

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BECKY NGUYEN,
Plaintiff,
v.
LOCKHEED MARTIN
CORPORATION,
Defendant.

Case No. 16-cv-03780-NC

**ORDER GRANTING DEFENDANT
LOCKHEED MARTIN
CORPORATION’S MOTION FOR
SUMMARY JUDGMENT**

Re: Dkt. No. 45

In this Fair Employment and Housing Act (FEHA) case, plaintiff Becky Nguyen asserts that defendant Lockheed Martin Corporation illegally terminated her due to stroke-related disability and her old age. Lockheed Martin asserts it terminated Nguyen for the legitimate, nondiscriminatory reason that it no longer needed a full-time employee to do the work Nguyen had been doing. Lockheed Martin now moves for summary judgment. Under FEHA’s burden-shifting framework, Lockheed Martin’s motion comes down to one issue: whether Nguyen offers sufficient evidence that Lockheed Martin’s proffered reasons for Nguyen’s termination are mere pretext for illegal discrimination.

Nguyen’s evidence of pretext include the hiring of a younger, non-disabled employee for a position similar to Nguyen’s; statements by Lockheed Martin employees about “fresh” or “junior” persons; examples of other old and disabled employees being terminated; allegedly altered performance reviews from before Nguyen’s termination; and evidence about Lockheed Martin’s budget constraints. Because this evidence does not

1 give rise to a reasonable inference of pretext or discriminatory motive, Lockheed Martin’s
2 motion for summary judgment is GRANTED.

3 **I. BACKGROUND**

4 **a. Undisputed Facts**

5 Nguyen began working for Lockheed Martin in 1985. Dkt. No. 56 at 7. Nguyen
6 suffered from a stroke in July 2012 and took seven months of disability leave, returning to
7 work in February 2013. Dkt. No. 56 at 6. When she returned, Nguyen experienced
8 lingering symptoms of the stroke, including depression, difficulty sleeping, headaches, and
9 dizziness. Dkt. No. 57-1 at 68–72 (Nguyen Decl. Ex. 25). There is no indication that
10 Nguyen’s stroke symptoms hindered her job performance. Nguyen was 56 years old when
11 Lockheed Martin terminated her employment on June 30, 2015. Dkt. No. 56 at 12.

12 Prior to her termination, Nguyen worked as a “Level 4 Systems Engineer.” Dkt.
13 No. 45-2 at 2 (Burgess Decl. ¶ 7). In this role, Nguyen supported Lockheed Martin’s
14 Milstar and Advanced Extremely High Frequency (AEHF) satellite programs. Dkt. No.
15 45-5 at 1–2 (Frakes Decl. ¶ 3). Nguyen’s primary responsibility was to provide flight
16 telemetry data from the Flight Engineering & Integration team to the AEHF Database
17 team, *Id.* at 2 (Frakes Decl. ¶ 3), which included maintenance and development of database
18 features that allowed the telemetry data to be delivered. *See, e.g.*, Dkt. No. 57-1 at 90–97
19 (Nguyen Decl. Exs. 33, 34).

20 The funding for Nguyen’s position came from different sources over time. In 2014,
21 the AEHF project was funded through a contract between Lockheed Martin and the United
22 States government called the Interim Contractor Sustainment (ICS) contract. Dkt. No. 45-
23 5 at 2 (Frakes Decl. ¶ 5). A new contract was anticipated to take effect in late November
24 2014, called the Combined Orbital Operations Logistics Sustainment (COOLS) contract.
25 *Id.* However, the start of the COOLS contract was delayed until 2015. *Id.* Consequently,
26 from December 2014, until the COOLS contract took effect in 2015, Lockheed Martin
27 used contract extensions with limited funds to sustain the AEHF and Milstar programs that
28 Nguyen worked on. *Id.*

1 Under Lockheed Martin’s “matrix” management structure, Nguyen’s “functional”
2 manager was William Egan. Dkt. No. 45-3 (Egan Decl. ¶ 3). Egan managed employees
3 with similar job functions, and those employees, including Nguyen, were assigned to other
4 managers for their day-to-day work. *Id.* Amanda Burgess managed the AEHF Database
5 team to which Nguyen provided data. Dkt. No. 45-2 (Burgess Decl. ¶ 2). Senior manager
6 Joseph Frakes oversaw components of the ICS contract, and senior manager Randy Fink
7 was responsible for determining staffing under the COOLS contract. Dkt. Nos. 45-5
8 (Frakes Decl. ¶¶ 1, 3), 45-4 (Fink Decl. ¶ 2).

9 In December 2014, Lockheed Martin first notified Nguyen that her employment
10 would be terminated. In light of the anticipated budget constraints during the ICS contract
11 extension period, Frakes considered eliminating three positions, including Nguyen’s. Dkt.
12 No. 45-5 at 2 (Frakes Decl. ¶¶ 5–6). On November 19, 2014, Fink consulted with Burgess
13 on whether Burgess’s team could meet its requirements without Nguyen. Dkt. No. 57-1 at
14 38. In late November 2014, Frakes instructed Egan to give Nguyen a 60-day layoff notice.
15 Dkt. No. 45-5 at 2 (Frakes Decl. ¶ 6). Egan did so on December 5, 2014. Dkt. No. 45-1 at
16 41 (Wilbur Decl. Ex. A). According to the Worker Adjustment and Retraining
17 Notification (WARN) document signed by Egan, the layoff was “due to funding
18 constraints.” *Id.*

19 At the same time Frakes was considering firing Nguyen, Burgess hired a new
20 software engineer, Brian Snodgrass, to her AEHF team. Burgess posted a requisition for
21 the position to Lockheed Martin’s employment portal in October 2014, after learning that a
22 software engineer named John Lee would be leaving her team. Dkt. No. 45-2 at 2
23 (Burgess Decl. ¶ 5–6). On December 8, 2014, three days after issuing the 60-day WARN,
24 Egan sent Nguyen an email alerting her to the position in an effort to help her find new
25 employment with Lockheed Martin. Dkt. No. 57-1 at 149 (Nguyen Decl. Ex. 57). Nguyen
26 initially expressed interest but then indicated she did not think she was qualified for the
27 position because she did not have the requisite technical skills. *Id.* at 168 (Nguyen Decl.
28 Ex. 67). After their email exchange, Nguyen and Egan learned that Burgess had already

1 put in the order to hire Snodgrass the same day Egan found the job posting. *Id.* at 33
2 (Nguyen Decl. Ex. 14). Nguyen never applied for the job, though she later stated she
3 would have applied for it had she known about it sooner. *Id.* at 170 (Nguyen Decl. Ex.
4 69).

5 Once she learned Snodgrass had been hired, Nguyen sent an email to her managers
6 alleging her termination was discriminatory. *Id.* at 34–36 (Nguyen Decl. Ex. 14). Egan
7 discussed the matter with an employee in Lockheed Martin’s human resource division,
8 Nilda Ramirez. *Id.* at 37. Ramirez looked into the matter and determined that Burgess had
9 known Nguyen was going to be terminated almost a month before issuing the order to hire
10 Snodgrass. *Id.* at 38. Based on his conversation with Ramirez, Egan emailed Frakes and
11 Fink stating that, because Burgess “was aware of the cut prior to the interview/order for
12 hire, there is some concern.” *Id.* at 38. He went on to say, “[Nguyen] herself admitted that
13 she was not an ideal candidate for the position, but [Ramirez] finds that the fact that
14 [Nguyen] does have some overlap and was not considered for this position is problematic.”
15 *Id.*

16 In late December 2014 and early January 2015, Egan and Frakes continued trying to
17 find work for Nguyen to do, including half-time work and work supporting the Milstar
18 project. *Id.* at 39–40. Eventually, Frakes and Fink determined not to continue Nguyen’s
19 employment once the COOLS contract took effect in June 2015. Dkt. No. 45-4 at 2 (Fink
20 Decl. ¶ 3). Lockheed Martin issued another WARN notice on February 25, 2015, and
21 Nguyen’s final day working for Lockheed Martin was June 30, 2015. Dkt. No. 45-1 at 41
22 (Wilbur Decl. Ex. A).

23 **b. Procedural History**

24 Nguyen filed a complaint with the Department of Fair Employment and Housing
25 (DFEH) on March 16, 2016, and on the same day requested and received a right-to-sue
26 notice. *Id.* at 45 (Wilbur Decl. Ex. C). Nguyen then filed this action against Lockheed
27 Martin stating a claim for disability discrimination and a claim for age discrimination, both
28 under FEHA, Cal. Gov. Code § 12940(a). Dkt. No. 1. Because Nguyen filed her

1 administrative complaint less than a year after she was terminated on May 30, 2015, she
2 satisfactorily exhausted her administrative remedies for both claims in this case. *See* Cal.
3 Gov. Code § 12960(d).¹

4 The Court has subject matter jurisdiction over Nguyen’s claims pursuant to 28
5 U.S.C. § 1332, and all parties have consented to the jurisdiction of a magistrate judge.
6 Dkt. Nos. 12, 13.

7 Lockheed Martin now moves for summary judgment. Dkt. No. 45. Nguyen
8 opposes the motion. Dkt. No. 56. The Court heard the motion on August 23, 2017, and
9 considered the parties’ supplemental briefing regarding recent Ninth Circuit precedent.
10 Dkt. Nos. 59, 61.

11 **II. LEGAL STANDARD**

12 Summary judgment may be granted only when, drawing all inferences and
13 resolving all doubts in favor of the nonmoving party, there is no genuine dispute as to any
14 material fact. Fed. R. Civ. P. 56(a); *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014);
15 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under
16 governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty*
17 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if “the
18 evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*
19 Bald assertions that genuine issues of material fact exist are insufficient. *Galen v. Cnty. of*
20 *L.A.*, 477 F.3d 652, 658 (9th Cir. 2007).

21 The moving party bears the burden of identifying those portions of the pleadings,
22 discovery, and affidavits that demonstrate the absence of a genuine issue of material fact.
23 *Celotex*, 477 U.S. at 323. Once the moving party meets its initial burden, the nonmoving
24 party must go beyond the pleadings, and, by its own affidavits or discovery, set forth

26 ¹ Although certain of the events surrounding Nguyen’s termination took place more than a
27 year before Nguyen filed her DFEH complaint, the action arises purely from Nguyen’s
28 termination. The Court considers the earlier events only to the extent they bear on
Nguyen’s termination. *See Burrell v. Cty. of Santa Clara*, No. 11-cv-4569-LHK, 2013 WL
2156374, at *33 (N.D. Cal. May 17, 2013) (considering time-barred claims for evidentiary
purposes).

1 specific facts showing that a genuine issue of fact exists for trial. Fed. R. Civ. P. 56(c);
2 *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1004 (9th Cir. 1990) (citing *Steckl v.*
3 *Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)). All justifiable inferences, however,
4 must be drawn in the light most favorable to the nonmoving party. *Tolan*, 134 S. Ct. at
5 1863 (citing *Liberty Lobby*, 477 U.S. at 255).

6 **III. DISCUSSION**

7 Nguyen's FEHA disability and age discrimination claims are evaluated using the
8 three-step, burden-shifting test the U.S. Supreme Court espoused in *McDonnell Douglas*
9 *Corp. v. Green*, 411 U.S. 792 (1973). See *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 354
10 (2000) (recognizing that California has adopted the *McDonnell Douglas* test for FEHA
11 discrimination claims). Because the two claims operate under the same legal framework
12 and implicate substantially similar evidence and arguments, the Court addresses them in a
13 single analysis.

14 At the first step of the *McDonnell Douglas* test, the plaintiff has the burden of
15 establishing a prima facie case of discrimination. This burden requires the plaintiff to
16 identify an action taken by the employer that, if unexplained, gives rise to an inference of
17 discrimination. *Guz*, 24 Cal. 4th at 355.

18 If the plaintiff meets her burden at the first step, the burden shifts to the employer at
19 the second step to rebut the inference. The burden is one of production, requiring the
20 employer to offer evidence that, if taken as true, would permit the conclusion that there
21 were legitimate, nondiscriminatory reasons for the adverse employment action. If the
22 employer's evidence meets this burden, the presumption of discrimination disappears. *Id.*
23 at 356.

24 In the third step, the plaintiff has an opportunity to attack the employer's proffered
25 legitimate reasons as mere pretext for discrimination, or to offer other evidence of
26 discriminatory motive. Ultimately, the question is "simply whether the employer acted
27 with a motive to discriminate illegally." *Id.* at 358.

28 The Court does not address the first step in this summary judgment motion,

1 following the California Supreme Court’s reasoning in *Guz*. There, the court noted that
 2 FEHA caselaw is unclear whether the *McDonnell Douglas* burdens are reversed when, as
 3 here, a defendant employer assumes responsibility for showing it is entitled to judgment by
 4 moving for summary judgment. *Id.* at 356–57. The court sidestepped the issue by finding
 5 that, even if a prima facie case were shown, the defendant employer in *Guz* met its second-
 6 step burden of providing legitimate, nondiscriminatory reasons for the plaintiff’s
 7 termination. *Id.* at 357. So the court proceeded directly to step three, evaluating whether
 8 the plaintiff could raise a triable issue of pretext or otherwise demonstrate discriminatory
 9 motive. *Id.* The Court takes the same approach here, because Lockheed Martin satisfies
 10 its step-two burden.

11 **a. Lockheed Martin Satisfies Its Step-Two Burden.**

12 Lockheed Martin offers legitimate, nondiscriminatory reasons for terminating
 13 Nguyen that are sufficient to rebut a step-one, prima facie showing of discrimination. Its
 14 evidence shows that Nguyen was terminated because senior managers Frakes and Fink,
 15 with input from Burgess, determined there would not be a need for a full time employee
 16 doing the work Nguyen had been doing once the COOLS contract took effect. Instead, it
 17 planned to allocate Nguyen’s work to other employees part-time on a “pay by the drink”
 18 basis. Dkt. No. 57-1 at 18 (Nguyen Decl. Ex. 9), 36 (Ex. 14), 118 (Ex. 46).

19 Lockheed Martin’s evidence supports its explanation. Frakes, Fink, and Burgess all
 20 testify that Nguyen was laid off because her position was not needed. Dkt. Nos. 45-4 at 2
 21 (Fink Decl. ¶ 3), 45-5 at 3 (Frakes Decl. ¶ 8), 45-2 at 2 (Burgess Decl. ¶ 4). And according
 22 to Burgess, Lockheed Martin employees spent just 145 hours doing Nguyen’s prior work
 23 in the first full calendar year following Nguyen’s departure. Dkt. No. 45-2 at 2 (Burgess
 24 Decl. ¶ 4). Lockheed Martin’s reasons and supporting evidence rebut a prima facie case of
 25 discrimination. *See Guz*, 24 Cal. 4th at 358 (finding an employer meets its step-two
 26 burden when it gives “reasons that are facially unrelated to prohibited bias, and which, if
 27 true, would thus preclude a finding of discrimination”).
 28

1 **b. Nguyen Does Not Meet the Step-Three Burden of Showing Pretext.**

2 In light of Lockheed Martin’s proffered nondiscriminatory reasons for Nguyen’s
3 termination, the dispositive question in this case is whether Nguyen can show Lockheed
4 Martin’s reasons are pretext for an illegal, discriminatory motive based on Nguyen’s
5 disability or age. To survive summary judgment, Nguyen must offer evidence that is
6 “sufficiently probative” to allow a reasonable jury to conclude either that Lockheed
7 Martin’s reasons for the termination are false, or that the true reason for the termination
8 was discriminatory. *See Merrick v. Hilton Worldwide, Inc.*, 867 F.3d 1139, 1147 (9th Cir.
9 2017) (quoting *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1996)).

10 The Court addresses five sets of evidence that Nguyen claims show pretext: (1) the
11 hiring of Snodgrass shortly before Nguyen was fired; (2) statements by Lockheed Martin
12 employees about “fresh” or “junior” persons; (3) examples of other old and disabled
13 employees being terminated; (4) allegedly altered performance reviews from 2012, 2013,
14 and 2014; and (5) other miscellaneous arguments and evidence, mostly regarding whether
15 Lockheed Martin was budget-constrained when it terminated Nguyen. The Court finds
16 that none of this evidence permits a reasonable inference of pretext or discrimination.

17 **i. Snodgrass’s Hiring Does Not Raise a Triable Issue of Pretext.**

18 Nguyen’s best evidence of pretext is Lockheed Martin’s decision to hire Snodgrass,
19 a younger and non-disabled employee, three days after giving Nguyen notice of her
20 termination. If Nguyen is correct that Snodgrass was hired to replace her, this would
21 contradict Lockheed Martin’s proffered explanation that it fired Nguyen because her
22 position was no longer needed. In response, Lockheed Martin argues Snodgrass was hired
23 to replace Lee, not Nguyen, and claims it did not hire Nguyen for the position because she
24 never applied for it. Viewing disputed facts in Nguyen’s favor, the Court finds
25 Snodgrass’s hiring does not give rise to a reasonable inference of pretext or discriminatory
26 motive.

27 Nguyen’s strongest evidence for her argument is Burgess’s role in the personnel
28 decisions. Because Frakes and Fink approached Burgess about Nguyen’s position on

1 November 19, 2014, Burgess knew Nguyen would be fired almost a month before giving
2 the order to hire Snodgrass. Dkt. No. 57-1 at 38 (Nguyen Decl. Ex. 14). So, even though
3 Nguyen did not apply for the software engineer position, it is possible to infer that Burgess
4 calculated a degree of tradeoff between Nguyen and Snodgrass and picked Snodgrass.

5 Unfortunately for Nguyen, the evidence is not sufficiently probative to support such
6 an inference. Instead, the evidence shows the new job was to backfill Lee’s departure and
7 that it differed materially from Nguyen’s. It is undisputed that Burgess initially posted the
8 requisition to replace Lee, and she did so before knowing that Frakes and Fink were
9 considering terminating Nguyen. Dkt. No. 45-2 at 2 (Burgess Decl. ¶ 5). Regarding
10 Burgess’s calculus between Snodgrass and Nguyen, Burgess testifies that she “did not
11 consider Ms. Nguyen for the position because she did not apply for it,” and that she “had
12 no reason to believe at the time that [Nguyen] was qualified for a software engineer job.”
13 *Id.* (Burgess Decl. ¶ 8).

14 The evidence also shows Snodgrass’s “Software Engineer” job required at least
15 some skills beyond what Nguyen’s “Systems Engineer” position required. Indeed, Nguyen
16 herself did not initially believe she had the requisite technical skills to perform the job.
17 Dkt. No. 57-1 at 168 (Nguyen Decl. Ex. 67) (“Amanda [Burgess] probably wants a person
18 with Java coding experience & strong SQL, which I don’t have.”). Moreover, Burgess
19 testified that once Snodgrass began working in the position, he did not perform the duties
20 Nguyen had previously performed. Dkt. No. 45-2 at 2 (Burgess Decl. ¶ 8). While there is
21 evidence supporting Nguyen’s contention that the new job involved some of the
22 knowledge and skills that Nguyen had, *see* Dkt. No. 57-1 at 149, 170–72 (Nguyen Decl.
23 Exs. 57, 70), it does not show that the job was anything other than a backfill for Lee. *Id.* at
24 115 (Nguyen Decl. Ex. 45) (original job posting, characterized as “a backfill for a level 3
25 that left the program”).

26 In sum, the evidence does not support an inference that Lockheed Martin replaced
27 Nguyen with Snodgrass. At most, there was overlap between the positions, and overlap is
28 not inconsistent with Lockheed Martin’s nondiscriminatory explanation that it did not need

1 a full-time employee doing Nguyen’s prior work. Absent other indicators of
2 discriminatory motive surrounding Snodgrass’s hiring, this evidence does not give rise to a
3 reasonable inference of pretext.

4 **ii. Statements About “Fresh” and “Junior” Employees Do Not Raise a**
5 **Triable Issue of Pretext.**

6 Nguyen further alleges that statements made in deposition about “fresh” and
7 “junior” employees reveal Lockheed Martin’s discriminatory motives. However, these
8 statements refer to less experienced employees, not younger ones, and are in any case
9 ambiguous in their application to Nguyen. Consequently, they do not reasonably permit
10 the conclusion either that Lockheed Martin’s proffered reasons for Nguyen’s discharge are
11 false, or that the true reason for her termination was discriminatory.

12 The statements Nguyen puts forth come from Burgess and Egan’s depositions.
13 Burgess indicated she initially wanted to hire for Snodgrass’s position at a Level 2, rather
14 than Level 3, “to ensure we had a fresh person who didn’t have all the experience and to
15 see what they would bring.” Dkt. No. 57-1 at 125 (Nguyen Decl. Ex. 49). Burgess also
16 sent an email stating “we wanted to bring in a more junior person and grow them into the
17 position.” *Id.* at 120 (Nguyen Decl. Ex. 48).

18 Similarly, Egan affirmed in deposition his sense that “there was a push to hire new
19 talent, people who will be around for a while.” *Id.* at 131 (Nguyen Decl. Ex. 51). Egan
20 explained that Lockheed Martin has a “mature program” and needed to make sure retiring
21 employees were replaced with people who “aren’t going to leave in the next year or two
22 because we have to sustain the program.” *Id.* at 131–32. Egan also affirmed that
23 Lockheed Martin wanted to avoid the higher salaries that experienced employees can
24 bring. *Id.* at 133.

25 It is difficult to understand Burgess’s statements as referring to anything other than
26 less experienced, junior level employees. Burgess reasonably explains that there is value
27 in having current employees train someone new, because “when you train it, you have to
28 explain it, and it helps you understand it even deeper.” *Id.* at 125 (Nguyen Decl. Ex. 49).

1 This explanation meshes with Lockheed Martin’s plan to allocate Nguyen’s work to other
 2 employees part-time “on a pay by the drink basis.” *Id.* at 18 (Nguyen Decl. Ex. 9), 138
 3 (Nguyen Decl. Ex. 53a).

4 Egan’s comments are more concerning, but do not save Nguyen from summary
 5 judgment because they are ambiguous and do not directly relate to her termination. In
 6 *Nesbit v. Pepsico, Inc.*, the Ninth Circuit held that the comment “[w]e don’t necessarily
 7 like grey hair” did not support an inference of discriminatory motive because it “was
 8 uttered in an ambivalent manner and was not tied directly to [the plaintiff’s] termination.”
 9 994 F.2d 703, 705 (9th Cir. 1993). The Ninth Circuit cited *Nesbit* when it affirmed
 10 summary judgment for an employer despite a supervisor’s statement that he “intended to
 11 get rid of all the ‘old timers’ because they would not ‘kiss my ass.’” *Nidds*, 113 F.3d at
 12 915. The court found the comment did not create an inference of age discrimination
 13 because it was “ambiguous” and “was not tied directly to [the plaintiff’s] layoff.” *Id.* at
 14 919; *accord Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1284 (9th Cir. 2000) (affirming
 15 summary judgment for an employer where the word “promotable” did not give rise to an
 16 inference of age discrimination); *McClain v. Cty. of Clark*, 585 F. App’x 410 (9th Cir.
 17 2014) (finding isolated references to the plaintiff as an “old dog” and a “crazy Canadian”
 18 did not provide direct evidence of discriminatory motive).

19 Here, Egan’s comments refer to an unspecific “push” to hire employees likely to
 20 stay with the company for a long time, and do not relate directly to Nguyen’s termination.
 21 Especially coming from Egan, who did not make the decision to fire Nguyen, these
 22 comments do not reasonably permit a conclusion that Lockheed Martin’s motives were
 23 discriminatory.

24 **iii. Termination of Other Disabled and Old Employees Does Not Raise a**
 25 **Triable Issue of Pretext.**

26 Nguyen points to what she deems “extreme statistics” that “clearly pointed to age
 27 and disability discrimination within Milstar and AEHF.” Dkt. No. 56 at 11. According to
 28 Nguyen, out of “less than 60” employees, all four of the “older and disabled employees”

1 were terminated between June 2012 and June 2015. *Id.*

2 For statistical evidence to raise a triable issue of pretext, they “must show a stark
3 pattern of discrimination unexplainable on grounds other than [the protected
4 characteristic].” *Pottenger v. Potlatch Corp.*, 329 F.3d 740, 748 (9th Cir. 2003).
5 Nguyen’s statistics fall far short of this standard, because the numbers lack context and
6 give no insight into the significance of four out of “less than 60” employees being fired
7 over three years.

8 **iv. Nguyen’s Performance Reviews Do Not Raise a Triable Issue of Pretext.**

9 Nguyen submits her performance reviews from 2012, 2013, and 2014 as evidence
10 of pretext. According to her, Lockheed Martin employees improperly altered the
11 performance reviews to justify the termination decision and disguise Lockheed Martin’s
12 true discriminatory motives. Dkt. No. 56 at 22–24.

13 Specifically, Nguyen asserts that a page from the 2012 performance review contains
14 a Lockheed Martin human resource employee’s surname that the employee did not adopt
15 until 2015, indicating the performance review was altered in 2015. *Id.* at 22–23. The 2013
16 performance review allegedly had certain of Nguyen’s job tasks removed in an effort to
17 make Nguyen’s position seem less important, revealed by a mismatched page from 2014.
18 *Id.* at 23. And the 2014 performance review purportedly shows discrepancies between the
19 mid-year review and the final review, with key statements removed regarding Nguyen’s
20 preparation for anticipated future work with Burgess on the AEHF project. *Id.* at 23–24.
21 Although Nguyen acknowledges that changes can be made between mid-year and final
22 versions, she claims these particular changes amount to “the removal and altering of
23 evidence to harm Nguyen’s case.” *Id.* at 24.

24 There are two problems with Nguyen’s argument. First, Lockheed Martin offers
25 entirely reasonable explanations for each of the alleged alterations, and Lockheed Martin’s
26 internal investigation into the matter found no evidence of alterations. Dkt. No. 57-1 at 54
27 (Nguyen Decl. Ex. 17). Second, and more importantly, the performance reviews do not
28 create a triable issue of pretext even assuming they were altered. Lockheed Martin makes

1 no argument that the quality of Nguyen’s performance led to her termination, and the
2 parties do not dispute what Nguyen’s responsibilities were before she was terminated.
3 Post hoc modifications to Nguyen’s performance reviews do not contradict Lockheed
4 Martin’s explanation that Nguyen’s position would not be necessary once the COOLS
5 contract began.

6 Moreover, even if the performance reviews did reveal something fishy, they imply
7 nothing about Nguyen’s age, disability, or other discriminatory motives. Thus, even
8 construing Nguyen’s evidence in her favor, it would not be reasonable to infer that
9 Lockheed Martin changed the 2012, 2013, and 2014 performance reviews as a cover-up
10 for disability or age discrimination.

11 **v. Nguyen’s Other Evidence Does Not Raise a Triable Issue of Pretext.**

12 Nguyen presents various other evidence in her voluminous exhibits. Much of it is
13 irrelevant (i.e. news articles about the start date of the COOLS contract, Lockheed
14 Martin’s responses to inapplicable interrogatories), but some warrants a brief explanation
15 as to why it does not change the outcome of the case. Specifically, Nguyen submits
16 evidence in an effort to demonstrate that Lockheed Martin was not actually financially
17 constrained when it terminated her, meaning its statements about “funding constraints”
18 must be pretext. *See, e.g., id.* at 2, (Nguyen Decl. Ex. 2), 16–18 (Ex. 9), 25 (Ex. 12).

19 This argument misses the mark because limited funding was not the proffered
20 reason for Nguyen’s ultimate termination. Lockheed Martin does not dispute that budget
21 issues initially animated Nguyen’s termination; by its own words, the December 5, 2014,
22 WARN notice was issued “due to program funding constraints.” Dkt. No. 45-1 at 40
23 (Wilbur Decl. Ex. A). Frakes made that determination when the ICS contract was set to
24 expire and before the COOLS contract was set to kick in—a time when there were in fact
25 budget constraints. Dkt. No. 45-5 at 2 (Frakes Decl. ¶ 5). But Lockheed Martin decided to
26 terminate Nguyen at the start of the COOLS contract based on Fink’s determination that a
27 full time position was not necessary to do Nguyen’s work. This is the operative
28 nondiscriminatory reason that Nguyen must rebut. Thus, Nguyen’s evidence attacking

1 budget constraints as pretext cannot create a triable issue of discrimination.

2 **IV. CONCLUSION**

3 The Court acknowledges Nguyen’s frustration and sense of injustice in this case.
4 Losing one’s livelihood is challenging no matter the circumstances, and it was reasonable
5 for Nguyen to question why she was fired at the same time new hires were launched. But
6 in light of the evidence presented, FEHA does not offer the remedy Nguyen seeks. The
7 law does not bar employers from making decisions that are unwise, incorrect, foolish,
8 trivial, or baseless. *See Guz*, 24 Cal. 4th at 358 (quoting *McCoy v. WGN Continental*
9 *Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992)). It just prohibits them from
10 discriminating.

11 Here, the evidence on record does not permit a reasonable factfinder to conclude
12 that Lockheed Martin’s proffered reasons for Nguyen’s discharge were pretext, or that its
13 true motives were discriminatory. Accordingly, Lockheed Martin’s motion for summary
14 judgment is GRANTED.

15
16 **IT IS SO ORDERED.**

17
18 Dated: October 2, 2017



NATHANAEL M. COUSINS
United States Magistrate Judge