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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF WASHINGTON**

10 KELLY O’KELL,

11 Plaintiff,

12 v.

13 DAVID BERNHARDT, in his
14 official capacity as Secretary of the
15 United States, Department of the
16 Interior,

17 Defendant.

NO. 2:18-cv-00279-SAB

PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT
RESPONSE BRIEF

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19 **I. INTRODUCTION & SUMMARY OF ARGUMENT**

20 Ms. O’Kell worked without incident as a Realty Specialist at the Bureau of
21 Reclamation’s Ephrata Field Office (EFO) from 2014 to May 2016. (SOF ¶11) She
22 received exceptional performance reviews, no discipline, and none of her co-workers
23 or supervisors accused her of being “unprofessional” or creating a “hostile work
24 environment.” *Id.* ¶12. Ms. O’Kell’s supervisor described her as “very
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1 professional...his go-to” and “any level difficulty of project...she can handle it, get
2 it done on time, and it will be a quality product.” *Id.* ¶12-13, 64. But that glowing
3 assessment changed on May 19, 2016, when Ms. O’Kell learned that Clint Wertz,
4 the EFO’s Manager, did not promote her to Project Manager and instead hired
5 Charity Davidson because Ms. Davidson was “young and perky and would bring
6 more energy to the office.” *Id.* ¶70-71. Mr. Wertz’s comments did not surprise Ms.
7 O’Kell: he’d made ageist comments to Ms. O’Kell (and others) before. *Id.* ¶35, 38,
8 48; CSOF¹ ¶5. Indeed, the EFO experienced ridiculously high numbers of
9 documented EEO complaints during this time period *Id.* ¶16-24, 33-34. Tellingly,
10 Mr. Wertz does not deny making the ageist comments to Ms. O’Kell; instead, he
11 conveniently “can’t recall” making them. *Id.* ¶38, 40, 48, 74-77. Mr. Wertz testified
12 “I don’t recall” or words to that effect **57 times** in his deposition. *Id.* ¶5.

13 While Mr. Wertz’s comments did not surprise Ms. O’Kell, they certainly
14 upset her; which, in turn, led Ms. O’Kell to exercise her right to oppose age
15 discrimination by complaining to the Agency’s EEO counselor, Kathy Hernandez.
16 *Id.* ¶83-85.² The Agency admits that Mr. Wertz and Clyde Lay (Wertz’s boss)
17 learned of Ms. O’Kell’s complaint the same day she filed it. *Id.* From that day on
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23 ¹ CSOF = Plaintiff’s Counter Statement of Facts (located at the end of Plaintiff’s
24 Statement of Facts (SOF)).

25 ² This was Ms. O’Kell’s first complaint. There is no evidence to the contrary.

1 Ms. O’Kell had a target on her back. The Agency first solicited colleagues to submit
2 complaints about Ms. O’Kell, then took away her telework agreement, then (July
3 2016) wrote her up for complaining about discrimination too harshly, and then
4 altered her Agency training records. (SOF ¶ 86-88, 93, 95, 98-99) Ms. O’Kell filed
5 a formal Agency EEO complaint on August 25, 2016. *Id.* ¶102.
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7 It took the Agency nearly one year to start its formal investigation of Ms.
8 O’Kell’s August 25, 2016, EEO complaint. *Id.* ¶109. Accordingly, from August
9 2016 to August 2017 things calmed down. *Id.* ¶103-105. In fact, Mr. Wertz and Mr.
10 Lay effectively confessed their ageism when hiring Ms. Davidson and promised to
11 create a second GS-12 position to remedy the injustice Ms. O’Kell experienced. *Id.*
12 ¶74-82. But that all ended in July 2017, when Ms. O’Kell’s immediate supervisor
13 Tony Ortiz was killed in a tragic accident, effectively removing O’Kell’s supportive
14 buffer from EFO ageism and retaliation. *Id.* ¶105-106. On August 14, 2017, Ms.
15 O’Kell once again started complaining about discrimination and retaliation at work
16 by first asking that Mr. Lay remove the July 2016 disciplinary write up and then
17 complained to Regional Director Lorri Gray/Lee (a government employee Defense
18 counsel won’t let be deposed). *Id.* ¶109-112. Mr. Lay went berserk. First, Mr. Lay
19 tried to bribe Ms. O’Kell: quit working here and I’ll get rid of your write up. *Id.*
20 ¶119-121. Kathy Hernandez—the Agency’s former EEO counselor—condemned
21 Mr. Lay’s bribery as retaliatory. *Id.* Second, when his bribe didn’t work, Mr. Lay
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1 called upon Kip Stover, the clearly biased Boise-based Agency HR specialist
2 accused by a different employee of age discrimination, a man who sometimes served
3 as Kelly’s EEO investigator, but also helped management to discipline and then fire
4 Ms. O’Kell. (SOF ¶49, 183) Tired of dealing with Ms. O’Kell’s “by the book” calls
5 for workplace accountability, Mr. Lay sent Mr. Stover eight “FYI: Kelly” emails
6 regarding Ms. O’Kell’s alleged conduct/performance deficiencies—issues Mr. Lay
7 never had any problem with until Ms. O’Kell (again) decided to stand up for herself
8 and oppose the Agency’s age discrimination. *Id.* ¶113-118. Mr. Stover conveniently
9 “can’t recall” why Mr. Lay forwarded eight O’Kell related emails to him on August
10 14, 2017. *Id.* ¶114. One of the documents Mr. Lay used to justify Ms. O’Kell’s
11 discipline was her complaint about age discrimination. *Id.* ¶117. Carolyn Chad, the
12 Agency employee chosen by Mr. Stover to “approve” the three day suspension, (a)
13 based her decision on documents she received from Mr. Lay, (b) acknowledged that
14 those documents from Lay contained complaints of age discrimination, (c) offered
15 conflicting and evasive deposition testimony boldly claiming ignorance of Ms.
16 O’Kell’s complaints of discrimination when documents and prior sworn testimony
17 from Ms. Chad herself irrefutably established otherwise, and (d) refused to answer
18 the “yes” or “no” question of whether it was even appropriate for Mr. Lay, who Ms.
19 O’Kell repeatedly accused of age discrimination and retaliation, to be involved in
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1 Ms. O’Kell’s discipline in the first place. *Id.* ¶113-139.³ Third, when all that didn’t
2 work, on February 26, 2018, (18 days after the EEO investigation into Ms. O’Kell’s
3 formal complaint of age discrimination and retaliation was finally completed), Mr.
4 Stover in conjunction with Mark Maynard (Ms. O’Kell’s new supervisor) used
5 “requested write-ups” [read: solicited employee complaints] from dubious witnesses
6 Barb Gentry and Karissa Fromm (a worker embroiled in her own workplace conduct
7 concerns, who months earlier testified to having no issues with Ms. O’Kell) to justify
8 Ms. O’Kell’s ultimate firing. *Id.* ¶148-154, 181. Before Ms. O’Kell had even
9 submitted her long, detailed, and complete rebuttal to the Agency’s proposed
10 termination, Dawn Weidmeier—the same Defense official who ratified Charity
11 Davidson’s promotion in the first place (SOF ¶2) and who turned a blind eye to Ms.
12 O’Kell’s numerous complaints of discrimination (and cries for help)—emailed Mr.
13 Stover thanking him for helping with Ms. O’Kell and claiming, without even
14 considering Ms. O’Kell’s response, that there was a “light at the end of the tunnel”
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20 ³ “Such inconsistency and evasiveness seem to be the epitome of pretext meant to
21 mask retaliatory discrimination, at the very least raising a factual question.” *Mickey*
22 *v. Zeidler Tool & Die Co.*, 516 F.3d 516, 527 (6th Cir. 2008) (reversing granting of
23 summary judgment in ADEA case based off of evasive deposition testimony).
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1 [read: O’Kell, the loudmouth who complained too much about illegal treatment,
2 would soon be out on the street.]. *Id.* ¶162-163. Marc Maynard, who claims he
3 ultimately made the decision to fire Ms. O’Kell, had been on site at the EFO less
4 than three months, and didn’t even read Ms. O’Kell’s rebuttal to the Agency’s
5 written justification—a document written by Kip Stover—for her firing. *Id.* ¶7.

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7 Defendant’s motion should be denied because:

8 1. Unrebutted direct evidence exists that Defendant did not promote Ms.
9 O’Kell because of her age, and Defendant’s after-the-fact justification for promoting
10 Ms. Davidson over Ms. O’Kell is more circumstantial evidence of discrimination.

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12 2. Strong and substantial circumstantial evidence exists that Defendant
13 fired Ms. O’Kell in retaliation for her opposition to the Defendant’s age
14 discrimination because (a) the Defendant deviated from human resources practices
15 by failing to respond to Ms. O’Kell’s age discrimination complaint in a timely
16 fashion and then assigning biased or unlicensed personnel to “investigate” Ms.
17 O’Kell’s complaints of age discrimination and retaliation; (b) the proximity in time
18 between Ms. O’Kell’s complaints of discrimination and the Defendant’s adverse
19 actions; (c) Defendant’s unequal treatment of similarly situated employees (e.g.
20 firing Ms. O’Kell for allegedly snarky emails but allowing others (Sarah Maciel) to
21 remain gainfully employed after documented verbal abuse and even “ransacking”
22 co-worker offices); (d) the history of age discrimination and retaliation occurring at
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1 the EFO; and (e) the glaring inconsistencies emanating from material Defense
2 witnesses.

3 3. Ms. O’Kell’s hostile work environment claim should go to trial as
4 Defendant has not moved to dismiss that claim.
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6 II. ARGUMENT

7 **A. Summary judgment is rarely granted in employment cases and Ms.
8 O’Kell bears the burden of proving that her age and protected activity was a
9 “but for” cause of the adverse employment actions, not the sole cause.**

10 On summary judgment reasonable inferences must be made in favor of the
11 non-moving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Association*, 809
12 F.2d 626, 631 (9th Cir. 1987). In the employment discrimination context, “a grant
13 of summary judgment...is generally unsuitable [when] the plaintiff has established
14 a prima facie case because of the ‘elusive factual question’ of intentional
15 discrimination.” *Yartzoff v. Thomas*, 809 F.2d 1371, 1377 (9th Cir. 1987). This
16 Circuit “emphasize[s] the importance of zealously guarding an employee's right to a
17 full trial, since discrimination claims are frequently difficult to prove without a full
18 airing of the evidence and an opportunity to evaluate the credibility of the
19 witnesses.” *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004).
20 This is true in age discrimination failure to promote cases where the decision maker
21 claims insulation from the discriminatory animus of others. *Schnidrig v. Columbia
22 Mach., Inc.*, 80 F.3d 1406, 1411 (9th Cir. 1996). Additionally, Ms. O’Kell does not
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1 need to prove that her age (or oppositional activity) was the “sole cause” of her non-
2 promotion or termination; instead, she must show that her age/oppositional activity
3 was a cause of her non-promotion/termination. *See Burrage v. United States*, 134 S.
4 Ct. 881, 888-89 (2014)(“[t]o establish a disparate-treatment claim under the plain
5 language of [§ 623(a)(1)] ... a plaintiff must prove that age was [a] ‘but for’ cause
6 of the employer's adverse decision.”)(quotations in original, citations omitted).

8 **B. Direct and circumstantial evidence exists that Ms. O’Kell’s age was**
9 **a proximate cause of Defendant’s failure to promote her.**

10 Defendant recognizes that numerous age-biased remarks permeate this case
11 but cites *Coleman v. Quaker Oats*, *Nesbit v. Pepsico*, *Nidds v. Schinhdler Elevator*
12 and *Merrick v. Farmers*, for the proposition that those age-based remarks are merely
13 “stray remarks” insufficient to survive summary judgment. (ECF No. 26, p.13-15)
14 Defendant’s argument fails. First, Defendant’s authorities are distinguishable:
15 *plaintiff’s* conflicting testimony disputed the ageist statements in *Coleman* – not the
16 case here; the ageist statements in *Nesbit* “did not relate in any way, directly or
17 indirectly,” to the adverse actions—not the case here; the ageist comment in *Nidds*
18 “was not tied directly to Nidds’ layoff”—not the case here; and *Merrick* involved
19 one vague statement that “without more” was insufficient to survive summary
20 judgment—not the case here. *Coleman*, 232 F.3d at 1284; *Nesbit*, 994 F.2d at 705;
21 *Nidds*, 113 F.3d at 919; *Merrick*, 892 F.2d at 1438. Second, Defendant ignores the
22 un rebutted evidence that Mr. Wertz—the person who made the decision to hire Ms.
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1 Davidson over Ms. O’Kell—made⁴ the ageist comments that he would “not hire a
 2 women over 50” and that Ms. Davidson was hired because she was “young and
 3 perky.” (SOF ¶74,82) Since the Ninth Circuit has “repeatedly held that a single
 4 discriminatory comment by a plaintiff’s supervisor or decisionmaker is sufficient to
 5 preclude summary judgment for the employer” the Court should deny Defendant’s
 6 motion outright. *Dominguez-Curry v. Nevada Transp. Dep’t*, 424 F.3d 1027, 1039
 7 (9th Cir. 2005); *E.E.O.C. v. Pape Lift, Inc.*, 115 F.3d 676, 684 (9th Cir. 1997). The
 8 direct evidence is overwhelming:
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- 10 • Ms. Maciel (who sat on the hiring panel) telling Ms. O’Kell on May
- 11 19, 2016, that she was not promoted because she was not “young and
- 12 perky.” (SOF ¶70)
- 13 • Ms. Maciel calling Ms. O’Kell “grandma” in front of Mr. Ortiz and
- 14 Mr. Wertz. (SOF ¶92)

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 16 ⁴ To be clear: Ms. O’Kell testified that Mr. Wertz verbally communicated his ageist
 17 admissions on several occasions and Mr. Wertz generally ***does not deny making***
 18 ***them.*** FRE 801(d)(2)(A); 804(b)(3). (SOF ¶35, 74-78, 91) Instead Mr. Wertz “does
 19 not recall” and while “[f]ailure to recall can be very useful because it avoids the risk
 20 of contradiction or perjury...a failure to recall does not even satisfy the burden of
 21 production.” *Pinholster v. Ayers*, 590 F.3d 651, 701 (9th Cir. 2009) *reversed on*
 22 *other grounds Cullen v. Pinholster*, 563 U.S. 170 (2011).
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- 1 • Mr. Wertz telling Ms. O’Kell that he’d “never make the mistake of
2 hiring a woman over 50 again because they can’t carry the workload
3 like a man.” (SOF ¶35)
- 4 • Mr. Wertz admitting to Ms. O’Kell that he (Wertz) hired Davidson
5 because Davidson was “young and perky.” (SOF ¶74, 78-79, 91)
- 6 • Ms. Wertz, a single man, wanting to hire a “young and perky”
7 supervisor into the workforce and not denying his desire to “bring a
8 new generation” of workers to the EFO. (SOF ¶39, 40, 48)
- 9 • Testimony from Ms. O’Kell’s co-workers witnessing Mr. Wertz say
10 age inappropriate comments—including telling elderly employee Gina
11 Hoff not to apply for the job. (SOF ¶38, 76-77, 59-60, CSOF ¶5)

12 The following circumstantial evidence also exists.

- 13 • Mr. Wertz and Mr. Lay claiming Ms. O’Kell did not get the job
14 because she was “not the right fit” as those words are indicative of
15 discrimination. (SOF ¶75, 79-81) *See Nanty v. Barrows Co.*, 660 F.2d
16 1327, 1334 (9th Cir. 1981) *overruled on other grounds by O’Day v.*
17 *McDonnell Douglas Helicopter Co.*, 79 F.3d 756 (9th Cir.
18 1996)(“Subjective job criteria [of which an applicant’s “fit”
19 unquestionably is] present potential for serious abuse and should be
20 viewed with much skepticism. Use of subjective job criteria...also
21 provides a convenient pretext for discriminatory practices. Subjective
22 criteria may easily be asserted as the reason for an adverse employment
23 decision when, in fact, the reason was discriminatory.”). Shockingly,
24 Mr. Lay claims that he uses “not the right fit” because those are the
25 words that the Agency’s HR office tells him to use. (SOF ¶80)
- Mr. Wertz’s inability to recall whether or not he said the ageist
comments Ms. O’Kell attributes to him. (SOF ¶5) *See Dennis v.*
Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 646-47 (4th Cir.
2002) (jury's pretext finding supported by testimony of decisionmaker
who was "unable to recall many details").
- Mr. Wertz (a single man looking for a relationship in rural Ephrata)
knew Ms. Davidson from before thus motivating his desire to bring a
“young and perky” and single person into the workforce as opposed to
elderly O’Kell. (SOF ¶39-40) Mr. Wertz denies knowing Ms.
Davidson pre-interview but Louella DuBois (former EFO employee
who has no dog in this fight) disputes this. (SOF ¶62)

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- Evidence of Mr. Wertz rigging the hiring process by, *inter alia*, (a) putting Sarah Maciel (a person with less experience than Ms. O’Kell, one who had an alleged workplace dispute with Ms. O’Kell and who called Ms. O’Kell “grandma”) on the interview panel (SOF ¶¶55, 56, 92); (b) covertly removing another worker from the interview panel (SOF ¶54); (c) having problem employee Ms. Maciel complete notes on O’Kell’s telephone reference checks (SOF ¶55)—for what better way to rig a reference checking process than by having the rival of the person you don’t want hired submit subjective reference check notes?
 - Ms. O’Kell was not told that her lesser/inferior qualifications/poor reference check were the reason for her non-selection to Project Manager until after she complained of discrimination. (SOF ¶63) *Lindahl v. Air France*, 930 F.2d 1434, 1438–39 (9th Cir.1991) (reasons for discharge not credible where they were vague, unsupported by the facts, and not articulated until the litigation commenced).

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The reasonable inferences, which must be made in Ms. O’Kell’s favor at this stage, make clear that Mr. Wertz had a *motive* to hire a younger Project Manager (after all, he was single and complained to Ms. Dubois of that fact), had an *opportunity* (Project Manager job opening) to bring a “young and perky” worker into his orbit, and then came up with a *plan* to rig the hiring board to ensure that he got what he wanted: someone “young and perky who could bring energy to the office” and possibly go have drinks with after work.

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C. Direct and circumstantial evidence exists that Ms. O’Kell’s complaints of age discrimination were a cause of her discharge.

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The Defendant claims that it then fired Ms. O’Kell because of alleged insubordination, inappropriate conduct, and lack of candor. (ECF No. 26, p. 21) Naturally, courts reject the proposition that an employee bringing an age

1 discrimination/retaliation claim must show that the decision maker announced the
2 employee's termination decision with "something to the effect of 'I'm firing you
3 because you are too old'" or complained of age discrimination. *See Pape Lift, Inc.*,
4 115 F.3d at 684. Indeed, "[f]ew employers who engage in illegal discrimination,
5 however, express their discriminatory tendencies in such a direct fashion; indeed,
6 we think that even those employers who claim to be ignorant of this nation's long
7 struggle against various forms of employment bias would find a more subtle
8 approach." *Id.* Such is the case here. When Ms. O'Kell refused to shut up about
9 being passed over for promotion for a "young and perky" employee (SOF ¶96, 108,
10 117) and refused to sit idly by and let a written reprimand for her opposing that
11 discrimination remain in her file Defendant embarked on a mission to get rid of the
12 problem.⁵ (SOF ¶111, 112) The following strong, substantial, and cumulative
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19 ⁵ As one court aptly puts it: "[b]ecause adverse employment actions almost always
20 involve a high degree of discretion, and most plaintiffs in employment
21 discrimination cases are at will, it is a simple task for employers to concoct plausible
22 reasons for virtually any adverse employment action ranging from failure to hire to
23 discharge." *Parada v. Great Plains Int'l of Sioux City, Inc.*, 483 F. Supp. 2d 777,
24 791–92 (N.D. Iowa 2007).
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1 circumstantial evidence of retaliatory discharge makes clear that Ms. O’Kell
2 (currently without work) should have her day in court.

3 ***Proximity in time is evidence of pretext.*** *Ray v. Henderson*, 217 F.3d 1234,
4 1244 (9th Cir. 2000). Whenever Ms. O’Kell complained of age discrimination
5 (hereinafter “EEO Action”) the Defendant hit back (hereinafter “Agency
6 counteraction(s)”).
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- 8 • EEO Action. *May 25, 2016*. Ms. O’Kell complains of age discrimination.
9 (SOF ¶¶84-85)
- 10 • Agency counteraction. *May 26, 2016 – August 25, 2016*. Agency solicits
11 poor comments on Ms. O’Kell, suspends her telework, disciplines her for
12 going AWOL, writes her up for complaining of age discrimination, alters
13 her records, and informs her that she’s on Mr. Lay’s “hit list.” *Id.* ¶¶87, 88,
14 93, 95, 99, 98, 105.

15 From August 2016 – August 2017 things generally calmed down given the
16 Defendant’s delay in appointing an investigator to investigate Ms. O’Kell’s August
17 2016 EEO complaint. (SOF ¶¶103-107)

- 18 • EEO Actions. *August 9, 2017*, Agency retains external investigator to
19 investigate Ms. O’Kell’s August 25, 2016 EEO complaint. (SOF ¶¶109)
20 Agency will not produce phone records in order to verify whether Stover,
21 Lay, Wertz, Weidmeier knew of investigation’s commencement. *Id.* ¶¶110.
22 *August 14, 2017*. Ms. O’Kell asks Mr. Lay to remove July 2016 letter of
23 reprimand from her file. *Id.* ¶¶111.⁶ *August 14, 2017*. Ms. O’Kell complains
24 to Lorri Gray-Lee of discrimination and retaliation by Mr. Lay. *Id.* ¶¶112.

25 ⁶ Driving Ms. O’Kell’s request was a statement Mr. Lay made a few weeks earlier
and after Mr. Ortiz (Ms. O’Kell’s tacit protector) died: “I’ve got you now” meaning

- 1 • Agency counteractions. *August 14, 2017*. Mr. Lay bribes Ms. O’Kell by
2 offering to remove the 2016 letter if she quit working for the Agency. *Id.*
3 ¶¶119-121. The Agency’s former EEO officer deems this act as retaliatory.
4 (SOF ¶121) *August 14, 2017*. Mr. Lay, who between August 25, 2016, and
5 August 14, 2017, had no documented issue with Ms. O’Kell, bombards Mr.
6 Stover with eight emails regarding Ms. O’Kell’s conduct that occurred
7 weeks or months earlier—issues Defendant would later use to justify its
8 three day suspension and subsequent termination of Ms. O’Kell. (SOF
9 ¶¶113-115) In short, Mr. Lay works with Stover to start the process of firing
10 Ms. O’Kell. (SOF ¶122)
- 11 • EEO Actions. *September 14, 2017*. Lay interviewed regarding Ms. O’Kell’s
12 8/14/17 discrimination/retaliation complaint. (SOF ¶127)
- 13 • Agency counteraction. *September 14, 2017*. Lay presents Ms. O’Kell with
14 proposed three-day suspension. (SOF ¶127) Lay describes this same day
15 series of events as a “unfortunate coincidence.” *Id.*
- 16 • EEO Action. *October 30, 2017*. Ms. O’Kell complains to Lorrie Gray-Lee
17 about ongoing harassment. (SOF ¶131)
- 18 • Agency counteraction. *November 8, 2017*. Carolyn Chad upholds Ms.
19 O’Kell’s three-day suspension. *Id.* ¶133.
- 20 • EEO Action. *February 8, 2018*. Michael Brown (external EEO investigator
21 who started external investigation on August 9, 2017) completes his
22 investigation. (SOF ¶146) Mr. Lay does not deny knowledge of the
23 investigation’s February 8, 2018 completion date. *Id.* ¶147.
- 24 • Agency counteraction. *February 26, 2018*. Karissa Fromm (O’Kell co-
25 worker who in September 2017 told Stover that she had no issues with
O’Kell) and Barb Gentry (receptionist) email Stover complaints regarding
Ms. O’Kell. *Id.* ¶148. Eleven days later Stover retains unlicensed
investigator to investigate Ms. O’Kell’s alleged hostility and that
investigator completes that investigation in 36 days. *Id.* ¶150 (By way of
comparison, the Agency takes 532, 230, and 155 days to complete
investigations into O’Kell’s allegations of discrimination/retaliation. (SOF
¶180))
- EEO Action. *March 18, 2018*. O’Kell reports harassing and retaliating
conduct to Marc Maynard. (SOF ¶152)

that Mr. Lay now knew that with Mr. Ortiz gone he could go after Ms. O’Kell with
impunity. (SOF ¶107)

- 1 • Agency counteraction. *May 14, 2018*. Maynard makes decision to fire Ms.
2 O’Kell, issues O’Kell the proposed termination letter, and does not read Ms.
3 O’Kell’s rebuttal to the termination decision. (SOF ¶7)

4 ***Deviation from standard HR policies is evidence of pretext.*** *Earl v. Nielsen*
5 *Media Research, Inc.*, 658 F.3d 1108, 1117 (9th Cir. 2011). Ms. O’Kell’s HR
6 practices expert opines that the Agency deviated from the standard HR practices one
7 would expect from a federal government agency insofar as Defendant (a) did not
8 timely investigate Ms. O’Kell’s complaints of age discrimination and retaliation (but
9 did timely inspect the 2018 “hostile work environment” claims Ms. O’Kell’s co-
10 workers brought out of the blue against her), (b) assigned biased investigators to
11 investigate Ms. O’Kell’s complaints, (c) did not conduct full investigations into her
12 complaints, and (d) did not follow Agency policy when investigating Ms. O’Kell’s
13 complaints. (SOF ¶180-188)

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16 ***Corporate atmosphere of age discrimination is allowed as evidence of***
17 **ADEA violations.** *See Abrams v. Lightolier Inc.*, 50 F.3d 1204,1214 (3d Cir. 1995);
18 *Obrey v. Johnson*, 400 F.3d 691, 698 (9th Cir. 2005)(“[A]necdotal evidence of past
19 discrimination can be used to establish a general discriminatory pattern in an
20 employer's hiring or promotion practices.”) Employees other than Ms. O’Kell filed
21 age discrimination and/or retaliation claims against Mr. Lay, Mr. Wertz, Ms.
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1 Weidmeier, and Mr. Stover.⁷ (SOF ¶C) Lorri Gray-Lee reported during 2017 that
2 “31% of Reclamation survey takers experienced some form of harassment, 62%
3 said it happened more than once, and 70.5% said they did not make a formal
4 complaint.” *Id.* ¶34. The Agency’s former EEO Officer, Kathleen Hernandez,
5 testified to over 30 complaints of discrimination and harassment originating out of
6 the EFO. (SOF ¶24) Ms. Hoff and Ms. Fromm testified to hearing age-biased claims
7 at the EFO, some of them from Mr. Wertz. (CSOF ¶5)

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9 ***Acceptance of allegedly poor performance until oppositional activity is***
10 **evidence of pretext.** *See Daoud v. Avamere Staffing, LLC*, 336 F. Supp. 2d 1129,
11 1137 (D. Or. 2004). The Agency has produced no evidence that it told Ms. O’Kell,
12 during the August 26, 2016 to August 14, 2017, timeframe, that it any of her
13 “conduct” would result in discipline or firing. (SOF ¶103) Yet on August 14, 2017,
14 the same day Ms. O’Kell complained to Lorri Lee and asked that her July 2016 write
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20 ⁷ That Weidmeier and Stover, who had been accused by others of age discrimination
21 and retaliation, were allowed to decide Ms. O’Kell’s fate somewhat akin to having
22 Harvey Weinstein decide the fate of a worker who accused her boss of sexual
23 harassment. Perhaps the Defense has an explanation for all this, but that explanation
24 should be given on the witness stand.
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1 up be removed from her file, all of Ms. O’Kell’s alleged misconduct (which the
2 Agency accepted until August 14, 2017) suddenly became a problem. (SOF ¶113)

3 ***Sham investigations*, i.e. “failing to adequately investigate whether the**
4 **alleged misconduct occurred” is circumstantial evidence of violations of federal**
5 **labor laws such as the ADEA.** *Overstreet ex rel. N.L.R.B. v. Gunderson Rail Servs.,*
6 *LLC*, 5 F. Supp. 3d 1073, 1082 (D. Ariz. 2014) *overruled on other grounds* 587 Fed.
7 App’x. 397 (2014). The Agency claims to have investigated Ms. O’Kell’s
8 complaints of age discrimination and retaliation in September 2017; however, of the
9
10 11 plus witness interviews conducted by Mr. Stover none of the questions asked of
11 the witnesses related to the topics of age discrimination or retaliation. (SOF ¶125-
12 126) The one instance of EEO retaliation that did come up during the course of the
13 September 2017 interviews was O’Kell’s allegation Mr. Ortiz told her (in co-worker
14 Toni Turner’s presence) that Mr. Wertz ordered him to fail Ms. O’Kell on her mid-
15 2017 review because Ms. O’Kell made an EEO complaint. *Id.* In those September
16 2017 interviews neither Wertz nor Turner “recalled” what Ms. O’Kell swore to:
17 Ortiz saying words to the effect of “Wertz told me to fail you on your EPAP cause
18 you went to the EEO” *Id.* ¶126. Yet there is no evidence Mr. Stover followed up on
19 this “no recall” verses sworn “it happened” testimonial disparity. Courts reject such
20 “[h]ear no evil, see no evil, speak no evil” defenses in other contexts and should
21 do so here. *Millennium Labs., Inc. v. Darwin Select Ins. Co.*, 2014 WL 2965324, at
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1 *3 (S.D. Cal. July 1, 2014). The Agency's March 2018 investigation into Ms.
2 Fromm and Ms. Gentry's complaints about Ms. O'Kell was also a sham because (a)
3 the investigation was conducted by an unlicensed investigator who would even not
4 give Stephon Rogers (an EFO employee who spoke highly of Ms. O'Kell's work
5 and conduct) his name; (b) there is no evidence Mr. Stover credited Mr. Rodger's
6 pro-O'Kell statements made to the investigator; while (c) Mr. Stover apparently
7 found credible those anti-O'Kell statements of Karissa Fromm who, months earlier,
8 spoke highly of Ms. O'Kell. (SOF ¶126, 149, 150-151) Tellingly, Mr. Stover did not
9 give the unlicensed investigator the September 2017 Fromm interview transcript in
10 which Ms. Fromm spoke highly of Ms. O'Kell. *Id.* ¶149.

13 ***Failure of the Defendant to identify the person who made the ultimate***
14 ***adverse employment decision is evidence of pretext in an ADEA case.***
15 *Christensen v. Titan Distribution, Inc.*, 481 F.3d 1085, 1095, 1096 (8th Cir. 2007).
16 Here Defendant cannot decide who made the decision to fire Ms. O'Kell. The
17 Agency's interrogatories say that Ms. Wiedmeier made the decision yet Mr.
18 Maynard says that decision was his. (SOF ¶2, 7)

21 ***Discharging an employee for violating a non-existent policy is evidence of***
22 ***pretext.*** *Hernandez v. Hughes Missile Systems Co.*, 362 F.3d 564, 569-70 (9th Cir.
23 2004) (no evidence of policy that plaintiff supposedly violated). Mr. Maynard based
24 his decision to fire Ms. O'Kell on her not submitting documents in support of her
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1 harassment complaint; however, Ms. Weidmeier testified that there is no policy
2 requiring harassment complaints to be supported by documents. (SOF ¶154-155)

3 ***Internal inconsistencies and “shifting explanations” are forms of***
4 ***indirect evidence that suggest pretext.*** *E.E.O.C. v. Timeless Investments, Inc.*, 734
5 F. Supp. 2d 1035, 1063 (E.D. Cal. 2010). The inconsistencies, contradictions, “don’t
6 recalls”, and evasive testimony among and between the material witnesses in this
7 case is overwhelming. (SOF ¶L) Maynard claims he made the decision to fire
8 O’Kell, yet the Agency claims it was Weidmeier. (SOF ¶2,7) Clint Wertz claims he
9 did not tell Ms. Davidson to not work with Ms. O’Kell; Ms. Davidson claims the
10 opposite. *Id.* ¶166. Ms. Maciel “didn’t recall” telling Ms. O’Kell the “young and
11 perky” comment in May 2016 but denied, in 2019, what she couldn’t recall, in 2016.
12 *Id.* ¶71-73.

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16 ***Different treatment of similarly situated workers is evidence of pretext*** and
17 “[w]hen comparing different treatment of similarly-situated employees, the
18 comparison need not be based on identical violations of identical work rules; the
19 violations need only be of comparable seriousness.” *Kelleher v. Fred Meyer Stores*
20 *Inc.*, 302 F.R.D. 596, 598 (E.D. Wn. 2014). Here EFO management received
21 numerous complaints about Ms. Maciel (including her ransacking a co-worker’s
22 office) but she was not disciplined. (SOF ¶171-179) Ms. Fromm was investigated
23 for having an inappropriate affair on work time but there is no evidence that she was
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1 disciplined. *Id.* ¶177. Additionally, the Agency was incredibly slow to investigate
2 Ms. O’Kell’s complaints of discrimination but quick to investigate the
3 Fromm/Gentry complaints against Ms. O’Kell. *Id.* ¶181.

4 In contrast, the Agency, beginning August 14, 2017, set the ball rolling to fire
5 Ms. O’Kell and did so, in part, based on subjectively “inappropriate” emails Ms.
6 O’Kell transmitted weeks to months earlier. (SOF ¶113) Some of Ms. O’Kell’s
7 emails complained explicitly of age discrimination, noting how the “young and
8 perky” were getting all the good jobs. *Id.* ¶117. Understandably, the constant barrage
9 of adverse actions (ranging from removal of telework, being taken off projects,
10 passed over by the likes of John Brooks, and other less qualified (but younger)
11 workers), coupled with the Defendant’s failure to take any meaningful action on her
12 complaints of age discrimination would cause someone to break. (SOF ¶117) For
13 “[i]t would be ironic, if not absurd, to hold that one loses the protection of an
14 antidiscrimination statute if one gets visibly (or audibly) upset about discriminatory
15 conduct.” *Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1022 (10th Cir. 2004). Such is
16 the case here: when Ms. O’Kell first complained of age discrimination in May 2016,
17 the Agency, in July 2016, wrote her up for doing just that. *See supra*. When Ms.
18 O’Kell asked, in August 2017, to have that July 2016 letter removed so she could
19 try to find work elsewhere the Agency first tried to bribe her (you quit and we will
20 then remove the July 2016 letter) and, when Ms. O’Kell refused to take the bribe and
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1 then complained to Ms. Gray-Lee, the gloves came off, and Ms. O’Kell’s fate was
2 sealed. *See supra*. Indeed, when Ms. O’Kell on March 21, 2018, expressed
3 frustration with the Agency’s failure to help her Mr. Maynard turned around and
4 (presumably with Stover’s help) used that frustration as justification to fire her. (SOF
5 ¶157)
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7 **D. Ms. O’Kell’s hostile work environment claim will go to trial.**

8 Ms. O’Kell’s claims include one for hostile work environment. (ECF No. 1,
9 pg. 12) Since defendant has not moved for summary judgment on that claim it will
10 go to trial.
11

12 **III. CONCLUSION**

13 Defendant’s motion should be denied because genuine issues of material fact
14 exist warranting a trial of this matter.
15

16 Dated this 5th day of March 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2020, I caused the forgoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

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