UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN

JOHN G. NELSON

Plaintiff

v.

DETROIT TIGERS, INC.

Defendant

Case No. 2:22-cv-12822

Hon. David M. Lawson

Mag. Judge David R. Grand

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PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, John Nelson, responds to Defendant's Motion for Summary Judgment for the reasons set forth in the attached brief.

Respectfully submitted,

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/s/ Nicholas Roumel

December 1, 2023

Nicholas Roumel (P37056)

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Issue Presented

Where Plaintiff John Nelson was terminated for alleged performance reasons, yet had excellent documented performance evaluations and feedback over the past four years, and was replaced by his much younger and less experienced assistant whom he had hired and trained, as part of a systematic purge of older and experienced workers supervised by the same decision-maker, is there a triable case of age discrimination under the Age Discrimination in Employment act, and the Elliott-Larsen Civil Rights Act?

PLAINTIFF SAYS YES

DEFENDANT SAYS NO

Controlling Authorities

Hazle v Ford Motor Co., 464 Mich 456, 628 NW2d 515 (2001)

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

Sloat v. Hewlett-Packard Enter. Co., 18 F.4th 204 (6th Cir. 2021)

Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 128 S.Ct. 1140, 170 L.Ed.2d 1 (2008)

Wexler v White's Fine Furniture, Inc, 317 F3d 564 (6th Cir 2003)

Willard v. Huntington Ford*, Inc.*, 952 F.3d 795 (6th Cir. 2020)

Introduction

John Nelson began with the Detroit Tigers as a teenage batboy in 1979, and served for 29 years as the Visiting Teams Clubhouse Manager – until he was abruptly terminated on October 11, 2021. This was despite four consecutive years of documented, positive performance (which Defendant overlooks). This alone creates a factual dispute as to whether Nelson's performance was the true motivation for his termination, or whether it was pretext for age discrimination.

Nelson was fired by Tigers' 31-year-old Vice President Sam Menzin, who replaced him with the 33-year-old Dan Ross, whom Nelson had hired as his assistant a few years before. Ross was then promoted again, to replace the 72-year-old Jim Schmakel, who was demoted after 44 years as Home Clubhouse Manager. These moves were part of a major purge of Tigers' older workers.

Under these circumstances, there is a triable case of age discrimination.

"The Players"

Sam Menzin (born 1990) joined the Tigers as a 21-year-old intern in 2013 and was eventually promoted to Director of Baseball Operations, in 2021. [Menzin dep., ECF 20-5, PageID190-191] Part of his duties included overseeing clubhouse operations. [Id., PageID.192]

Each home and visiting clubhouse had their own staff, a Clubhouse Manager, an Assistant Clubhouse Manager, and various attendants. The home clubhouse was considered more prestigious, and was more financially lucrative. [Ross dep., ECF 20-8, PageID.242] The home clubhouse manager also supervised all clubhouse staff, and evaluated the other managers. [Schmakel dep., ECF 20-7, PageID.217-218]

When Menzin took over the clubhouses in 2021, they were staffed as follows:

Home Manager – Jim Schmakel (age 70)
Home Assistant Manager – Mark Cave (50)
Visiting Manager – Plaintiff John Nelson (58)
Visiting Assistant Manager – Dan Ross (33)

After Menzin fired Plaintiff, replacing him with Ross, the 2022 roster was:

Home Manager – Jim Schmakel (age 71)
Home Assistant Manager – Mark Cave (51)
Visiting Manager – Dan Ross (34)
Visiting Assistant Manager – Kaolayao Pritchet (age 26)

For 2023, Menzin demoted Schmakel, and promoted Ross in his stead:

Home Manager – Dan Ross (35)
Home Assistant Manager – Mark Cave (52)
Visiting Manager – Jim Schmakel (age 72)
Visiting Assistant Manager – Kaolayao Pritchet (age 27)

Plaintiff's Documented Performance was Exemplary

When John Nelson was in high school in 1979, the principal, Sister Mary, knew Jim Schmakel, who was the Tigers' Home Clubhouse manager even back then. She connected Nelson to Schmakel, who hired the young Plaintiff as a clubhouse attendant and batboy. [Nelson dep., ECF 20-2, PageID.145] Nelson was unwaveringly loyal. For instance, when he entered the Air Force in 1984, he used his annual 30 day leave to assist the Club with spring training. [Complaint, ECF 1, PageID.3, ¶ 9] He worked his way up, and in 1992 was named the Visiting Teams Clubhouse Manager, ensuring that visiting teams had proper facilities and amenities. [Nelson dep., ECF 20-2, PageID.146]

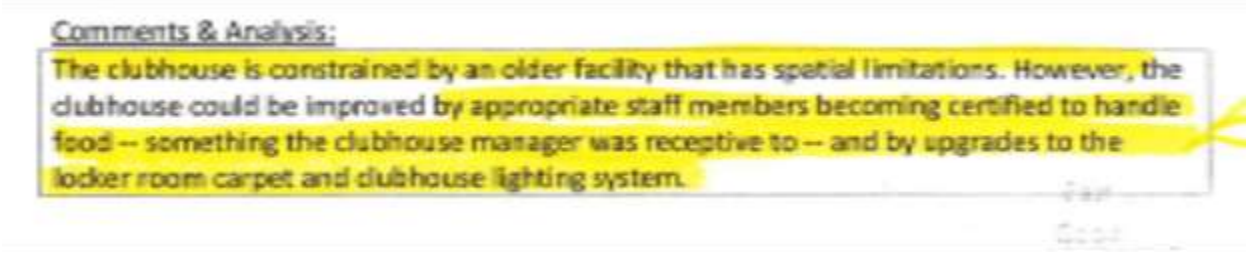
Nelson never saw a job description. Schmakel was his immediate supervisor from 1992 until Nelson's 2021 termination, and evaluated Nelson annually. [Nelson dep., Id.]

Before joining the Tigers, Jim Schmakel worked for Eltra corporation as a human resources manager, and developed performance review models as part of his job. He continued to consult with them in the off season, even after joining the Tigers. [Schmakel dep., ECF 20-7, PageID.212] He took the process seriously and emphasized employee improvement in the process. [Id., PageID.214, 216]

He was objective in assessing John Nelson's performance, and it shows in his annual evaluations. In 2017, after the players and the league negotiated a new

collective bargaining agreement, Nelson had difficulty adjusting to the new reality, which abolished visiting teams "dues" paid directly to the league's clubhouse managers, and as a result, lessened Nelson's income. Schmakel did not hold back in numerous specific criticisms, rating Nelson overall as "Needs Improvement." [Nelson 2017 evaluation, ECF 20-6, PageID.205-207]

Major League Baseball's teams formally rated visitors' clubhouse facilities in a survey conducted in the 2018 season. [Survey, ECF 20-4, PageID.177-187] While the Tigers fared poorly, it is crucial to emphasize that the criticisms related to the Tigers' facilities – not Nelson's performance [Id., PageID.178]


Comments & Analysis:
The clubhouse is constrained by an older facility that has spatial limitations. However, the clubhouse could be improved by appropriate staff members becoming certified to handle food -- something the clubhouse manager was receptive to -- and by upgrades to the locker room carpet and clubhouse lighting system.

The **only** comments about Nelson personally were the suggestion that he become certified to handle food. [Id., PageID.181] Nelson promptly got certified. Nelson dep., ECF 20-2, PageID.139]

In 2018, Schmakel noted significant improvement in Nelson's performance. Whereas most of the categories in the 2017 evaluation were rated "Further Development Needed," they rose to mostly "Regularly Exhibits" in 2018. [2018 Performance Evaluation, Exh A] Importantly, Schmakel did not consider the 2018 evaluation to be negative. [Schmakel dep., ECF 20-7, PageID.214]

By 2019, Schmakel scored Nelson as "Excellent" overall, with an "Exceeds Expectations" in the "Core Values" rating. [2019 Performance Evaluation, Exh B] In the 2020 COVID-shortened year, with its myriad challenges for food service and cleanliness, Nelson "rose to the occasion, multiple protocols, multiple meals served, multiple games played, and John not once received any criticism. In fact a few teams took the time to call me and tell me how good the clubhouse was run, many complimented the food and its delivery." [2020 Performance Evaluation, Exh C]

Nelson was terminated at the end of the 2021 season, before Schmakel could formally evaluate him. If he had, it would have been "very similar to the year before, which was pretty good." [Schmakel dep., ECF 20-7, PageID.217] Schmakel also testified he received no criticisms from opposing teams after 2017. [Id., PageID.216]

Schmakel had regular interaction with Nelson; it could be "daily, weekly." He also got regular feedback from visiting teams. He felt sufficiently informed to conduct evaluations. [Id., PageID.213] No one criticized the way he did performance evaluations, or suggested he wasn't fairly assessing Nelson. [Id., PageID. 215, 217]

In contrast, Sam Menzin had virtually zero contact with Nelson. When the 2018 visiting clubhouse survey came out, then Vice President and General Manager Al Avila instructed his staff to **not** send a copy to Menzin because he had "absolutely nothing to do with the visiting clubhouse." [Avila email, Exh D] Even after Menzin assumed clubhouse supervision duties in 2021, he made it a point to **not** enter the

visiting clubhouse "when the visiting team was present," testifying , "Yeah, it's more out of respect. Obviously my position where I'm involved in player analysis, player transaction, going into the visiting clubhouse while they are there would give me inside information into their operations and that's frowned upon obviously for anybody in the front office position." [Menzin dep., ECF 20-5, PageID.202]

Before Menzin terminated John Nelson, he conceded that he had **never** had any discussions with him about his performance. [Id., PageID.49-50] Nelson agreed, testifying that Schmakel's formal reviews were the only feedback he had, and was not aware of any complaints from visiting teams or co-workers after 2018. [Nelson dep., ECF 20-2, PageID. 156-157, 159, 162] He said he rarely interacted with Menzin and never saw him in the visiting clubhouse. [Id., PageID.161]

John Nelson is Terminated

On October 11, 2021, Nelson was summoned to a meeting with Menzin. Menzin alluded to the 2018 survey results and proceeded to terminate him. [Nelson dep, ECF 20-2, PageID.162] Nelson was taken by complete surprise. He had understood those survey results to have to do with the spatial limitations of the facility itself, and did what he could personally at the time, such as by getting the food handler's certificate, [Id., PageID.167-168] and was rewarded with excellent evaluations thereafter.

Nor was he aware of any complaints about his performance since the 2018 survey, and Menzin did not mention any. [Id., PageID.162; also see Menzin dep, ECF 20-5, PageID.200] Menzin only recalls non-specifically alluding to "further investigation" in the termination meeting. [Menzin dep, ECF 20-5, PageID.201]

Worse, Nelson was replaced by Dan Ross, his much younger assistant that Nelson himself had hired, trained, and supervised which led him to believe he was subjected to discrimination, succinctly describing him as a "Younger white guy, less experience." [Nelson dep, ECF 20-2, PageID.162][1]

Behind Nelson's back, Ross brought directly to Menzin a list of complaints about Nelson, that Ross admitted mostly had to do with the way Nelson shared tips with the visiting clubhouse staff. [Ross dep, ECF 20-8, PageID.241] Notably, all witnesses acknowledge that there were no rules about tip sharing, except that they were to be divided in the discretion of the Clubhouse Manager. [Ross, Id., PageID.230, 233; Nelson dep, ECF 20-2, PageID.149]

The day after Nelson was terminated, Menzin offered Ross the now-vacant job of Visiting Clubhouse Manager. [Ross dep, Id. 240-241] This was a job that Ross admitted, in a previous performance evaluation, he wanted to have one day. [Id., PageID.233]

[1] Nelson's race claim has been dismissed on stipulation. [ECF 19]

To the extent Menzin was also influenced by conversations with some visiting club personnel, he didn't recall specifics, and offered no context about who he tried to reach, the details of the conversations, the time frame for the alleged criticisms. He testified, "I was in touch with various other teams and asked for their feedback on the visiting clubhouse operation." [Menzin dep, ECF 20-5, PageID.201]

In making his decision, Menzin discounted Nelson's stellar performance evaluations. (See, e.g., Defendant's brief, referring to "cursory reviews of Plaintiff's performance since 2018.") Inconsistently, when he promoted Dan Ross to Nelson's position, he was influenced by Ross' "exemplary reviews." [Menzin dep, Id., PageID.197] The same person – Jim Schmakel – evaluated both. [Schmakel dep, ECF 20-7, PageID.213, 218]

The contrast is striking: between an experienced human resources professional (Schmakel) conducting a fair and objective annual performance evaluation, and the person (Menzin) who made the ultimate employment decision without talking to the employee or observing his work, and disregarding his corporation's **only** formal method of measuring employee performance. [See, e.g., Menzin dep, ECF 20-5, PageID.193-194] This in and of itself sets up a factual dispute as to the legitimacy, or honesty, of the Tigers' decision. When taken into consideration with the club's systematic targeting of older, experienced employees, it also raises a triable issue of age discrimination.

Sam Menzin's Purging of Older, Experienced Workers

Sam Menzin's first promotion with the Tigers was replacing Mike Smith as director of baseball operations in 2015, [Menzin dep., Id., PageID.191] Smith had graduated from college before Menzin was ten years old, and had been with the Tigers since 2002. [https://www.linkedin.com/in/michael-smith-2a03976] In 2021, at the age of 31, Menzin was promoted again, to vice president/assistant general manager, replacing David Chadd, who had been with the club 18 years. [https://www.freep.com/story/sports/mlb/tigers/2021/08/31/detroit-tigers-promote-sam-menzin-jay-sartori-front-office-moves/5667650001/]

In his new and present role, besides the clubhouses, Menzin's duties included supervision of the medical department, strength and conditioning, and scouting. [Menzin, Id., PageID.192] In a purge announced on October 23, 2022, senior staff members **in all three areas** were terminated.

Menzin did not renew the contract of Kevin Rand, the senior director of medical services, who had been with the club 20 years, and in professional baseball for 41. Steve Chase, the strength and condition coach who was not only with the Tigers for 18 years, but served in that role for *all of major league baseball*, was also terminated. Finally, amateur scouting director Scott Pleis, who had been with the organization since 2007, was also let go, along with Andy Bjornstad of the advance scouting team, with the Tigers since 2004, and replaced with a younger person.

The fifth person terminated under Menzin's watch was John Nelson.[2] After Dan Ross was pegged to replace Nelson, Ross' position was filled with the even younger 26-year-old Kaolayao Pritchet. [Ross dep, ECF 20-8, PageID.233-234; https://www.linkedin.com/in/kaolayao-pritchet-a36b0917a/]

While Menzin did not terminate Jim Schmakel, he demoted him from Home Clubhouse Manager to Visiting Clubhouse Manager in the same time frame as Rand, Chase, Pleis, and Bjornstad, shortly after the 2022 baseball season. [Schmakel dep, ECF 20-7, PageID.211] Menzin said he did so based on conversations with players, but refused to identify them. [Menzin dep, ECF 20-5, PageID.196] He claimed to have warned Schmakel in previous conversations, but had no documentation of such. [Id., PageID.196-197] He had no cogent answer to the question, "Why was [Schmakel] a "good candidate to lead the visiting clubhouse when he couldn't meet the standards for the home clubhouse?" [A: "Jim has a lot of experience and felt like that change would play to his strengths and working with visiting teams and giving that level of service." Id.]

[2] Sources for the information about terminations and years of service: Menzin dep, ECF 20-5, PageID. 192-193; https://www.mlb.com/news/tigers-make-changes-to-medical-and-conditioning-staff; https://www.freep.com/story/sports/mlb/tigers/2022/10/24/tigers-renew-kevin-rands-contract-doug-teter-shifts-roles/69583348007/; https://www.mlb.com/tigers/news/tigers-part-ways-with-amateur-scouting-director-scott-pleis; https://www.linkedin.com/in/andrew-bjornstad-985850197/]

Nor did Menzin have an adequate explanation as to why he bypassed (for Home Clubhouse Manager) the 51-year-old Assistant Home Clubhouse Manager Mark Cave, who had faithfully served the Tigers since 1997 and had outstanding performance evaluations, in favor of the 34-year-old Dan Ross. Besides his experience, Cave - who was "role model" or "outstanding" in every category in 2019, 2020, and 2021 – had slightly better evaluations. [Compare: Cave Evaluations, Exh E, Ross Evaluations Exh F; also see Schmakel dep, ECF 20-7, PageID.218: "(Ross was) Not as good as Mark Cave, and I've had issues with him."]

Moreover, Cave didn't even realize that he had an opportunity to apply for either the Visiting Clubhouse Manager position, after Nelson was terminated, or the Home Clubhouse Manager, after Schmakel was demoted, though he would have liked the opportunity, and told Menzin so. [Cave dep., Exh G, pp. 10-12]

This evidence shows that the Tigers, and Sam Menzin in particular, had a "pattern and practice" of purging or bypassing older, experienced workers in favor of younger ones. When coupled with the contrast between John Nelson's exemplary documented performance, and the reasons and manner of his termination, this relevant and probative evidence helps to create a triable issue of age discrimination to defeat the motion for summary judgment.

Standard of Review

Nelson's remaining claims are two: Violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 6121 et seq. ("ADEA"), and age discrimination under Michigan's Elliott-Larsen Civil Rights Act, M.C.L. 37.2201 *et seq.* ("ELCRA"). This Honorable Court is tasked with deciding whether a reasonable jury **could** find that John Nelson was discriminated against because of his age. [*Anderson v. Liberty Lobby,* Inc., 477 U.S. 242, 249 (1986) ("A fact is material if it 'might affect the outcome of the suit under the governing law")] When so doing, this Court must view the evidence, and any inferences drawn therefrom, in the light most favorable to Mr. Nelson. [*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986); *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 584 (6th Cir. 2009)] Summary judgment is improper if reasonable minds could differ as to whether Mr. Nelson was discriminated against. [*Anderson*, Id. at 250–51; FRCivP 56(a). See also *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.,* 725 F.3d 571, 577 (6th Cir. 2013) ("The [summary judgment] motion may be granted only if in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party.")] Here, John Nelson has put forth sufficient evidence for a factfinder to find in his favor, on both his ADEA and ELCRA claims. Summary judgment should therefore be denied.

Legal Argument

John Nelson's evidence would allow a jury to infer that he was terminated because of age discrimination. Since he has no "smoking gun" direct evidence, [*cf. Gohl v. Livonia Pub. Schs.*, 836 F.3d 672, 683 (6th Cir. 2016)] he may present an indirect case, with evidence would allow a jury to infer unlawful discrimination. [*Sloat v. Hewlett-Packard Enter. Co*., 18 F.4th 204, 209 (6th Cir. 2021)]

An indirect case is analyzed under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–06 (1973). A plaintiff must first establish a prima facie case, showing (1) membership in a protected class; (2) an adverse employment action; (3) qualifications for the position held; and (4) replacement by someone outside the protected class. "This light burden is "'easily met' and 'not onerous.'" [*Pelcha v. MW Bancorp, Inc*., 988 F.3d 318, 326 (6th Cir. 2021), internal cites omitted]

Similarly, under ELCRA, a plaintiff must prove, by a preponderance of the evidence, that (1) membership in a protected class; (2) an adverse employment action; (3) qualification for the position; and (4) replacement by a younger person. [*Lytle v Malady*, 458 Mich 153, 177; 579 NW2d 906 (1998)]

Under both statutes, once a plaintiff makes a prima facie case, the burden shifts to defendant to articulate a legitimate, non-discriminatory reason. If so, the burden returns to plaintiff to show pretext. [*Pelcha*, Id. at 324-325; *Hazle v Ford Motor Co.*, 464 Mich 456, 463-465; 628 NW2d 515 (2001)]

There is a difference, however, in the plaintiff's standard of proof. The ADEA requires a showing that age "had a determinative influence on the outcome of the employer's decision-making process." [*Sloat,* Id. at 209, quoting *Pelcha,* Id. at 324 "(cleaned up)"] In contrast, an ELCRA plaintiff must demonstrate that the evidence, is 'sufficient to permit a reasonable trier of fact to conclude that discrimination was **a motivating factor** for the adverse action...in other words, "whether it made a difference." [*Hazle,* Id. at 465-456, emphasis added]

In other words, the case of often comes down to this: "Pretext is a commonsense inquiry: did the employer fire the employee for the stated reason or not? This requires a court to ask whether the plaintiff has produced evidence that casts doubt on the employer's explanation, and, if so, how strong it is." [*Chen v. Dow Chem. Co*., 580 F.3d 394, 400, n. 4 (6th Cir. 2009)] The Sixth Circuit has also stated, "Courts should be cautious in granting, and affirming, summary judgment on discrimination claims when the plaintiff has made a prima facie case and a showing of pretext because "an employer's true motivations are particularly difficult to ascertain, thereby frequently making such factual determinations unsuitable for disposition at the summary judgment stage." [*Willard v. Huntington Ford, Inc.*, 952 F.3d 795, 810 (6th Cir. 2020), quoting *Singfield v. Akron Metro. Hous. Auth*., 389 F.3d 555, 564 (6th Cir. 2004) (citations omitted)]

Plaintiff Has Made a Prima facie Case

There is no dispute that John Nelson, age 58 when he was terminated, was a member of a protected class and suffered an adverse action. Nor is there a dispute that he was replaced by someone substantially younger; Dan Ross was 34 when he took Plaintiff's job. Defendant challenges only the third element of a prima facie case, challenging that Plaintiff was "qualified for the job." [Defendant's brief, ECF 20, PageID.127] In so arguing, Defendant asks this Court to accept its position as a matter of law – that Nelson was not performing his job at a level that "met the employer's legitimate expectations." [Id.]

But this is a disputed issue of fact. Mr. Nelson performed the position according to his employer's standards for decades. The Tigers tasked Jim Schmakel with evaluating Nelson, and except for 2017, Schmakel testified – and demonstrated through his 2018-2020 performance evaluations – that Nelson was doing the job at least at a satisfactory level, utilizing the **only** formal procedure for assessing performance that the Tigers used for their clubhouse staff.

In *Wexler v White's Fine Furniture, Inc*, 317 F3d 564, 575 (6th Cir 2003), an *en banc* panel of the Sixth Circuit "explicitly set forth what is required for a plaintiff to satisfy the qualification prong of the prima facie test" in an ADEA case. In *Wexler*, the Sixth Circuit found that the district court improperly considered the employer's alleged nondiscriminatory reason for its action when analyzing the prima facie case.

Instead, a court must examine plaintiff's evidence independently of the nondiscriminatory reason produced by defendant. [Id. at 574–575]

This was further explained by Judge Gerald Rosen, in a case cited by the Defendant. In *Nizami v. Pfizer, Inc*., 107 F. Supp. 2d 791, 801 (E.D. Mich. 2000), explaining *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 660-66 (6th Cir.2000), Judge Rosen wrote: "… the Sixth Circuit cautioned that the courts must not use the 'qualified' element of the prima facie case to heighten the plaintiff's initial burden. In an effort to ensure that the first two stages of the *McDonnell Douglas* inquiry remain analytically distinct, and that a plaintiff's initial burden not be too onerous, Cline requires that the 'qualified' prong of the prima facie case be evaluated in light of the plaintiff's employment record 'prior to the onset of the events that the employer cites as its reason' for its decision. 206 F.3d at 662-63. Moreover, the Sixth Circuit instructed that the legitimate nondiscriminatory reason offered by the employer at the second stage of the *McDonnell Douglas* inquiry may not be considered in determining whether the employee has produced sufficient evidence to establish a prima facie case. 206 F.3d at 660-61."

Also see *Blackwell v Sun Elec Corp*, 696 F2d 1176, 1181 (6th Cir 1983), where it was held that a challenge to an employee's qualifications does not defeat a prima facie case, where a long-term employee has had a successful career, but failed to meet quota in his last year. *Accord*, *Wolff v Automobile Club*, [194 Mich App 6,

13, 486 NW2d 75 (1992)] where the court held that a reasonable juror could conclude that plaintiff was qualified for his position as a salesperson because he had built a large book of business in his 31-year career. The court refused to conclude that plaintiff's failure to meet a recently enacted sales quota suddenly left him unqualified for the position.

Defendant has offered no cases that fail to find this factor met for an existing, non-disabled employee. Their brief did cite Judge Lawson's opinion in *Figgins v. Advance Am. Cash Advance Centers of MI, Inc.*, 476 F. Supp. 2d 675 (E.D. Mich. 2007), but there, plaintiff was on medical leave and unable to return to work: "Therefore, the plaintiff was unqualified for the job at the time this decision was made." [Id. at 689]

Defendant fares no better citing *Town v. Michigan Bell Tel. Co.*, 455 Mich. 688, 568 N.W.2d 64 (1997), because even though the court noted the plaintiff sales representative was not even covering his salary with his annual sales receipts, and "By all accounts, the plaintiff's performance was less than stellar," the court presumed that the plaintiff established a prima facie case because "The purpose of the prima facie case is to force the defendant to provide a nondiscriminatory explanation for the adverse employment action. That purpose having been served, we move to the plaintiff's evidence that the defendant's proffered nondiscriminatory reason is a pretext for discrimination." [*Town*, Id. at 699]

Plaintiff Has Shown Pretext

"An employee may show that an employer's proffered reason for terminating him was pretext by demonstrating 'that the 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.'" [*Wexler*, 317 F.3d at 576)]

But a plaintiff is not limited to those three rigid categories. "At this stage of the *McDonnell Douglas* burden-shifting framework, we examine all evidence that the plaintiff has put forth—evidence from the prima facie stage, "evidence discrediting the defendant's proffered reason," and "any additional evidence the plaintiff chooses to put forth." We "consider all evidence in the light most favorable to the plaintiff, including the evidence presented at the prima facie stage." The plaintiff must "produce sufficient evidence from which a jury could reasonably reject [the defendant's] explanation of why it fired [him]." In order "to survive summary judgment, a plaintiff need only produce enough evidence to ... rebut, but not disprove, the defendant's proffered rationale." [*Willard*, 952 F.3d at 810, internal cites omitted]

In John Nelson's case, it can be argued that his termination on the basis of performance has "no basis in fact" because the Tigers' documentation of his performance showed he was performing very well for the past four years. It can be argued that it did not actually motivate Defendant's decision, given Sam Menzin's

systematic removal of experienced employees under his watch, in favor of younger ones. It can be argued that complaints about tip sharing, that did not violate any rule, along with alleged hearsay from some visiting teams without context, was not sufficient to justify termination, in light of Nelson's longevity and excellent performance evaluations.

But as *Willard* points out, Nelson does not have to *disprove* the employer's reasons at this stage; he only needs to raise enough evidence to rebut it and let a reasonable jury determine the real reason. There are a constellation of factors, already discussed, that contrast the documented record with Menzin's willful disregard of that record. Recall that when he terminated Nelson in 2021, Menzin reminded him of the 2018 survey results. This is akin to the facts in *Willard,* where citing disciplinary events four years previously, to justify terminating the plaintiff, was evidence of pretext: "Willard's formal disciplinary record is thin, considering that it covers more than a ten-year period. This evidence demonstrates that Huntington Ford's final legitimate, nondiscriminatory reason for terminating Willard was not the real motivation for the discharge." [*Willard,* Id. at 812] Or bluntly put, if the Tigers were going to fire Nelson for performance, the time would have been better in 2017 when he was *honestly* called out by Jim Schmakel - not in 2021 after four years of good evaluations.

Defendant Cannot Avail Itself of the "Honest Belief" Defense

Defendant has raised an "honest belief" defense to defeat Plaintiff's pretext evidence. The Sixth Circuit has adopted a "modified honest belief" rule, which provides that "'for an employer to avoid a finding that its claimed nondiscriminatory reason was pretextual, the employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made.'" [*Blizzard v. Marion Tech. Coll*., 698 F.3d 275, 286 (6th Cir. 2012)]

Typically, this defense involves a mistaken belief, or a good faith error, to be viable. For example, in *McCarthy v Ameritech Publ'g, Inc*, 763 F3d 469, 482–483 (6th Cir 2014), an honest belief defense succeeded because the employer submitted evidence that it attempted in good faith to follow collective bargaining agreement, even though plaintiff demonstrated that employer's interpretation was not correct.

In contrast, in *Bledsoe v. Tennessee Valley Auth. Bd. of Directors*, 42 F.4th 568, 586 (6th Cir. 2022), the honest belief defense was rejected, because the plaintiff submitted evidence of animus and bias: "To show pretext here, Bledsoe relies both on the existence of reasonable alternatives to demotion and on evidence of Dahlman's negative animus … It follows, then, that an employer may still raise the honest-belief rule if the decisionmaker conducts an 'in-depth and truly independent investigation' showing that the adverse action is warranted for reasons unrelated to the bias."

Bledsoe involved a "cat's paw" theory, where a biased person's influence may be imputed to the ultimate decision-maker. Here, Dan Ross' bias may not have been age discrimination, but more likely his resentment over tip-sharing, and perhaps ambition for Nelson's job. But the analysis is the same; Ross' input motivated Menzin to conduct a biased investigation to justify a dishonest termination. This creates a jury question. [See, e.g., *Bledsoe*, Id. at 582 (6th Cir. 2022)]

Regardless, there is nothing honest or reasonable about Sam Menzin disregarding John Nelson's positive performance reviews on one hand, but then relying on Dan Ross' positive reviews (by the same person), to justify promoting Ross twice within the space of a year. Nor is there anything honest or reasonable about blaming John Nelson for the size of the clubhouse. And there is nothing honest or reasonable about terminating a man who served his business for over 40 years, when the decision-maker never talked to him about his alleged issues, or even visited the clubhouse where he worked.

In reality, Sam Menzin *turned his back* on the "particularized facts before him at the time" – namely, the documented evidence of John Nelson's performance, performed by a trained HR professional, in accordance with the Tigers' only established protocol for evaluating employees. Menzin should therefore not be availed of the honest belief defense.

Older Workers Were Purged in Every Area Sam Menzin Supervised

This court cannot ignore that after Menzin took his present position, long-serving employees in every area he supervised were terminated (Kevin Rand, Steve Chase, Scott Pleis, Andy Bjornstad, and John Nelson), demoted (Jim Schmakel), or overlooked (Mark Cave), while younger persons were hired and put in their stead.

Discharge of other older workers was a factor in *Blackwell* [696 F.2d at 1181] to help show age discrimination. In *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 380–81, 387-388, 128 S.Ct. 1140, 170 L.Ed.2d 1 (2008), the Supreme Court set standards for evaluating whether to admit evidence of discrimination against other workers: "Whether such evidence is relevant is a case-by-case determination that "depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." [As cited in *Griffin v. Finkbeiner*, 689 F.3d 584, 598 (6th Cir. 2012)] Bear in mind that typically, *Sprint* "me too" evidence is used to determine whether discrimination by **other supervisors** may be considered.

That is not the case here. Sam Menzin, who twice benefitted himself by replacing older, more established managers as he ascended the Tigers' corporate ladder, took the same actions against others in every area he supervised, in 2021 and 2022. It is another factor the jury may consider in evaluating the true reason for Mr. Nelson's discharge, as relevant and probative evidence under FRE 401 and 403.

Summary and Conclusion

John Nelson has raised a triable case of age discrimination because there is a genuine factual dispute as to his performance, and whether his performance or impermissible age discrimination was the true reason for his dismissal. The Tigers should not be permitted to prevail as a matter of law, where there is documented evidence of excellent performance to rebut the reasons cited by Defendant. This Court should also consider the relevant and probative evidence that decision-maker Sam Menzin terminated Nelson as part of a troubling purge of older, experienced workers in 2021 and 2022, and replaced Nelson with a much younger, less experienced assistant whom Nelson himself had hired and trained.

This case presents exactly the type of factual dispute that should be decided by a jury, to sort out the disputed element of motive.

Relief Requested

W H E R E F O R E , Plaintiff requests that this Honorable Court deny Defendant's Motion for Summary Judgment.

Respectfully submitted,

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/s/ Nicholas Roumel

December 1, 2023 Nicholas Roumel (P37056)