d at 812 (citing  
25 *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)). "Direct evidence, in  
26 the context of an ADEA claim, is defined as evidence of conduct or statements by persons  
27 involved in the decision-making process that may be viewed as directly reflecting the  
28 alleged discriminatory attitude ... sufficient to permit the fact finder to infer that that

1 attitude was more likely than not a motivating factor in the employer’s decision.” *Enlow*,  
2 389 F.3d at 812 (internal quotations, alterations, and citations omitted).

3 Where an employee must rely on circumstantial evidence, the court evaluates  
4 ADEA claims by using the three-stage burden-shifting framework established in  
5 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Id.*; *Diaz v. Eagle Produce*  
6 *Limited Partnership*, 521 F.3d 1201, 1207 (9<sup>th</sup> Cir. April 4, 2008).<sup>1</sup> *Cf. Schnidrig v.*  
7 *Columbia Machine, Inc.*, 80 F.3d 1406, 1409 (9<sup>th</sup> Cir. 1996) (plaintiff must first establish  
8 *prima facie* case of discrimination, which may be based either on direct evidence of  
9 discriminatory intent or on a presumption arising from factors such as those set forth in  
10 *McDonnell Douglas Corp. v. Green*).

11 At the first stage, the employee must establish a *prima facie* case of discrimination.  
12 *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9<sup>th</sup> Cir. 2000). To establish a *prima*  
13 *facie* case using circumstantial evidence, an employee must show that he: (1) was a  
14 member of the protected class, (2) performed his job satisfactorily, (3) was terminated,  
15 and (4) was replaced by substantially younger employees with equal or inferior  
16 qualifications or, where his job was eliminated,<sup>2</sup> “circumstances giving rise to an  
17 inference of age discrimination.” *Id.* The employee can establish this inference by  
18 showing the employer had a continuing need for his skills and services in that his duties  
19 still were being performed. *Id.*

20 If the employee establishes a *prima facie* case of unlawful age discrimination, the  
21 burden shifts at the second stage to the employer to articulate a legitimate  
22 nondiscriminatory reason for its employment decision. *Id.* If the employer satisfies its

---

23  
24 <sup>1</sup> Disparate treatment claims under the ADEA are analyzed by the same standard used  
25 to analyze disparate treatment claims under Title VII. *Coleman v. Quaker Oats Co.*, 232  
F.3d 1271, 1295 (9<sup>th</sup> Cir. 2000).

26 <sup>2</sup> Where the employee is not replaced because the job is eliminated, the situation is  
27 analogous to a reduction in force, which allows proof of an inference of age discrimination  
28 instead of proof of replacement. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 891 (9<sup>th</sup> Cir. 1994).



1 burden, then at the third stage, the employee must prove that the employer’s alleged  
2 reason for the adverse employment decision constitutes mere pretext for another motive  
3 that is discriminatory. *Id.* Despite the burden shifting, the employee always bears the  
4 ultimate burden of proving the employer intentionally discriminated because of the  
5 employee’s age. *Id.*

6 At the third stage, the employee must do more to establish pretext than establish a  
7 *prima facie* case and deny the credibility of the employer’s witnesses. *Id.* at 1282. At  
8 this stage, the employee may defeat summary judgment by satisfying the usual standard  
9 of proof for summary judgment, *i.e.*, evidence in the record such that a reasonable jury  
10 could find by a preponderance of the evidence the employer’s actions were based on the  
11 employee’s age. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9<sup>th</sup>  
12 Cir. 2006).

13 The employee may establish pretext through direct or circumstantial evidence.  
14 *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9<sup>th</sup> Cir. 1998). The employee can  
15 establish pretext (1) directly, by persuading the court a discriminatory reason more likely  
16 motivated the employer,<sup>3</sup> or (2) indirectly, by showing the employer’s explanation is  
17 unworthy of credence because it is internally inconsistent or otherwise not believable.  
18 *Id.*; *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 849 (9<sup>th</sup> Cir. 2004). In  
19 some cases a combination of direct and indirect evidence may serve to establish pretext.  
20 *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1127 (9<sup>th</sup> Cir. 2000).

21 “Direct evidence is evidence which, if believed, proves the fact [of discriminatory  
22 animus] without inference or presumption.” *Godwin*, 150 F.3d at 1221; *accord Stegall v.*  
23 *Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9<sup>th</sup> Cir. 2004). “When the plaintiff offers  
24 direct evidence of discriminatory motive, a triable issue as to the actual motivation of the  
25

---

26 <sup>3</sup> What is referred to here as “direct” evidence is direct evidence of an employer’s  
27 discriminatory intent or bias from which a jury could infer the employer’s justification is  
28 pretext. It is not direct evidence that the employer’s explanation is false. *Cornwell v. Electra*  
*Cent. Credit Union*, 439 F.3d 1018, 1029 & n.7 (9<sup>th</sup> Cir. 2006).

1 employer is created even if the evidence is not substantial.” *Id.* (both). “The plaintiff is  
2 required to produce ‘very little’ direct evidence of the employer’s discriminatory intent to  
3 move past summary judgment.” *Godwin*, 150 F.3d at 1221; *Chuang*, 225 F.3d at 1128.

4 The Ninth Circuit has stated that when the plaintiff relies on indirect,  
5 circumstantial evidence to show that the employer’s motives were different from its stated  
6 motives, the evidence must be “specific” and “substantial” evidence of pretext to create a  
7 triable issue and survive summary judgment. *Godwin*, 150 F.3d at 1222; *Stegall*, 350  
8 F.3d at 1066. Subsequently, a Ninth Circuit panel interpreted United States Supreme  
9 Court and Ninth Circuit precedent as holding that in the context of summary judgment, a  
10 plaintiff relying on circumstantial evidence is not required “to produce more, or better,  
11 evidence than a plaintiff who relies on direct evidence.” *Cornwell v. Electra Cent. Credit*  
12 *Union*, 439 F.3d 1018, 1030 (9<sup>th</sup> Cir. 2006) (citing *Desert Palace, Inc. v. Costa*, 539 U.S.  
13 90, 100 (2003); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9<sup>th</sup> Cir. 2004)).  
14 More recently, a Ninth Circuit panel observed that the Circuit “has not clearly resolved  
15 this issue,” citing *Cornwell* and *McGinest* as holding circumstantial and direct evidence  
16 should be treated alike, and other post-*Costa* cases, e.g., *Dominguez-Curry v. Nevada*  
17 *Transp. Dep’t*, 424 F.3d 1027, 1038 (9<sup>th</sup> Cir. 2005), that have held a plaintiff’s  
18 circumstantial evidence of pretext must be “specific” and “substantial.”<sup>4</sup>

19 Generally, in an employment discrimination action, the employee need produce  
20 “very little evidence” to overcome an employer’s motion for summary judgment. *Chuang*  
21 *v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1124 (9<sup>th</sup> Cir. 2000); accord *Diaz*, 2008  
22 521 F.3d at 1207. This is because the resolution of the ultimate question requires “a  
23 searching inquiry” that is most appropriately conducted by a fact finder on a full record.  
24 *Chuang*, 225 F.3d at 1124. At trial, the employee must prove both that the employer’s  
25 alleged reason for the employment decision was false and that discrimination was the real  
26

---

27 <sup>4</sup> *Davis* did not need to decide the issue because it found the plaintiff had offered  
28 specific and substantial evidence. *Id.* at 1091.

1 reason, but to survive summary judgment, the employee is not required to provide direct  
2 evidence of discriminatory intent as long as a reasonable fact finder could conclude,  
3 based on the employee's *prima facie* case and the fact finder's disbelief of the employer's  
4 reasons for the decision, that discrimination was the real reason for the employment  
5 decision. *Nidds v. Schindler Corp.*, 113 F.3d 912, 918 n.2 (9<sup>th</sup> Cir. 1997).

6 **C. TIN's Comments Are Not Direct Evidence of Discriminatory Motive.**

7 The EEOC contends numerous statements made by Mishurda and Garza constitute  
8 direct evidence of age discrimination. To avoid the three-stage, burden-shifting  
9 *McDonnell Douglas* analysis, the EEOC must produce evidence of conduct or statements  
10 by persons involved in TIN's termination decisions that directly reflect the alleged  
11 discriminatory attitude sufficient to permit a jury to infer that that attitude was more likely  
12 than not a motivating factor in the employer's decisions. *See Enlow*, 389 F.3d at 812.  
13 "Direct evidence typically consists of clearly sexist, racist, or similarly discriminatory  
14 statements or actions by the employer." *Coghlan v. American Seafoods Co.*, 413 F.3d  
15 1090, 1095 (9<sup>th</sup> Cir. 2005); *accord Dominguez-Curry*, 424 F.3d at 1038. When the  
16 employer's statements do not directly concern the plaintiff employee, some inference is  
17 necessary to establish discrimination with regard to that plaintiff, but "[w]hen the  
18 evidence establishes the employer's animus toward the class to which the plaintiff  
19 belongs, the inference to the fact of discrimination against the plaintiff is sufficiently  
20 small that [the court has] treated the evidence as direct." *Coghlan*, 413 F.3d at 1095 n.6.  
21 But "stray remarks"—isolated discriminatory comments unrelated to the decision-making  
22 process—are insufficient to establish discrimination. *Merrick v. Farmers Ins. Group*, 892  
23 F.2d 1434, 1438 (9<sup>th</sup> Cir. 1990).

24 For example, on three separate occasions telling an employee seeking a promotion  
25 that the Board wanted somebody younger for the job was considered direct evidence of  
26 discriminatory motive whereas choosing to promote a younger candidate over an older  
27 one because he was "a bright, intelligent, knowledgeable young man" was not. *Compare*  
28 *Schnidrig*, 80 F.3d at 1411 (summary judgment for employer inappropriate), with *Merrick*

1 *v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9<sup>th</sup> Cir. 1990) (summary judgment for  
2 employer appropriate). A decisionmaker's statements, connected to a discharge, that an  
3 employee was "old and burnt out," "too old to change," "old geezer," and "old fart," and  
4 the employee "did not fit the [company] mold of a young, aggressive type manager like  
5 they had in most other management positions" served as evidence of the fact the  
6 employee was discharged because of his age. *EEOC v. Pape Lift, Inc.*, 115 F.3d 676,  
7 679, 684 (9<sup>th</sup> Cir. 1997). A decisionmaker's statements that the employee "was so old  
8 [he] must have come over on the Mayflower" and he "was too damn old to do [his] job,"  
9 which were not made in the direct context of the employee's termination, were considered  
10 "additional evidence of age-based animus." *Reeves v. Sanderson Plumbing Prods., Inc.*,  
11 530 U.S. 133, 151-53 (2000). A supervisor's statement that "he intended to get rid of all  
12 the 'old timers' because they would not 'kiss my ass,'" and a supervisor's statement that  
13 "[w]e don't necessarily like grey hair," which were not tied directly to the employment  
14 decisions, were held to be "at best weak circumstantial evidence" and "not enough to  
15 create an inference of age discrimination." *Nidds v. Schindler Elevator Corp.*, 113 F.3d  
16 912,915, 918-19 (9<sup>th</sup> Cir. 1997); *Nesbit v. Pepsico*, 994 F.2d 703, 705 (9<sup>th</sup> Cir. 1993).

17 Here, the EEOC concedes the comments it alleges to be direct evidence of  
18 discriminatory motivation were not directed at any of the class members or related to their  
19 terminations. (*See* doc. ##110 at 13-14, 119 at 6-7.) It further concedes that the  
20 comments were made only by Mishurda, who was responsible for terminating Neal, and  
21 Garza, who terminated Ives and was responsible for consolidating positions and then  
22 eliminating McGraw's and Vanecko's positions. (Doc. #119 at 3-6.) None of the  
23 allegedly discriminatory remarks were made by Siebert, who terminated Flores, or Grube,  
24 who approved Flores's termination, and the EEOC did not dispute TIN's statement that  
25 neither Mishurda nor Garza was involved in Flores's termination. (Doc. ##119 at 3-4,  
26 121, ¶ 124.)

27 The EEOC summarizes Mishurda's comments as showing "Mishurda connected  
28 age with energy, health, vitality, and creativity." (Doc. #120, ¶ 15.) Neal testified that

1 Mishurda was concerned about employees who “retired on the job,” and lacked energy,  
2 creativity, and “that young thinking sort of mentality.” (Doc. #120-2 at 238, 242.) Neal  
3 described his first meeting with Mishurda in 2002:

4 And in the course of the conversation, as we talked about the profile of my  
5 team and I went through each member of the team and explained their  
6 background, their experience, their longevity with the company, pluses and  
minuses of their performance, he was very inquisitive about their health, their  
well being, their age.

7 Q. He asked their age?

8 A. Yes.

9 Q. He asked what each of their dates of birth was?

10 A. No.

11 Q. What did he say exactly?

12 A. “How old are these people?”

13 Q. Go ahead.

14 A. And so we described and went over the direct reports.

15 Q. Did you tell him what their ages were?

16 A. I did not know their ages. I just said approximately 50, 60, 40,  
whatever they were.

17 And then we went on and we talked about vitality and the new ideas,  
18 and that’s where these, the new blood and the dream team came []. And he  
19 told me about his dream team and he told me about examples of the dream  
20 team. An example was ... one of the young guys that turned around a plant in  
21 Imperial Valley, and how he had come in and with all this energy and all these  
22 new ideas and turned this plant around in a heartbeat and how proud he was  
23 of these young lions and tigers that were out there.

24 (Doc. #112-5 at 26, Neal Tr. 184:8-185:10.)

25 Neal also testified that Mishurda vetoed hiring “an ideal candidate in his 50s” for  
26 the Production Manager position because Mishurda was “obsessed with people retiring on  
27 the job and age and energy,” but Mishurda did not veto hiring 61-year-old McGraw for  
28 that position. (*Id.* at 29-30, Neal Tr. 217:12-219:19.) Mishurda only cautioned Neal  
against hiring McGraw, saying, “You seem to have a tendency to hire older people,” and  
“that it appeared to him that he might have a tendency to retire on the job, that he might  
have a tendency not to have the energy, as a production manager’s position was a very  
fast moving, energetic kind of position.” (*Id.* at 23, Neal Tr. 140:22-141:6.)

29 Alex Salomon, a TIN employee assigned to the Monterey, Mexico facility and  
30 later the Imperial Valley, California facility, testified that over the years 1996-2002 he  
31 heard Mishurda refer to others as “old,” “old school,” “old fashioned,” “old guard,” and  
32 “not energetic,” while referring to Salomon as “energetic” and “youthful.” (Doc. #120,

1 ¶¶ 27-40.) Salomon said Mishurda referred to his “roster of champions” as “young  
2 blood” and “young breed” and said the business needed “young,” “fresh,” and “energetic”  
3 people and “motivated blood.” (*Id.*) Mishurda told Salomon “older people should move  
4 on and learn new tricks.” (*Id.* at ¶ 39.) Salomon further testified that during a telephone  
5 conversation with Mishurda in June 2002, Mishurda said “we are replacing older  
6 employees” “referring to the change of team or the change of personnel at the Imperial  
7 Valley level” in the context of referring to “replacing older ways of doing business with  
8 his roster of champions,” “young blood,” and “young breed.” (*Id.* at ¶ 33, doc. #120-2 at  
9 321-22, 325-26, Salomon Tr. 197:17-198:25, 202:16-203:1.) Salomon also testified that  
10 Mishurda referred to the business as a “young man’s game,” which Salomon interpreted  
11 as meaning he would need “[y]outh, energy, new mind, modernism” to do his next  
12 assignment properly because the Imperial Valley management group was “old,” an “old  
13 way of doing business,” and “was not performing.” (Doc. #120-2 at 342-43, Salomon Tr.  
14 236:24-237:21.) Salomon said these comments were “part of the pep talk” to motivate  
15 him for his new assignment. (*Id.*)

16 In June 2002, when Mishurda interviewed a 51-year-old candidate for the Sales  
17 Manager position at the Phoenix facility with Garza and Neal, Mishurda openly discussed  
18 the “pros and cons” of hiring an “older” sales manager. (Doc. #120, ¶ 41.) Mishurda said  
19 something like, “Basically what we need to decide is when we’re looking at someone  
20 older like yourself is that you obviously have the experience, but compared to a young  
21 guy, would you be willing to go out into that hot Phoenix sun, climb the stairs and make  
22 the sales calls with your sales rep? A young guy would be hungry and maybe have more  
23 energy.” (*Id.*) Mishurda asked the candidate, “[I]t’s hot out there, do you really want to  
24 go back to pounding the bricks? It’s a young man’s job.” (*Id.*) Mishurda subsequently  
25 told Neal not to hire the candidate because Mishurda “was concerned that he didn’t have  
26 the energy, he was concerned that he would retire on the job, he was concerned that he  
27 wouldn’t go back and play the young man’s game.” (*Id.* at ¶ 42.) Mishurda also told  
28

1 Flores he had terminated the general manager of another plant because he had “retired on  
2 the job.” (*Id.* at ¶ 26.)

3 Garza questioned whether a California sales broker in his 70’s had the physical  
4 ability to do his job. (*Id.* at ¶ 43.) Garza and Mishurda talked about a sales manager  
5 getting on in age, retiring on the job, lacking energy, being overweight, golfing, and  
6 drinking. (*Id.* at ¶¶ 44-45.) Garza referred to the sales manager as “perro viejo,” meaning  
7 “old dog,” and said “an old dog does not learn new tricks.” (*Id.* at ¶¶ 49-51.) Garza also  
8 said the Phoenix plant was “lacking juice,” was being run slowly and inefficiently, and  
9 needed “young people with push.” (*Id.* at ¶¶ 49, 51-52.)

10 When Garza asked Flores if he was sure that he wanted to hire Bill Childress as  
11 Production Manager, he mentioned that he had seen Childress falling asleep during  
12 meetings, which Flores interpreted as meaning that Childress did not have energy to last  
13 all day because he was an older guy. (*Id.* at ¶ 55; Doc. #120-2 at 277-278, Flores Tr.  
14 65:15-66:9.) Nevertheless, Flores hired Childress as production manager, and Garza,  
15 who was Flores’s boss at the time, did not prevent the hiring. (Doc. #120-2 at 278, Flores  
16 Tr. 66:12-23.)

17 In 2004 or 2005, Daniel Garcia, the Human Resources Manager for the  
18 International Division in Mexico, came to the Phoenix plant for about a week, conducted  
19 a study, and presented the results of his study to help the Phoenix plant with absenteeism  
20 and turnover. (Doc. #120, ¶¶ 57-58.) During his presentation, Garcia suggested that  
21 employees in certain age groups have more or less turnover, but neither Flores nor the  
22 Human Resources Manager for the Phoenix plant could remember which age group  
23 Garcia said had the greatest turnover. (*Id.* at ¶ 59.)

24 Accepting the EEOC’s evidence as true and drawing all inferences in the EEOC’s  
25 favor, Mishurda’s and Garza’s comments do not establish Mishurda or Garza had animus  
26 toward people over the age of 40 years old from which it may be inferred that age-based  
27 animus was more likely than not a motivating factor in the terminations of Neal, Flores,  
28 McGraw, Vanecko, or Ives. The evidence shows that Mishurda, and perhaps also Garza,

1 were concerned that older employees may not perform as well as younger employees in  
2 positions requiring physical endurance and energy, may not be willing to adopt new  
3 strategies, and may prefer a job that permits them to collect a paycheck without  
4 continuing to work as hard as before, *i.e.*, “retire on the job.” But the evidence does not  
5 establish that Mishurda or Garza assumed those characteristics applied to all older  
6 workers—in fact, their cautiousness did not prevent TIN from hiring 61-year-old  
7 McGraw or Childress. Moreover, when Mishurda said “we are replacing older  
8 employees,” he was not referring to terminations at the Phoenix plant, but rather to the  
9 change of personnel at the Imperial Valley plant, and there is no evidence connecting that  
10 comment to the terminations of Neal, Flores, McGraw, Vanecko, or Ives.

11 Therefore, the allegedly discriminatory statements submitted by the EEOC do not  
12 constitute direct evidence that TIN had a discriminatory motive in the terminations of  
13 Neal, Flores, McGraw, Vanecko, or Ives. They are instead circumstantial evidence the  
14 court will consider in determining whether the EEOC has met its burden in proving TIN’s  
15 justification for the terminations is pretextual.

16 **D. Stage I of *McDonnell-Douglas* Analysis: The EEOC Has Established a**  
17 ***Prima Facie* Case of Discrimination for Four of the Five Former**  
18 **Employees.**

19 The requisite degree of proof necessary to establish a *prima facie* case of  
20 discrimination for “claims on summary judgment is minimal and does not even need to  
21 rise to the level of a preponderance of the evidence.” *Davis v. Team Elec. Co.*, 520 F.3d  
22 1080, 1089 (9<sup>th</sup> Cir. 2008). Based on the facts described above, most of which are  
23 undisputed, the EEOC has clearly shown three of the four elements of a *prima facie* case  
24 for each of the five class members. Each was terminated, at least forty years old at the  
25 time of termination, and replaced by a substantially younger employee with equal or  
26 inferior qualifications. Where the positions were eliminated, the terminated employee’s  
27 duties were assigned to a substantially younger employee with equal or inferior  
28 qualifications. The fourth element, whether the class members performed their jobs  
satisfactorily, requires closer analysis.



1                   **1. David Neal**

2                   Mishurda, with Garza’s input, terminated 56-year-old Neal and assigned Neal’s  
3 General Manager responsibilities to 41-year-old Garza, who had previously served as  
4 interim General Manager of a different plant, which also was not profitable. In Garza’s  
5 opinion, Neal “was not going to be a good General Manager for the Phoenix plant given  
6 the situation we were in.” (Doc. #121, ¶ 57.) In Mishurda’s opinion, Neal was not  
7 capable of improving the performance of the Phoenix plant as quickly as TIN wanted the  
8 performance improved. (*Id.* at ¶ 59.) Mishurda said he also based his decision to  
9 terminate Neal on his perception that Neal did not appear to accept Garza as his manager  
10 and his belief that Neal was focused more on receiving compensation under a severance  
11 agreement than on plant business. (*Id.* at ¶ 63.)

12                   Mirshurda and Garza communicated to Neal their concerns about the Phoenix  
13 plant’s profitability and had discussions with Neal regarding a plan to move the plant  
14 toward profitability. (Doc. #120-2 at 209-210.) But Neal never had a formal  
15 performance review that focused on plant profitability, and Mirshurda and Garza gave  
16 him positive feedback regarding the business plan and how he was doing. (*Id.* at 210-  
17 211.) Neal never was informed that his job was in jeopardy because the plant was not  
18 profitable enough. (*Id.* at 258, ¶ 16.) Thus, presuming the EEOC’s evidence to be true  
19 and because the requisite degree of proof is minimal, the court concludes the EEOC has  
20 established that Neal performed his job satisfactorily.

21                   The EEOC, therefore, has established a *prima facie* case of unlawful age  
22 discrimination with respect to Neal.

23                   **2. Hector Flores**

24                   After slightly less than two years as General Manager, 49-year-old Flores was  
25 terminated and replaced by 41-year-old Monkewicz, who did not have experience as a  
26 General Manager. The Phoenix plant moved toward profitability during part of Flores’s  
27 management. (Doc. #120, ¶ 87.) In 2005, the Phoenix plant’s profitability regressed, due  
28 to multiple factors, including market conditions, corporate decisions regarding paper

1 pricing, and increases in energy, wax, and labor costs. (*Id.* at ¶¶ 113-118.) Reduction in  
2 productivity caused by decisions made by Mishurda, Garza, and Juarez also adversely  
3 affected profitability of the Phoenix plant. (*Id.* at ¶¶ 119-22.) Flores believes the Phoenix  
4 plant's equipment was in severe disrepair, which resulted in excessive downtime. (Doc.  
5 #121, ¶ 111.)

6 Flores never received an annual performance review. (*Id.* at ¶ 109.) The only  
7 performance feedback he received consisted of his merit bonus and his merit increase in  
8 pay. (*Id.*) Based on this feedback, Flores believed TIN was satisfied with his  
9 performance as General Manager. (*Id.* at ¶ 110.) Thus, presuming the EEOC's evidence  
10 to be true and because the requisite degree of proof is minimal, the court concludes the  
11 EEOC has established that Flores performed his job satisfactorily.

12 The EEOC, therefore, has established a *prima facie* case of unlawful age  
13 discrimination with respect to Flores.

### 14 **3. Clifton McGraw**

15 Although Mishurda cautioned Neal not to hire McGraw as Production Manager,  
16 Neal did so when McGraw was 61 years old. Two months later Neal was terminated.  
17 Fourteen months after McGraw was hired, Garza transferred 62-year-old McGraw to a  
18 newly created Logistics Manager position, which Garza eliminated four months later.  
19 Juarez, then 43 years old, and Monkewicz, then 46 years old, shared what had been  
20 McGraw's duties under both positions. Juarez subsequently was transferred to a plant in  
21 Mexico because he was not performing successfully at the Phoenix plant.

22 McGraw's transfer to Logistics Manager was considered a demotion. (Doc. #120,  
23 ¶ 139.) However, the EEOC has not alleged that McGraw was wrongfully demoted from  
24 the Production Manager position, only that McGraw was wrongfully terminated from the  
25 Logistics Manager position. (Doc. #1, 121, ¶¶ 160-162.) As Logistics Manager,  
26 McGraw was held responsible for areas such as customer service returns and allowances  
27 and shipping department overtime even though he did not have power to change those  
28 areas and did not manage the people who could change those areas. (Doc. #120, ¶ 145.)

1 McGraw served as Logistics Manager for just over four months. (*Id.* at ¶ 148.) McGraw  
2 never received any negative performance reviews during his employment with TIN.  
3 (Doc. #120, ¶ 133.) Thus, presuming the EEOC's evidence to be true and because the  
4 requisite degree of proof is minimal, the court concludes the EEOC has established that  
5 McGraw performed his job satisfactorily.

6 The EEOC, therefore, has established a *prima facie* case of unlawful age  
7 discrimination with respect to McGraw.

#### 8 **4. John Vanecko**

9 Garza promoted Cervantes to the position of Regional Controller and then replaced  
10 both the Regional Controller and the Plant Controller positions with a consolidated  
11 position. By choosing 36-year-old Cervantes over 60-year-old Vanecko for the  
12 consolidated position, Garza terminated Vanecko's employment. Less than a year later,  
13 Cervantes resigned.

14 Although Garza made the decision to terminate Vanecko, Garza testified he had  
15 observed Vanecko's performance as a controller and was not aware that Vanecko had any  
16 performance problems. (Doc. #120-2 at 44.) Thus, presuming the EEOC's evidence to  
17 be true and because the requisite degree of proof is minimal, the court concludes the  
18 EEOC has established that Vanecko performed his job satisfactorily.

19 The EEOC, therefore, has established a *prima facie* case of unlawful age  
20 discrimination with respect to Vanecko.

#### 21 **5. Paul Ives**

22 Ives was 58 years old when he was informed his employment as Maintenance  
23 Superintendent would be terminated. A few months later, he was replaced by 31-year-old  
24 Hawley, who was subsequently terminated for poor performance.

25 Ives was responsible for the maintenance of all the equipment at the Phoenix plant,  
26 and the Production Manager shared responsibility for ensuring that preventive  
27 maintenance was performed. (Doc. #121, ¶ 224.) Ives was responsible for equipment  
28 maintenance at the Phoenix plant from approximately 1993 to January 2006. (Doc. #120,

1 ¶ 193.) Class member McGraw was the Production Manager from November 2002 until  
2 January 2004, and McGraw said he did not have any problems with Ives' performance.  
3 (Doc. ##121, ¶¶ 158, 165; 120-2 at 392.) But, according to class member Flores, Ives  
4 was "part of many management teams that ran that plant for many years," and those  
5 management teams, including Ives, were responsible for "excessive downtime ... caused  
6 by years of undermaintenance of the equipment." (Doc. #120-2 at 269.)

7 When Juarez was Production Manager, Juarez reported to Flores that Ives needed  
8 to improve his performance. (*Id.* at 292.) Although Juarez wanted to replace Ives, Juarez  
9 had not documented that Ives did not have good performance, and Juarez had not  
10 prepared a plan to give Ives opportunity to improve his performance. (*Id.*)

11 Rick Sullivan visited the Phoenix plant in December 2005 for the purpose of  
12 analyzing maintenance reliability and efficacy of plants that "could not seem to get their  
13 maintenance in order" or had excessive maintenance costs. (Doc. #121, ¶ 261.) Sullivan  
14 analyzed the plant from planning to maintenance and reported his recommendations. (*Id.*  
15 at ¶ 262.) Sullivan's report stated, "The facility is in major disrepair and the Maintenance  
16 Department needs some firm and fair leadership in order for the plant to turn around."  
17 (Doc. #112-6 at 23.) The report further stated, "There is obvious years of negligence in  
18 this facility that is crippling its ability to compete effectively in the marketplace," and  
19 "My immediate recommendations are to replace the Maintenance Manager," referring to  
20 Ives. (*Id.*) Flores agreed with those statements and recommendation. (*Id.*) Flores also  
21 said he had "misgivings about Mr. Ives's ability to help us turn the plant around." (*Id.*)

22 There is evidence that equipment downtime affected profitability only if the  
23 machine was needed at the time, Ives had to reschedule preventive maintenance on a daily  
24 basis to avoid delaying customer orders, the Production Manager shared responsibility  
25 with Ives for ensuring preventive maintenance was performed, and when preventive  
26 maintenance is not performed as scheduled, it increases the risk of a potential breakdown.  
27 But there is no affirmative evidence that Ives performed his job satisfactorily—just that  
28

1 others shared the blame with him for the “major disrepair” of the facility and its  
2 equipment.

3 Thus, even presuming the EEOC’s evidence to be true, the court concludes the  
4 EEOC has not produced the minimal degree of proof required to establish Ives’  
5 satisfactory performance. Because the EEOC has failed to establish a *prima facie* case of  
6 discrimination regarding Ives’ termination, the court does not complete the remainder of  
7 the *McDonnell Douglas* analysis with respect to Ives.

8 **D. Stage II of *McDonnell-Douglas* Analysis: TIN Has Articulated**  
9 **Legitimate Nondiscriminatory Reasons for Terminating The**  
**Employees.**

10 TIN has articulated the following reasons for its employment decisions regarding  
11 Neal, Flores, McGraw, and Vanecko:

12 **1. David Neal**

13 TIN asserts it terminated Neal as General Manager because he was responsible for  
14 all aspects of the Phoenix plant, the Phoenix plant was not profitable after six years of  
15 Neal’s management, and Neal was not meeting TIN’s legitimate expectations. (Doc.  
16 #110 at 5-6.) TIN further asserts that Mishurda believed in good faith that Neal (1) could  
17 not improve the Phoenix plant’s performance as quickly as TIN wanted it improved, (2)  
18 was not focused on the plant’s business, and (3) did not appear to accept Garza as his  
19 manager. (*Id.* at 9.)

20 **2. Hector Flores**

21 TIN asserts it terminated Flores as General Manager based on Siebert’s assessment  
22 of the Phoenix plant’s financial performance under Flores, the plant’s physical condition,  
23 Siebert’s opinion that Flores was not effectively leading the plant, and Siebert’s lack of  
24 confidence that Flores could work to achieve TIN’s goals for the plant given Flores’s past  
25 performance. (*Id.* at 10.)

1                                   **3.     Clifton McGraw**

2                   TIN asserts it eliminated the Logistics Manager position, which McGraw held,  
3 because Garza believed the position was not adding value and eliminating it would reduce  
4 the Phoenix plant's excessive fixed costs. (*Id.* at 10-11.)

5                                   **4.     John Vanecko**

6                   TIN asserts Garza consolidated the Plant Controller position held by Vanecko and  
7 Regional Controller position held by Cervantes to reduce the Phoenix plant's fixed costs  
8 and that Cervantes was qualified to perform both jobs whereas Vanecko was not.

9                   Although the EEOC disputes the methods TIN used to determine that the Phoenix  
10 plant was not profitable and what factors contributed to the plant's profitability, the  
11 undisputed evidence shows that TIN management had concerns regarding the Phoenix  
12 plant's profitability and fixed costs. (Doc. #120, ¶¶ 6-12, 77-78, 86-88, 97, 116-120, 206,  
13 232-234; doc. #121, ¶¶ 45-46, 55-56, 93, 103-111, 146, 190.) It also is undisputed that  
14 TIN acquired the Phoenix plant in April 2002 and changed the Phoenix plant's position in  
15 the corporate structure during the summer of 2002, in January 2006, and in November  
16 2006. (Doc. #121, ¶¶ 4, 8, 10-11, 15, 19.) Further, the parties agree that eliminating jobs  
17 is one way to reduce costs. (*Id.* at ¶ 194.) Therefore, TIN has articulated legitimate,  
18 nondiscriminatory reasons for its employment decisions regarding Neal, Flores, McGraw,  
19 and Vanecko, and the presumption of discrimination created by the *prima facie* cases  
20 disappears. *See Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889, 892 (9<sup>th</sup> Cir. 1994).

21                   **E.     Stage III of McDonnell-Douglas Analysis: A Reasonable Jury Could**  
22                   **Not Conclude by a Preponderance of the Evidence that TIN**  
23                   **Terminated Neal, Flores, McGraw, and Vanecko Because of Their Age.**

24                   At the third stage, the EEOC must produce enough evidence that a reasonable jury  
25 could conclude by a preponderance of the evidence that TIN terminated the employment  
26 of Neal, Flores, McGraw, and Vanecko because of their age. The EEOC has offered (1)  
27 purported evidence that TIN's explanations for the terminations are not credible and (2)  
28 evidence of comments it argues demonstrate age-based bias and give rise to an inference  
TIN had a discriminatory motive when it terminated these employees .

1           In *Pottenger v. Potlatch Corp.*, 329 F.3d 740 (9<sup>th</sup> Cir. 2003), the Ninth Circuit held  
2 a former employee failed to create a genuine factual issue of pretext and affirmed  
3 summary judgment for the employer in circumstances similar to those here. In *Pottenger*,  
4 a former divisional vice president made a *prima facie* case of age discrimination: he was  
5 60 years old, his most recent performance review indicated he was meeting job  
6 requirements, he was discharged, and he was replaced by a 43-year-old employee with  
7 equal or inferior qualifications. *Id.* at 745-46. The employer articulated a legitimate,  
8 nondiscriminatory reason for terminating the employee: “a lack of confidence that [the  
9 vice president] could make the hard decisions necessary to turn around the ailing []  
10 Division, which he headed.” *Id.* at 746. The appellate court explained that at the  
11 summary judgment stage, the employee’s burden is “not high” because “[h]e must only  
12 show that a rational trier of fact could, on all the evidence, find that [the employer’s]  
13 explanation was pretextual and that therefore its action was taken for impermissibly  
14 discriminatory reasons.” *Id.* To show the employer’s explanation was unworthy of  
15 credence, the former vice president argued that his performance review included positive  
16 comments, the employer’s justifications for his dismissal were shifting, and the company  
17 did not follow a formal discharge procedure. *Id.* The employer’s justification for the  
18 termination, however, was not that the former vice president was incompetent or a bad  
19 employee, but rather the employer lacked confidence that the vice president could help  
20 turn the company around. *Id.* The justification was consistent with the performance  
21 review and had not shifted. *Id.* Further, there was little evidence the company had an  
22 established procedure for discharging high-level employees, and, therefore, failing to  
23 follow some unspecified procedure did not cast any doubt on the employer’s justification.  
24 *Id.* at 746-47.

25           The former vice president also attempted to prove discriminatory motive for his  
26 termination through evidence that his supervisor, the company president, made comments  
27 referring to an “old management team,” an “old business model,” and “deadwood.” *Id.* at  
28 747. The appellate court found these remarks, in the context of that case, did not support

1 an inference of age discrimination and, therefore, did not create a triable issue of material  
2 fact that would defeat summary judgment. *Id.* After considering all of the former vice  
3 president’s evidence of pretext, the court concluded that it did not refute the employer’s  
4 basic rationale for the termination, *i.e.*, the division was losing money and the company  
5 lacked faith that this individual was the one to turn the division around. *Id.* at 748. The  
6 court explained that the company “has leeway to make subjective business decisions,  
7 even bad ones,” and although it may have been unfair and perhaps unwise to blame the  
8 former vice president for the division’s losses, “it is not surprising that [the company’s]  
9 bosses would try to make a change in leadership in a division that was having such  
10 consistent trouble.” *Id.* at 748-49. Thus, even though the employee’s evidentiary burden  
11 was “not high,” the appellate court held he had not created a genuine factual issue of  
12 pretext and affirmed the summary judgment. *Id.* at 749.

13 **1. The EEOC Has Not Established that TIN’s Justification for Its**  
14 **Employment Decisions Is Unworthy of Credence.**

15 The EEOC argues that TIN’s justifications for the terminations are not credible  
16 because shifting and inconsistent reasons suggest the “official reasons” are not the “true  
17 reasons” and, thus, are evidence of pretext. (Doc. #119 at 14.) The EEOC contends that  
18 TIN now is attempting to justify the terminations as based on the employees’ poor  
19 performance, but no evidence was prepared contemporaneously with the terminations to  
20 show that the class members were terminated for performance reasons. (*Id.*) Although  
21 the Ninth Circuit has held “fundamentally different qualifications for an employer’s  
22 action ... give rise to a genuine issue of fact with respect to pretext,” the EEOC has not  
23 identified *fundamentally different* explanations made by TIN for any of the class  
24 members. *See Pottenger*, 329 F.3d at 746. It is true that TIN argues here that the  
25 terminated employees had poor performance, but that is to show the EEOC cannot  
26 establish a *prima facie* case of discrimination in Stage I because it cannot prove each  
27 class member performed his job satisfactorily. That does not mean TIN has abandoned its  
28 previously articulated explanations for the terminations. The EEOC has not shown that



1 TIN has fundamentally shifted its justifications to the extent the court should infer they  
2 are not credible.

3 Moreover, the EEOC has not demonstrated that TIN's explanations are internally  
4 inconsistent or otherwise not believable:

5 **Neal and Flores.** The EEOC argues that because the Phoenix plant lost money for  
6 years before and after TIN acquired it, plant profitability must not have been the real  
7 reason for terminating these General Managers. The EEOC also argues that neither  
8 General Manager was terminated "for cause," and that Mishurda and Garza made  
9 decisions that affected plant profitability and deprived Flores of the autonomy given to  
10 other General Managers. Mishurda and Garza hired Flores and they were not involved in  
11 his termination. Further, there is no evidence they influenced Siebert and Grube to  
12 terminate Flores shortly after responsibility for the Phoenix plant was reassigned. As in  
13 *Pottenger*, TIN "has leeway to make subjective business decisions, even bad ones," and it  
14 is not surprising that shortly after acquiring the unprofitable Phoenix plant and again  
15 shortly after reorganizing supervision over the plant, TIN would change plant  
16 management.

17 **McGraw.** Garza created the Logistics Manager position, which existed at other  
18 plants, and four months later eliminated the position at the Phoenix plant. TIN contends  
19 it eliminated the position to reduce fixed costs and if Garza had wanted to terminate  
20 McGraw because of his age, he could have done so instead of transferring him to the  
21 Logistics Manager position. Moreover, when Garza took over Neal's General Manager  
22 job, McGraw was 61 years old and had been Production Manager for less than 90 days.  
23 Garza easily could have terminated McGraw at that point if he was motivated by age-  
24 based animus. The fact that at one point TIN incorrectly stated McGraw's reason for  
25 leaving was that he had chosen voluntary early retirement is not sufficient to create an  
26 inference that cost reduction was not the real reason for eliminating the Logistics  
27 Manager position.

28

1           **Vanecko.** Because the regional controller’s office was located at the Phoenix  
2 facility, TIN consolidated the Regional Controller and Plant Controller positions to  
3 reduce the Phoenix plant’s fixed costs. Such consolidation would not have been possible  
4 at other plants where a regional controller did not have an office. Garza chose to fill the  
5 consolidated position with the person holding the regional position instead of the one  
6 holding the plant position because the consolidated position required skills needed for  
7 both positions. Garza’s opinion that the person holding the consolidated position should  
8 speak Spanish and understand Mexican tax law is not unbelievable where the  
9 consolidated position included responsibilities for a plant in Mexico, even if the  
10 controllers did not prepare income tax filings.

11                           **2. The EEOC Has Not Produced Credible Evidence That a**  
12                           **Discriminatory Reason More Likely Motivated TIN to**  
13                           **Terminate Neal, Flores, McGraw, and Vanecko.**

14           Mishurda’s and Garza’s comments that the EEOC contends show age-based  
15 animus are insufficient to conclude that a discriminatory reason more likely motivated  
16 TIN to terminate Neal, Flores, McGraw, and Vanecko than did TIN’s explanations for the  
17 terminations. Mishurda may have “connected age with energy, health, vitality, and  
18 creativity,” and Garza may have been concerned about whether older applicants had the  
19 physical ability or endurance to handle certain jobs, but their comments do not suggest  
20 that Mishurda and Garza made employment decisions based on stereotypes about age  
21 instead of evaluating each applicant’s or employee’s actual abilities. Questioning  
22 whether an experienced sales manager is willing and able to climb stairs in the Phoenix  
23 summer heat, wondering whether a sales manager in his 70’s is actively pursuing new  
24 customers, and expressing concerns about an overweight sales manager spending too  
25 much time drinking, golfing, and possibly coasting into retirement while still on the  
26 payroll may be legitimate business concerns. Despite their questions and concerns,  
27 however, the evidence shows Mishurda and Garza hired older employees, and they  
28 replaced Neal, Flores, and McGraw with employees who were more than 40 years old.

1           Thus, a company’s preference for “energetic,” “fresh,” and “youthful,” rather than  
2 “old school” and “old fashioned,” does not necessarily reflect age-based animus or  
3 provide credible evidence that a discriminatory reason motivated TIN to terminate Neal,  
4 Flores, McGraw, and Vanecko.

5 **IV. Conclusion**

6           The EEOC has not provided direct evidence that the terminations of Neal, Flores,  
7 McGraw, Vanecko, and Ives were motivated by age-based animus. The EEOC has  
8 established a *prima facie* case of age discrimination for the terminations of Neal, Flores,  
9 McGraw, and Vanecko, but not for Ives. TIN has articulated legitimate,  
10 nondiscriminatory reasons for the terminations of Neal, Flores, McGraw, and Vanecko.  
11 The EEOC has not established that TIN’s articulated reasons are mere pretext. Presuming  
12 the EEOC’s evidence to be true and drawing all reasonable inferences from the evidence  
13 in the light most favorable to the EEOC, a reasonable factfinder could not conclude that  
14 age discrimination was the real reason for the terminations of Neal, Flores, McGraw,  
15 Vanecko, and Ives. Therefore, the court will grant TIN’s motion for summary judgment.

16           IT IS THEREFORE ORDERED that Plaintiff’s Motion to Strike and Motion for  
17 Leave to File Surreply (doc. #131) is granted, striking Defendant TIN’s Response to  
18 Plaintiff EEOC’s Statement of Facts in Opposition to Defendant’s Motion for Summary  
19 Judgment (doc. #129) and Defendant TIN’s Supplemental Appendix of Materials in  
20 Support of Its Response to Plaintiff EEOC’s Statement of Facts in Opposition to TIN’s  
21 Motion for Summary Judgment (doc. #130). The Clerk shall leave the documents imaged  
22 in the electronic records of the court.

23           IT IS FURTHER ORDERED that Defendant TIN’s Motion for Summary  
24 Judgment (doc. #110) is granted.

25 ///

26  
27  
28

1 IT IS FURTHER ORDERED that the Clerk of the Court enter judgment in favor  
2 of Defendant and that Plaintiff take nothing on its complaint. The Clerk shall terminate  
3 this action.

4 DATED this 2<sup>nd</sup> day of June, 2008.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

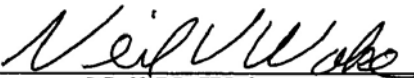
24

25

26

27

28

  
\_\_\_\_\_  
Neil V. Wake  
United States District Judge