[Cite as *Sciaretta v. Refractory Specialties*, 2018-Ohio-1141.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

DOMENICO P. SCIARETTA, PLAINTIFF-APPELLANT, VS. REFRACTORY SPECIALTIES, INC. et al. DEFENDANTS-APPELLEES.	)))))))))	CASE NO. 17 MA 0094 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 2014 CV 02532

JUDGMENT: Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellant:

Atty. Ira J. Mirkin
Atty. Richard T. Bush
Green Haines Sgambati, Co., L.P.A.
City Centre One, Suite 800
100 Federal Plaza East
Youngstown, Ohio 44503

For Defendants-Appellees:

Atty.Ashley M. Manfull
Vorys, Sater, Seymour and Pease, LLP
106 S. Main Street, Suite 1100
Akron, Ohio 44308

JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: March 16, 2018

[Cite as *Sciaretta v. Refractory Specialties,* 2018-Ohio-1141.]
ROBB, P.J.

{¶1} Plaintiff-Appellant Domenico P. Sciaretta appeals the decision of the Mahoning County Common Pleas Court granting summary judgment in favor of Defendants-Appellees Refractory Specialties, Inc. (RSI) and Unifrax I, LLC (Unifrax). Appellant contends there was a genuine issue of material fact as to his age discrimination claim. For the following reasons, this court concludes there was a genuine issue of material fact precluding summary judgment.

{¶2} Appellant also claims the court abused its discretion in denying his motion to compel discovery on Unifrax succession planning (and his motion to stay the summary judgment briefing until such discovery was produced). Even assuming some of the information sought was relevant under discovery standards, Appellant's argument is overruled as the request was overbroad and untimely.

{¶3} The summary judgment is hereby reversed, and the case is remanded for further proceedings.

STATEMENT OF THE CASE

{¶4} Appellant began working as a product manager for RSI in Sebring in 2006, when he was 63 years old. In 2011, Unifrax acquired RSI as a wholly-owned subsidiary. According to Appellant, RSI's owner (Wilk) told him about the sale the day before it was announced and informed him, since he was a key employee, Unifrax asked how old he was and how much longer he planned to work for the company. (Sciaretta Dep. 34). Wilk told Unifrax Appellant was his age and they both planned to continue working as long as they enjoyed their work.

{¶5} In July 2013, a Unifrax general manager (Olchawski) prepared a succession planning document estimating Appellant's retirement date as July 2017. He also wrote a memorandum on the need for "immediate succession planning" for Appellant (and others) which discussed the need to identify "the next generation of leadership" and the "need to get the next generation in place." (Olchawski Dep. 6, 16-24).

{¶6} In December 2013, Wilk told Appellant Unifrax was again raising the same inquiry about his age and retirement. (Sciaretta Dep. 72). Appellant voiced it

was none of their business. He said other companies he worked for engaged in succession planning without using ages or retirement plans as it was not necessary and a person could leave for various reasons. He opined if a corporation asked how many more years an employee was going to work, the answer would have an influence on the employee's position and promotions. Appellant had the impression Unifrax was pressuring Wilk for information. After a week, Appellant felt compelled to provide Wilk with an estimate that he planned to work until he was 75 (which would be April 2018). (Sciaretta Dep. 74).

{¶7} A month later, in January 2014, Appellant went to a convention in New York. Appellant said Olchawski asked him over dinner: his age, why he was still working, and how much longer he was going to work. (Sciaretta Dep. 86-88). The dinner then became confrontational.

{¶8} In March 2014, Unifrax posted a position opening for Market Manager-Silplate, which would be located at corporate headquarters in Tonawanda, New York and would require domestic and international travel. Unifrax sought a candidate with a degree in mechanical engineering (or equivalent), 7-10 years of experience in the steel and refractory industry with 3-5 years of sales experience, good communication skills at various organizational levels, and complete knowledge of Fiberfrax products and their application. Appellant, who was 71 years old at the time, applied for the position. Appellant had an equivalent degree (chemical engineering) and worked in the steel and refractory industry for 43 years. Appellant said he had sales experience, which included direct and international sales. (Sciaretta Dep. 190-194). Wilk opined Appellant was "very qualified" for the position and more qualified than the younger employee who filled the position. (Wilk Dep. 49-51).

{¶9} A vice president at Unifrax (Juda) was the decision-maker in filling the position. Of the five applicants, Appellant was the only one who was not called for an interview. Three of those interviewed worked in front-line sales positions at Unifrax and the other was an international marketing and sales manager for a competitor. Juda sent an email to his boss noting one candidate "appears to be a good athlete" and the candidate they hired "is also a good athlete" but "isn't quite there yet." Juda

claimed he used the term to mean the candidate was well-rounded with the right tools and the potential to grow into the position. (Juda Dep. 103-104).

{¶10} A human resources employee who scheduled the interviews testified when she asked Juda whom he wanted to interview, he said he did not want to interview Appellant because Appellant fell asleep at a regional sales meeting. (Horne Dep. 21). Juda also commented to her that Appellant "was close to retirement age." She clarified that this comment was made in the context of Juda explaining why he would not be interviewing Appellant. (Horne Dep. 22). In response to Juda's retirement age comment, the human resources employee told him he should talk to Kuchera (another Unifrax vice president) about that topic, and Juda said he would.

{¶11} Juda hired a 29-year-old Unifrax employee, but because this employee was short of the desired years of sales and marketing experience, he was hired with a lower title and a step lower salary grade than that posted. (Juda Dep. 50-52, 77). This employee was permitted to continue working out of Pittsburgh. Juda said he received calls recommending this employee and was impressed with his preparation at the interview. After working for two years in direct sales at another company in Dubai, this employee began working at Unifrax in 2010, starting in direct sales at Unifrax in 2012, with the responsibility for sales in North and South America, including sales of Silplate. This employee had unsuccessfully applied for the position in 2013 when it was first created, and he then worked with the person who was hired to fill the position overseeing the global launch of the product Silplate. (The former market manager had a Ph.D. with significant technical knowledge and experience in the industry, but Juda concluded the position required more skill in direct sales and marketing).

{¶12} Juda said it did not appear Appellant had front-line sales experience. (Juda Dep. 32, 75). Appellees state Appellant spent most of his workday on the telephone answering questions from sales employees or people who learned of the product online and was not responsible for meeting sales goals or creating marketing strategies; they construed his current position as involving little time developing sales. Appellant and Wilk testified Appellant had front-line sales experience.

{¶13} Juda also explained he had a negative impression of Appellant because the first time he met him in mid-2012, Appellant fell asleep during a sales meeting. Juda had traveled from New York to lead the meeting, and Appellant was sitting next to Juda at a boardroom-style table. (Juda Dep. 32, 35). During the hiring process, Juda asked Olchawski if he was missing anything about Appellant's performance and Olchawski answered in the negative. (Juda Dep. 44). Olchawski, who was the person involved in preparing the succession plan for Appellant, testified he told Juda Appellant was not a star performer, his quantity of work "wasn't that good," and his quality of work was average. (Olchawski Dep. 12-13). Juda said he had "[p]retty much" already decided not to interview Appellant prior to the conversation. (Juda Dep. 47-48). Wilk, who testified favorably as to Appellant's work skills and was Appellant's direct supervisor, was not asked for his opinion by Juda.

{¶14} In October 2014, Appellant filed a complaint alleging a state age discrimination claim against RSI and Unifrax under R.C. 4112.02(A). Appellant's discovery deadline was extended until March 1, 2016. On March 30, 2016, Appellant filed a motion to compel discovery of Unifrax's succession planning documents. The defense previously produced all RSI succession planning documents created by Olchawski which related to Appellant. They asserted the motion to compel was untimely and the higher-level succession planning at the parent corporation was separate and irrelevant to Appellant as it involved identification of potential successors to the officers of the company (and not the position Appellant occupied or desired). (Kuchera Dep. 76-77).

{¶15} On May 2, 2016, Appellees filed motions for summary judgment. They urged there was no direct evidence of age discrimination, and even if Appellant had direct evidence, Juda would have made the same decision absent the impermissible motive. They did not dispute Appellant had made an indirect, prima facie case for purposes of summary judgment; they then pointed to non-discriminatory reasons for Appellant's rejection and concluded Appellant could not show the proffered reasons were pretextual. RSI's motion additionally argued, regardless of whether Unifrax and

RSI were joint employers of Appellant, only Unifrax made the actionable decision and RSI engaged in no adverse employment action as Appellee still worked for RSI.

{¶16} On May 5, 2016, Appellant filed a request to delay further briefing until the motion to compel was decided. On July 1, 2016, the magistrate denied the motion to delay briefing and the motion to compel discovery. On July 7, 2016, Appellant filed a motion to stay and set aside the magistrate's order.

{¶17} Without a trial court ruling on the discovery issue, Appellant responded to the summary judgment motion on July 29, 2016. Appellant urged there was direct and indirect evidence of age discrimination and a genuine issue as to whether the proffered reasons were pretext and whether the same decision would have been made in the absence of the impermissible motive. On August 5, 2016, Appellees filed their replies in support of summary judgment.

{¶18} On August 22, 2016, the trial court denied the motion to set aside the magistrate's order (denying the motion to compel and to stay briefing). On May 4, 2017, the trial court granted summary judgment in favor of Appellees. The court found Appellant did not provide direct evidence of age discrimination. In evaluating the indirect case, the court noted Appellant's prima facie case was not disputed by the defense and the defense presented legitimate, nondiscriminatory reasons (Juda had a negative impression of Appellant because he fell asleep at a meeting; Juda's review of Appellant's resume gave him the impression Appellant lacked front-line sales experience; and Olchawski confirmed Juda was not missing anything).

{¶19} The court then evaluated whether Appellant showed the reasons proffered by the defense were mere pretext for age discrimination. The court said Appellant did not dispute he fell asleep during the meeting or show the incident did not motivate Juda's decision. The court also said Appellant failed to refute that Juda perceived (right or wrong) that Appellant did not have sufficient sales and marketing experience. The court noted the chosen candidate did not lack the type of experience Juda sought but merely lacked the length of experience. The court also concluded the allegation that RSI managers asked him about his age and retirement

plans in the context of succession planning did not establish Juda's reasons were pretextual. The within timely appeal followed.

ASSIGNMENT OF ERROR ONE: SUMMARY JUDGMENT

{¶20} Appellant's first assignment of error provides:

"The lower court erred by granting Defendants-Appellees RSI and Unifrax's motions for summary judgment in its order dated May 4, 2017."

{¶21} Summary judgment can be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The movant has the initial burden to show that no genuine issue of material fact exists. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). The non-moving party then has the burden to respond by setting forth specific facts showing a genuine issue remains for trial. *Id.*, citing Civ.R. 56(E) (may not rest upon mere allegations or denials in the pleadings).

{¶22} Civ.R. 56 must be construed in a manner that balances the right of the non-movant to have a jury try claims adequately based in fact with the right of the movant to demonstrate, prior to trial, that the claims and defenses have no discernible factual basis. *Byrd*, 110 Ohio St.3d 24 at ¶ 11, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In determining whether there exists a genuine issue of material fact, the court is to consider the evidence and all reasonable inferences to be drawn from that evidence in the light most favorable to the non-movant. *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 11. Doubts are to be resolved in favor of the non-movant. *Leibreich v. A.J. Refrig., Inc.*, 67 Ohio St.3d 266, 269, 617 N.E.2d 1068 (1993).

{¶23} A court "may not weigh the proof or choose among reasonable inferences." *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 121, 413 N.E.2d 1187 (1980). We consider the propriety of granting summary judgment under a de novo standard of review. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833

N.E.2d 712, ¶ 8. In accordance, we review the entry of summary judgment independently and give no deference to the trial court's decision. *Matasy v. Youngstown Ohio Hosp. Co.,* 7th Dist. No. 16 MA 0136, 2017-Ohio-7159, ¶ 17.

{¶24} Pursuant to R.C. 4112.02: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, 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." An employment discrimination plaintiff must prove discriminatory intent in order to prevail. *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 583, 664 N.E.2d 1272 (1996). Ohio courts often look to federal law interpreting equivalent federal discrimination statutes for guidance. *Coryell v. Bank One Tr. Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, 803 N.E.2d 781, ¶ 15 ("Although we are not bound to apply federal court interpretation of federal statutes to analogous Ohio statutes, we have looked to federal case law when considering claims of employment discrimination brought under the Ohio Revised Code."); *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 573, 697 N.E.2d 204 (1998).

{¶25} In establishing a prima facie case, the employee can set forth direct evidence of discrimination, or "absent direct evidence of age discrimination," the employee can indirectly establish a prima facie case by satisfying the *McDonnell Douglas* elements. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523, (1985), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 582-583, 664 N.E.2d 1272 (1996). "In this context, the phrase 'direct evidence of age discrimination' is indicative of a method of proof, not a type of evidence. It is, in a sense, a misnomer. It means the plaintiff may establish a prima face case directly by presenting evidence, of any nature, to show the employer more likely than not was motivated by discriminatory animus." *Mauzy*, 75 Ohio St.3d at 583, 586-587 (the term is not being used to distinguish direct evidence from

circumstantial evidence; *McDonnell Douglas* sets forth the elements the employee must prove to establish a prima facie case of discrimination "absent direct, circumstantial, or statistical evidence of discrimination").[1]

{¶26} Prior to this, a plurality of the United Supreme Court in a sexual discrimination case stated if the employee had direct evidence the protected status was a motivating factor in the employee's adverse treatment, then the employer could escape liability by showing by a preponderance of the evidence it would have taken the same action even in the absence of the protected trait. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244, 249, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (and stating this was not burden-shifting, but was an affirmative defense). In response to the statement the protected status must be the "but for" causation for the adverse action, Congress eventually amended a portion of the Title VII discrimination law so a court could find liability where an employee demonstrates their protected status was a "motivating factor" in the adverse employment action even though the employer could also demonstrate it would have taken the same action regardless of this status.

{¶27} Age discrimination, which is contained in a different federal statute, was not covered by the amendment. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). *See also Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013) (nor did the amendment cover retaliation claims). Furthermore, when presented with an age discrimination case, the Court refused to apply *Price Waterhouse* where the federal age discrimination statute contained the language "because of such individual's age." *Gross*, 557 U.S. at 176-177 (and the statute did not contain "motivating factor" language as was added to parts of Title VII). *See also Nassar*, 570 U.S. 338, 133 S.Ct. at 2534. Ohio's statute also contains simple "because of" language (with no addition of "motivating factor" language). *See* R.C. 4112.02(A).

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[1] The Court also observed it was not determining what was required to shift the burden of persuasion, which it believed was a different issue from the issue of what is required to raise an inference of discrimination. *Mauzy*, 75 Ohio St.3d at 586 (noting how federal courts were "left to grapple" with whether direct evidence was required to shift the burden).

{¶28} The *Gross* Court concluded the employee retains the burden of persuasion to establish age was the "but-for" cause of the employer's adverse action. *Gross*, 557 U.S. at 176-177. The Court further explained: "A plaintiff must prove by a preponderance of the evidence (***which may be direct*** or circumstantial), that age was the "but-for" cause of the challenged employer decision." (Emphasis added). *Id.* at 177-178. *See also Mauzy*, 75 Ohio St.3d at 588, syllabus at paragraph two (irrespective of which method is utilized {whether an inference of discriminatory intent is created directly or indirectly} the plaintiff must show she was discharged on account of age).

{¶29} Nevertheless, it is not for the trial court at summary judgment to determine whether the court is *persuaded* by the non-movant's evidence that one discriminatory reason was not the determinative factor where there is another nondiscriminatory reason. The trial court stated Appellant "has not established any direct evidence of age discrimination." Appellant contends the trial court ignored the testimony of the human resources officer which provided direct evidence that a reason for his rejection was his age. He asks us to consider this statement along with the evidence of management inquiring about his age and retirement plans at the urging of Unifrax (starting when Unifrax purchased RSI) and other evidence establishing a prima facie case under the indirect method.

{¶30} In the context of discussing why he would not interview Appellant, the decision-maker told a human resources employee who scheduled the interviews that Appellant was "close to retirement age." Although he also explained to her that Appellant fell asleep at a regional sales meeting, this does not eliminate what could reasonably be read as an additional reason expressed for Appellant's rejection. Appellees read the testimony as a mere comment about an impending retirement. However, the comment dealt with age and was said to be made in the context of explaining why the decision-maker was not willing to interview and hire Appellant. This court concludes there was direct evidence of age discrimination. This decision is further supported by the totality of circumstances as discussed further infra.

{¶31} As aforementioned, an employee can also establish a prima facie case of discrimination indirectly by demonstrating certain items derived from the *McDonnell Douglas* case. As applied to age discrimination in hiring, the parties agree the indirect method of proving a prima facie case requires Appellant to show he: (1) was a member of the statutorily protected class; (2) was qualified and applied for the position; (3) he was denied the position despite his qualifications; and (4) the position was filled by a person of substantially younger age. *See generally Coryell v. Bank One Tr. Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, 803 N.E.2d 781, ¶ 20; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The underlying premise of the indirect method of proof under *McDonnell Douglas* allows the employee to "raise an inference of discriminatory intent indirectly" by merely eliminating the most common nondiscriminatory reasons. *Mauzy*, 75 Ohio St.3d at 583. For purposes of summary judgment, Appellees' motion acknowledged Appellant had a prima facie case of age discrimination.

{¶32} Upon establishing a prima facie case, a rebuttable presumption of unlawful discrimination arises and the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's rejection. *Burdine*, 450 U.S. at 253, citing *McDonnell Douglas*, 411 U.S. at 802. The reasons provided by the employer were said to be: Appellant's falling asleep at a meeting nearly two years before the hiring decision; the decision-maker's claimed perception that Appellant did not have front-line sales experience; and a general manager told the decision-maker Appellant was merely an adequate performer (although the decision-maker's decision to reject Appellant was "pretty much" already made). Appellant's response to the motion for summary judgment acknowledged Appellees presented summary judgment evidence of legitimate, nondiscriminatory reasons.

{¶33} The employer's "production of evidence of nondiscriminatory reasons, whether ultimately persuasive or not, satisfie[s] their burden of production and rebut[s]the presumption of intentional discrimination" *at which point the "McDonnell Douglas framework then bec[omes] irrelevant*, and the trier of fact [i]s required to decide the ultimate question of fact: whether [the employee proved the employer]

intentionally discriminated against him because of [the protected status]." (Emphasis added). *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 503, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). It is at this point the plaintiff has "an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253 (the ultimate burden of persuasion remaining with the employee at all times).

{¶34} This stage in a trial involves the employee showing the reasons proffered by the employer were mere pretext and discrimination was the real reason. *See Hicks*, 509 U.S. at 503, 515. An employee can show pretext by proving the proffered reasons had no basis in fact, did not actually motivate the employer's action, or were insufficient to motivate the employer's action. *See, e.g., Roghelia v. Hopedale Mining, L.L.C.*, 7th Dist. No. 13 HA 8, 2014-Ohio-2935, ¶ 41. *See also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive."). This inquiry reviews the evidence presented in support of the prima facie case again, but "the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255; *Reeves*, 530 U.S. at 145 (although the presumption created by the prima facie case disappears once the employer meets its burden of production, the trier of fact may still consider the evidence establishing the prima facie case and inferences which can be drawn therefrom on the issue of pretext).

{¶35} The trial court's summary judgment was based upon a finding Appellant failed to meet his burden of establishing pretext. This essentially means the trial court held no rational fact-finder could reasonably doubt the employer's explanation. *See Reeves*, 530 U.S. at 148. "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case * * * ." *Id.* at 148-150 (on a motion for judgment as a matter of law in a jury trial; where the

Court observed the standard was the same as for summary judgment). "[A]n employer would be entitled to judgment as a matter of law if the record *conclusively* revealed some other, nondiscriminatory reason for the employer's decision, *or* if the plaintiff created *only a weak issue of fact* as to whether the employer's reason was untrue *and there was abundant and uncontroverted independent evidence that no discrimination had occurred*." (Emphasis added). *Id.*

{¶36} Appellant states he produced evidence from which a jury could reasonably doubt the employer's explanation. He states he only needed to produce evidence to rebut the employer's reasons, not to disprove them to the trial court, who is not the trier of fact on a summary judgment motion. He reviews the evidence supporting his prima facie case and factors, such as: his work history at RSI and prior to RSI; the inquiries as to his age and retirement date; his supervisor's encouragement for him to apply for the position at the parent company and opinion that he was very qualified for the posted position; out of five applicants, the parent company did not contact him for an interview; his qualifications relative to the person hired; and the deviation from the March 2014 job posting in hiring the 29-year-old applicant. Appellant also claims the reasons provided for his rejection and for questioning him as to retirement were inconsistent. He emphasizes the statement the decision-maker made to the human resources employee as to why he did not interview Appellant.

{¶37} Appellant also points to the differing opinions on the information collected during succession planning: Unifrax argued it was collecting information for succession planning; the decision-maker stated succession planning involved planning who would "backfill" a position if someone were to leave the company for any reason; the decision-maker said it did not involve retirement planning; for purposes of succession planning, he said there was no reason for the general manager to be asking people their age or what their intentions were with respect to retirement; and another vice president testified succession planning involved identifying high potential individuals to step into a key position if it were to be vacated.

{¶38} To review, two months before the job posting, a Unifrax general manager (over the three local subsidiaries) asked Appellant about his age and retirement date, during what became a confrontational dinner in New York. A month before this, in December 2013, Appellant's direct supervisor told him Unifrax was working on a succession plan and wanted to know his age and how many more years he was going to work. Appellant answered it was none of their business, noting an employee can die or quit or be fired without any advance notice of a date. (Appellant had protested a similar question when Unifrax purchased RSI in mid-2011.) At the time of December and January questioning, a succession planning document had already been drafted (months earlier) wherein the general manager inserted a date four years away for Appellant's retirement date; he said it was an estimated date based on information gathered by Appellant's direct supervisor. A contemporaneous succession planning memorandum written by this general manager identified Appellant's position as requiring "immediate succession planning" and discussed the need to identify and get in place "the next generation" of leadership.

{¶39} Appellant points out the incident involving him dozing off at a hotel meeting was nearly two years before his rejection, and he was not disciplined in any manner for the event or for any other reason. As set forth supra, an employee is not mandated to prove a proffered reason is factually untrue; such proof is merely one avenue to showing a reason is pretextual. An employee can also show the reason is insufficient. Appellant points out he received raises and bonuses regularly while working for RSI. Appellant's direct supervisor, who previously owned RSI and stayed with the company after the sale, described him as a key employee and had no complaints about Appellant's work performance. Furthermore, an employee can show the reason did not actually motivate the adverse employment decision. The totality of the circumstances is important in evaluating motivation and causation.

{¶40} The decision-maker said he asked the general manager about Appellant, and this person did not have high praise for Appellant's performance. Yet, Appellant's direct supervisor (the former owner) testified to Appellant's knowledge and skill, opining he was very qualified for the position posted and more qualified

than the person hired. It must also be emphasized the general manager was the person Appellant recently rebuffed after being asked, "How old are you and how much - - why are you still working and how much longer are you going to work?" (Sciaretta Dep. 87). Moreover, the decision-maker admitted he had already "pretty much" made his decision to reject Appellant before this conversation with the general manager.

{¶41} The decision-maker claimed Appellant's resumé lacked "frontline sales" experience. His resumé stated he had experience with sales and marketing in domestic and international markets and noted he traveled extensively internationally to train people in making sales and marketing presentations. In addition, Appellant worked for a wholly-owned subsidiary of the parent company. The decision-maker spoke to the general manager about Appellant, and Appellant testified he did have frontline sales experience here and in the past and had experience bringing a product to a new market, essentially disputing the factual basis for this reason. His direct supervisor also characterized Appellant's position as involving frontline sales.

{¶42} Furthermore, Appellant was 71 at the time of the rejection, and the person who was hired as a result of the job posting and interview was 29 years old. This person admittedly lacked the posted requirements. The position was altered to fit this person's lesser experience; the salary grade was reduced one step and the title was changed. This person was also permitted to remain in Pittsburgh, Pennsylvania, even though the posting required a move to Tonawanda, New York. Appellant also points out how the decision-maker described this candidate as an "athlete" in an email to the CEO. The decision-maker testified this had nothing to do with athletic ability. He claimed it was a term he used to mean the person was well-rounded with the right tools and the potential to grow into the position; yet, he said he did not know if his boss would know what this term meant.

{¶43} Finally, although the decision-maker first told the human resources employee he would not be interviewing Appellant because of the incident where he appeared to be sleeping at a sales meeting in 2012, he provided an additional reason as well: Appellant was "close to retirement age." (Horne Dep. 22). This statement

was specifically said to be made by the decision-maker in the context of explaining why Appellant was being rejected for the position. (The trial court's decision, which outlined the nondiscriminatory reasons proffered by the employer, did not mention this reason at all.)

{¶44} In considering unlawful discrimination cases, the totality of the circumstances must be considered. In considering summary judgment, doubts must be resolved in favor of the non-movant. *Leibreich*, 67 Ohio St.3d at 269. Courts considering summary judgment motions cannot "weigh the proof or choose among reasonable inferences." *Dupler,* 64 Ohio St.2d at 121. Upon considering the evidence and all reasonable inferences in the light most favorable to the non-movant, this court concludes there is a factual dispute as to whether the reasons provided by the employer were pretext and as to whether discrimination was the real reason. It appears some rational fact-finder could find Appellant was rejected because of his age. Although the employer's reasons could be considered strong, the employee's case does not appear so weak that judgment should be entered as a matter of law as there is not uncontradicted evidence on all pertinent facts; nor does the record conclusively establish Appellant's age was not the determinative factor. That decision is one for the jury.

RSI Liability

{¶45} Appellant's brief addresses the portion of RSI's summary judgment motion which raised an alternative ground for summary judgment that only applied to RSI. RSI's motion for summary judgment argued RSI engaged in no adverse employment action as Appellee still worked for RSI and only Unifrax (through Juda) made the actionable decision. Appellant responded by arguing RSI and Unifrax were "joint employers" and they were both subject to liability under the "single employer" or "integrated enterprise" doctrine, whereby "two companies may be considered so interrelated that they constitute a single employer subject to liability under the ADEA [Age Discrimination in Employment Act.]" *See Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993 (6th Cir.1997). According to this case, in determining whether to treat two entities as a single employer for an age discrimination claim,

courts consider the following list of factors: interrelation of operations (including common offices, record-keeping, bank accounts, and equipment); common management, directors, or boards; centralized control of labor relations and personnel; and degree of common ownership and financial control. *Id.* at 994 (no factor is conclusive, and all four need not exist).

{¶46} Appellant's response urged the employers should be treated as a single employer or integrated enterprise due to the following evidence: RSI employees became subject to Unifrax handbook and policies when Unifrax purchased RSI as a wholly-owned subsidiary; the former owner of RSI said RSI employees were Unifrax employees; Appellant's paycheck said "RSI a Unifrax Company"; his company phone and travel were paid through Unifrax; Appellant was on the Unifrax employee email distribution list (where he received the job posting); Unifrax forced RSI to change its bonus payments; Unifrax engaged in managerial oversight at RSI; Unifrax took over employee relations and human resources for RSI; a Unifrax employee was the general manager of RSI (and two other local subsidiaries); and this general manager prepared a "Unifrax Ohio" succession plan involving Appellant's RSI position. RSI replied: even if these facts raise a genuine issue as to whether Appellant was employed by both companies, RSI (the subsidiary) cannot be held liable for the hiring decisions of Unifrax (its parent) because they did not participate in the adverse employment action as Unifrax vice president Juda was the sole decision-maker for filling the position.

{¶47} Appellant acknowledges the trial court's decision granting summary judgment for Appellees did not address this issue, but he preemptively raises the topic. RSI's brief on appeal also recognizes the trial court did not express a decision on this issue but continues to argue, even accepting Appellant's factual allegations as true, Appellant failed to establish a subsidiary can be held liable for the hiring decision for a position located only in the realm of the parent company. In other words, even if there is a joint employment relationship for Appellant's current position, the posted position would not involve RSI. Although the trial court did not express an opinion on RSI's alternative ground, App.R. 3(C)(2) provides: "A person who intends

to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross appeal or to raise a cross-assignment of error."

{¶48} Initially, it must be clarified that the "single employer" or "integrated employer" doctrine is considered a different approach than the "joint employer" doctrine. After reciting the law on the single employer or integrated enterprise doctrine, set forth above, the Sixth Circuit case cited by Appellant points out: "In another approach, courts consider whether one defendant has control over another company's employees sufficient to show that the two companies are acting as a 'joint employer' of those employees." *Swallows*, 128 F.3d at 994 (setting forth three different doctrines courts have fashioned under which a defendant who does not directly employ a plaintiff may still be considered an "employer" under the discrimination statutes: single employer or integrated enterprise; joint employer; and agency). The case cited by RSI also recognizes these three different doctrines. *See Sampson v. Sisters of Mercy of Willard, Ohio*, N.D.Ohio No. 3:12-CV-00824 (2015), citing *Swallows*, 128 F.3d at 993.

{¶49} In defining the joint employer approach, another case relied upon by RSI provides: "Entities are joint employers if they 'share or co-determine those matters governing essential terms and conditions of employment.' " *E.E.O.C. v. Skanska USA Bldg., Inc.*, 550 Fed.Appx. 253, 256 (6th Cir.2013), quoting *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir.1985). "To determine whether an entity is the plaintiff's joint employer, we look to an entity's ability to hire, fire or discipline employees, affect their compensation and benefits, and direct and supervise their performance." *Id.*

{¶50} RSI's motion for summary judgment did not discuss either of the doctrines but simply argued RSI took no adverse employment action. Appellant's response named both the joint employer doctrine and the single employer or integrated enterprise doctrine and quoted the law for applying the single employer or integrated enterprise doctrine. RSI's reply briefly set forth principles on the joint employer doctrine. Likewise, on appeal RSI argues even if there is a joint

employment situation, it would not extend to the posted position which was solely a Unifrax position. RSI does not explain the connection of this argument to the single employer or integrated enterprise doctrine for purposes of an age discrimination claim. We need not ascertain whether the factors (for determining integrated enterprise status) were sufficient as the application of the factors was not disputed by RSI for purposes of summary judgment.

{¶51} In addition, the general manager of RSI expressed in July 2013 there was need for immediate succession planning for Appellant and wrote about the need to get the "next generation" in place; he prompted Appellant's supervisor at RSI to question him about his age and retirement date in December 2013; he confronted Appellant about his age and asked why he was still working in January 2014; and soon thereafter, he provided Juda (the alleged sole hiring decision-maker for the posted position) information which was said to confirm that Appellant was not worthy of hiring for the Unifrax position. This person was a Unifrax employee *and was the general manager of RSI*. Based on the arguments in RSI's summary judgment motion (and reply) and the totality of the evidence, this court concludes the trial court was not required to grant summary judgment to RSI on their alternative ground.

ASSIGNMENT OF ERROR TWO: DISCOVERY

{¶52} Appellant's second assignment of error provides:

"The trial court erred when it denied Plaintiff-Appellant's motion to compel Discovery regarding succession planning in its orders dated July 1, 2016 and August 22, 2016, and refused to stay briefing pending such discovery."

{¶53} After an initial extension to December 2015, Appellant's discovery deadline was extended until March 1, 2016, in an order stating "All discovery by Plaintiff shall be completed (**not merely filed or mailed**) by" this date. (Emphasis original). On January 28, 2016, Appellant deposed Unifrax's vice president of human resources (Kuchera) who mentioned Unifrax succession planning for corporate officers and a request for manufacturing facilities (such as RSI) to develop their own succession planning. The next day, Appellant deposed Olchawski (the general manager who implemented succession planning at RSI) during which Appellees

provided all of RSI's succession planning documents. Nevertheless, Appellant sent a second request for production of documents to Appellees requesting all records relating to succession planning at Unifrax, RSI, and all affiliates during the period of January 1, 2006 to the present as referenced in Kuchera's deposition, including PowerPoint presentations of succession planning objectives, spreadsheets of high potentials, development planning forms, and any other succession planning documents.

{¶54} On February 22, 2016, Appellees timely objected, stating they produced all documents created and/or utilized by Olchawski which relate to succession planning at RSI. Appellees argued the higher-level succession planning at the parent corporation was separate and irrelevant to Appellant as it involved the identification of potential successors to the officers of the company (and not the position Appellant occupied or the position for which he applied). (Kuchera Dep. 76-77). They noted Kuchera attested he had no involvement in succession planning at RSI. Appellees concluded Appellant's request was overly broad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence.

{¶55} On March 10, 2016, Appellant's attorney sent a letter to Appellees explaining why he believed the documents were discoverable. Appellees replied on March 15, 2016 noting the discovery deadline had passed and reiterating Unifrax succession planning had nothing to do with Appellant or the posted position.

{¶56} On March 30, 2016, Appellant filed a motion to compel discovery of Unifrax's succession planning documents. He asserted Kuchera was asked why anyone at RSI would have asked Appellant his age and retirement date, and he responded RSI may have been involved in succession planning and described items used by Unifrax in conducting its planning. Appellant concluded the request for the documents is related to the subject matter of the action and reasonably calculated to lead to discoverable information.

{¶57} Appellees filed a memorandum in opposition to the motion to compel. They emphasized the untimeliness of Appellant's March 30, 2016 request and noted the extensive discovery already conducted in this case pending since October 2014.

They also claimed there was no connection between Unifrax succession planning for corporate officers and the succession planning implemented at RSI (who was to develop their own process). They alleged the request for high-level executive succession planning documents at Unifrax was a fishing expedition for information on items unrelated to the case.

{¶58} Appellant replied: the request for production of additional documents was made prior the discovery deadline; the response was due prior to the discovery deadline; and the reason they did not file a motion to compel until after the deadline was they were trying to resolve the dispute as per Civ.R. 37; and the information was related to the subject matter of the lawsuit and could not be withheld unless it was "totally irrelevant."

{¶59} Since the motion to compel was not ruled on by the time Appellees filed their summary judgment motion on May 2, 2016, Appellant filed a request to delay further briefing on summary judgment until the motion to compel was decided. Appellant thereafter supplemented the motion to compel with pages from Olchawski's deposition containing the following: he was asked if Unifrax gave him direction on how to engage in succession planning at RSI; he responded, "Not specifically for the work I did in Ohio but we have general guidelines, corporate guidelines, if you will, that describe the succession planning process"; and when asked if he relied on Unifrax's information, he responded, "just as general information." (Olchawski Dep. 33-34).

{¶60} On July 1, 2016, after hearing oral arguments, the magistrate denied the motion to delay the summary judgment briefing and the motion to compel discovery. The magistrate opined "that information is not dispositive for the pending motion before the Court." On July 7, 2016, Appellant filed a motion to stay and set aside the magistrate's order. Appellant stated the magistrate's "not dispositive" terminology evinced the application of an erroneous legal standard. Appellees' response reiterated their arguments on: untimeliness, extensive discovery, prior production of documents relating to RSI succession planning, and failure to show the request would lead to relevant evidence.

{¶61} As a decision was not made on this motion by the response deadline, Appellant filed his response to summary judgment on July 29, 2016, without waiting for the trial court's review of the magistrate's order denying the motion to compel discovery and stay briefing. On August 22, 2016, the trial court denied the motion to stay and set aside the magistrate's order, thereby upholding the denial of the motion to compel.

{¶62} On appeal, Appellant contends the court erred in denying the motion to compel discovery and in refusing to stay the summary judgment briefing schedule. The motion to stay the briefing schedule is moot as this court concluded the entry of summary judgment is reversed. This leaves the issue of the motion to compel discovery. The standard of review of the trial court's decision in a discovery matter is abuse of discretion. *Mauzy*, 75 Ohio St.3d at 592. The reviewing court considers whether the trial court's decision that "extinguishes a party's right to discovery" is "improvident and affects the discovering party's substantial rights." *Id.* Pursuant to rule:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party * * *. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Civ.R. 26(B)(1). The standard is broader than the test for determining the relevancy of evidence at trial as information is only irrelevant at the discovery stage if it does not appear it will reasonably lead to the discovery of admissible evidence. *See id.*

{¶63} "[D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. * * * Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits." *Oppenheimer Fund, Inc. v. Sanders*, 437

U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978), citing *Hickman v. Taylor*, 329 U.S. 495, 500-501, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Appellant also cites a case finding discovery in a discrimination case is necessarily broad as such a case is particularly hard to prove in the absence of a discriminatory comment made by a hiring official. *Chen-Oster v. Goldman, Sachs & Co.*, 293 F.R.D. 557, 562 (S.D.N.Y.2013) (also opining, "Broader discovery is warranted when a plaintiff's claims are premised on a pattern or practice of discrimination at the organization-wide level, as opposed to specific allegations of discrimination made against an individual supervisor.").

{¶64} It does appear at least some of the information requested on Unifrax succession planning was relevant to the subject matter in the action and reasonably calculated to lead to the discovery of admissible evidence, especially the material used to train employees on succession planning. If this was not clear from the motion to compel's reliance on certain pages of Kuchera's deposition, it became clear with the later citation to pages of Olchawski's deposition. That is, he suggested he relied on Unifrax succession planning information and he learned in the past to implement succession planning at RSI. The actual identification of "high potentials" at Unifrax (those who were perceived as being able to fill corporate officer positions upon vacancy) may be less relevant to this case and not reasonably calculated to lead to the discovery of admissible evidence. The request was therefore overbroad.

{¶65} Appellant states the trial court did not find the motion to compel untimely. However, the trial court did not express its rationale for denying the motion. On the topic of strict deadlines and timeliness, Appellant notes that although Appellees filed a reply in support of summary judgment on August 5, 2016, the trial court did not issue a ruling until May 4, 2017, granting summary judgment in favor of Appellees. Appellant also notes during the time between the passing of the deadline and the filing of the motion to compel, he was attempting to resolve the issue through communication with Appellees' counsel; although, considering the time constraints, there is some unexplained time lapse before and after this communication.

{¶66} Upon evaluating the totality of the circumstances, the trial court could reasonably find the motion to compel untimely. Although Appellant suggests his request for production of documents was prompted by the January 28 and 29, 2016 deposition testimony, the topic of succession planning at Unifrax's urging was raised long before these depositions. The October 2014 complaint speaks of succession planning by "Defendants" (plural) and asserts Unifrax wanted information from Appellant. The answer admitted the instances of succession planning. Appellant testified at his deposition in August 2015 that he was advised the requests for his age and retirement date were for the purpose of succession planning at the prompting of Unifrax. (Sciaretta Dep. 72-74, 90). He also spoke of the gradual integration of various Unifrax policies into RSI. (Sciaretta Dep. 97-98). Wilk (Appellant's supervisor) testified at his September 2015 deposition about the succession planning and integration of policies as well. In addition, Juda (the decision-maker for the job posting) was asked about succession planning at his August 2015 deposition, where he testified it dealt with contingency backfilling and not retirement, seeming to agree with Appellant's testimony that (in his experience with his prior large corporate employers who conduct succession planning) an employer need not continually seek such information for proper succession planning. The topic was not a surprise in January 2016.

{¶67} Furthermore, Appellant's March 30, 2016 motion to compel was filed more than four weeks after the discovery deadline. No request to extend the discovery deadline was made, even though the issue for further discovery was known prior to the passing of the deadline. (Moreover, the court was not cited to the significant connecting evidence until two months after the motion to compel was made, when the motion was supplemented with a citation to pages from Olchawski's January 2015 deposition.) We also note Appellant did receive succession planning documents related to RSI and Appellant. Although the trial court could have used its discretion to compel some additional discovery, it was not required to do so considering the timing and totality of the circumstances of this case. This assignment of error is overruled.

{¶68} The summary judgment is hereby reversed, and the case is remanded for further proceedings.

Donofrio, J., concurs.

Waite, J., concurs.