

1 (“Jones”), who is being sued individually in this matter. It is undisputed that Jones had superior expertise
2 data entry and that her pay grade was higher than that of Hardwick or Plaintiff. (McLaughlin Dep. at 65-
3 67, attached to Def.’s Separate Statement of Facts in Supp. of Their Mot. for Summ. J. (“DSOF”) as
4 Exh. A). According to Defendant, while Jones had no role in preparing performance reports or wage
5 increases for Hardwick or Plaintiff, she was responsible for overseeing their output to ensure that the work
6 got done. (Id.) Plaintiff claims that Jones had no supervisory role in the department, though he supports
7 this primarily with statements by Motorola employees who attested to having no knowledge of Jones
8 having supervisory authority over Plaintiff. (McCartan Dep. at 42, attached to PNFE as Exh. 5, noting
9 that he didn’t “recall ever hearing that [Jones] was made a supervisor”; Coulter Dep. at 19, attached to
10 PNFE as Exh. 2; Altfeltis Dep. at 21, attached to PNFE as Exh. 6.)

11 In February of 1994, Kathleen Hand became the Manager of the Purchasing Department.
12 (Hand Dep. at 22, attached to PNFE as Exh. 8.) The second in command in the department was Terry
13 Hanley (“Hanley”), who was McLaughlin’s immediate supervisor. According to Plaintiff, Hand harbored
14 longstanding hostility towards men. Plaintiff’s wife, who worked with Hand before she was promoted to
15 Purchasing Manager, claimed in 1990 Hand made derogatory comments about men at an office event
16 celebrating the promotion of Hand’s supervisor. (A. Tempesta Dec. at ¶¶ 7-8, attached to PNFE as Exh.
17 10.) Hand’s statements allegedly included the comments that “in my book, a good man is a dead man”
18 and “When I’m in a position like that, it will be, girls.” (Id. at ¶8.) Plaintiff contends that once Hand joined
19 the Purchasing Department, she put this promise into practice, discriminating against men in hiring and
20 promotions within the department. Plaintiff also contends that Hand discriminated against older people
21 hiring and promoting employees with college degrees and by instituting an evaluation tool which measured
22 an employee’s potential for promotion as a favorable quality. (Hanley Dep. at 40, attached to PNFE as
23 Exh. 7.) Plaintiff claims that these practices disproportionately harmed older employees within the
24 department. (Jenkins Dep. at 18, attached to PNFE as Exh. 6.) Plaintiff notes the names of several young
25 women who were hired or promoted after Hand became the manager of the department. (Tempesta Dep.
26 at 120, attached to DSOF as Exh. D.) However, as Plaintiff acknowledges, several male employees and
27 people over forty were also hired or promoted within that time period. (Id. at 22-23, 215.) Plaintiff
28 further admits that around the time of Hand’s arrival in the Purchasing Department, the department was

1 predominately comprised of male employees over 40 years of age. (Jenkins Dep. at 18, attached to
2 PNFE as Exh. 6.)

3 At some point after Plaintiff was given a permanent position in the Purchasing Department,
4 relationship with Jones became increasingly strained. (Tempesta Dep. at 198-202, attached to PNFE as
5 Exh. 1.) Plaintiff claims Jones interfered in his work, which he resented. (Id.) According to Defendant,
6 Jones was simply doing her job, including monitoring the data entry workload, dividing work projects
7 between Hardwick and Plaintiff, and overseeing the output to ensure that the work was accomplished.
8 (Jones Dep. at 19, attached to DSOF as Exh. C.)

9 According to Defendant, in 1995, Motorola instructed all departments to assess their
10 personnel needs. (McLaughlin Dep. at 37, attached to DSOF as Exh. A.) McLaughlin produced a chart
11 indicating that the data entry workload had diminished dramatically due to the use of a new computer
12 program. (Id. at 38-39; Work Load Chart, attached to DSOF as Exh. C.) This was the first time
13 McLaughlin had prepared such a chart and it only analyzed certain portions of the data entry workload.
14 (McLaughlin Dep. at 37, attached to DSOF as Exh. A.) It did not reflect the entry of vendor stock tickets
15 or light maintenance of office equipment, which Plaintiff claims constituted a significant portion of his
16 responsibilities. (Id. at 19-20.) Defendant claims that based on the results of McLaughlin's chart, the
17 department could no longer justify both Hardwick's and Plaintiff's positions. (Id. at 54.) Hardwick, who
18 had more seniority than Plaintiff, was retained and Plaintiff was informed in April or May of 1995 that his
19 job had been eliminated. (Id.) He was given thirty days in which to find another job. (Tempesta Dep. at
20 299, attached to PNFE as Exh. 1.) In June of 1995, Plaintiff was offered a position in Motorola's
21 chemical handling department which was Defendant deemed a "promotional move". (Propster Email of
22 6/6/95, attached to DSOF as Exh. E; Propster Email of 7/14/95, attached to DSOF as Exh. F.) There is
23 a dispute regarding whether Plaintiff was offered an additional position or not, but it is undisputed that
24 Plaintiff was offered at least one position with the same pay grade as his data entry job. (Bedford Letter
25 4/16/96, attached to DSOF as Exh. J.) Plaintiff informed Defendant that he was medically incapable of
26 working as a chemical handler due to an allergy to chemicals. (Propster Email of 7/14/95, attached to
27 DSOF as Exh. F.) He documented this with a letter from a doctor written in 1985 identifying the problem
28 and reporting that the condition would last a "lifetime." (Defendant's Letter of 9/10/85, attached to PNF

1 as Exh. 13.) However, when Plaintiff, at Defendant's request, updated this medical information after a
2 December 1995 visit to a doctor, Defendant was informed that there was "no reason unique to Mr.
3 Tempesta which would disqualify him from working with chemicals with appropriate worker protection.
4 (Kolecki Letter of 12/28/95, attached to DSOF as Exh. G.) Defendant continued to communicate with
5 Plaintiff about possible reassignment, but when Plaintiff failed to accept the chemical handling offer,
6 Defendant concluded that Plaintiff had abandoned his employment with Motorola. (Bedford Letter of
7 4/16/96, attached to DSOF as Exh. J.) In response, Plaintiff claims Defendant is liable for age and gender
8 discrimination under Federal and state statutes,¹ breach of contract, and intentional infliction of emotional
9 harm. Plaintiff has also brought a claim of intentional interference with contractual relations against Jon
10 Defendants filed a motion for summary judgment on July 1, 1998 and Plaintiff filed a cross-motion for
11 partial summary judgment on his discrimination claims on August 24, 1998.

12 **LEGAL ANALYSIS**

13 Fed. R. Civ. P. 56 (c) authorizes the granting of summary judgment "if the pleadings,
14 depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show
15 there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
16 of law." Judgment for the moving party must be entered "if, under the governing law, there can be but one
17 reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).
18 "If reasonable minds could differ as to the import of the evidence," judgment should not be entered in favor
19 of the moving party. Id. at 250-251.

20 The moving party bears the initial burden of identifying the elements of the claim in the
21 pleadings, depositions, answers to the interrogatories, affidavits, and other evidence, which the moving
22 party "believes demonstrates the absence of a genuine issue of material fact." Celotex Corp. v. Catrett,
23 477 U.C. 317, 323 (1986). "A material issue of fact is one that affects the outcome of the litigation and
24 requires a trial to resolve the parties' differing versions of the truth." S.E.C. v. Seaboard Corp., 677 F.2d
25 1301, 1305-06 (9th Cir. 1982). The burden then shifts to the non-moving party to establish that there is a
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27 ¹ Plaintiff initially brought a claim under the Americans With Disabilities Act, but he has since dropped
28 this claim. (Trans. of December 21, 1998 Hearing.)

1 genuine issue for trial. Celotex, 477 U.S. at 324. More than a “metaphysical doubt” is required to
2 establish a genuine issue of material fact. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.
3 574, 586 (1986). The parties bear the same substantive burdens of proof as would apply at a trial on the
4 merits. Anderson, 477 U.S. at 252. In a summary judgment motion, the Court does not weigh the
5 evidence or the credibility of witnesses, rather “the nonmovant’s version of any disputed issue of fact is
6 presumed correct.” Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 458 (1992).

7 I. Plaintiff’s Statutory Claims:

8 A. Discrimination:

9 Plaintiff alleges that Defendant has discriminated against him on the basis of age and gender
10 violation of federal and state statutes.² Both parties rely exclusively on federal case law in their discussion
11 of Plaintiff’s discrimination claims, agreeing that Arizona courts look to federal precedent in interpreting
12 Arizona Civil Rights Act.

13 1. Gender:

14 In order to establish a prima facie case of unlawful gender discrimination, a plaintiff must offer
15 evidence that “give[s] rise to an inference of unlawful discrimination.” Godwin v. Hunt Wesson, Inc., 1
16 F.3d 1217, 1220 (9th Cir. 1998). A plaintiff can establish the requisite level of proof in one of two ways.
17 He can establish discrimination with direct evidence of discriminatory intent. Id. Alternatively, a plaintiff
18 can establish a prima facie case of unlawful discrimination indirectly by relying on the factors set forth in
19 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), which require a showing that: (1) the
20 plaintiff is a member of a protected class; (2) he was performing according to his employer’s legitimate
21 expectations; (3) he suffered an adverse employment action, and (4) other employees with qualifications
22 similar to his own were treated more favorably.

23 If the plaintiff succeeds in making a prima facie case, the burden of production shifts to the
24 employer to articulate a legitimate, non-discriminatory justification for the adverse employment decision

26 ² In Plaintiff’s First Amended Complaint, Plaintiff also alleges that Defendant has discriminated
27 against him on the basis of disability. At oral argument on Defendant’s Motion for Summary Judgment,
28 Plaintiff’s counsel conceded that Plaintiff was no longer pursuing a claim under the Americans with Disability
Act (ADA), 42 U.S.C. § 12112.

1 Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994). If the employer succeeds, the burden then
2 returns to the plaintiff to establish that the stated rationale for the adverse action was actually a pretext for
3 discrimination. Id. The plaintiff can establish pretext “either directly by persuading the court that a
4 discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s
5 proffered explanation is unworthy of credence.” Godwin, 150 F.3d at 1220 (citation omitted); Wright
6 v. Metropolitan Hospitals, Inc., 726 F.2d 1346, 1354 (9th Cir. 1984). If the plaintiff offers direct evidence
7 of discriminatory intent, he can survive summary judgment “even if the evidence is not substantial.”³
8 Godwin, 150 F.3d at 1221. In fact, the evidence “need be ‘very little.’” Id. (citation omitted). However
9 a plaintiff may not have direct evidence and may instead rely on “circumstantial evidence that tends to
10 show that the employer’s motives were not the actual motives because they are inconsistent or otherwise
11 not believable.” Id. at 1222. If this is the case, Plaintiff’s evidence must be “specific” and “substantial
12 in order for the plaintiff to survive summary judgment. Id. (citation omitted).

13 Plaintiff’s gender discrimination claim alleges that Hand harbored discriminatory animus
14 towards men which was evidenced in her favorable treatment of women in hiring and promotion decisions
15 in the Purchasing Department. Plaintiff attempts to establish discriminatory animus directly with the
16 comments about men that Hand allegedly made to Plaintiff’s wife, Angela Tempesta. However, such
17 comments only constitute direct evidence if, assuming their truth, they would “prove[] the fact of
18 [discriminatory animus] without inference or presumption.” Godwin, 150 F.3d at 1220 (citing examples
19 comments that would constitute direct evidence, including an employer’s reference to a Mexican-American
20 employee as a “dumb Mexican”); Schnidrig v. Columbia Machine, Inc., 80 F.3d 1406, 1411 (9th Cir.
21 1996) (employer’s response, repeated on three separate occasions, that plaintiff was too old to be
22 considered for a job was not merely a “stray remark”). When the comment at issue is “not tied directly to
23 [the employee’s] termination” it is insufficient to establish discriminatory animus. Nesbit v. Pepsico, Inc.
24 994 F.2d 703, 705 (9th Cir. 1993) (affirming the lower court’s ruling that a supervisor’s comment made
25 during a business meeting that “[w]e don’t necessarily like grey hair” was “at best weak circumstantial
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27 ³ Direct evidence is that which “if believed, proves the fact [of discriminatory animus] without
28 inference or presumption.” Id. (citation omitted).

1 evidence of discriminatory animus” in the plaintiff’s age discrimination claim); Merrick v. Farmers Ins.
2 Group, 892 F.2d 1434, 1439 (9th Cir. 1990) (“‘stray’ remarks are insufficient to establish discrimination”
3 In the instant case, Hand’s alleged comments, while negative towards men in general, were allegedly ma
4 at an office social gathering in 1990, four years before Hand became the manager of the Purchasing
5 Department. Thus, under Nesbit, Hand’s comments do not constitute direct evidence of discriminatory
6 animus. 994 F.2d at 705.

7 Plaintiff must therefore rely on indirect evidence according to the factors outlined in
8 McDonnell Douglas. 411 U.S. at 802. Plaintiff has met his burden on the first two factors: while there i
9 some dispute about the caliber of Plaintiff’s typing and interpersonal skills, Plaintiff has offered admissil
10 evidence that he was performing according to his employer’s legitimate expectations and Plaintiff is a
11 member of a protected class based on his gender. (Jenkins Dep. at 12, attached to PNFE as Exh. 6;
12 McCartan Dep. at 27, attached to PNFE as Exh. 5.) However, Plaintiff fails to establish the third factor,
13 that he was rejected from a position by the allegedly discriminatory decision-maker despite his
14 qualifications. McDonnell Douglas. 411 U.S. at 802. Notably, Plaintiff fails to establish that he actually
15 applied for any positions after Hand became the manager of the department. Plaintiff states that “[i]n the
16 first quarter of 1994,” he “had already applied for more than one position in Purchasing...through Terry
17 Hanley.” (Tempesta Dec. at ¶ 6, attached to PNFE as Exh. 9.) Because Plaintiff applied for these jobs
18 through Hanley and Hand did not begin her job in the Purchasing Department until sometime in Februar
19 Plaintiff cannot claim that he was denied these positions due to Hand’s discriminatory practices. And w
20 Plaintiff claims that he was interested in opportunities within the department aside from the jobs mentio
21 above, he does not point to any specific jobs that he applied for and was denied. Moreover, even if
22 Plaintiff had done so, he fails to provide sufficient evidence to allow the Court to compare his qualificati
23 with those of any female employee who received a promotion or pay increase Plaintiff claims he was
24 denied. Plaintiff offers his own opinions about the educational background of some of the women who
25 were promoted (Tempesta Dec. at ¶ 9, attached to PNFE as Exh. 9), but these opinions are inadmissible
26 because Plaintiff offers no first hand knowledge of the facts to which he attests. Furthermore, even if
27 Plaintiff had offered admissible evidence regarding the educational background of the female candidates
28 he has offered no information regarding their work experience or other qualifications. Without this

1 information, the Court has no basis for determining whether Plaintiff was passed over in favor of women
2 who were similarly situated or whether the female applicants had superior qualifications.⁴ Thus, Defendant
3 is entitled to summary judgment on Plaintiff's claim of gender discrimination.

4 2. Age:

5 Plaintiff also claims that Defendant's hiring, promotion, and merit increase decisions
6 impermissibly favored employees under age 40 at the expense of older employees in violation of the
7 ADEA.⁵ Part of this claim is based on the same allegations that he raises in his gender discrimination
8 claim--that younger candidates for hiring and promotion were given preferential treatment over him. The
9 burden of proof in an ADEA discrimination claim is similar to that in claims arising under Title VII. Ro
10 Wells Fargo & Co., 902 F.2d 1417, 1420 (9th Cir. 1990). A plaintiff must show that he was between 40
11 and 70 years old, that he was performing his job in a satisfactory manner, that he was treated unfavorably
12 and that he was either replaced by or given less favorable treatment than "a substantially younger
13 employee with equal or inferior qualifications." Nesbit, 994 F.2d at 704-5 (citation omitted). Thus, in
14 order to establish that younger employees were favored in promotion and pay raise decisions over older
15 employees, Plaintiff must show that the older employees were at least as qualified as the younger
16 employees. Plaintiff's ADEA allegation of disparate treatment fails for the same reasons as his Title VII
17 claim: Plaintiff has failed to provide sufficient admissible evidence of the qualifications of the younger
18 women who did receive the promotions and pay increases Plaintiff claims he was denied. Without this
19 evidence, the Court cannot determine whether the younger employees and Plaintiff were similarly situated

23 ⁴ It is worth noting that some of the employees who were hired or promoted during Hand's tenure
24 were men. (Tempesta Dec. at ¶ 6, attached to PNFE as Exh. 9; Hanley Dep. at 41, attached to PNFE as
25 Exh. 7.)

26 ⁵ Plaintiff cannot argue that he was discharged because of age discrimination, since he was replaced by
27 Harwick, who is older than Plaintiff.

28 ⁶ Moreover, as Plaintiff acknowledges, some employees over forty were given promotions or hired
by Hand. (Tempesta Dep. at 22-23, attached to DSOF as Exh. D.)

1 Plaintiff also attempts to argue that the methods used to select and evaluate employees, while
2 facially neutral, disparately impacted older employees in violation of the ADEA. In particular, he
3 challenges Hand's preference for employees with college degrees and her use of an evaluation tool that
4 was partially based on an employee's potential for promotion as favoring younger employees over older
5 ones.⁷ Disparate impact claims "involve employment practices that are facially neutral in their treatment
6 different groups but that in fact fall more harshly on one group than another and cannot be justified by
7 business necessity." International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 325 (1977). The
8 focus in a disparate impact claim is generally "on statistical disparities, rather than specific incidents, and
9 competing explanations for those disparities." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987
10 (1988). Plaintiff points to evidence that Hand implemented a policy favoring applicants with college
11 degrees for hiring and promotion (Hanley Dep. at 40, attached to PNFE as Exh. 7.) However, he fails to
12 offer evidence connecting this policy with any pattern of discrimination. As the Supreme Court has stated

13 Once the employment practice at issue has been identified, causation must be
14 proved; that is, the plaintiff must offer statistical evidence of a kind and degree
15 sufficient to show that the practice in question has caused the exclusion of
16 applicants for jobs or promotions because of their membership in a protected
group. Our formulations, which have never been framed in terms of any rigid
mathematical formula, have consistently stressed that statistical disparities must
be sufficiently substantial that they raise such an inference of causation.

17 Watson, 487 U.S. at 994-95. Plaintiff offers some evidence of younger employees who were hired or
18 promoted during Hand's tenure in the Purchasing Department, but it hardly constitutes "a stark pattern of
19 discrimination unexplainable on grounds other than age." Rose, 902 F.2d at 1423. Thus, Plaintiff fails to
20 meet his burden in establishing that the policy favoring college degrees violated the ADEA.

21 Finally, Plaintiff claims that an evaluation tool used to rate employees had a disparately
22 negative impact on the performance rankings of older employees because it rewarded employees'
23 potential for promotion, which is likely to be greater in younger employees. (Hanley Dep. at 92, attached
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25 ⁷ There is some indication that disparate impact theories of liability may not be viable under the
26 ADEA, as the Supreme Court suggested in Hazen Paper Co. v. Biggens, 507 U.S. 604, 610 (1993).
27 However neither the Supreme Court nor the Ninth Circuit has explicitly resolved the issue. Id.; Mangold v.
28 California Public Utilities Com'n, 67 F.3d 1470, 1473 (9th Cir. 1995). Because the Court finds that Plaintiff
would not prevail in his disparate impact claim even if he were allowed to bring the claim, the Court need not
decide whether a disparate impact claim is available under the ADEA.

1 to PNFE as Exh. 7.) However, at oral argument Plaintiff’s counsel conceded that this evaluation tool wa
2 not completed until after Plaintiff’s job had been eliminated. Therefore, Plaintiff cannot claim to have b
3 harmed by its use and his disparate impact claim regarding the evaluation tool fails. Because Plaintiff fa
4 to establish an ADEA violation from any of the challenged practices under either a disparate impact or
5 treatment theory, summary judgment will be granted on his ADEA claim.

6 B. Retaliation:

7 Under Title 42 U.S.C. § 2000e-3, an employer cannot discriminate against an employee
8 “because he has opposed any practice made an unlawful employment practice by this subchapter.” Whi
9 this provision applies only to Title VII claims, the ADEA contains a similar provision and courts have re
10 on Title VII case law in analyzing ADEA retaliation claims. Wallis, 26 F.3d at 888 (“We combine the
11 Title VII and ADEA claims for analysis because the burdens of proof and persuasion are the same.”).
12 Thus, it is appropriate to apply the same analysis to Plaintiff’s retaliation claims under Title VII and the
13 ADEA.

14 The burdens of proof in unlawful retaliation claims under Title VII and the ADEA are the
15 same as those set forth in McDonnell Douglas, 411 U.S. at 802-04 for Title VII suits based on non-
16 retaliation theories of liability. Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982). As a
17 threshold matter, an employee bringing a retaliation claim must establish a prima facie case by showing
18 he engaged in a protected activity, that he was thereafter subjected to adverse employment action by his
19 employer, and that there was a causal link between the two. Wallis, 26 F.3d at 891. “To show the
20 requisite causal link, the plaintiff must present evidence sufficient to raise the inference that her protecte
21 activity was the likely reason for the adverse action.” Cohen, 686 F.2d at 796. The requisite degree of
22 proof required to establish a prima facie case of retaliation on summary judgment is “minimal and does
23 even rise to the level of a preponderance of the evidence.” Wallis, 26 F.3d at 889.

24 If the plaintiff succeeds in making a prima facie case, the burden shifts to the employer to
25 articulate a legitimate justification for the adverse employment decision. Wallis, 26 F.3d at 889.
26 Defendant “need not prove the absence of retaliatory intent or motive; it simply must produce evidence
27 sufficient to dispel the inference of retaliation raised by the plaintiff.” Cohen, 686 F.2d at 796. If the
28 employer makes such a showing, the burden then returns to the plaintiff to establish that the action was

1 really motivated by retaliatory animus. The plaintiff can establish pretext with direct evidence, even if
2 insubstantial, or with indirect evidence if such evidence is “specific” and “substantial.” Godwin, 150 F.3d
3 at 1221-22.

4 In the case at hand, Plaintiff claims that Hand discriminated against men over forty in favor
5 younger women in hiring and promotion decisions. He also asserts that he voiced his opposition to what
6 he perceived as discriminatory practices in several meetings and exchanges of memoranda with Hand,
7 Hanley, and McLaughlin in 1994 and early 1995. (Dec. of Tempesta at ¶¶ 6, 9, 11, 13 14, attached to
8 PNFE as Exh. 9.)⁸ These complaints would constitute protected activity under the anti-retaliation
9 provisions at issue. O’Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 763 (9th Cir. 1996)
10 (noting that an employee’s opposition activity is protected if it is “reasonable in view of the employer’s
11 interest in maintaining a harmonious and efficient operation.”). This is particularly true because in order
12 a plaintiff to show that he engaged in protected activity, he need not establish that the conduct he objected
13 to violated the relevant statutes. Gifford v. Atchison, Topeka and Santa Fe Railway Co., 685 F.2d 1149,
14 1157 (9th Cir. 1981). Rather, “an employee who opposes employment practices reasonably believed to
15 be discriminatory is protected by the ‘opposition clause’ whether or not the practice is actually
16 discriminatory.” Id. This is based on the underlying notions that an employee would be chilled from
17 engaging in protected activity if he was uncertain whether the conduct at issue would ultimately be found
18 to be unlawful and that “it requires a certain sophistication for an employee to recognize that an offensive
19 employment practice may represent...discrimination that is against the law.” Id.

20 A jury could conclude that Plaintiff’s belief that Hand’s practices were discriminatory was
21 unreasonable. For instance, the anti-male comments that Hand allegedly made at an office social gathering
22 several years before Plaintiff’s job elimination could be found to be too remote from the allegedly
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26 ⁸ Plaintiff also complained to Juanita Reeves (“Reeves”) of Defendant’s “EEOC” department about
27 the allegedly discriminatory practices, but not until after learning that his job in Purchasing would be eliminated.
28 (Tempesta Dec. at ¶ 16, attached to PNFE as Exh. 9.) Thus, this complaint could not have caused the earlier
decision to eliminate Plaintiff’s position.

1 discriminatory practices at issue.⁹ A jury could also conclude that the comments were not serious
2 expressions of an intent to discriminate against men, given the context in which they were spoken, or tha
3 Plaintiff's wife's purported vivid recollection of the statements after three years was not credible.
4 (A.Tempesta Dec. at ¶¶ 7-8, attached to PNFE as Exh. 10.) Finally, a jury may consider Plaintiff's belie
5 that Hand discriminated against older men unreasonable given the qualifications of the employees who
6 were hired or promoted and the fact that the Purchasing Department was primarily male and over 40 whe
7 Hand became the manager. However, these determinations would present credibility issues, which the
8 Court cannot engage in at the summary judgment stage. Eastman, 504 U.S. at 458. Thus, Plaintiff has
9 succeeded in creating a genuine issue of material fact that his expressions of frustration about Hand's hir
10 decisions constituted protected activity under the ADEA and Title VII.

11 Plaintiff must also demonstrate that after expressing his complaints to his supervisors, he wa
12 subjected to an adverse employment decision. Cohen, 686 F.2d at 796. He must also establish a "causal
13 link" between his objection to Hand's hiring decisions and the elimination of his job. Id. Plaintiff has
14 offered admissible evidence that he voiced his complaints to Hand, Hanley, and McLaughlin, the three
15 people who made the decision to eliminate his job. (Tempesta Dec. at ¶¶ 6, 9.) He has thus created a
16 genuine issue of material fact that the decision-makers responsible for the adverse employment action
17 knew he had engaged in the protected activity. Cohen, 686 F.2d at 797. Plaintiff has also offered
18 evidence that his complaints occurred in sufficiently close proximity to the elimination of his job. Miller
19 Fairchild Industries, Inc., 885 F.2d 498, 505 (9th Cir. 1988) (noting that the timing of complaints relative
20 to an adverse employment action is relevant in a retaliation inquiry). While a jury might find that he has
21 failed to establish the requisite causal link, Plaintiff has offered the "minimal" amount of evidence requi
22 to establish a prima facie case of retaliation.¹⁰ Wallis, 26 F.3d at 889.

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24 ⁹ See, Wallis, 26 F.3d 885 at n.5 (refusing to consider events that occurred several years before the
25 employee's termination as evidence of retaliation).

26 ¹⁰ Plaintiff also points to the fact that the only job Motorola offered him after his job was eliminated
27 was in the chemical handling department. Plaintiff was told, in a 1985 letter from his doctor, that he had a
28 "lifetime" allergy to chemicals that prevented him from working in jobs that required exposure to chemicals.
Plaintiff claims that the fact that Defendant offered him a position that would have required exposure to

1 The burden then shifts to Defendant to offer a legitimate, non-discriminatory justification fo
2 the elimination of Plaintiff's job. Defendant claims that the data entry workload began to taper off in 19
3 due to the gradual introduction of a computerized paperless requisitioning system which reduced the nee
4 for data entry employees in the requisition process. (McLaughlin Dep. at 15-16, 18, attached to DSOF a
5 Exh. A.) Defendant also claims that, due to a downturn in business, the company mandated that each
6 department assess its work-to-employee ratio as part of an office-wide attempt to cut costs. (Id. at 37.)
7 Defendant asserts that to comply with this directive, McLaughlin created a chart assessing the data entry
8 workload for the period between 1992 and 1995. (Id.) The chart showed a substantial reduction in the
9 data entry workload which Defendant attributed to the introduction of the use of the computerized
10 purchasing system. (Hand Dep. at 68, attached to PNFE as Exh. 8, estimating the data entry reduction as
11 "approximately 50 percent.") McLaughlin discussed the chart with Hand, including the "readily obvious
12 conclusion...that the data entry workload no longer required two individuals." (McLaughlin Dep. at 54,
13 attached to DSOF as Exh. A.) McLaughlin, Hanley, and Hand decided to eliminate one of the data entry
14 positions and concluded, based on Hardwick's seniority with Motorola, that Plaintiff's job would be
15 eliminated.¹¹ (Id.) This evidence satisfies Defendants' burden of offering substantial evidence of a
16 legitimate, non-discriminatory reason for the elimination of Plaintiff's job.¹²

17 _____
18 chemicals was "vindictive." (Pl's Resp. at 10.) However, Defendant made several requests that Plaintiff
19 update his health information after his job was eliminated to determine if the exclusion was still viable after over
20 ten years. When Plaintiff finally went to a doctor, he was informed that he was no more allergic to chemicals
21 than the general population. Thus, Defendant's offer of the chemical handling position is not evidence of
retaliatory motive.

22 ¹¹ Plaintiff offers evidence that his job performance was superior to Hardwick's and that during her
23 tenure in the Purchasing Department, her primary responsibility was as a receptionist rather than a full time data
24 entry employee. (Brooks Dec. at ¶5, attached to PNFE as Exh. 11.) However, Plaintiff cannot seriously
25 contend that Hardwick did not have significant data entry responsibilities, for Plaintiff claims that Hardwick
26 was primarily responsible for inputting purchasing orders, while his primary job was inputting vendor stock
tickets. By all indications, the decision to eliminate Plaintiff's job instead of Hardwick's was based on seniority
rather than any illegitimate factors.

27 ¹² Plaintiff also moves for partial summary judgment against Defendant on his discrimination claims.
28 Based on the Court's conclusion in favor of Defendant on these claims, the Plaintiff's -cross motion will be
denied.

1 Because Plaintiff has no direct evidence of retaliation, he must offer “‘specific’ and
2 ‘substantial’” evidence that Defendant’s justification for its decision to eliminate his job was pretextual i
3 order to survive summary judgment.¹³ Godwin, 150 F.3d at 1222. Plaintiff’s primary means of meeting
4 this burden is to attack the chart used to justify the elimination of Plaintiff’s job. Plaintiff asserts that
5 McLaughlin’s chart, which purports to represent the workload in data entry, actually only reflects a porti
6 of the work that comprised Plaintiff’s job responsibilities. The chart includes purchase orders, purchase
7 order revisions, and new contracts. (McLaughlin Dep. at 20, attached to DSOF as Exh. A.) It does not,
8 however, track vendor stock tickets, new supplier set ups, and some clerical functions.¹⁴ (Id. at 20-21.) I
9 also does not reflect the minor repairs that Plaintiff claims to have been responsible for making on office
10 equipment, a responsibility that McLaughlin allegedly eliminated from Plaintiff’s job approximately one
11 month before his position was eliminated. (Tempesta Dec. at ¶ 15, attached to PNFE as Exh. 9;
12 Statement of Data Entry Responsibilities, attached to PNFE as Exh. C.) However, even if some of
13 Plaintiff’s job responsibilities were not included in the chart, it is undisputed that the overall data entry
14 workload in the department declined dramatically as a result of the new computer system. Thus, even if
15 some of Plaintiff’s responsibilities remained constant, the substantial decline in the remaining workload
16 legitimately justifies the elimination of one data entry position. Moreover, though Plaintiff claims that o
17 Motorola employees are currently doing the work he formerly performed, he points only to the hiring of a
18 summer intern in the Purchasing Department two weeks before Plaintiff left Motorola. While the intern
19 may have input some vendor stock tickets along with his other responsibilities (Jenkins Dep. at 35,
20 attached to PNFE as Exh. 6), he left the Purchasing Department a few months after the summer ended ar
21 has not been replaced. (Id.) Because Plaintiff has not offered evidence sufficient to create a genuine iss

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23 ¹³ Plaintiff contends that the statement Hand allegedly made at the office social gathering in 1990
24 constitutes direct evidence. This Court has already concluded that Hand’s comments were “stray remarks.”
25 Moreover, it is illogical that a statement made three years before Plaintiff’s job was eliminated and long before
26 Plaintiff’s complaints about Hand’s hiring practices could constitute direct evidence of Hand’s intent to retaliate
27 against Plaintiff.

27 ¹⁴ McLaughlin claims that he did not track vendor stock tickets because it was a task that his
28 department was asked by another department to take over, so “we just assumed the task without keeping
track of the number of tickets.” (Id. at 30.)

1 of material fact on whether Defendant’s proffered justifications for Plaintiff’s job elimination were
2 pretextual, summary judgment on Plaintiff’s retaliation claims under the ADEA and Title VII will be
3 granted.¹⁵

4 II. Plaintiff’s Breach of Contract Claim:

5 Plaintiff does not claim that he entered into a written contract with Defendant. Rather, Plain
6 claims that Defendant violated “[s]everal Motorola policies in the course of Hand’s desperate attempt to
7 get Tempesta out of her department.” (Pl’s Resp. at 11.) However, Plaintiff’s response to Defendant’s
8 motion for summary judgment on this claim consists of five lines. The only specific policy Plaintiff cite
9 Policy No. 1260, which imposes restrictions on Defendant’s ability to terminate Motorola employees wh
10 have been with the company for over ten years. (Policy No. 1260, attached to PNFE as Exh. 8.)

11 Specifically, the policy provides:

12 prior approval of the CEO as recommended by the Sector/Group Director of
13 Personnel is required before such an employee can be separated for one or
14 more of the following reasons:...2) In the case of Involuntary Separations
15 occasioned by the closing of a facility or elimination of jobs, separation may not
16 occur without documented evidence that reasonable efforts have been made to
17 identify and reassign employees to jobs for which they are qualified within the
18 Company.

17 (Id.) Defendant is correct in noting that Plaintiff must do more than recite Hand’s statement that she cou
18 not confirm whether Policy No. 1260 was followed in Plaintiff’s termination if he is to establish a breach
19 contract violation. (Hand Dep. at 225-26, attached to PNFE as Exh. 8.) However, while Plaintiff fails to
20 elaborate on how he believes this policy has been violated, he apparently believes that Defendant did not
21 make reasonable efforts to reassign him to another position within Motorola after his data entry job was

25 ¹⁵ Plaintiff alleges that Defendant violated public policy by failing to promote or give pay raises to
26 Plaintiff and by eliminating his job. However, these claims are predicated on a finding that Defendant
27 impermissibly discriminated against Plaintiff on the basis of age and gender. Because the Court finds that
28 Plaintiff did not suffer gender or age discrimination, his public policy claim on this issue also fails. Gesina v.
General Elec. Co., 780 P.2d 1376, 1379 (Ariz. App. 1989) (relying on ADEA in its analysis of plaintiff’s
claim of wrongful termination in violation of public policy).

1 eliminated.¹⁶ Because Plaintiff has worked for Motorola for over ten years, this could constitute a violation
2 of the policy.

3 The Arizona Supreme Court has held that the “terms in an employer’s policy statements
4 regarding such things as job security and employee disciplinary procedures...may become part of the
5 contract, supplementing the verbalized at-will agreement, and thus limiting the employer’s absolute right
6 discharge an at-will employee.” Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1036 (Ariz.
7 1985). Moreover:

8 Whether any particular personnel manual modifies any particular employment at-
9 will relationship and becomes part of the particular employment contract is a
10 *question of fact*. Evidence relevant to this factual decision includes the
language used in the personnel manual as well as the employer’s course of
conduct and oral representations regarding it.

11 Id. (quoting Leikvold v. Valley View Community Hospital, 688 P.2d 170, 173 (Ariz. 1984)). Defendant
12 has offered evidence that its personnel department did try to reassign Plaintiff to other jobs and that Plaintiff
13 waited several months to update his medical records despite Defendant’s repeated requests for the
14 updated information so that they could determine appropriate positions within the company. (7/14/95
15 Letter to Plaintiff, attached to DSOF as Exh. F; 12/28/95 Letter to Nancy Simpkins, attached to DSOF as
16 Exh. G.) However, fact questions remain regarding whether whether Policy No. 1260 was incorporated
17 into the at-will agreement between the parties and if so, whether Defendant’s efforts to relocate Plaintiff
18 were reasonable. Thus, summary judgment on this claim will be denied.

19 III. Plaintiff’s Intentional Infliction of Emotional Harm Claim:

20 Plaintiff also claims that Defendant is liable for intentional infliction of emotional harm. Plaintiff
21 bases this claim on the fact that his job was eliminated after thirteen years with the company and that he
22 was allegedly not given sufficient time to find another job. (Tempesta Dep. Vo. II at 295, 298, attached to
23 DSOF as Exh. D.) In addition, Plaintiff cites the allegedly harassing treatment he received by Jones, who
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25 ¹⁶ Plaintiff also appears to contend that Defendant had a policy requiring Defendant to give employees
26 ninety days of employment after receiving notice of termination. Plaintiff claims that he was only given thirty
27 days before he was required to leave the company. However, Plaintiff can point to no particular policy
28 referencing a ninety day requirement. Thus, this allegation does not form the basis for his breach of contract
claim.

1 “was protected by Motorola in her actions.” (Pls’ Resp. at 11.) Plaintiff claims that Defendant’s conduct
2 caused him emotional distress, prompting him to visit a therapist once. (Tempesta Dep. Vo. II at 296,
3 attached to DSOF as Exh. D.)

4 An intentional infliction of emotional distress claim requires proof that the conduct was
5 “extreme” and “outrageous”, that the defendant either intended to cause emotional distress or recklessly
6 disregarded the near certainty that such distress would result from his conduct, and that he suffered severe
7 emotional distress as a result of defendant’s conduct. Ford v. Revlon, Inc., 734 P.2d 580, 585 (Ariz.
8 1987). Arizona courts have refused to allow plaintiffs to prevail in such claims unless defendant’s conduct
9 is found to be extraordinary. “A plaintiff must show that the defendant’s acts were ‘so outrageous in
10 character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded
11 as atrocious and utterly intolerable in a civilized community.’” Mintz v. Bell Atlantic Systems Leasing,
12 P.2d 559, 563 (Ariz. App. 1995) (citation omitted). In Mintz, for example, an Arizona appeals court
13 affirmed the trial court’s dismissal of an emotional distress claim brought by an employee who claimed to
14 have suffered an emotional breakdown as a result of gender discrimination at work. Id. at 561. Although
15 the employee was hospitalized for severe emotional and psychological problems, the employer terminated
16 her disability benefits and ordered her to return to work several weeks before her doctor’s
17 recommendation. Id. She returned to work as directed, but was rehospitalized the following day and was
18 subsequently fired by a letter the employer delivered to her hospital room. Id. Despite the conduct of the
19 employer in Mintz, the court concluded that it did not “‘go beyond all possible bounds of decency,’ even
20 it was motivated by sex discrimination or retaliation.” Id. at 563.

21 Even if all the allegations against Defendant in the instant case were assumed to be true,
22 Defendant’s conduct would fall far short of the employer’s actions in Mintz. Id. Thus, Defendant’s motion
23 for summary judgment on intentional infliction of emotional distress will be granted.

24 IV. Plaintiff’s Intentional Interference with his Employment Claim:

25 Plaintiff claims that Jones intentionally interfered with his employment and brings this claim
26 against Jones in her individual capacity. Plaintiff’s complaints against Jones span a range of issues,
27 including her alleged mistreats of him, her alleged comments to his supervisors and co-workers about him
28 and her alleged involvement in overseeing his work, a role Defendant claims was included in her

1 responsibilities and which Plaintiff challenges. The actors involved offer differing accounts of these mat
2 but it is clear there was considerable friction between Jones and Plaintiff.

3 It is not clear, however, that such friction between co-workers merits legal action. It is true,
4 as Plaintiff points out, that the Arizona Supreme Court has held that an employee can bring an intentiona
5 interference with employment claim against a supervisor for maliciously causing the plaintiff to be
6 terminated.¹⁷ Wagenseller, 710 P.2d at 1043. In Wagenseller, however, the plaintiff's supervisor had
7 allegedly caused plaintiff's termination by, among other things, refusing to participate in group "moonin
8 on a camping trip with co-workers. Id. at 1029. In the case at hand, Plaintiff merely alleges that Jones
9 attempted to cast Plaintiff's work performance in a negative light. Moreover, Plaintiff has failed to
10 establish that, even if the allegations regarding Jones were true, his employment contract with Defendant
11 was in any respect "disrupted". Id. at 1041. Plaintiff's only support for his claim that Jones's conduct le
12 to the elimination of his position is a statement from Hanley that Plaintiff had "los[t] control" during the
13 altercation between Jones and Plaintiff. (Hanley Dep. at 135, attached to PNFE as Exh. 7.) Hanley adds
14 however, that the decision to eliminate Plaintiff's job was based solely on seniority, and that Hanley, Ha
15 and McLaughlin did not discuss Plaintiff's job performance in the meeting in which the decision was ma
16 This evidence is uncontroverted. (Id. at 107.) Furthermore, McLaughlin stated that he does not recall ar
17 complaints made by Jones about Plaintiff. (McLaughlin Dep. at 67, attached to DSOF as Exh. B.)
18 Because Plaintiff has offered no support for his claim that Jones' conduct had any effect on the decision
19 terminate his position, summary judgment will be granted on his claim against Jones.¹⁸

21 ¹⁷ The elements of a claim of intentional interference with contract are as follows: (1) the existence
22 of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy
23 on the part of the interferer; (3) intentional interference causing a breach or termination of the relationship or
24 expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. Id.
at 1041.

25 ¹⁸ Plaintiff also claims that Jones interfered with his pay increases, alleging Jones inappropriately
26 calculated his pay increase when McLaughlin, whose responsibility it was to calculate raises, was on vacation.
27 (Tempesta Dep. at 323, attached to PNFE as Exh. 1.) However, Plaintiff's statements suggest that Jones had
28 authority from McLaughlin to calculate his raise. According to Plaintiff, "[I] asked [McLaughlin] why did she
get involved with this? He said, well, I was busy. I couldn't get back in time, and we had to get the
paperwork in. I said that wasn't right, that he should do it. He apologized, and then we did the merit review."

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Accordingly,

IT IS ORDERED that Defendant’s Motion for Summary Judgment on Plaintiff’s ADA claim (Doc. 86) is granted.

IT IS FURTHER ORDERED that Defendant’s Motion for Summary Judgment on Plaintiff’s ADEA claim (Doc. 86) is granted.

IT IS FURTHER ORDERED that Defendant’s Motion for Summary Judgment on Plaintiff’s Title VII claim (Doc. 86) is granted.

IT IS FURTHER ORDERED that Defendant’s Motion for Summary Judgment on Plaintiff’s Arizona Civil Rights Act claims (Doc. 86) is granted.

IT IS FURTHER ORDERED that Defendant’s Motion for Summary Judgment on Plaintiff’s public policy claim (Doc. 86) is granted.

IT IS FURTHER ORDERED that Defendant’s Motion for Summary Judgment on Plaintiff’s Breach of Contract claim (Doc. 86) is denied.

IT IS FURTHER ORDERED that Defendant’s Motion for Summary Judgment on Plaintiff’s Intentional Infliction of Emotional Distress claim (Doc. 86) is granted.

IT IS FURTHER ORDERED that Defendant’s Motion for Summary Judgment on Plaintiff’s Intentional Interference with Contract claim (Doc. 86) is granted.

IT IS FURTHER ORDERED that Plaintiff’s Cross-Motion for Partial Summary Judgment (Doc. 94) is denied.

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(Id.) Thus, not only does Plaintiff fail to show that he was harmed by Jones’ conduct--because McLaughlin raised Plaintiff’s initially low review--he also suggests that Jones had been directed by her supervisor to complete the review. (Id. at 366.)

Plaintiff also claims that he was denied pay increases because Jones improperly calculated Plaintiff’s output to make it seem like he was doing less work than he was. (Id. at 324.) However Jones and McLaughlin both dispute this allegation and Plaintiff offers no admissible evidence to the contrary. Without more, Plaintiff fails to withstand summary judgment on this claim.

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DATED this 19 day of January, 1999.

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ROSLYN O. SILVER
UNITED STATES DISTRICT JUDGE

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copies to all counsel of record

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