UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

RONALD POPE,

Plaintiff,

v.

Case Number 02-10274-BC
Honorable David M. Lawson

RENT-A-CENTER, INC.,

Defendant.
_____/

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant in this age discrimination case has filed a motion for summary judgment. The plaintiff's complaint pleads a cause of action based on Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, *et seq.*, and is before this Court because of the diverse citizenship of the parties. The parties presented their motion arguments in open court through their respective counsel on November 13, 2003. The defendant argues that the plaintiff was fired from his job as a store manager because of chronic poor performance, and that age was not a factor in its decision to terminate him. The plaintiff contends that the record contains direct evidence that the adverse employment action was motivated by the defendant's discriminatory animus, and that the defendant's claim that the plaintiff was not performing well was a pretext for age discrimination. The Court concludes that the testimony upon which the plaintiff relies does not constitute direct evidence of discriminatory intent, but that the plaintiff has brought forth evidence that creates a question on which reasonable minds might differ as to whether the plaintiff's age was a determining factor in his employer's decision to discharge him. The Court, therefore, will deny the defendant's motion.

I.

The plaintiff began working for defendant Rent-A-Center, Inc. (RAC) on May 4, 1987, when he was 42 years old. He was 56 years old when he was terminated on May 1, 2001 by Glenn Wallace, a market manager for RAC, from his position as store manager of the 3419 E. Genesee, Saginaw, Michigan store, referred to as store number 1685.

RAC is in the business of offering appliances, furniture, and electronics under rent-to-own agreements that allow the customer to obtain ownership of merchandise after an agreed upon rental period. The plaintiff's first assignment with the company in 1987 was to a store in Saginaw as an account manger. After four or five months, he was promoted to assistant manager at a RAC store in Flint, Michigan. The company moved the plaintiff to a store in Detroit for several months, then back to Flint, and in November 1988, RAC promoted the plaintiff to become the store manager of an RAC store in Lansing, Michigan. In March of 1991, after several years with the company, the plaintiff was promoted to the position of market manager, which is a supervisory position requiring oversight of several stores that make up a "market." The plaintiff was in charge of supervising three to five RAC stores.

In July 1992, after having a disagreement over management style with Steve Art, a regional supervisor, the plaintiff was demoted to the position of store manager and sent to work in a Flint RAC store. In March 1994, the plaintiff was transferred to store number 1467, which is located on Dixie Highway in South Saginaw, and, later was sent to work in store number 1626 in Bay City, Michigan. In November 1998, while the plaintiff was working at the Bay City store, Renter's Choice, another rent-to-own type business, bought out Rent-A-Center. As a result, Glenn Korf, who

was employed by Renter's Choice, became the market manager over the stores in the Saginaw and Bay City market area. Mr. Korf was the plaintiff's immediate supervisor at the time.

The plaintiff testified that the management style and philosophy of Renter's Choice, and specifically of Mr. Korf, differed from that of RAC. The plaintiff explained that he was held more "accountable" under Mr. Korf's supervision. The plaintiff described his new responsibilities as follows:

> You were in charge of the physical building itself, merchandise in the store, ordering the product in, hiring, training, firing and disciplining the employees. You were involved, I think somewhat in the advertising as far as where the drops would be. We had a book of your, like your city that would give different areas where you could drop the flyers for the advertising. Always look out for new people, take care of the company's assets, make money.

Def.'s Mot. S. J. Ex. 2, dep. of Ronald Pope at 55-56. The plaintiff further testified that it was necessary for a manager to be "hands on . . . trying to improve the units on sale, trying to improve the merchandising," *id*. at 87, and that in order to maintain a high collection rate on customer accounts "you have to make phone calls to customers, send letters, make in home visits, counsel them." *Id*. at 59. Finally, the plaintiff acknowledged that as a manager, he was responsible for the overall direction and operation of his store, and ultimately accountable for its profit or loss.

In May 1999, the plaintiff received a favorable performance evaluation from Mr. Korf, who commented that the plaintiff had "done very well through the transition period with the changes in policy and procedures" and that he had "shown the ability to make good decisions with consistency." Def.'s Mot. S. J. Ex. 4 at 1. However, the plaintiff's June 2000 performance review from Mr. Korf was less than favorable, stating that "Store 1626 [the Bay City store] is operating far below its growth and profit potential. I [Mr. Korf] get the impression that there is no sence [sic] of urgency to get things done." Def.'s Mot. S. J. Ex. 5 at 2. The performance review included a

detailed "Action Plan," which the plaintiff reviewed and signed. *Ibid*. Several months later, in August 2000, the plaintiff signed a "Coaching Discussion Plan" wherein Mr. Korf stated that if the plaintiff "did not implement and maintain the credit process on your store and consistently stay within minimum company credit standards[,] you [the plaintiff] will be subject to progressive disciplinary action." Def.'s Mot. S. J. Ex. 6.

Later that month, Mr. Korf transferred the plaintiff to store number 50 in Saginaw. The manager of that store, Mark Thomas, had been promoted to the market manager position. Korf believed that the plaintiff's poor performance at the Bay City store might improve if he were given the manager's duties in a smaller store with less volume, and the vacancy created by Mark Thomas' promotion presented that opportunity.

The plaintiff testified that he agreed to manage store 50 with the understanding that he could return to work at the store in Bay City if things did not work out after 90 days. Def.'s Mot. S. J. Ex. 2, dep. of Ronald Pope at 62-63. The plaintiff stated that store 50 was in very bad shape when he arrived. Merchandise that had been returned damaged was piled up in a back room because the previous manager had done nothing to repair the merchandise. Pl.'s Ans. to Mot. S. J. Ex. A, aff. of Ronald Pope ¶ 10. As a result, the plaintiff stated that he had to spend over $600 to secure parts to make the necessary repairs. He also testified that the store merchandise was poorly displayed, the store was dirty, and he had a very weak staff, which consisted of an assistant store manager and two account managers. Shortly after the plaintiff began managing store 50, he fired one of the account managers for not showing up for work, and the other account manager quit. Mr. Korf recognized the poor state of store 50 when he stated in his October 24, 2000 performance evaluation that "Ron Pope came to store 0050 at a time when the store was in a cycle of high credit and losing BOR," which

stands for "balance on rent" and is a figure indicating the sales volume of an RAC store. Def.'s Mot. S. J. Ex. 8 at 3.

Mr. Korf continued to believe that the plaintiff was underperforming as a manger, even in the smaller store 50 with all its challenges. Korf stated in his affidavit that the plaintiff "failed to properly train his staff and hold them accountable, insure store cleanliness and rent readiness, and implement crucial sales and collection programs." Def.'s Mot. S. J. Ex. 7, aff. of Glenn Korf at ¶ 4. Korf filled the vacant manager position in the Bay City store by promoting an assistant manager named Matt Spreeman. Korf stated in his deposition that although Mr. Spreeman "lacked experience in important areas," he felt that "he was the best option available." *Id*. at ¶ 5.

In December 2000, RAC replaced Korf with Glen Wallace as the market manager over the Saginaw and Bay City RAC stores. Wallace averred in his affidavit that RAC wanted Korf to become a store manager in that market and, therefore, Wallace needed to create a vacancy. Def.'s Mot. S. J. Ex. 1, aff. of Glenn Wallace at ¶ 6. He considered removing either Josh Carroll, who was managing store number 1685 in South Saginaw, or the plaintiff, because these two managers were the poorest performing managers in the market. Wallace stated further that the plaintiff was the more likely of the two candidates because his performance was the lowest. Ultimately, however, Mr. Carroll informed RAC that he wanted to transfer to Flint to be closer to his home and so Wallace moved Carroll to a store in Flint as an assistant manager, where, he was told, he would be able to compete for the next available store manger position in that market. The plaintiff was subsequently transferred to store number 1685 to replace Carroll as store manager. Wallace testified that although the plaintiff expressed an interest in returning to the store in Bay City, "it did not make business sense to return him to that store when it was being, at that time, successfully managed by

another Manager." *Id.* at ¶ 7. Wallace believed that transferring the plaintiff to store 1685 "was a good decision given the poor performance he exhibited at store 50 and because 1685, being a lower volume store with a strong performing Assistant Manager, Al Jeffries, should have been easier to manage." *Ibid*. Wallace also stated that "[w]ithin one month of Mr. Korf taking over Mr. Pope's vacated position at store 50, store 50's performance improved significantly." *Ibid*.

The plaintiff stated in an affidavit that store 1685 suffered from the same deficiencies as store 50 when he first arrived. "The store was dirty, credit problems were severe, a back room was filled with damaged merchandise that had been returned, and the two account managers, both minority employees, were not doing their jobs." Pl.'s Ans. to Mot. S.J. Ex A, aff. of Ronald Pope at ¶ 18. The plaintiff stated that he worked 65 hours per week trying to improve the performance of the store, but it was difficult given the state of the store and the need to replace the two account managers with more competent employees. He explained that terminating minority employees was a time-consuming process under RAC's progressive discipline policy. Eventually, the plaintiff explains he was able to fire the account managers and hire two new employees in March and April 2001.

Before assigning the plaintiff to work in store 1685, Wallace met with the plaintiff and reviewed his performance as manager of store number 50, informing the plaintiff that he was not meeting company standards or following basic company procedures. Def.'s Mot. S. J. Ex. 1, aff. of Glenn Wallace at ¶5. After the plaintiff was transferred to store 1685, Wallace continued to meet with the plaintiff to review his performance. On January 23, 2001, Wallace gave the plaintiff a list of areas in which he felt the plaintiff should improve, which included rental order processing, presentation of sales items, sales programs, and collections. Def.'s Mot. S. J. Ex. 9. On March 9, 2001, Wallace issued a written "Coaching Plan" for the plaintiff wherein he noted that the plaintiff's

store was suffering a continuing loss of revenue and sales and that the showroom was "not to standard." Def.'s Mot. S. J. Ex. 10. Wallace's plan was to review the store again the following week and "continue using RAC disciplinary system" with the plaintiff. *Ibid*. Wallace also enlisted the help of other store and assistant managers in the market to assist the plaintiff. Wallace averred that these other managers "uniformly told me that they did not believe Mr. Pope was exerting any effort." Def.'s Mot. S. J. Ex. 1, aff. of Glenn Wallace at ¶ 9. The managers also told Wallace that the plaintiff was not following company collection procedures, not following up with his staff, and that during the majority of the time, the plaintiff remained in his back office and did not "proactively" manage his staff. *Ibid*.

The defendant also supports its allegations with the affidavit of Mark McRae, who was a "floating" store manager over the Saginaw market area and was assigned by Wallace to work with the plaintiff, and the deposition of Al Jeffries, who was store 1685's assistant manager. McRae averred that the plaintiff "made no effort toward improving [] store [1685] . . . simply sat in his office doing nothing . . . [and] was so removed that on the days I was there to simply assist, I was forced to take over management of the store." Def.'s Mot. S. J. Ex. 11, aff. of Mark McRae ¶ 5. McRae also stated that when he asked the plaintiff why he was not putting forth any effort to manage his store, the plaintiff explained to him that "he had lost his drive to do the job and was waiting for Wallace to terminate him so that he could go to truck driving school." *Id*. at ¶ 7. When McRae asked why he did not simply quit, McRae states that the plaintiff told him "he wanted to collect unemployment compensation while he went to school." *Ibid*. Mr. Jeffries testified that although the plaintiff was a "good" manager, the plaintiff would "sit down with his legs kicked up on the desk, you know, letting us run the show." Def.'s Mot. S. J. Ex. 12, dep of Alfred Jeffries at

12, 19. The plaintiff adamantly denies these allegations and states that he spent his day not in his office, but "on the floor at store 1685, or monitoring the account manager's collection efforts, all through each work day." Pl.'s Ans. to Mot. S. J. Ex A, aff. of Ronald Pope at ¶ 23. The plaintiff also denies that he said anything about truck driving to any one at RAC in 2001. *Id*. ¶ 24. This is supported, argues the plaintiff, by the independent report of his psychiatrist, Dr. M.H. Syed, who, after examining the plaintiff, noted that the plaintiff was satisfied with his work and was "not looking for other jobs." Pl.'s Ans. to Mot. S. J. Ex. E.

In April 2001, Wallace met with the plaintiff for another performance review. Wallace found that the plaintiff was "not hitting company standards" at store 1685, the store was down 23 BOR while the market average was up 25, and the first quarter potential increase for store 1685 was $145 while the market average was $5,158. Def.'s Mot. S. J. Ex. 13. Wallace also found that the plaintiff was "not leading by example, or showing attitude and intensity to improve store performance. Showroom is poorly displayed and merchandise is not rent ready. Offices are messy and dirty." *Ibid*. Wallace concluded in his evaluation: "Ron these areas must improve upon my weekly visits, failure to do so will result in further coaching up to and including termination." *Ibid*. On April 20, 2001, Wallace again evaluated store 1685. The store received a score of 581 points out of a possible 1008 performance points resulting in a "poor" grade on the company's scale. Def.'s Mot. S.J. Ex. 14.

On May 2, 2001, Wallace fired the plaintiff. The plaintiff testified about his termination as follows:

> Glen [Wallace] came into the store, was there for just a couple of seconds, said I need to speak to you in your office. So I went in there with him and as I recall, he cut right to the chase, he didn't waste any time, he said you're being terminated and I was shocked, and I said no disciplinary action. He said nope, I've made up my mind.

> I said no chance, not even a demotion. He said nope, the decision has been made and he said I feel at this time in your career, a demotion wouldn't help, you couldn't make the change, that's what it was.

Def.'s Mot. S. J. Ex. 2, dep. of Ronald Pope at 129-30. RAC replaced the plaintiff with Keith Ruby as the manger of store 1685. Ruby, born on January 2, 1970, was 31 years old at the time. Pl.'s Ans. to Mot. S. J. Ex C.

The plaintiff alleges that RAC has a pattern of demoting poor performing managers rather than firing them, and that the only reason he was fired was because of his age. The plaintiff first refers to RAC's action with Josh Carroll, the manager at store 1685 before the plaintiff, who instead of being fired for poor performance was demoted and sent to Flint to be an assistant manager. The plaintiff next points to Matthew Spreeman, who, with only fifteen months of employment with RAC, was promoted to be the manager of the Bay City store after the plaintiff left. RAC demoted Spreeman to assistant manager because of poor performance after allowing him just over one year to demonstrate his ability. Def.'s Mot. S.J. Ex. 3, dep. of Glenn Wallace at 99. Finally, the plaintiff alleges that Steve Bengry became the manager of store 50 after Mr. Korf left the store, and was given fourteen months to prove himself as store manager before being demoted to assistant manager for poor performance.

The plaintiff also testified that while he was attending company meetings or gatherings before he took over for the plaintiff at store 1685, Keith Ruby, who was a store manager in Owosso, Michigan, would call him "old man" and "grandfather." Def.'s Mot. S.J. Ex. 2, dep. of Ronald Pope at 133. The plaintiff said that he complained about the comments to Wallace who said that he would speak to Ruby. *Id*. at 134-35. The plaintiff acknowledged that Ruby was not in a supervisory position over him. *Ibid*.

In September 2002, the plaintiff filed a complaint in the Saginaw County, Michigan Circuit Court alleging that RAC discriminated against him as an employer on account of his age in violation of the Michigan Elliot-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, *et seq*. On October 28, 2002, RAC removed the case to this Court, and then filed its motion for summary judgment on September 2, 2003. The plaintiff filed an answer to the motion on September 23, 2003, RAC replied on October 3, 2003, and oral argument occurred on November 13, 2003.

II.

A motion for summary judgment under Fed. R. Civ. P. 56 presumes the absence of a genuine issue of material fact for trial. The Court must view the evidence and draw all reasonable inferences in favor of the non-moving party, and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 251-52 (1986). The "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotes omitted).

A fact is "material" if its resolution affects the outcome of the lawsuit. *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001). "Materiality" is determined by the substantive law claim. *Boyd v. Baeppler*, 215 F.3d 594, 599 (6th Cir. 2000). An issue is "genuine" if a "reasonable jury could return a verdict for the nonmoving party." *Henson v. Nat'l Aeronautics and Space Admin.*, 14 F.3d 1143, 1148 (6th Cir. 1994) (quoting *Anderson*, 477 U.S. at 248). Irrelevant or unnecessary factual disputes do not create genuine issues of material fact. *St. Francis*

Health Care Centre v. Shalala, 205 F.3d 937, 943 (6th Cir. 2000). When the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," there is no genuine issue of material fact. *Simmons-Harris v. Zelman*, 234 F.3d 945, 951 (6th Cir. 2000). Thus a factual dispute which "is merely colorable or is not significantly probative" will not defeat a motion for summary judgment which is properly supported. *Kraft v. United States*, 991 F.2d 292, 296 (6th Cir. 1993); *see also Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. BVR Liquidating, Inc.*, 190 F.3d 768, 772 (6th Cir. 1999).

The party bringing the summary judgment motion has the initial burden of informing the district court of the basis for its motion and identifying portions of the record which demonstrate the absence of a genuine dispute over material facts. *Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848 (6th Cir. 2002). The party opposing the motion then may not "rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact" but must make an affirmative showing with proper evidence in order to defeat the motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). A party opposing a motion for summary judgment must designate specific facts in affidavits, depositions, or other factual material showing "evidence on which the jury could reasonably find for the plaintiff." *Anderson,* 477 U.S. at 252. If the non-moving party, after sufficient opportunity for discovery, is unable to meet his or her burden of proof, summary judgment is clearly proper. *Celotex Corp.*, 477 U.S. at 322-23.

The party who bears the burden of proof must present a jury question as to each element of the claim. *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000). Failure to prove an essential element of a claim renders all other facts immaterial for summary judgment purposes. *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 895 (6th Cir. 1991). "[T]he party opposing the

summary judgment motion must 'do more than simply show that there is some "metaphysical doubt as to the material facts."'" *Highland Capital, Inc. v. Franklin Nat. Bank*, __ F.3d __, __, No. 02-5505 (6th Cir. Nov. 25, 2003) (quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (6th Cir. 1994), and *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). "Thus, the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Ibid.* (quoting *Anderson*, 477 U.S. at 252) (internal quote marks omitted).

Michigan's Elliot Larsen Civil Rights Act, under which the plaintiff has brought his claim, prohibits an "employer" from "fail[ing] or refus[ing] to hire or recruit, discharge, or otherwise discriminat[ing] against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . age." Mich. Comp. Laws § 37.2202(1)(a). To make out a claim of age discrimination under that statute, a plaintiff must produce evidence that he suffered an adverse employment action and that age was a determining factor in the employer's decision. *Town v. Michigan Bell Telephone Co.*, 455 Mich. 688, 697, 568 N.W.2d 64, 69 (1997).

As is the case under federal civil rights statutes, the elements of a civil rights claim under Michigan law may be proved by direct or circumstantial evidence, *id.* at 694-695, 568 N.W.2d at 67 (holding that "[a] claim of age discrimination may be shown under ordinary principles of proof by the use of direct or indirect evidence"), and Michigan courts frequently "turn to federal precedent for guidance in reaching [their] decision" to determine whether a claim has been established in discrimination cases. *Radtke v. Everett*, 442 Mich. 368, 382, 501 N.W.2d 155, 162 (1993) (quoting *Sumner v. Goodyear Co.*, 427 Mich. 505, 525, 398 N.W.2d 368 (1986)). For analytical purposes, Michigan's Elliott-Larsen Act resembles federal law, and the same evidentiary burdens prevail as in

ADEA cases. *See Sumner*, 427 Mich. at 525, 398 N.W.2d at 376; *Jenkins v. Southeastern Mich. Chapter, Am. Red Cross*, 141 Mich. App. 785, 793 n.2, 369 N.W.2d 223, 227 n.2 (1985); *Gallaway v. Chrysler Corp.*, 105 Mich. App. 1, 4-5, 306 N.W.2d 368, 370-71 (1981). In this case, the plaintiff argues that both direct and circumstantial evidence of discrimination establish his claim.

A.

"Direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Weberg v. Franks*, 229 F.3d 514, 522 (6th Cir. 2000) (internal quotes omitted); *Jacklyn v. Schering Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999). It does not require the fact finder to draw any inferences to reach that conclusion. *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000). "This credible and direct evidence cannot be based on rumors, conclusory allegations, or subjective beliefs." *Hein v. All America Plywood Co., Inc.*, 232 F.3d 482, 488 (6th Cir. 2000); *see Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (6th Cir. 1992) (rejecting the plaintiff's affidavit as evidence of age discrimination where it was comprised of the plaintiff's subjective beliefs). "Nor can it be based on vague, ambiguous, or isolated remarks." *Hein*, 232 F.3d at 488; *see Phelps v. Yale Sec., Inc.*, 986 F.2d 1020 (6th Cir. 1993) (finding no *prima facie* case of age discrimination, even though the plaintiff's supervisor twice stated that the plaintiff was too old to continue at her prior secretarial position, because these were only isolated and ambiguous comments). "Finally, the evidence must establish not only that the plaintiff's employer was predisposed to discriminate on the basis of age, but also that the employer acted on that predisposition." *Hein*, 232 F.3d at 488; *see Downey v. Charlevoix County Bd. of Rd. Comm'rs*, 227 Mich. App. 621, 632-33, 576 N.W.2d 712, 717-18

(1998) (finding that the employer's agent acted on his predisposition towards age discrimination when he repeatedly stated that he was going to "get rid" of all the older workers).

When the plaintiff offers direct evidence of discrimination, the employer's claim that it would have terminated the plaintiff even absent the assertion of protected rights becomes an affirmative defense for which the employer has the burden of proof. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-46 (1989); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 572 (6th Cir. 2000). The plaintiff need prove no more to withstand a summary judgment motion. *See Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 879 (6th Cir. 1991) (finding that the plaintiff had no need to disprove pretext where she presented, and the fact-finder believed, that her supervisors informed her and told others that their actions were taken in response to her protected activity).

The plaintiff here insists that the direct evidence of discriminatory animus comes from the statement of Glenn Wallace when Wallace explained the reason for terminating the plaintiff instead of imposing a lesser penalty, such as demotion. According to the plaintiff, Wallace told him demotion was not an option for him because "at this time in your career, a demotion wouldn't help, you couldn't make the change." Def.'s Mot. S.J. Ex. 2, dep. of Ronald Pope at 130. The defendant quarrels with whether Wallace actually made that statement, but the Court does not resolve credibility issues at this stage of the proceedings and views the evidence in the light most favorable to the plaintiff, who is opposing the motion for summary judgment. *See Seaway Food Town, Inc. v. Medical Mut. of Ohio*, 347 F.3d 610, 616 (6th Cir. 2003).

Nonetheless, Wallace's statement does not constitute direct evidence that the defendant was terminating the plaintiff's employment because he was too old. It is true that one could draw parallels between Wallace's comment and the old bromide that one "can't teach an old dog new

tricks." Even then, however, a fact finder would have to infer that Wallace's comment referenced the plaintiff's chronological age, and not the belief that the plaintiff had established immutable work habits, or that he lacked the motivation to change his ways, or that he could not accept a subservient position after having served as the store manager in charge over a substantial portion of his career with the company. Although Wallace's statement might support an inference that favors the plaintiff's case, an inference would be required nevertheless. For the plaintiff to prove his case using direct evidence of discrimination, he cannot rely on the fact finder to draw any inferences to reach the conclusion that age discrimination was the motivation behind his termination. *See Nguyen*, 229 F.3d at 563.

Although the plaintiff does not seriously press the point, the Court also rejects the suggestion that the remarks of Keith Ruby, who would occasionally call the plaintiff an "old man," constitute evidence of discrimination. There is no evidence that other RAC supervisors shared this opinion or that by calling the plaintiff an old man, Ruby was repeating the predisposed discriminatory statements of RAC. *See Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354 (6th Cir.1998) (commenting that "[i]n assessing the relevancy of a discriminatory remark, we look first at the identity of the speaker. An isolated discriminatory remark made by one with no managerial authority over the challenged personnel decisions is not considered indicative of . . . discrimination"). There is no evidence in this record that Ruby played any meaningful role in reviewing the plaintiff's performance or the decision to terminate the plaintiff.

The Court concludes that direct evidence of discrimination does not exist on this record.

B.

Discriminatory intent on the part of the employer may also be proved by circumstantial evidence. The well-known burden-shifting methodology described in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), is employed when there is no direct evidence of discriminatory animus and the plaintiff must resort to circumstantial evidence to prove that element. *See Jackson v. Quanex Corp.*, 191 F.3d 647, 658 (6th Cir. 1999). To prevail under this framework, a plaintiff must present a *prima facie* case, at which point the defendant must come forward with a legitimate, non-discriminatory reason for its action. If the defendant is able to offer such a reason for the adverse employment action, the plaintiff must offer evidence that the defendant's justification is a pretext that masks its true discriminatory intent. *See Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir. 2003).

In order to establish a *prima facie* case of age discrimination based on circumstantial evidence, the plaintiff must show that he was (1) a member of a protected class (age 40 to 70); (2) subjected to adverse employment action; (3) qualified for the position; and (4) replaced by a younger person. *See Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940 (6th Cir. 1987). *See also Hein*, 232 F.3d at 489; *Mitchell*, 964 F.2d at 582; *Town*, 455 Mich. at 695, 568 N.W.2d at 68. The plaintiff has offered sufficient evidence on each of these elements. The plaintiff was 56 years old when he was terminated. He was subject to an adverse employment action because he was fired from his position as a store manager. The plaintiff was qualified for the position he was terminated from because he had been a long standing store manager with RAC since 1988. Finally, the plaintiff was replaced by 31-year-old Keith Ruby.

Likewise, the defendant has met its burden of articulating a legitimate, non-discriminatory reason for its actions. The plaintiff's record of performance is well-documented. The problems with

the plaintiff's performance appear to have begun after Renter's Choice purchased Rent-A-Center. As the plaintiff testified, more responsibility was placed on his shoulders after the purchase and, based on the performance evaluations, the statements from co-workers, and the statistical data comparing the amount of business the plaintiff's store was generating with the company benchmarks, the plaintiff was failing under the Renter's Choice system. As Wallace stated, the plaintiff's store was down 23 BOR, while the market average was up to 25, and the first quarter potential increase for the plaintiff's store was $145, while the market average was $5,158. Although Wallace does not elaborate on the specifics of these numbers, it is obvious from the figures that the plaintiff's store was doing quite poorly. The economic data coupled with the reports describing the unkempt appearance of the plaintiff's store establishes a legitimate, non-discriminatory reason for firing the plaintiff from his position as store manager.

The plaintiff does not dispute that the defendant's proffered justification is facially legitimate. However, the plaintiff insists that RAC's reasons are a pretext that was intended to conceal its intention to eliminate an older worker in favor of younger hirelings. In this circuit, a plaintiff can demonstrate pretext "by showing 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." *Johnson v. Kroger Co.*, 319 F.3d at 866. A leading Sixth Circuit case, *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078 (6th Cir. 1994), provides a thorough gloss on each of these methods of proving pretext. There, the court explained that the first method consists of a challenge to the factual basis for the employer's claim – i.e. "evidence that the proffered bases for the plaintiff's discharge never happened." *Id.* at 1084. When using this method, the plaintiff need not introduce additional evidence of discrimination beyond his *prima facie* case. *See Reeves v.*

Sanderson Plumbing Prod., Inc., 530 U.S. 133, 148 (2000) (holding that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated"). The second method usually encompasses an acknowledgment by the employee that events proffered by the employer actually occurred and that they *could* justify dismissal, but it adds the argument that the employer's proffered reason was not the true motivation. "In other words, the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a . . . coverup." *Manzer*, 29 F.3d at 1084. The third method calls for a comparison of the treatment of similarly-situated employees outside the protected group, demonstrating that they "were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff." *Ibid.*

The plaintiff argues that the first method comes into play in this case because of the testimony of Glenn Wallace that he offered the plaintiff an opportunity to take an assistant manager job, just like the younger workers who removed from manager positions, and the plaintiff turned him down. The plaintiff contends that testimony is false, and that he was never offered that opportunity. However, the defendant does not rely on the offer of demotion in arguing its summary judgment motion, and concedes for the present that the plaintiff was fired outright. The plaintiff's argument misses the point of demonstrating pretext by this method in any event. It is the underlying reason for adverse action that is challenged, not the consequences that flow from it. Here, the plaintiff does not contend that his poor record of performance "never happened;" rather, the plaintiff maintains that his performance should not have earned him a discharge. That argument does not establish pretext on

the basis that the employer's proffered reason "has no basis in fact." *Johnson v. Kroger Co.*, 319 F.3d at 866.

The Court views the main thrust of the plaintiff's pretext argument as falling into the third category: that the proffered reasons are insufficient to motivate discharge if the evidence shows inconsistent treatment of similarly situated employees. *See Smith v. Leggett Wire Co.*, 220 F.3d 752, 762 (6th Cir. 2000). The plaintiff argues that he was treated differently than Josh Carroll, Matt Spreeman, and Stephen Bengry, who were all similarly situated and were all outside the protected class because they are all younger than 40 years old. The plaintiff contends that they were given longer time frames to demonstrate their abilities as store managers, they all performed poorly by company standards, and each of them was allowed to accept a demotion as an alternative to termination.

As the Sixth Circuit first explained in *Mitchell*, "[i]t is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the 'comparables' are similarly situated *in all respects*." *Mitchell*, 964F.2d at 583 (emphasis in original). That standard was softened somewhat in *Ercegovich*, where the court stated that "[t]he plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered 'similarly- situated;' rather . . . the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in 'all of the *relevant* aspects.'" *Ercegovich*, 154 F.3d at 352 (emphasis in original) (citation omitted). In *Perry v. McGinnis*, 209 F.3d 597 (6th Cir. 2000), the Sixth Circuit explained that "this Court has asserted that in applying the standard courts should not demand exact correlation, but should instead seek relevant similarity." *Id*. at 601.

Circumstances and characteristics that may be "relevant" in some cases may not be "relevant" in others. For instance, in *Mitchell*, the court required the plaintiff, who was terminated for misconduct and claimed that non-protected workers were treated less harshly, to show that the she "dealt with the same supervisor," was "subject to the same standards," and "engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell*, 964 F.2d at 583. The Sixth Circuit has cautioned, however, that district courts "should not assume . . . that the specific factors discussed in *Mitchell* are relevant factors in cases arising under different circumstances, but should make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee." *Ercegovich*, 154 F.3d at 352. Thus, the relevance of the common characteristics must be judged in the context of the employer's proffered reason for termination. In a case such as this, where the proffered reason for terminating the plaintiff is poor performance, the Court must focus on the similarities (or dissimilarities) in the job performance of the plaintiff and the younger, better-treated workers to determine if they are in fact similarly-situated. It is only when the relevant differences are eliminated that an inference of unlawful intent can emerge.

The defendant argues that Josh Carroll, age 32, was not similarly situated, and thus cannot be used by the plaintiff as a comparator for the purpose of raising an inference that age and not poor performance was a determining factor in the decision to terminate the plaintiff, because Carroll was not demoted for performance reasons. Rather, the defendant contends, Carroll was removed as manager of the South Saginaw store (store 1685) to create a vacancy for Glenn Korf, who was to be placed as store manager in Glenn Wallace's market area. The plaintiff points out, however, that

Wallace admitted in his affidavit and at deposition that he considered Carroll's performance in determining which manager position to open up for Korf. Wallace testified that "Carroll wasn't putting forth the effort necessary to do his job," Def.'s Mot. S.J. Ex. 3, dep. of Wallace at 48, and averred that the plaintiff and Carroll were "the two poorest performing store managers." Def.'s Mot. S.J. Ex. 1, aff. of Glenn Wallace at ¶ 6.

RAC's own documentation states that Carroll was demoted for performance reasons. Pl.'s Ans. to Mot. S.J. Ex. H. Wallace's affidavit creates a fact contest on that point, since he avers that Carroll's desire to move to Flint was the main reason that he was transferred. However, there is other evidence that must be considered. For instance, the defendant argues that the plaintiff had worked as a manager for the company for several years, and therefore he had greater experience than the younger store managers who were demoted (rather than fired) for performance reasons. The defendant contends that the plaintiff's experience is a factor that distinguishes his treatment from those to whom he seeks to compare himself. However, the record indicates that the plaintiff did not begin receiving poor performance evaluations until June 2000, within two years after the merger with Renter's Choice, when his duties as store manager were changed. The plaintiff points out that he was given a significantly shorter period of time to demonstrate his ability to perform as a store manager under this system than the younger employees. The plaintiff was transferred among one store in Bay City and two stores in Saginaw between August 2000 and his termination in May 2001. Carroll remained at the Bay City store for seventeen months before disciplinary action due to his performance was taken.

Likewise, Matt Spreeman, age 24, managed store 1686 for eleven months before he was demoted for poor performance. The defendant contends that Spreeman was not similarly situated

because he was reviewed and disciplined by a different supervisor. The defendant's personnel documentation, however, indicates that Glenn Wallace signed the demotion form, *see* Pl.'s Ans. to Mot. S.J. Ex. I, and Wallace testified that he demoted Spreeman because Spreeman "was unable to train people, hold them accountable, things he should have been doing." Def.'s Mot. S.J. Ex. 3, dep. of Glenn Wallace at 99. Moreover, when the adverse employment action is based on performance that is assessed by company-wide standards, such as the BOR in this case, the identity of supervisors is not as relevant an aspect in evaluating the non-protected employee as a comparator as when, for example, the discipline results from misconduct. *See, e.g., Petsch-Schmid v. Boston Edison Co.*, 914 F. Supp. 697, 705 n.17 (D. Mass. 1996) (observing that "[t]o the extent that *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir.1992), can be read as Edison suggests, to require an employee to compare herself only with other employees disciplined by the same supervisor, I cannot agree, particularly where a company has instituted company-wide standards of discipline, as Edison has, intended to provide guidance to all company supervisors"); *Ramos v. Marriott Intern., Inc.*, 134 F. Supp. 2d 328, 339-40 (S.D.N.Y. 2001) (holding that "[a] plaintiff must show that she and those "similarly situated" were subject to the same workplace standards and that plaintiff's conduct was of seriousness comparable to that of conduct which went undisciplined").

The defendant distinguishes Stephen Bengry on the same grounds – that he was not supervised by Glenn Wallace, although, once again, the documentation suggests otherwise. *See* Pl.'s Ans. to Mot. S.J. Ex. J. Bengry, age 31, was demoted after serving fourteen months as a store manager. However, the defendant notes that Bengry's performance suffered in part due to a fire at his store and the task of operating from temporary facilities for a time. The difficulties encountered by Bengry are material and set him apart from the plaintiff for comparison purposes.

The plaintiff also argues that he was placed into difficult and poorly equipped stores, and the defendant failed to account for those factors when evaluating him. The defendant contends that it treated the plaintiff differently than the younger, less experienced store managers because the defendant's supervisors learned that the plaintiff intended to leave the company to attend truck driving school. The plaintiff denies that he ever discussed this career option with anyone at RAC during the relevant period.

At the summary judgment stage of the proceedings, the Court must view the evidence in the light most favorable to the non-moving party, and decide if reasonable minds might differ on the material facts. *See Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1022-23 (6th Cir. 2000) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509-10 (1993) (holding that "[i]f . . . reasonable minds could differ as to whether a preponderance of the evidence establishes the facts of a prima facie case, then a question of fact does remain, which the trier of fact will be called upon to answer"). Here, the plaintiff offers evidence that the defendant's legitimate, non-discriminatory reason for terminating him – poor performance as a store manager – did not result in the termination of younger managers. Against this background, the plaintiff presents his sworn testimony that the defendant's market manager fired him instead of imposing a lesser sanction because "I feel at this time in your career, a demotion wouldn't help, you couldn't make the change." Def.'s Mot. S.J. Ex. 2, dep. of Ronald Pope at 130. This evidence does not compel the conclusion that age was a determining factor in the defendant's decision, but it certainly permits it. The defendant disputes the plaintiff's evidence and the inferences to be drawn from it. But the overarching principle of which this Court must be ever mindful is that when the evidence conflicts on a material point, the case may not be summarily decided. A trial is required to resolve those disputed facts. *See Johnson v. Kroger Co.*, 319 F. 3d at

869 (observing that "one judge's scintilla is another's genuine issue of material fact that requires consideration by a jury").

III.

The Court finds that the record contains no direct evidence of discriminatory intent on the part of the defendant. The plaintiff, however, has brought forth sufficient evidence to make out a circumstantial case of age discrimination, since he has established a *prima facie* case, and he has offered evidence that creates a genuine fact issue on whether the defendant's legitimate reason for firing him was a pretext for age discrimination.

Accordingly, it is **ORDERED** that the defendant's motion for summary judgment [dkt #20] is **DENIED**.

It is further **ORDERED** that the matter will proceed in accordance with the Case Management and Scheduling Order, as modified by this Court's order modifying case management dates entered September 18, 2003.

_____/s/_____
DAVID M. LAWSON
United States District Judge

Dated: November 26, 2003

Copies sent to: Robert J. Krupka, Esquire
Charles J. Porter, Esquire
Eric J. Pelton, Esquire