[Cite as *Brown v. O'Reilly Automotive Stores, Inc.*, 2015-Ohio-5146.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102694

TIMOTHY E. BROWN

PLAINTIFF-APPELLANT

vs.

O'REILLY AUTOMOTIVE STORES, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-14-824095 and CV-14-825026

BEFORE: Celebrezze, A.J., Jones, J.,and Keough, J.

RELEASED AND JOURNALIZED: December 10, 2015

ATTORNEYS FOR APPELLANT

Brian D. Spitz
Fred M. Bean
The Spitz Law Firm, L.L.C.
25200 Chagrin Blvd.
Suite 200
Beachwood, Ohio 44122

ATTORNEY FOR APPELLEES

Robert E. Dezort
Fisher & Phillips, L.L.P.
9150 South Hills Blvd.
Suite 300
Broadview Heights, Ohio 44147-3599

FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Plaintiff-appellant, Timothy Brown ("Brown"), brings this appeal challenging the trial court's order granting summary judgment in favor of defendant-appellees, O'Reilly Automotive Stores, Inc. ("O'Reilly") and Timothy Schlairet ("Schlairet"). After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} Brown began working at O'Reilly on March 27, 2013, as the store manager of the Maple Heights Store (store 3312 in district 333). Brown was 52 years old when he was hired. Brown was hired on an at-will basis, and did not have any contract of employment for a specific period of time. Schlairet was the district manager of district 333 and Brown's direct supervisor.

{¶3} Brown reported that he endured harassment and discrimination based on his age. Specifically, Brown claims that he was called "gramps" by Schlairet and other employees, mocked for carrying a flip phone, and called "old man" by O'Reilly store manager Bill Shostrand. Brown alleges that Schlairet and Shostrand stated that he would be dead by the time they were taking over the company's headquarters in Missouri. Despite Brown's claims, Schlairet denied being around Brown when he was called "gramps" or being aware that he was called "gramps." Furthermore, Schlairet denied ever calling Brown an "old man."

{¶4} Brown claims that he was treated differently under the company's progressive discipline policy because of his age. Specifically, Brown argues that despite giving much more leeway to the younger store managers, Schlairet issued him a probationary letter and final written warning without ever providing any coaching, information letters, or first or second warnings.

{¶5} Schlairet testified during his deposition that the following events transpired. Schlairet testified that Brown received "plenty of verbal coaching" between March 27, 2013 and September of 2013. Schlairet prepared and reviewed a "game plan" performance review with Brown in September 2013. Schlairet met with Brown on September 2013, to discuss concerns regarding the store's performance and the manner in which Brown was communicating with store employees.

{¶6} Specifically, there were concerns that Brown was communicating in a manner that was threatening or intimidating. Brown testified during his deposition that he told his employees that he kept a universal key to any locked door in his shoe — implying that as a Tae Kwon Do black belt, he could open the door with his foot.

{¶7} During the September 26 meeting, Schlairet issued a "probation letter" to Brown and placed him on a final written warning. Furthermore, Schlairet identified specific tasks that Brown was supposed to complete within a two-week period, including: (1) making 20 in-person sales calls weekly and reporting back to Schlairet with a summary of those calls, (2) meeting with each store employee to discuss their opinions on improving the workplace, and (3) sending an action plan that identified areas of the store that needed improvement to Schlairet. Brown testified during his deposition that he did not complete some of these tasks within the two-week period.

{¶8} Schlairet and Brown met again on October 10, 2013, to review Brown's performance and follow up on some of the issues identified in the probation letter. During this meeting, Schlairet informed Brown that an employee filed a complaint regarding a comment he made to her. Brown denied making the derogatory comment during his deposition. Schlairet

prepared a "store visit recap" form and reviewed the document with Brown. Brown testified during his deposition that he refused to sign the document because he disputed the following martial arts comment:

> Communication: You continue to use your martial arts background as means of solving conflict. [Team members] have complained that you are unapproachable and that any conflict will result in you talking about your martial arts background. The [team members] feel that is threatening and avoid bringing problems to you.

For the reasons discussed below, Schlairet sent Brown home at the end of this meeting.

{¶9} On October 14, 2013, Schlairet met with Brown in the morning and notified him that he was being demoted. Schlairet offered Brown an assistant manager's position at $9/hour. During the afternoon on the same day, Schlairet, Brown, and O'Reilly regional director Clint McFadden met to discuss issues in the probation letter and the store visit recap form. During this meeting, Brown told Schlairet and McFadden that he was not going to work for O'Reilly for $9/hour.

{¶10} Schlairet and Brown met again on the following morning October 15, 2013. During this meeting, Schlairet informed Brown that he and McFadden had agreed to increase his compensation to $10.10/hour, and informed Brown that he had until the end of the day to accept the new position. Brown took some time to think about the offer, and met with an attorney to discuss the situation and his options. The attorney drafted a letter that Brown brought to his meeting with Schlairet that evening. Brown stated in the letter:

> Tim,
>
> I do not agree with your decision to demote me. Although you said that I am being demoted because the payroll percentage for my store is too high, I checked the numbers and my store is in the middle of the pack. There are a number of younger guys with worse profit margins, but I am being told to either take a 60%

> pay cut or be fired. I refuse to take the demotion since I don't deserve it. There are other more deserving store managers, so why me? I am not resigning.

{¶11} Based on this refusal to accept the new position, Schlairet terminated Brown's employment with O'Reilly.

{¶12} Brown filed a complaint against his former employer O'Reilly and district manager Schlairet asserting claims for (1) wrongful termination based on age discrimination, in violation of R.C. 4112.14, (2) retaliatory discharge, in violation of R.C. 4112.02, and (3) intentional infliction of emotional distress. Appellees filed a joint answer, expressly denying Brown's claims and raising various affirmative defenses. At the close of discovery, appellees moved for summary judgment, seeking to dismiss the claims raised in Brown's complaint. The trial court held a hearing on appellees' summary judgment motion, during which both parties presented oral arguments. On February 4, 2015, the trial court granted appellees' motion for summary judgment, thereby dismissing the case.

{¶13} Brown filed the instant appeal assigning four errors for review:

> I. The trial court committed reversible error by wrongfully weighing the facts.
>
> II. The trial court committed reversible error by determining that Brown did not satisfy his prima facie case for age discrimination.
>
> III. The trial court committed reversible error by determining that no genuine issue of material fact remained as to whether Brown experienced retaliation based on age discrimination.
>
> IV. The trial court committed reversible error by determining that no genuine issue of material fact remained as to whether O'Reilly Automotive Stores, Inc.'s alleged reasons for terminating Brown were a pretext for age discrimination and retaliation.

II. Law and Analysis

A. Summary Judgment Standard

{¶14} This court reviews the lower court's granting of summary judgment de novo. *Baiko v. Mays*, 140 Ohio App.3d 1, 746 N.E.2d 618 (8th Dist.2000), citing *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987); *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.*, 121 Ohio App.3d 188, 699 N.E.2d 534 (8th Dist.1997); *Dragmen v. Swagelok Co.*, 8th Dist. Cuyahoga No. 101584, 2014-Ohio-5345, ¶ 15. An appellate court affords no deference to the trial court's ruling and conducts an independent review of the record to determine whether summary judgment is appropriate. "The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party. * * * [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul*, 71 Ohio App.3d 46, 50, 593 N.E.2d 24 (8th Dist.1990).

{¶15} Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party.

{¶16} The party moving for summary judgment has the initial burden to show that no genuine issue of material fact exists. *Redeye v. Belohlavek*, 8th Dist. Cuyahoga No. 87874, 2007-Ohio-85, ¶ 16, citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

{¶17} In *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996), the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991). Under *Dresher*, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Id*. at 296. The movant cannot simply rely on conclusory assertions that the nonmovant has no evidence — the movant must specifically point to evidence contained within the pleadings, depositions, answers to interrogatories, written admissions, affidavits, etc., which affirmatively demonstrate that the nonmovant has no evidence to support his claims. *Id*. at 293.

{¶18} The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. *Id*. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. *Id*.; *see Citibank, N.A. v. Katz*, 8th Dist. Cuyahoga No. 98753, 2013-Ohio-1041, ¶ 15. If the nonmoving party establishes the existence of a genuine issue of material fact, then the trial court should deny the motion for summary judgment.

B. Age Discrimination

{¶19} Brown argues that the trial court committed reversible error by: (1) wrongfully weighing the facts, and (2) determining that Brown did not satisfy his prima facie case for age discrimination.

{¶20} R.C. 4112.02(A) prohibits, the following unlawful discriminatory practice:

> For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

{¶21} Furthermore, R.C. 4112.14(A) provides:

> No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee.

{¶22} Pursuant to *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 582, 664 N.E.2d 1272 (1996), Ohio courts may rely on federal anti-discrimination case law when interpreting and deciding claims brought under R.C. 4112.02 and 4112.14. Under both federal and Ohio standards, a plaintiff may establish a prima facie case of discrimination through either direct or indirect evidence. Under Ohio law — absent direct evidence — a plaintiff can establish a prima facie case of age discrimination in an employment discharge action by demonstrating that he or she was: (1) a member of a statutorily protected class, (2) discharged, or subject to adverse employment action, (3) qualified for the position, and (4) replaced by — or the discharge permitted the retention of — a person not belonging to the protected class. *McDonnell Douglas Corp. v. Green* 411 U.S. 792, S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501, 575 N.E.2d 439 (1991); *Ahern v. Ameritech Corp.*, 137 Ohio App.3d 754, 739 N.E.2d 1184 (8th Dist.2000); *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146, 147, 451 N.E.2d 807 (1983).

{¶23} In *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, 803 N.E.2d 781, the Supreme Court of Ohio modified the fourth prong of this test, by replacing it

with "a requirement that the favored employee be substantially younger than the protected" individual. *Id*. at ¶ 19. The Supreme Court of Ohio declined to define "substantially younger." *Id*. at ¶ 22. Instead, the court noted that "[t]he term 'substantially younger' as applied to age discrimination in employment cases defies an absolute definition and is best determined after considering the particular circumstances of each case." *Id*. at ¶ 23.

{¶24} Once a plaintiff establishes a prima facie case, a presumption of age discrimination arises, and the employer bears the burden of producing evidence of a "legitimate, nondiscriminatory reason for the plaintiff's discharge." *Ahern v. Ameritech Corp.*, 137 Ohio App.3d 754, 739 N.E.2d 1184 (8th Dist.2000); *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501, 575 N.E.2d 439 (1991); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). If the employer is able to present legitimate, nondiscriminatory reasons for its adverse action, the burden shifts back to plaintiff to show that the purported reasons were merely a pretext for invidious discrimination. To succeed in sustaining the ultimate burden of proving intentional discrimination, a plaintiff may establish a pretext either directly — by showing that the employer was more likely motivated by a discriminatory reason, or indirectly — by showing that the employer's proffered reason is unworthy of credence. *Sarach-Kozlowska v. Univ. of Cincinnati College of Med.*, Ct. of Cl. Case No. 2001-07505, 2004-Ohio-1926, citing *Fragante v. City & Cty. of Honolulu*, 888 F.2d 591, 595 (9th Cir.1989), citing *Burdine* at *id.*

{¶25} In the instant case, the first three elements are uncontroverted: (1) Brown belonged to a protected class — he was 52 years old when Schlairet hired him and 53 years old when Schlairet terminated his employment, (2) he was discharged from his employment, and (3)

he was qualified for his position. The fourth element, however, is disputed.

{¶26} Carl Carter ("Carter") replaced Brown as store manager. At the time, Carter was 46 years old — within the age-protected class — and 7 ½ years younger than Brown. Brown argues that Carter's age is irrelevant and that the elements of the prima facie case must remain flexible to conform to the facts of the case. *See Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, 837 N.E.2d 1169,¶ 10, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The United States Supreme Court held that "the fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he lost out *because of his age*." (Emphasis added.) *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996).

{¶27} After reviewing the record, we cannot say that Brown met his burden of creating the inference that he was terminated because of his age. Brown cannot prove age discrimination without satisfying the fourth element of the prima facie case. Carter — Brown's replacement — was 46 years old when he was hired. Thus, Carter was both within the age-protected class and not of a substantially younger age. We recognize, however, that the fourth element — Carter's age — is only one factor in a broader analysis. The Supreme Court of Ohio emphasized that courts must not "overlook the ultimate inquiry in age discrimination cases, i.e., whether [a] plaintiff was discharged on account of age." *Coryell*, 101 Ohio St.3d 175, 181, 2004-Ohio-723, 803 N.E.2d 781, ¶ 22, citing *Kohmescher*, 61 Ohio St.3d 501, 505, 575 N.E.2d 439. Aside from Carter's age, Brown has not produced adequate evidence to create an inference that his termination was based on his age, rather than his performance.

{¶28} For all of these reasons, we cannot find that the trial court erred in granting

appellees' motion for summary judgment on Brown's age discrimination claim. We agree with the trial court's assessment that reasonable minds can come to but one conclusion, and the conclusion is adverse to Brown. Thus, Brown's second assignment of error is overruled.

C. Retaliatory Discharge

{¶29} Brown argues that the trial court committed reversible error by determining that no genuine issue of material fact remained as to whether he experienced retaliation based on age discrimination.

{¶30} R.C. 4112.02 prohibits, in relevant part, the following unlawful discriminatory practice:

> (I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

{¶31} To establish a claim for retaliatory discharge plaintiff must prove that: (1) he or she engaged in a protected activity, (2) the employer knew of plaintiff's participation in the protected activity, (3) he or she was subject to adverse employment action, and (4) a causal link existed between the protected activity and the adverse action. *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174. A plaintiff's opposition to an alleged unlawful employment practice must be reasonable and based on a good-faith belief that the employer's actions were unlawfully discriminatory. *See Clark Cty. School Dist. v. Breeden*, 532 U.S. 268, 271, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir.2000).

{¶32} First, regarding the protected activity element, R.C. 4112.02(I) protects two types of activities: participation and opposition. Participation activity involves making a charge, testifying, assisting, or participating in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Ohio Revised Code. Opposition activity involves opposing unlawful discriminatory practices. In *Coch v. GEM Indus.*, the Sixth District Court of Appeals explained:

> "In order to engage in a protected opposition activity *** a plaintiff must make an overt stand against suspected illegal discriminatory action." *Comiskey v. Automotive Industry Action Group* (E.D.Mich. 1999), 40 F.Supp.2d 877, 898; *see, also, Jackson v. Champion Natl. Bank & Trust Co.* (Sept. 26, 2000), 10th Dist. No. 00AP-170, 2000 Ohio App. LEXIS 4390. Vague charges of discrimination do not invoke the protection of the law. [Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304,1313 (6th Cir.1989)]. In addition, "complaints concerning unfair treatment in general which do not specifically address discrimination are [likewise] insufficient to constitute protected activity." *Weaver v. Ohio State Univ.* (S.D. Ohio 1998), 71 F.Supp.2d 789, 793-94.

Coch v. GEM Indus., 6th Dist. Lucas No. L-04-1357, 2005-Ohio-3045, ¶ 32.

{¶33} Brown argues that he engaged in protected activity on three occasions: (1) calling Russ Stoutenburgh ("Stoutenburgh"), O'Reilly Loss Prevention Manager, on October 14, 2013; (2) complaining to Schlairet and McFadden about discriminatory treatment during the October 14, 2015 meeting; and (3) writing the letter to Schlairet on October 15, 2013. The record does not contain any evidence that Brown specifically alleged discriminatory employment practices to appellees prior to his termination.

{¶34} Brown now contends that after Schlairet informed him that he was being demoted, he contacted Stoutenburgh because he felt that he was being demoted — and at risk of being fired — for unfair and discriminatory reasons. However, Brown did not testify at deposition to

reporting discriminatory treatment to Stoutenburgh. Instead, Brown testified that he "was looking for information," and "asked [Stoutenburgh] for advice as to what he thought would be a good plan of action." An employee who does not complain of unlawful discriminatory conduct, and only complains generally about job conditions, has not engaged in a protected activity. *Canady v. Rekau & Rekau, Inc.*, 10th Dist. Franklin No. 09AP-32, 2009-Ohio-4974, ¶ 41, citing *Gerard v. Bd. of Regents*, 324 Fed. Appx. 818, 826 (11th Cir.2009). The record does not reflect that Brown complained to Stoutenburgh about unlawful discriminatory conduct. Thus, Brown's phone call to Stoutenburgh does not constitute protected activity.

{¶35} Brown contends that he verbally complained about discriminatory treatment to Schlairet and McFadden during the afternoon meeting on October 14, 2013. The record does not support Brown's claim. Brown testified that the only thing he discussed during the October 14, 2013 meeting with Schlairet and McFadden was that he "wasn't going to go to work for them for $9 an hour." The record does not reflect that Brown expressed his concern about discriminatory treatment to Schlairet and McFadden. Thus, Brown's discussion with Schlairet and McFadden during the October 14, 2014 meeting does not constitute protected activity.

{¶36} Brown further argues that his letter to Schlairet — in which he stated he believed he was being treated differently because of his age — constitutes protected activity. Specifically, Brown's letter stated, "There are a number of young guys with worse profit margin, but I am being told to either take a 60% pay cut or be fired." However, Brown's letter did not specifically allege discriminatory employment practices. *See Willoughby v. Allstate Ins. Co.* 104 Fed. Appx. 528, 531 (6th Cir.2004), (rejecting claim that letter sent preceding retaliation constituted protected activity where letter made vague references to unhappiness among

Caucasian employees); *Barber v. CSX Distrib. Servs*. 68 F.3d 694, 701-702 (3d Cir.1995), (holding that plaintiff's letter to Human Resources complaining about unfair treatment in general was not protected activity under the ADEA because letter did not specifically complain about age discrimination). Brown's general complaint of unfair treatment in the letter — which does not specifically address discrimination — is insufficient to constitute protected activity. *See Weaver v. Ohio State Univ.*, 71 F.Supp.2d 789, 793-794, (S.D.Ohio 1998). Thus, Brown's letter does not constitute a protected activity, and Brown failed to establish the first element of a claim of retaliation.

{¶37} As Brown failed to establish that he engaged in a protected activity, he cannot demonstrate that appellees knew of his participation in the protected activity. Accordingly, Brown failed to establish the second element of a claim of retaliation.

{¶38} The third element is undisputed, because appellees terminated Brown on October 15, 2013, after he turned down the assistant store manager position.

{¶39} Brown cannot establish the fourth element of a claim of retaliation, regarding a causal connection between the protected activity and the adverse employment action, because Brown failed to establish that he engaged in a protected activity. However, assuming arguendo that Brown's letter to Schlairet constituted a protected activity, Brown is still unable to establish the fourth element.

{¶40} Brown learned that he was being demoted on the morning of October 14, 2013. However, Brown did not present his letter to Schlairet until the evening of October 15, 2013. Brown's letter even acknowledges that he already learned of the adverse employment action before drafting the letter: "I am being told to either take a 60% pay cut or be fired." Brown

argues that he and Schlairet merely discussed the possibility of adverse employment action on October 14, 2013, and that the adverse employment action did not take place until October 15, 2013 — after Brown had engaged in a protected activity by submitting the letter to Schlairet. The record does not support Brown's argument. During the October 14, 2013 meeting, Schlairet informed Brown that he was being demoted and offered him the assistant store manager position — Schlairet did not merely discuss a possibility that Brown may be demoted. Based on the fact that Brown learned of his demotion before presenting the letter to Schlairet, he cannot satisfy the causality element of the prima facie case.

{¶41} For all of these reasons, we cannot find that the trial court erred in granting appellees' motion for summary judgment on Brown's retaliatory discharge claim. A review of the evidence in a light most favorable to Brown leads to the conclusion that there is no genuine issue of material fact regarding his retaliation claim. We agree with the trial court's assessment that reasonable minds can come to but one conclusion, and the conclusion is adverse to Brown. Thus, Brown's third assignment of error is overruled.

D. Pretext

1. Age Discrimination

{¶42} Assuming, arguendo, that Brown could establish a prima facie case of age discrimination, Brown failed to meet his burden of showing that appellees' legitimate, nondiscriminatory reasons for terminating him were merely a pretext for unlawful discrimination. Brown raises three challenges to the legitimacy of appellees' reasons for his termination: (1) the evidence does not establish that he had performance issues, (2) that Schlairet changed the

rationale for demoting him from performance-related issues to Brown's aggressive behavior, and (3) appellees did not follow the company's progressive discipline policy.

Performance Issues

{¶43} Brown argues that his store had the highest sales numbers in the district and a higher profit margin than the majority of stores in the district, and that he was outperforming almost every other younger manager in Schlairet's district. Thus, Brown argues, these numbers cannot serve as a legitimate basis for his demotion. However, the record shows that Brown's demotion was not based on his store's numbers. Instead, Brown was demoted based on: (1) communication concerns, (2) his failure to complete the probationary tasks within the two-week period, and (3) several complaints filed against Brown — both before and after he was placed on probation.

{¶44} Schlairet prepared a "game plan" for Brown's store and reviewed the report with him in September 2013. The "game plan" performance review identified 53 out of 88 performance-related categories in which Brown's performance was deemed to be "needing improvement" or "unsatisfactory." Furthermore, Brown acknowledged that he failed to meet several performance goals as store manager — outlined in the "game plan" — including: payroll goals, cash ticket averages, sales call quotas, completing corporate "to do" lists, inventory turnover goals, outside purchasing tracking requirements, and making timely deposits. Schlairet testified at his deposition that after preparing the "game plan" performance review for Brown's store, he "was so disappointed in the outcome of the store," and that the report "helped lead to [his] decision for [issuing] the probationary letter."

{¶45} During the September 26, 2013 meeting, Schlairet discussed: (1) his concerns

regarding the store's performance, and (2) his concerns that Brown was communicating with store employees in a manner that was threatening or intimidating. Brown testified during his deposition that he told his employees that he kept a universal key to any locked door in his shoe — implying that as a Tae Kwon Do black belt, he could open the door with his foot. Schlairet issued a "probation letter" to Brown and placed him on a final written warning.

{¶46} Schlairet also identified three specific tasks during the September 26, 2013 meeting that Brown was supposed to complete within a two-week period: (1) making 20 in-person sales calls weekly and reporting back to Schlairet with a summary of those calls, (2) meeting with each store employee to discuss their opinions on improving the workplace, (3) sending an action plan that identified areas of the store that needed improvement to Schlairet. Schlairet testified that he gave Brown the two-week deadline to complete the tasks "because they needed to be addressed immediately."

{¶47} Brown argues that the "store visit recap" form reflects that he made "great improvement" after the September 26, 2013 probation meeting with Schlairet. Although Schlairet acknowledged that Brown showed "great improvement" in his payroll percentage after receiving the probation letter, he testified that Brown did not show significant improvement in several areas. Brown neither completed — nor attempted to complete — the tasks outlined in the probation letter within the two-week time period.

{¶48} Furthermore, Schlairet testified in his deposition that "a lot of team members" filed complaints against Brown, involving: (1) Brown's general lack of leadership, not being approachable, exhibiting poor management; (2) not making sales calls, not helping the wholesale business grow, not being able or willing to speak with team members, exhibiting stubbornness,

and team members felt that it was Brown's way or the highway; and (3) making derogatory comments to a female employee — filed after Brown received the probation letter. Schlairet raised these concerns in the probation letter:

> Communication: must improve communication with both supervisors and subordinates. There must be more of an effort on your part to speak with and encourage your personnel. You must refrain from communicating in a manner which may be perceived to be threatening or intimidating. It is not acceptable to make jokes or comments about your martial arts experience. That can easily be perceived as threatening.

{¶49} Schlairet's "store recap visit" report states, in relevant part:

> Morale: I continue to have complaints from [team members] within the store. Many of those [team members] have expressed that they want a transfer to a different store because of the current work environment.
>
> Communication: You continue to use your martial arts background as means of solving conflict. [Team members] have complained that you are unapproachable and that any conflict will result in you talking about your martial arts background. The [team members] feel that is threatening and avoid bringing problems to you.

{¶50} Both the probation letter and the store visit recap form indicated that Brown's performance would be closely monitored, and that he may be subject to further disciplinary action including demotion and/or termination if "significant improvement is not shown during this period of time and maintained at company standards."

{¶51} Based on these facts, appellees' reasons for demoting Brown were legitimate and nondiscriminatory.

Progressive Discipline Policy

{¶52} Brown argues that appellees' deviation from the company's progressive discipline policy indicates that the reasons for terminating him were merely a pretext for unlawful discrimination.

{¶53} The company's progressive discipline policy states that progressive discipline generally takes place in the following stages: (1) verbal warning (documented), (2) written warning, (3) final warning, and (4) termination. The policy states that "exceptions may be made to these steps depending on the severity of the issue and may result in final warning, demotion or immediate termination." Furthermore, the policy provides, in relevant part, information about demotions:

> A potential alternative to termination may be a demotion. All demotions are at the discretion of management. This level of discipline does not follow any specific [progressive discipline] step but may be issued depending on the [team member's] position and performance concerns. Generally, a demotion should be preceded by a written warning detailing the performance deficiencies or misconduct.

{¶54} At deposition, Schlairet testified about an O'Reilly "Rules of Conduct" list that identifies the "more serious violations," that may bypass progressive discipline. The "Rules of Conduct" state that violations of this nature "may result in disciplinary action up to and including discharge." Schlairet testified that Brown committed two of these serious infractions: (1) "failure to treat customers, visitors, or fellow team members in a professional manner," and (2) "unsatisfactory work performance."

{¶55} Schlairet testified at his deposition that Brown received "plenty of coaching" before he was issued a probationary letter final warning. Furthermore, Schlairet complied with the company's demotion policy: Brown's demotion was preceded by three written reports detailing performance deficiencies/misconduct — the "game plan," probation letter, and "store visit recap" report.

{¶56} Schlairet testified that he "skipped steps" in disciplining other similarly situated

store managers for performance deficiencies and "Rules of Conduct" infractions. First, Schlairet issued a probation letter and final written warning in August 2013 to Wayne Jenkins — a store manager in his 30s — for failing to meet the payroll percentage goals. Second, Schlairet demoted store manager Bill Shostrand for getting into a verbal argument in which he threatened another store manager.

{¶57} Based on these facts, we cannot say that an inference of pretext can be drawn from Schlairet's disciplining of Brown. Schlairet identified two "Rules of Conduct" violations that Brown committed. Brown neither showed "significant improvement" in performance nor completed the tasks assigned by Schlairet after the probation meeting. Furthermore, Brown failed to show an improvement in the manner in which he communicated with his team members.

Same Actor Inference

{¶58} In the instant matter, the same actor — Schlairet — hired, demoted, and terminated Brown. In *Pirsil v. Internatl. Steel Group-Cleveland*, 8th Dist. Cuyahoga No. 85056, 2005-Ohio-3013, this court addressed the "same actor" inference, stating:

> An employer can demonstrate a nondiscriminatory intent with regard to demotion or termination of an employee through the "same actor" inference. Where the same actors make positive and adverse employment decisions about an individual, especially within a short time period, a court may strongly infer a nondiscriminatory motivation in the later action.

Id. at ¶ 15; citing *Pulver v. Rookwood Highland Tower Invest.*, 1st Dist. Hamilton Nos. C-950361, C-950492, 1997 Ohio App. LEXIS 1153 (Mar. 26, 1997); *see also Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 572 (6th Cir.2003) (en banc); *Zambetti v. Cuyahoga Cty. College*,

314 F.3d 249 (6th Cir.2002); *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 463 (6th Cir.1995). The "same actor" inference embodies the idea that an individual willing to hire a person of a certain class is unlikely to fire them simply because they are a member of that class. *See Pirsil* at ¶ 15-16.

{¶59} Brown argues that the "same actor" inference does not apply here because: (1) seven months passed between his hiring and termination — whereas only two months passed between plaintiff's hiring and firing in *Pirsil* — and (2) Schlairet was merely following orders to hire him, and that he was recruited and recommended by other O'Reilly employees.

{¶60} The record reflects that Schlairet was ultimately responsible for hiring Brown, offering him the assistant store manager demotion, and terminating his employment with O'Reilly. Furthermore, Brown was employed at O'Reilly for seven months — he was hired at 52 years old, and fired at the age of 53. Based on these facts, the "same actor" inference is applicable — weighing against a finding of unlawful age discrimination. The fact that Schlairet did not terminate Brown's employment outright — instead offering him the assistant store manager position — following the performance issues also weighs against a finding of unlawful age discrimination.

{¶61} For all of these reasons, we cannot find that the trial court erred in granting appellees' motion for summary judgment on Brown's age discrimination claim.

2. Retaliatory Discharge

{¶62} Assuming, arguendo, that Brown established a prima facie case of retaliatory discharge, he failed to meet his burden on pretext after appellees advanced a legitimate, nondiscriminatory reason for the adverse employment actions. In order to meet the burden on

pretext, a plaintiff "must produce evidence sufficient that a reasonable finder of fact could reject the employer's proffered reason." *Haughton v. Orchid Automation*, 206 Fed. Appx. 524, 531 (6th Cir.2006); *see also Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 595 (6th Cir.2007). A plaintiff can meet this burden by showing that the employer's proffered reason "(1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *(*International citation omitted.) *Hopson v. DaimlerChrysler Corp.*, 306 F.3d 427, 434 (6th Cir.2002).

{¶63} In an attempt to meet his burden on pretext for the retaliatory discharge claim, Brown restates his arguments that: (1) the evidence does not establish that he had performance issues, (2) Schlairet changed the rationale for demoting him from performance-related issues to Brown's aggressive behavior, and (3) appellees did not follow the company's progressive discipline policy. As we discussed above, the record does not support these arguments.

{¶64} Based on these facts, we cannot say that an inference of pretext can be drawn for unlawful discrimination or unlawful retaliatory discharge. A review of the evidence in a light most favorable to Brown leads to the conclusion that there is no genuine issue of material fact regarding whether appellees' reasons for demoting Brown were a pretext for unlawful discrimination or retaliation. We agree with the trial court's assessment that reasonable minds can come to but one conclusion, and the conclusion is adverse to Brown. Thus, Brown's fourth assignment of error is overruled.

E. Weighing the Facts

{¶65} Brown argues that the trial court improperly weighed the facts and made credibility determinations in favor of appellees. In ruling upon a motion for summary judgment, a court

may not weigh the evidence or consider the credibility of witnesses. *See Hickory Grove Investors, Ltd. v. Jackson*, 10th Dist. Franklin No. 08AP-514, 2008-Ohio-6428, ¶ 28; *Santho v. BSA*, 10th Dist. Franklin No. 05AP-341, 2006-Ohio-3656, ¶ 16; *Gessner v. Schroeder*, 2d Dist. Montgomery No. 21498, 2007-Ohio-570, ¶ 43.

{¶66} First, Brown argues that the trial court merely stated that no genuine issue of material fact existed as to the age discrimination retaliation claim, without offering any explanation as to how it reached this conclusion. However, a trial court is not required to provide specific findings of fact and conclusions of law — or an "explanation" — in ruling on summary judgment motions. *See Kristian v. Youngstown Orthopedic Assocs.*, 7th Dist. Mahoning No. 03-MA-189, 2004-Ohio-7064, ¶ 21; *Mosley v. Gen. Motors Corp.*, 7th Dist. Mahoning No. 01-CA-85, 2002-Ohio-6000, ¶ 43. Furthermore, as this court reviews the lower court's ruling de novo, any error in the trial court's explanation — or lack of explanation — for granting summary judgment is harmless error.

{¶67} Brown further argues that in granting summary judgment, the trial court ignored the following evidence: (1) O'Reilly terminated him within one day of complaining about age discrimination, (2) Schlairet did not investigate Brown's age discrimination claim, and (3) Schlairet told Brown — after he complained of age discrimination — that he would either be demoted or terminated by the end of the day. This evidence, Brown contends, demonstrates that conflicting issues of fact exist.

{¶68} As we analyzed earlier, Schlairet notified Brown that he was being demoted before Brown complained of age discrimination in his written letter. Furthermore, Schlairet demoted Brown based on his communication issues, failure to complete the probationary tasks within the

two-week period, and the complaints filed against Brown by other team members. When Brown declined the demotion and assistant store manager position, Schlairet terminated his employment with O'Reilly. Brown's demotion and termination were neither based on his age nor his alleged complaints of age discrimination. The trial court did not ignore this evidence in granting appellees' motion for summary judgment.

{¶69} Second, Brown argues that the inconsistencies in his testimony regarding who was responsible for his hiring and termination create a genuine issue of material fact. Brown cites *Turner v. Turner*, 67 Ohio St.3d 337, 342, 617 N.E.2d 1123,(1993) in support of his argument that the inconsistencies in his testimony can only be resolved by a trier of fact. In *Turner*, the Supreme Court of Ohio held that when a moving party's testimony is inconsistent, "summary judgment in that party's favor is improper because there exists a question of credibility which can be resolved only by the trier of fact." Id. However, unlike *Turner*, Brown is not the moving party in the instant matter. The testimony presented by the appellees in this case was not inconsistent.

{¶70} Third, Brown argues that the trial court, in granting summary judgment, failed to consider the inconsistencies regarding appellees' progressive discipline policy. Specifically, Brown contends that although Schlairet — in applying the discipline policy — "gave plenty of leeway to the younger store managers in his district," Schlairet gave him a probationary letter and a final written warning without providing any coaching, information letters, or a first or second warning. The trial court did not fail to consider appellees' application of the progressive discipline policy. Furthermore, as we analyzed earlier, the record does not reflect inconsistencies in appellees' application of the progressive discipline policy.

{¶71} After reviewing the record, we cannot say that the trial court improperly weighed the facts in granting appellees' motion for summary judgment as to Brown's age discrimination retaliation claim. Brown's first assignment of error is overruled.

III. Conclusion

{¶72} A review of the evidence in a light most favorable to Brown leads to the conclusion that there are no geniune issues of material fact regarding Brown's age discrimination and retaliation claims. First, Brown failed to satisfy the fourth element of the prima facie case — that he was replaced by an employee of a substantially younger age who was not a member of the protected class — for age discrimination, and failed to meet his burden of showing that appellees' reasons for the adverse employment action were a pretext for unlawful age discrimination. Second, Brown failed to satisfy the causality element of the prima facie case for retaliatory discharge, and failed to meet his burden of showing that appellees' reasons for the adverse employment action were a pretext for unlawful retaliatory discharge. Finally, the trial court did not improperly weigh the facts in granting appellees' motion for summary judgment

{¶73} We agree with the trial court's assessment that reasonable minds can come to but one conclusion, and the conclusion is adverse to Brown. Thus, Brown's assignments of error are overruled, and we affirm the judgment of the trial court.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules

of Appellate Procedure.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

KATHLEEN ANN KEOUGH, J., CONCURS;
LARRY A. JONES, SR., J., CONCURS IN JUDGMENT ONLY