**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**Judge Robert E. Blackburn**

Civil Action No. 17-cv-02635-REB-SKC

BRUCE CASIAS,

Plaintiff,

v.

RAYTHEON COMPANY, RAYTHEON INFORMATION SYSTEMS COMPANY, and/or its business division: INTELLIGENCE, INFORMATION, and SERVICES,

Defendant.

---

**ORDER RE: DEFENDANT'S RULE 50(b) MOTION FOR JUDGMENT AS A MATTER OF LAW**

---

**Blackburn, J.**

The matter before me is **Defendant's Rule 50(b) Motion for Judgment as a Matter of Law or, Alternatively, Rule 59 Motion for New Trial or Remittitur** [#124],[1] filed October 21, 2020. I have jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question). I deny the motion for judgment as a matter of law and grant the motion for new trial in part and deny it in part.

Following the trial of this case from November 18-21, 2019, a jury returned a verdict in favor of plaintiff Bruce Casias on his sole claim of retaliation under the Defense Contractor Whistleblower Protection Act ("DCWPA"), 10 U.S.C. § 2409. Mr. Casias alleged his quondam employer, defendant Raytheon Company ("Raytheon"), reassigned and effectively demoted him in retaliation for complaining that his

[1] "[#124]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

supervisor's direction to mark certain software test run procedure reports on a Department of Defense project as completed when they had not been completed was unethical.

At mid-trial, and again following the close of the evidence, Raytheon moved for judgment as a matter of law pursuant to Rule 50. I took the matter under advisement, and submitted the case to the jury.[2] The jury returned a verdict in favor of Mr. Casias and awarded him $43,000 in past earnings (backpay) and benefits and $1,000,000 in noneconomic damages. (**Jury Verdict** at 2 [#76], filed November 21, 2019.) I then denied Raytheon's Rule 50 motion. (***See* Order Denying Defendant Raytheon Company's Motion for Judgment as a Matter of Law** [#92], filed January 14, 2020.) Raytheon now renews that motion. In the alternative, it seeks a new trial as to liability and/or damages, or remittitur of the jury's award of non-economic damages. I address these two aspects of the motion in turn.

A party seeking relief under Rule 50(b) is entitled to judgment as a matter of law if the evidence so overwhelmingly supports one position that no reasonable inferences may be drawn from the evidence to sustain the position of the nonmovant. ***Tyler v. RE/MAX Mountain States, Inc.***, 232 F.3d 808, 812 (10th Cir. 2000). "[I]n reviewing the record, [the court] will not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury." ***Hampton v. Dillard Department Stores Inc.***, 247 F.3d 1091, 1099 (10th Cir. 2001) (internal quotation marks omitted). Judgment as a matter of law must be denied if there is any legally sufficient evidentiary basis for a claim. ***Id***. I

[2] Raytheon subsequently memorialized its oral motion in a written submission. (***See* Defendant Raytheon Company's Motion for Judgment as a Matter of Law** [#68], filed November 19, 2019.)

must consider the evidence and all inferences in favor of the nonmoving party. ***Id***.; ***see also Aquilino v. University of Kansas***, 268 F.3d 930, 933 (10th Cir. 2001). This is a rigorous standard which is appropriately deferential to the jury's verdict. It is not satisfied in this case.

The DCWPA, *inter alia*, prohibits a contractor of the Department of Defense from "discharg[ing], demot[ing], or otherwise discriminat[ing]" against an employee who reports to "[a] management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct" any "gross mismanagement," "gross waste," "an abuse of authority," or "violation of law, rule, or regulation" in connection with a Department of Defense contract. ***See*** 10 U.S.C.A. §§ 2409(a)(1)(A) & (a)(2)(G). An employee who believes he has been retaliated against in violation of the statute may recover by showing "(1) he engaged in protected activity as described in the statute, (2) the [employer's] decision maker knew he engaged in protected activity, and (3) his protected activity was a contributing factor in the adverse employment action taken against him." ***Cejka v. Vectrus Systems Corp***., 292 F.Supp.3d 1175, 1192 (D. Colo. 2018). ***See*** 5 U.S.C.A. § 1221(e)(1).[3] Raytheon maintains Mr. Casias cannot show either that he suffered an adverse employment action or, if he did, that his protected activity was a contributing factor in Raytheon's decision to reassign him.

[3] Pursuant to 10 U.S.C. § 2409(c)(6), "[t]he legal burdens of proof specified in section 1221(e) of title 5 shall [control] any . . . judicial . . . proceeding to determine whether discrimination prohibited under this section has occurred." ***See also Cejka***, 292 F.Supp.3d at 1192; ***United States ex rel. Cody v. Mantech International Corp.***, 207 F.Supp.3d 610, 620 & n.15 (E.D. Va. 2016).

As to the first of these contentions, Raytheon insists that because Mr. Casias's reassignment resulted in no loss of pay, benefits, title, or grade, it can neither be considered a demotion nor sufficiently materially adverse to constitute an adverse employment action. Neither of these contentions is supported by the law or the evidence presented at trial.

Mr. Casias testified that as a result of his reassignment, he was left supervising only 3 people and lost 90 percent of his previous responsibilities. (Tr. 48.) He characterized the reassignment as "being put in a corner and basically given nothing to do." (Tr. 47.) Mr. Casias's coworkers – one of whom was the person who took over his job after the reassignment – also testified they perceived the reassignment to constitute a demotion. (Tr. 125-126 (testimony of David Martinez); 142-143 (testimony of Karl Sheldon).) In fact, Mr. Martinez testified that being reassigned to a position with far less responsibility, even if having no immediate impact on an employee's financial circumstances, could result in negative repercussions later in one's career:

> When you go from managing 30 people, 40 people, down to two people, in the future there are going to be questions about that. Whether there's a monetary impact now, you know, whether you're losing money now, you are going to lose money in the future.

(Tr. 125-126.) Mr. Sheldon (who characterized his contemporaneous and comparable reduction in responsibilities as leading to his doing nothing more than"babysitting" the client (Tr. 142)) perceived Mr. Casias's reassignment as essentially a career dead end for him at Raytheon:

> [A]s far as I know, there was no indication of, um, a new position he was going to. Um, and, unfortunately, a lot of times I guess with, um, more senior, um, personnel and

> managers, um, that you're kind of told you don't have that position anymore and you need to go find something else.

(Tr. 143.) Given this testimony, the jury was more than justified in concluding that a reasonable employee would have found Mr. Casias's reassignment a materially adverse employment action.[4]

Raytheon further suggests the evidence does not support the jury's conclusion that Mr. Casias's protected activity was a contributing factor in the decision to reassign him. A contributing factor

> is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision. This element is broad and forgiving, and this test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a significant, motivating, substantial, or predominant factor in a personnel action in order to overturn that action.

***Wilczynski v. Loyal Source Government Services, LLC***, 2020 WL 1076125 at *5 (D. Colo. March 6, 2020) (quoting ***Feldman v. Law Enforcement Associates Corp***., 752 F.3d 339, 348 (4th Cir. 2014) (internal quotation marks and citations omitted)). In establishing such a standard, Congress "substantially reduc[ed] a whistleblower's burden to establish his case." ***BNSF Railway Co. v. U.S. Department of Lab***or, 816 F.3d 628, 639 (10th Cir. 2016) (citation and internal quotation marks omitted; alteration in original).

[4] Moreover, even if the evidence did not support a conclusion that Mr. Casias was demoted – which, to be clear, it does – the DCWPA protects employees not only from discharge and demotion but more broadly from being "otherwise discriminated against." 10 U.S.C.A. §§ 2409(a)(1). The evidence clearly was sufficient to support a conclusion that Mr. Casias suffered an adverse employment action under this exceptionally broad standard.

There are a number of ways in which a plaintiff may substantiate his burden of proof in this regard:

> A plaintiff can establish a prima facie case that his protected activity was a contributing factor in the adverse action by . . . circumstantial evidence ... includ[ing] [1] temporal proximity, [2] indications of pretext, [3] inconsistent application of an employer's policies, [4] an employer's shifting explanations for its actions, [5] antagonism or hostility toward a complainant's protected activity, [6] the falsity of an employer's explanation for the adverse action taken, and [7] a change in the employer's attitude toward [the complainant] after he or she engages in protected activity.

***Sirois v. Long Island Railroad Co.***, 797 Fed. Appx. 56, 59-60 (2nd Cir. 2020) (quoting ***Niedziejko v. Delaware & Hudson Railway Co.***, 2019 WL 1386047 at *43 (N.D.N.Y. March 27, 2019)) (internal quotation marks and citation omitted). Focusing exclusively on the first of these considerations, Raytheon concludes the evidence is insufficient to support a causal connection between Mr. Casias's November 2015 complaint and his May 2016 reassignment. I cannot agree, for two reasons.

First, whereas under Title VII, the Tenth Circuit has held that a period of more than 6 weeks between the protected activity and the adverse employment action is too attenuated to support an inference of retaliatory animus based on temporal proximity alone, ***Meiners v. University of Kansas***, 359 F.3d 1222, 1231 (10th Cir. 2004), where the plaintiff's burden requires he prove only that his protected activity was a contributing factor in the employer's decision, plaintiffs are afforded more leeway in proving that an adverse action is sufficiently proximate in time to allow the inference of retaliation, taking account of the context surrounding the employer's actions. ***See Lockheed Martin Corp. v. Administrative Review Board, U.S. Department of Labor***, 717 F.3d

1121, 1136-37 (10th Cir. 2013) (finding plaintiff met burden to establish causal link, despite lapse of more than a year between protected activity and adverse action, where pattern of retaliatory conduct leading up to the discharge began shortly after protected activity and plaintiff also presented other evidence of retaliatory animus).

Approximately six months elapsed between the time Mr. Casias complained to his supervisor, Joseph Hollon, and the time he was demoted. If this were the extent of the evidence before the jury, Raytheon's position might have more traction. Viewing the evidence in the light most favorable to the jury's verdict, however, the totality of the evidence lends important context which supports the jury's verdict.

For one thing, Mr. Casias testified he raised the issue again with Mr. Hollon on two or three subsequent occasions. (Tr. 29.) Thus, his complaints were ongoing during the relevant time period. There also was evidence from which the jury could conclude Mr. Hollon was hostile toward Mr. Casias's complaints. ***See Sirois***, 797 Fed. Appx. at 59-60. Mr. Casias testified Mr. Hollon became angry with him and raised his voice when Mr. Casias questioned whether the directive to mark the reports as completed was ethical. (Tr. 25.) Mr. Hollon himself testified he admonished Mr. Casias for raising the issue during a leads meeting instead of discussing it directly with him (Tr. 338), and acknowledged he became increasingly frustrated with Mr. Casias during the intervening months (Tr. 340-341). Although Mr. Hollon suggested his frustration was due to Mr. Casias's performance, it was within the jury's legitimate purview to determine whether his explanations and asserted motives were credible or merely a pretext for retaliation. The jury also reasonably could infer pretext in Raytheon's asserted reasons for Mr. Casias's reassignment when it was Mr. Hollon who directed Mr. Casias, over Mr.

Casias's protests, to make the changes Raytheon claimed ultimately prompted Mr. Casias's reassignment.

Moreover, even if none of this evidence were probative, the jury found that Raytheon would not have reassigned Mr. Casias in the absence of his complaints. (**Jury Verdict** ¶ 2 at 2 [#75], filed November 21, 2019). ***See Cejka***, 292 F.Supp.3d at 1192. Raytheon does not challenge that determination by this motion, and it is fatal to any suggestion that the jury's verdict cannot stand. As a matter of law, "if the employer would not have taken the adverse action without the protected activity, the employee's protected activity satisfies the contributing-factor standard." ***BNSF Railway Co.***, 816 F.3d at 639.

Accordingly, considering the evidence and all inferences in favor of the jury's verdict for Mr. Casias, I find and conclude that there is a legally sufficient evidentiary basis for each essential element of Mr. Casias's claim of retaliation under the DCWPA. Raytheon's motion for judgment as a matter of law under Rule 50 therefore must be denied. I thus turn to its motion for new trial.

When a case has been tried to a jury, a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." **FED. R. CIV. P.** 59(a)(1)(A). A motion for new trial "is not regarded with favor and should only be granted with great caution," ***United States v. Kelley***, 929 F.2d 582, 586 (10th Cir.), ***cert. denied***, 112 S.t. 341 (1991), and then "only to correct manifest errors of law or to present newly discovered evidence," ***Elm Ridge Exploration Co., LLC v. Engle***, 721 F.3d 1199, 1216 (10th Cir. 2013). The decision

whether to grant a new trial is committed to the sound discretion of the trial court. ***Kelley***, 929 F.2d at 586.

To the extent Raytheon maintains a new trial is required because the weight of the evidence does not support the jury's verdict as to liability, I reject that contention for the same reasons set forth above.

However, I am compelled to conclude that the jury's award of backpay damages is not supportable and must be reversed. As I have found previously, Mr. Casias affirmatively waived any right to proceed on a theory that he was constructively discharged. (***See* Memorandum Opinion and Order Denying Plaintiff's Opposed Motion for Equitable Damages** at 3-5 [#114], filed September 14, 2020.) Thus, as a matter of law, he voluntarily left Raytheon and cannot claim as damages any difference between the salary and benefits of his position at Raytheon and those of the position he took after leaving Raytheon. ***See Derr v. Gulf Oil Corp.***, 796 F.2d 340, 342 (10th Cir. 1986). Moreover, it is undisputed that Mr. Casias suffered no loss of pay or benefits as a result of his reassignment, the only adverse employment action the jury was empowered to consider. The award of backpay damages therefore must be vacated.

However, I decline Raytheon's further invitation to vacate the jury's award of noneconomic damages or alternatively order remittitur.[5] ***See Klein v. Grynberg***, 44 F.3d 1497, 1504 (10th Cir.), ***cert. denied***, 116 S.Ct. 68 (1995). The Tenth Circuit has affirmed that the jury, as the finder of fact, has "wide latitude and discretion" in

[5] The fact that Mr. Casias is not entitled to economic damages has no bearing on whether the jury's award of non-economic damages was excessive. ***See White v. Wycoff***, 2016 WL 9632873 at * 6 (D. Colo. June 24, 2016).

determining an appropriate award of damages:

> The jury holds the exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of fact. It is a fundamental legal principle that the determination of the quantum of damages in civil cases is a fact-finder's function. The jury, who has the first-handed opportunity to hear the testimony and to observe the demeanor of the witnesses, is clothed with a wide latitude and discretion in fixing damages, pursuant to the court's instructions, deemed proper to fairly compensate the injured party. Further, the amount of damages awarded by a jury can be supported by any competent evidence tending to sustain it.

***Prager v. Campbell County Memorial Hospital***, 731 F.3d 1046, 1063 (10th Cir. 2013) (internal citations and quotation marks omitted). Given the breadth of the jury's discretion in this regard, Raytheon "carries the heavy burden of demonstrating that the verdict was clearly, decidedly, or overwhelmingly against the weight of the evidence." ***Hill v. J.B. Hunt Transport, Inc.***, 815 F.3d 651, 668 (10th Cir. 2016) (citation and internal quotation marks omitted). "[A] jury's determination of fact is considered inviolate absent an award so excessive . . . as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial." ***Id.*** (citation and internal quotation marks omitted). ***See also Slevin v. Board of Commissioners for County of Doña Ana***, 934 F.Supp.2d 1270, 1275 (D.N.M. 2012) ("[W]here the jury has fixed an award to compensate a plaintiff for pain and suffering, the court is permitted to grant a new trial or remit the judgment 'only rarely and in extraordinary circumstances.'") (citation omitted).

Raytheon's arguments to the contrary notwithstanding, I cannot find this extremely high bar has been met in this case. Raytheon cites to a number of factors against which it suggests the court should measure the jury's award. ***See Blangsted v. Snowmass-Wildcat Fire Protection District***, 642 F.Supp.2d 1250, 1257 (D. Colo. 2009) (citing ***Smith v. Northwest Financial Acceptance, Inc.***, 129 F.3d 1408, 1416117 (10th Cir.1997)). Most of these considerations, however, were not made known to the jury when it was asked to assign a monetary value to Mr. Casias's "emotional distress, pain, suffering, inconvenience, mental anguish, loss of reputation, and loss of enjoyment of life." For example, the jury was not told to consider whether Mr. Casias sought "medical or other healthcare assistance" in connection with his emotional and psychological distress. ***See id.*** Indeed, not only is the testimony of treating physician or psychologist not a "dispositive requirement" to entitlement to emotional damages, ***Smith***, 129 F.3d at 1417, "there is no rule in this circuit requiring corroboration of a plaintiff's testimony to support an emotional damages award" at all, ***Evans v. Fogarty***, 241 Fed. Appx. 542, 561 (10th Cir. 2007), ***cert. denied***, 128 S.Ct. 2081 (2008). ***Cf. Blangstead***, 642 F.Supp.2d at 1257. Also, and not surprisingly, the jury also was not instructed to consider awards made in similar cases, since it is a "basic principle that a jury's damages award is highly specific to the facts and circumstances of the case." ***Id***. at 562. ***See also Clawson v. Mountain Coal Co.***, 2007 WL 4225578 at *3 (D. Colo. Nov. 28, 2007) ("[T]he mere fact that another court directed remittitur or a new trial on somewhat similar facts is not especially persuasive.

To find otherwise would be to disregard the unique factual determination that each jury is called upon to make.").[6]

Instead, the jury was told that "[n]o evidence of the monetary value of such intangible things" had been or needed to be introduced and that "[t]here is no exact standard for setting the compensation to be awarded for these elements of damages," but only that its award "should be fair in light of the evidence presented at trial."[7] (**Jury Instruction No. 16** [#78], filed November 21, 2019.) "[I]t is precisely in this situation – where the jury has been asked to place a monetary value on Plaintiff's experience of non-economic harm – that deference to the jury's determination is most appropriate." ***Slevin***, 934 F.Supp.2d at 1274.

As a firm believer in the inviolability of the Seventh Amendment, and in light of the evidence presented at trial, I cannot say the jury's award so shocks the conscience that it would be appropriate to substitute my judgment for that of the jury on this issue. ***See Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.***, 703 F.2d 1152, 1170

---

[6] Even if I were to find remittitur appropriate in this case, which I do not, Raytheon's arguments for an award of no more than $50,000 are insupportable. To the extent awards in other cases have been considered instructive, more recent authority would support a far greater award than the 25-30-year old authority on which Raytheon relies. ***See Blangsted***, 642 F.Supp.2d at 1259; ***Clawson***, 2007 WL 4225578 at *4. Regardless, any suggestion that there is some upper limit to permissible non-economic damages in this circuit seems to this court as fundamentally at odds with the precepts of the Seventh Amendment. ***See Feltner v. Columbia Pictures Television, Inc.***, 523 U.S. 340, 353, 118 S.Ct. 1279, 1287, 140 L.Ed.2d 438 (1998) ("The right to a jury trial includes the right to have a jury determine the amount of [] damages . . . . Thus, . . . the common law rule as it existed at the time of the adoption of the Constitution was that in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.") (quoting ***Dimick v. Schiedt***, 293 U.S. 474, 480, 55 S.Ct. 296, 298, 79 L.Ed. 603 (1935)) (internal quotation marks and citations omitted).

[7] The jury also was instructed that in awarding damages, it was to be "guided by dispassionate common sense" and "should fix the amount using calm discretion and sound reason, not sympathy, prejudice, or speculation" (**Jury Instructions No. 16 & 13** [#78], filed November 21, 2019), instructions which it is presumed the jury followed, ***Weeks v. Angelone***, 528 U.S. 225, 234, 120 S.Ct. 727, 733, 145 L.Ed.2d 727 (2000); ***Cavanaugh v. Woods Cross City***, 718 F.3d 1244, 1250 (10th Cir. 2013).

(10th Cir.1981) (en banc ) ("What is most relevant . . . is not the judicial conscience, it is the conscience of the community as represented by the [nine] people who served on this trial jury."), ***cert. denied***, 104 S.Ct. 92 (1983). Mr. Casias presented compelling evidence as to his non-economic damages. A fourteen-year employee of Raytheon with 34 years of experience as an aerospace engineer (Tr. 6-7), Mr. Casias testified he was scapegoated and relegated to a dead-end position with nothing to do (***see*** Tr. 47-49, 53-54). Following his reassignment, he became the subject of "corporate whispering" questioning his reputation and integrity. (Tr. 54, 59; ***see also*** Tr. 58 ("[T]hey had basically dragged my name through the mud.").) He felt he had no path forward at Raytheon (Tr. 58), a conclusion that was bolstered by the testimony of his co-workers (Tr. 125-126, 142-143 ).

Mr. Casias characterized this situation as "unbelievably stressful." (Tr. 55.) He lost weight and sleep, and his blood pressure fluctuated. (Tr. 55-56.) His family relationships also suffered. Indeed, Mr. Casias testified the stress of his circumstances ultimately contributed to his divorce. (Tr. 55.) He claimed the whole episode was emotionally and physically "devastating" (Tr. 59, 67) and personally "destructive" (Tr. 62). The jury's estimation of the emotional and other non-economic harm Mr. Casias suffered also undoubtedly took account of the tenor and tone of this testimony, as well as that of the other witnesses at trial, which a recitation from a cold record can never adequately reflect.

Ultimately, I cannot find that Mr. Casias's professional integrity and personal dignity, let alone the loss of his marriage and the emotional and physical stress his

circumstances caused him, are not worth the jury's estimation. The motion for a new trial or remittitur as to noneconomic damages therefore is denied.

**THEREFORE, IT IS ORDERED** as follows:

1. That **Defendant's Rule 50(b) Motion for Judgment as a Matter of Law or, Alternatively, Rule 59 Motion for New Trial or Remittitur** [#124], filed October 21, 2020, is granted in part and denied in part, as follows:

   a. That the motion is granted as regards the jury's award of backpay damages, and that award is vacated; and

   b. That in all other respects, the motion is denied;

2. That the **Final Judgment** [#116], filed September 24, 2020, shall be amended to excise that portion thereof which awards plaintiff Bruce Casias backpay in the amount of $43,000 and prejudgment interest thereon.

Dated May 3, 2021, at Denver, Colorado.

**BY THE COURT:**

Bob Blackburn

Robert E. Blackburn
United States District Judge