No. 16-16945

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GAYLE MCCOY,

Plaintiff-Appellant,

v.

BARRICK GOLD OF NORTH AMERICA, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Nevada
The Honorable Larry R. Hicks, District Judge
Civ. No. 3:15-cv-188

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND IN FAVOR OF REVERSAL

JAMES L. LEE
Deputy General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ELIZABETH E. THERAN
Acting Assistant General Counsel

BARBARA L. SLOAN
Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of General Counsel
131 M Street N.E., 5th Floor
Washington, D.C. 20507
(202) 663-4721
FAX: (202) 663-7090
barbara.sloan@eeoc.gov

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("Commission" or "EEOC") is the agency charged with interpreting, administering, and enforcing the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), along with other federal employment discrimination statutes. The Commission is authorized to participate as amicus curiae in federal court appeals. Fed. R. App. P. 29(a)(2).

This case raises important questions concerning the application of the three-step burden-shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The district court erroneously required the plaintiff to disprove the employer's proffered reason for his termination in order to establish a prima facie case of discrimination, thereby collapsing the three steps into one. The court also erroneously applied the "same-actor inference," given its limited utility in the age context and the absence of competent evidence that the same individual who fired the plaintiff had also hired or promoted him. If allowed to stand, these rulings could undermine enforcement not only of the ADEA, but of other antidiscrimination statutes as well, because both the *McDonnell Douglas* proof scheme and the same-actor inference have been applied broadly. We therefore offer our views to this Court.

STATEMENT OF THE ISSUES[1]

1. Did the district court err in requiring the plaintiff, as part of the prima facie case, not only to show that he could meet the minimum objective requirements of his job but also to disprove the reasons the employer proffered to explain its decision to discharge him?

2. Did the court err in applying the same-actor inference where it is undisputed who made the decision to terminate the plaintiff, but there is no

[1] The Commission expresses no opinion on any other issues in the case.

competent evidence as to who hired or promoted him, and the three years between promotion and termination would not normally be considered a "short period of time," especially in the age discrimination context?

STATEMENT OF THE CASE

1. Nature of the Case and Course of Proceedings

This is an appeal from a final judgment dismissing this suit under the ADEA and state law. On March 30, 2015, Plaintiff brought suit alleging that his employer fired him because of his age and worker's compensation claims. District court docket number ("R.") 1. On September 27, 2016, the district court granted Defendant's motion for summary judgment (R.22) and entered final judgment. R.23. The court held that even though Plaintiff had recently received an above-average performance evaluation, the evidence would not support a finding that he was qualified for his position for purposes of establishing a prima facie case under the *McDonnell Douglas* framework. Further, the court held, Plaintiff could not show that the reason proffered for his termination was pretextual because he had been hired at age 52, promoted at age 58, and fired at age 61. Plaintiff timely noticed an appeal on October 24, 2016. *See* Fed. R. App. P. 4(a)(1)(A).

2. Statement of Facts

Plaintiff Gayle McCoy began working as a laborer and welder with Barrick Bald Mountain, then part of Barrick Gold Corp., in 2005. Volume II, page 164

("VII:164") (McCoy Dep.17). In late 2011, he accepted a position as a process operator on the leach pad crew.[2] McCoy speculated that Scott Olsen, Barrick's General Supervisor for Process, might have made the promotion decision, but he was "not for sure." VII:165 (McCoy Dep.28). Barrick did not identify the decisionmaker, and McCoy's offer letter was signed by Senior Recruiter Helen McGee. VII:103 (ExD).

It is undisputed that, while a member of the leach pad crew, McCoy was involved in several incidents, three of which resulted in property damage and/or injury to himself. In October 2012, McCoy was orally reprimanded for making comments that another employee found offensive. VII:106 (ExE). The following September, he slipped on a berm and tore his meniscus; he needed surgery to repair the tear. VII:168 (McCoy Dep.57); VII:117 (form). In January 2014, he was observed using a chain saw with an ill-fitting chain. He explained that he had asked his supervisor to order the proper size chain; on inquiry it turned out that the chain had arrived, so the saw was fixed. His supervisor did not tell him that he purportedly was also working without proper ear protection. *See* VII:169 (McCoy Dep.62) (McCoy did not realize he was being coached about the incident). The

[2] The leach pad is where employees leach ore with cyanide or another chemical to separate the gold from the rock. *See* Amit Kumar & Fergus Murphy, *Heap Leach Pads*, Heap Leach Pad Construction, Operation, & Performance (rev'd July 2012), http://technology.infomine.com/reviews/heapleachpads/welcome.asp?view=full.

next day, when he was attempting to move some pipe, it slipped and the end of the pipe hit a bulldozer, knocking out the headlights. There is conflicting evidence whether McCoy was directed or forbidden to move the pipe. VII:47 (lead foreman Mike Limke told McCoy to move the pipe); VII:47, 170 (McCoy Dep.72, 75) (McCoy never heard supervisor Bruce Wilson or John Hobbes say not to move the pipe). There is also conflicting evidence whether the pipe was thirty feet long, as McCoy testified (VII:169 (McCoy Dep.64)), or 300 feet long, as Steve Martinez indicated (VII:30) (Martinez Dep.31). In any event, McCoy was placed on a Decision Making Leave Day ("DMLD"), the company's name for a final warning. VII:168, 169, 170 (McCoy Dep.53-54, 62-63, 74)).[3] DMLD status is permanent and can result in termination for any subsequent infraction. VII:29 (Martinez Dep.23-24).

Nevertheless, in June 2014, McCoy's supervisor, Steve Martinez, gave him an above-average performance evaluation. According to the evaluation, McCoy "does the job right the first time," "has a good attitude, " "communicates well," "works great with his and other dept," and is "an asset" to the company. *See generally* VII:111-15 (ExG (evaluation)). The evaluation further described McCoy as "safety oriented," adding that he had "become a safety leader" since the earlier incidents. VII:113.

[3] McCoy's DMLD document is not in the district court record.

On September 10, 2014, McCoy, now 61 years old, was sent to repair a leaking pipe in an area that was covered with weeds. Before starting to work, he completed the requisite safety form, identifying as possible issues "slip, trip and fall, pinchpoints, awkward position, fire, personal injury, and welding on a broken pipe." VII:50 (McCoy Dep.114). To address these issues, he planned to "watch where [he] walk[ed] and watch what [he] was doing and watch the grass around the area." *Id.* (McCoy Dep.115). On his own initiative, he also used a skidsteer machine to flatten the weeds before he began walking. *See* VII:33 (Martinez Dep.64) (McCoy could do anything he thought would make the area safe).

The ground was uneven. VII:128-30 (ExJ (site photos)). McCoy "hit some weeds in a little hole and fell down." VII:51 (McCoy Dep.115). In falling, he bumped and bruised his knee on a rock, causing the knee to swell. VII:49 (McCoy Dep.102-03); VII:139 (knee was swelling). He continued working but, sometime later, Martinez took him for medical treatment. VII:49 (McCoy Dep.104-05). He was then cleared to return to work the following day. VII:142 (ExM (return-to-work form)).

However, the next day, the company suspended McCoy for three days while Olsen and an HR representative, Nikita Haye, investigated the incident. VII:174 (McCoy Dep.118-20). There is conflicting evidence as to whether McCoy was focusing on his work when he fell. He testified that he was watching where he

walked, "looking around the whole area," and "looking at the weeds, too." VII:51 (McCoy Dep.115). According to Haye's notes, however, McCoy indicated that he might have been thinking about something else, adding that "we all take tumbles." VII:147 (notes).

On one of his "last visits" with McCoy, Olsen told McCoy that he wanted McCoy to retire "safe and healthy" from Barrick. VII:42 (Olsen Dep.36-37). Olsen also asked McCoy when he planned to retire, and McCoy said in "a couple more years." VII:42, 43 (Olsen Dep.36-37, 38). On September 15, 2014, Olsen informed McCoy that he was fired, purportedly for "conduct unsafe" in the trip-and-fall and failing to take responsibility for the accident, violations of company standards of conduct. *See* VII:175 (McCoy Dep.124); VII:198 (Olsen Dep.53). The termination was upheld on internal appeal. VII:154 (ExP).

3. District Court Decision

The district court granted summary judgment to Barrick. The court stated that to prove a prima facie case of age discrimination under the *McDonnell Douglas* proof scheme, a plaintiff "must" show that "he was performing his job satisfactorily." VI:2 (Order) (also listing the other three elements). Here, however, McCoy could not make the requisite showing because he was already "on a DMLD for previous incidents and safety violations" when he tripped in the field and bumped his knee. VI:5-6. In the court's view, McCoy's "undisputed

discipline history and the fact that [he] was involved in another accident after having been placed on a DMLD" precluded him from establishing that he "was performing his job satisfactorily at the time of his termination." VI:6.

The court rejected McCoy's argument that his good performance evaluation just four months earlier was sufficient to satisfy this element. To the contrary, the court stated, the fact that the defendant had "'at one time complimented [him] on his performance'" was insufficient to "suddenly erase" his discipline history. VI:6 (Order, citing *Vidal-Soto v. Banco Bilbao Vizcaya*, 4 F. Supp. 2d 60 (D.P.R. 1998)). Finding no genuine dispute as to McCoy's "unsatisfactory performance," the court held that he had failed to state a prima facie case of age discrimination. *Id.*

"Additionally," the court continued, even if McCoy had established a prima facie case, he did not produce any evidence that Barrick's proffered reason for the termination — "failing to perform his job in a safe manner" — was a pretext for discrimination. VI:6-7. "In fact," the court stated, "any pretext argument is without merit given the fact that Barrick first hired McCoy when he was 52 years old, and that Olsen, the individual who made the decision to terminate McCoy's employment, also" — McCoy guessed — "made the decision to promote [him] to leach pad crew in 2011 when he was 58 years old." VI:7. "On such facts," the court concluded, "Barrick [was] entitled to a 'strong inference' that McCoy's age

was not the but-for cause of his termination." *Id.* (quoting *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996) ("'[W]here the same actor is responsible for both the hiring and firing of a discrimination plaintiff ... a strong inference arises that there was no discriminatory motive.'")). Moreover, the court noted, Barrick proffered evidence that younger employees were also fired for safety violations, and McCoy's age was never mentioned during the investigation, termination, or related appeal.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, viewing the facts and drawing all reasonable inferences in the light most favorable to the non-moving party. *Earl v. Nielsen Media Research*, 658 F.3d 1108, 1111 (9th Cir. 2011). In its review, the Court determines "whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Dawson v. Entek Int'l*, 630 F.3d 928, 934 (9th Cir. 2011). Summary judgment is appropriate only where the movant proves both that no material facts are genuinely in dispute and that the movant is entitled to judgment as a matter of law. *Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014) (en banc) (citing Fed. R. Civ. P. 56(a)).

ARGUMENT

Gayle McCoy alleges that while supposedly firing him for "unsafe conduct" — *i.e.*, tripping on a weed — Barrick actually terminated him because of his age (61). The critical question, therefore, is whether age "played a role" in the decisionmaking process and "had a determinative influence on the outcome." *Hazen Paper Co. v Biggins*, 507 U.S. 604, 610 (1993). The district court granted summary judgment to the defendant for two principal reasons: because McCoy purportedly failed to show that he was qualified, for purposes of the prima facie case, and because the "same-actor inference" would preclude a finding of pretext. Based on the established precedent of the Supreme Court and of this Court, neither ruling is correct.

I. The court erred in requiring McCoy to disprove Barrick's proffered reason for his discharge in order to establish a prima facie case of discrimination.

Under the ADEA, employers such as Barrick may not "discharge" or "otherwise discriminate" against an individual like McCoy "because of such individual's age." 29 U.S.C. § 623(a). Intentional discrimination claims are frequently analyzed using some version of the three-step burden-shifting proof scheme set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As the Supreme Court has noted, that scheme is not intended to be "rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Rather, it simply provides a "sensible, orderly way" to present and evaluate the evidence

(*id.*), and to progressively "sharpen the inquiry into the elusive factual question of intentional discrimination." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981). The purpose of the prima facie case is satisfied when a plaintiff puts forward evidence creating an inference of discrimination sufficient to trigger the requirement that the employer produce an explanation for its actions. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002).

Under the *McDonnell Douglas* proof scheme, the plaintiff bears the initial burden of establishing a prima facie case. That burden is "not onerous." *Burdine*, 450 U.S. at 253. Indeed, this Court has recognized that "[t]he requisite degree of proof necessary to establish a prima facie case ... is *minimal* and does not even need to rise to the level of a preponderance of the evidence." *Aragon v. Republic Silver State Disposal*, 292 F.3d 654, 659 (9th Cir. 2002) (citations omitted). Thus, where the plaintiff is alleging discriminatory discharge based on age, he may carry his burden with evidence that he was (1) age 40 or older, (2) otherwise qualified for his position, (3) discharged, and (4) replaced by a younger employee with similar qualifications.[4] *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142 (2000).

[4] This evidence eliminates the possibilities that some occurrence such as loss of a necessary license rendered the plaintiff unfit for the position (*Bienkowski v. Am. Airlines*, 851 F.2d 1503, 1506 n.3 (5th Cir. 1988)), or that the position no longer existed (*Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977))— two common reasons for a termination.

At that point, the burden of production shifts to the defendant to proffer evidence that the challenged employment decision was made for a "legitimate, nondiscriminatory reason." *Reeves*, 530 U.S. at 142. If the employer carries that burden, the burden shifts back to the plaintiff to prove intentional discrimination with evidence, for example, that the reason proffered by the defendant was not a true reason but was a pretext for discrimination. *Id.* at 142-43 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993)); *Burdine*, 450 U.S. at 252-53).

Here, the only element of the prima facie case Barrick contested is the second one: whether McCoy was "otherwise qualified" for his job. Although the district court stated that McCoy "must" show that he was "performing his job satisfactorily," both the Supreme Court and this Court regularly use the terms "qualified" or "otherwise qualified" for the job in describing the second element. *See, e.g.*, *Reeves*, 530 U.S. at 142-43 ("otherwise qualified"); *Nicholson v. Hyannis Air Serv.*, 580 F.3d 1116, 1123 (9th Cir. 2009) ("qualified"). Moreover, the "otherwise qualified" formulation is consistent with this Court's longstanding position that, at the prima facie case stage, a plaintiff need only show that he can meet the minimum objective requirements of the job. *Lyons v. England*, 307 F.3d 1092, 1114 (9th Cir. 2002) (minimum qualifications); *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1344-45 (9th Cir. 1981) (objective job requirements). Subjective job requirements – such as doing the job "safely" — should be

addressed only in steps two and three of the three-step burden-shifting proof scheme. *See, e.g.*, *Nicholson*, 580 F.3d at 1123-24 ("communication and cooperation skills" are subjective and, so, not part of the prima facie case).

To show that he was otherwise qualified for his position, McCoy noted that he had received an above-average performance evaluation describing him as "a safety leader" and an "asset" to the company who "does the job right the first time" and "works great with his and other dept," just a few months before he was fired. The evaluation would support a finding that McCoy met the minimum objective requirements for the job and, therefore, was qualified for the position during the relevant timeframe. Both this Court and others have acknowledged that such evidence can satisfy the second element. *See, e.g.*, *Earl*, 658 F.3d at 1112 (noting satisfactory performance evaluation); *Love-Lane v. Martin*, 355 F.3d 766, 787 (4th Cir. 2004) (genuine issue of material fact as to second element created by above-average evaluation). Accordingly, the district court should have held that McCoy could establish a prima facie case of discrimination, and, so, shifted the burden of production to the employer to adduce a legitimate nondiscriminatory reason for firing him.

That did not happen. Instead, the court found that, given McCoy's history of safety issues, including the DMLD and final trip-and-fall, he could not show that he was "performing his job satisfactorily" within the meaning of the *McDonnell*

Douglas prima facie case. VI:6-7 (Order). As for the evaluation, the court opined that "a single performance evaluation" did not "suddenly erase" McCoy's discipline and safety history. VI:6 (Order, citing, *e.g.*, *Vidal-Soto*, 4 F. Supp. 2d at 64). This ruling is flawed for several reasons.

First, insofar as the court based its ruling on McCoy's DMLD status itself, it erred in failing to view the facts in the record in the light most favorable to McCoy, as the nonmoving party on summary judgment. As noted *supra* at page 5, in giving McCoy the positive evaluation, his supervisor, Steve Martinez, described him as "safety oriented" and noted that he had "become a safety leader" since the earlier incidents that had resulted in the DMLD. VII:113 (ExG (evaluation)). Martinez's specific remarks in the evaluation about McCoy's safety improvements since the DMLD were sufficient to constitute the "minimal" "degree of proof necessary to establish a prima facie case ... on summary judgment" with respect to his qualifications. *Aragon*, 292 F.3d at 659.

In fact, in the same case that the district court cited for its articulation of the prima facie case, this Court recognized that a plaintiff with a disciplinary history similar to McCoy's had raised a triable issue of fact as to the second element of the prima facie case. *See Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1208 (9th Cir. 2008). The Court reached this conclusion despite evidence that the plaintiff had damaged the employer's property three times in approximately four years and

once violated a company safety rule, noting there was no evidence the plaintiff caused the damage "intentionally or recklessly," and his supervisor generally found him "dependable." *Id.*

Instead, in refusing to credit the evaluation, the district court relied on an out-of-circuit and factually inapt lower court decision, *Vidal-Soto v. Banco Bilbao Vizcaya*, 4 F. Supp. 2d 60. The positive evaluation received by the plaintiff in *Vidal-Soto* was followed by two poor evaluations that immediately preceded her termination. Since the poor evaluations were more recent, the court concluded that the earlier one would not support a finding that her performance was satisfactory for purposes of the prima facie case. *Id.* at 61, 64.

Here, in contrast, McCoy's good evaluation preceded his termination by only a few months, with nothing in between. Thus, the fact that Barrick "complimented" McCoy's performance — calling him a "safety leader" with full knowledge that he was on DMLD status — clearly was relevant and sufficient both to support a finding that he was qualified for his position for purposes of the prima facie case and to shift the burden to the employer to explain the reason for his termination. In reaching the contrary conclusion, the court failed to view the facts in the light most favorable to McCoy.

Second, to the extent the court based its ruling — that McCoy could not adequately demonstrate his qualifications, for prima facie case purposes — on the

trip-and-fall incident, the court erred in conflating the requisite showing for a prima facie case with that for pretext, the third step of the *McDonnell Douglas* proof scheme. Because the trip-and-fall incident was Barrick's proffered reason for terminating McCoy, the district court effectively put McCoy in the position of having to disprove that reason merely in order to establish a prima facie case.

Both this Court and others have rejected any such interpretation of the *McDonnell Douglas* proof scheme. As this Court has recognized, the "minimal" "showing of satisfactory performance necessary to establish a prima facie case ... does not consider the nondiscriminatory reason proffered by the defendant." *Fulkerson v. Ameritite, Inc.*, 64 F. App'x 63, 65 (9th Cir. 2003) (citing *Aragon*, 292 F.3d at 659-60). Any other result would be improper because it would "conflate the minimal inference needed to establish a prima facie case with the specific, substantial showing [he] must make" at the third, pretext stage of the proof scheme. *Aragon*, 292 F.3d at 659 (discussing district court's requirement that plaintiff "show that he was doing his job well enough to eliminate the possibility that he was laid off for inadequate job performance"); *see also Metzger v. Martinez*, 48 F. App'x 660, 663 (9th Cir. 2002) (explaining that requiring a plaintiff to refute an employer's reasons as part of his prima facie case is improper because it assumes that the employer's reasons are true, when in fact at step three they might be shown to be pretextual).

Concerns about collapsing the prima facie case and pretext also underlie this Court's decision to consider subjective job qualifications only in steps two and three of the *McDonnell Douglas* proof scheme. The Court explained that "if such subjective criteria are considered in evaluating a plaintiff's qualifications at step one ..., the entire burden-shifting scheme collapses into a single inquiry into the truth of a subjective claim regarding [plaintiff's] alleged inadequacies." *See Nicholson*, 580 F.3d at 1123; *see also Lynn*, 656 F.2d at 1344-45 (reasoning that consideration of subjective criteria within the prima facie case would often "collapse the three-step analysis into a single initial step at which all issues would be resolved [thereby] defeat[ing] the purpose underlying the *McDonnell Douglas* process").

Other circuits agree that the proffered reasons should play no role in the prima facie case. The Eighth Circuit, for example, has held that a plaintiff "establishes his prima facie case if, setting aside [the employer's] reasons for [his termination], he was *otherwise* meeting expectations or *otherwise* qualified." *Lake v. Yellow Transp.*, 596 F.3d 871, 874 (8th Cir. 2010) (reasoning that otherwise, "the *McDonnell Douglas* burden-shifting analysis would collapse into the second element of the prima face case"). The court explained, "by requiring plaintiff to disprove [] alleged conduct violations in order to establish his prima facie case, the district court [would] essentially require[] plaintiff, at the outset, to disprove

defendant's alleged business reasons for its adverse employment action — in other words, to prove pretext and the ultimate issue of intentional discrimination. The prima facie case is not so onerous." *Davenport v. Riverview Gardens Sch. Dist.*, 30 F.3d 940, 944 (8th Cir. 1994).

Likewise, the Sixth Circuit has stated that "a court may not consider the employer's alleged nondiscriminatory reason for taking an adverse employment action when analyzing the prima facie case" because that "would bypass the burden-shifting analysis and deprive the plaintiff of the opportunity to show that the nondiscriminatory reason was in actuality a pretext designed to mask discrimination." *Wexler v. White's Fine Furniture*, 317 F.3d 564, 574-75 (6th Cir. 2003); *see also Bienkowski v. Am. Airlines*, 851 F.2d 1503, 1505-06 (5th Cir. 1988) ("[A] plaintiff challenging his demotion or termination can ordinarily establish a prima facie case of age discrimination by showing that he continued to possess the necessary qualifications for his job at the time of the adverse action. The lines of battle may then be drawn over the employer's articulated reason for its action and whether that reason is a pretext for age discrimination."); *cf. Graham v. LIRR*, 230 F.3d 34, 42 (2d Cir. 2000) (concluding that because "the burden to produce evidence does not shift to a defendant ... until a prima facie case has been established," "only [a plaintiff's] evidence should be considered when deciding whether [he] has met his initial burden"). *Cf. McDonnell Douglas*, 411 U.S. at 802

(elements of prima facie case do not include plaintiff's alleged prior unlawful conduct, the proffered nondiscriminatory reason for employer's refusal to rehire him).

The district court thus erred in ruling that McCoy failed to adduce the "minimal" required evidence to support a finding that he was qualified for his job for purposes of the *McDonnell Douglas* prima facie case. It also erred in collapsing the three steps of the *McDonnell Douglas* analysis into one by requiring McCoy to disprove Barrick's proffered reason for terminating him—the trip-and-fall incident—in order to establish a prima facie case of discrimination. In both respects, the district court contravened established precedent of the Supreme Court and this Court. The rulings therefore should not stand.

II. The court erred in applying the "same-actor inference" in this age discrimination case because there were significant temporal gaps between the relevant employment actions and because there was insufficient record evidence to support it.

The district court held that, even if McCoy had established a prima facie case, he could not show that Barrick's stated reason for his termination — that he did not perform his job in a safe manner — was a mere pretext for discrimination. The court based its conclusion largely on the same-actor inference, which was unwarranted both because it is of limited utility in age discrimination cases and because the record evidence here simply does not support its application.

This Court explained the operation of the same-actor inference in *Bradley v. Harcourt Brace & Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996). The plaintiff in *Bradley* brought suit alleging sex discrimination after the same decisionmaker hired and fired her in the space of eleven months. The Court held that "where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive." *Id.* The Court explained, "'From the standpoint of the putative discriminator, it hardly makes sense to hire workers from a group one dislikes, thereby incurring the psychological costs of associating with them, only to fire them once they are on the job.'" *Id.* (internal citation omitted).

Age cases, however, are different from Title VII cases like *Bradley* in significant ways. Title VII cases generally involve protected classes like race or sex that usually do not change with time. Thus, the rationale this Court posited for adopting the same-actor inference in *Bradley* makes some sense in that context because a plaintiff's class would be the same when she was fired as when she was hired.

Unlike a person's sex or race, though, aging is a constant in every person's life. As the Tenth Circuit put it, "Age is unusual in that it is a protected class in which an employee becomes more susceptible to unlawful discrimination over

time. Simply because an employer harbors no age animus toward forty-five-year-old employees does not necessarily mean it feels the same about fifty-eight-year-old employees." *Paup v. Gear Prods.*, 327 F. App'x 100, 110 (10th Cir. 2009). Moreover, an employer's assumptions about an older person may evolve over time. The employer may assume, for example, that an employee in his late fifties or sixties will be unproductive or incapable of changing, or that he will or should soon retire. Thus, the passage of time dramatically weakens any possible same-actor inference where the protected class is age. *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 & n.2 (6th Cir. 1995) (observing that, while in a sex discrimination case "the length of time between the hiring and firing of an employee affects the strength of the [same-actor] inference ... [because over] the years, an individual may develop an animus towards a class of people that did not exist when the hiring decision was made," in an age discrimination case "a short period of time may be *required* in order to infer a lack of discrimination ... simply because the employees' classification changes over time") (emphasis added). To make sense in the age context, the passage of time between hiring and firing should be especially short.

Without considering whether the same-actor inference was appropriate for this claim under the ADEA, the district court here simply assumed that it was. The court then held that McCoy was precluded from showing pretext "given the fact

that [he] was first hired by Barrick when he was 52 years old, and that Olsen, the individual who ultimately made the decision to terminate McCoy's employment, also made the decision to promote McCoy to leach pad crew" just three years earlier, when he was 58 years old. VI:7(Order at 6). The court was wrong about the facts, however, and the correct facts do not support an inference that Barrick had no discriminatory motive.

Initially, we note that the relevant timeframe was not "short." The nine years between McCoy's hiring and firing far exceed any reasonable understanding of "a short period of time" under any statute. Even the three years between McCoy's promotion and his discharge is lengthy. The norm for application of the same-actor inference is two years or less. *Coburn v. PN II, Inc.*, 372 F. App'x 796, 799 (9th Cir. 2010) ("almost two years" is more than "short period of time"); *Bradley*, 104 F.3d at 270-71 (eleven months); *Lowe v. J.B. Hunt Transport*, 963 F.2d 173, 174 (8th Cir. 1992) (under two years); *Proud v. Stone*, 945 F.2d 796, 798 (4th Cir. 1991) (six months).[5]

[5] In *Diaz*, an age case, this Court discussed the applicability of the same-actor inference, stating that, "on its own," the evidence of the timeframes (ranging from one to five years) between the plaintiffs' hirings and firings was not enough to defeat application of the inference. 521 F.3d at 1209. However, the Court continued, the record evidence regarding a particular supervisor's decisionmaking "helps to explain how Eagle Produce could both hire Plaintiffs without regard to age and also terminate their employment because of age shortly thereafter. Because Brandt did not work at Eagle Produce until May 2001, he could not preclude the [plaintiffs' pre-2001 hirings]. However, he could lay off these

Moreover, a jury could easily find that there is a difference between being over and under age 60—a line that McCoy crossed during the period in question. Here, evidence indicates that Olsen initially asked McCoy when he planned to retire, stating that he hoped McCoy could retire safely and happily. Olsen did not tell McCoy that he was fired until after McCoy indicated that he had no immediate retirement plans. *See* VII:42-43 (Olsen 36-38).

Finally, as its name suggests, the "same-actor inference" applies only where evidence establishes that the same individual made the decision both to hire/promote the plaintiff and to fire him. There is no such evidence here.

Although the district court noted that "Barrick" initially hired the plaintiff at age 52, for example, there is no evidence *who* at Barrick made the hiring decision. Elsewhere, this Court refused to draw the same-actor inference where the alleged discriminator was not the plaintiff's direct supervisor and was only one of several people involved in the hiring and firing decisions. *Coburn*, 372 F. App'x at 799. Here, the record does not reveal even that much information.

And importantly, while it is undisputed that Olsen made the decision to terminate McCoy, there is no competent evidence that Olsen also made the

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workers because of their ages in the winter of 2002." *Id.* at 1210. In this case, McCoy's nine-year timeframe far exceeded any of the *Diaz* plaintiffs', but, more importantly, *Diaz* also demonstrates the importance of understanding *who* made the relevant employment decisions to the same-actor analysis—evidence that, as discussed *infra*, was lacking here.

decision to promote him. Defendant cited McCoy's testimony that he "guessed" that Olsen may have made the promotion decision, but he was "not for sure." VII:165 (McCoy Dep.28). He therefore did not know whose decision it was, and Defendant — who should know — did not cite any testimony from Olsen, for example, confirming a role in the decisionmaking process. Absent evidence that Olsen in fact made the promotion decision, there is simply no basis for applying the same-actor inference. *See Coburn*, 372 F. App'x at 799 (no inference even where alleged discriminator was one of several decisionmakers).[6] Accordingly, contrary to the court's decision, on these facts, Barrick is not entitled to any inference that McCoy's age played no role in the termination decision. *See Hazen Paper*, 507 U.S. at 610.

[6] The district court also noted Barrick's statement that it had terminated six employees under 40 for alleged safety violations in 2013 and 2014. VI:6 (Order). Even assuming this list is supported by admissible evidence, a jury could find that several of the listed incidents were materially different from McCoy's conduct of tripping on a weed. For example, one of the individuals was caught driving a sterling boom truck from the passenger seat, another was using a cell phone during truck haul operations, and a third was not aware of his surroundings when parking a haul truck, resulting in damage to another vehicle. VII:69-70 (SJ Memo12-13).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

JAMES L. LEE
Deputy General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ELIZABETH E. THERAN
Acting Assistant General Counsel

s/ Barbara L. Sloan
BARBARA L. SLOAN
Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of General Counsel
131 M Street N.E., 5th Floor
Washington, D.C. 20507
(202) 663-4721
FAX: (202) 663-7090
barbara.sloan@eeoc.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,650 words from the Statement of Interest through the Conclusion, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with Times New Roman 14-point font.

s/ Barbara L. Sloan
BARBARA L. SLOAN
Attorney for Equal Employment
Opportunity Commission

Dated: March 9, 2017

CERTIFICATE OF SERVICE

I certify that I filed this foregoing brief of the Equal Employment Opportunity Commission as amicus curiae with the Clerk of the Court this 9th day of March, 2017, by uploading an electronic version of the brief via this Court's Case Management/ Electronic Case Filing (CM/ECF) System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

s/ Barbara L. Sloan
BARBARA L. SLOAN