UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

STEVE BARKER,

Plaintiff,

v. Case No. 2:19-cv-280-JLB-NPM

FEDEX, a foreign corporation doing business in the State of Florida,

Defendant.
_____/

ORDER

Before the Court is Defendant FedEx's Motion for Summary Judgment. (Doc. 49.) Plaintiff Steve Barker is a former FedEx driver who brings age discrimination claims against FedEx under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq., and the Florida Civil Rights Act (FCRA), Fla. Stat. § 760.01 et seq. According to Mr. Barker, FedEx's discrimination against him took two forms: (1) disciplinary actions, which ultimately led to his termination; and (2) failure to assign him a regular delivery route despite assigning such routes to younger, less-experienced drivers. Mr. Barker also claims that FedEx retaliated against him by terminating his employment after he filed a written complaint with the Equal Opportunity Employment Commission (EEOC). For the reasons explained below and after viewing the facts in the light most favorable to Mr. Barker, FedEx's motion for summary judgment (Doc. 49) is **GRANTED**.

STATEMENT OF FACTS

I. Mr. Barker is hired by FedEx in 2002 and reviews FedEx's policies.

On July 23, 2002, when he was approximately 42 years old, Mr. Barker began working for FedEx in an Indianapolis warehouse, loading delivery trucks. (Doc. 49-2 at 47:1–4; Doc 49-3 at 148:19–23, 179:9–11.) On that same day, Mr. Barker acknowledged receipt of the FedEx "Employee Handbook." (Doc. 49-4, Ex. 12.) He also acknowledged that he was aware of the following FedEx policies: (1) 2-5, Acceptable Conduct; (2) 1-20, Attendance; (3) 5-5, Guaranteed Fair Treatment Procedure/EEO Complaint Process; (4) 2-50, Performance Improvement; (5) NHO-C Safety Rules; and (6) Safe Work Methods On-The-Job Training. (Id., Ex. 13.)

The Acceptable Conduct (2-5) policy provides that:

> [a]n employee is dismissed upon completion of an investigation confirming violations related to:
>
> - Deliberate falsification of Company documents including but not limited to business reports, delivery records, timecards, benefits eligibility forms, expense reports and employment applications.

(Id., Ex. 14.) The policy goes on to warn that "[e]ven **one** failure to maintain our reputation for integrity can jeopardize our relationship with customers and other groups whose business and goodwill is essential to our continued success." (Id.) In no uncertain terms, the policy provides that FedEx would have "zero tolerance" for "falsification-related violations." (Id.)

FedEx employees are presented with internal job change opportunities. The Acceptable Conduct policy includes a provision stating that a job-related Performance Reminder or Warning Letter—which serves as a notification of an employee's

behavioral deficiency—"may affect the selection" of that employee for other posted employment opportunities at FedEx for up to "a period of 12 months." (Id., Ex. 5 at 15; Ex. 17 at 4.)

Even if an employee has an active Warning Letter, that employee may still apply for other available job opportunities within FedEx. (Id., Ex. 17 at 5.) Specifically, existing employees may submit a "Job Change Application" (JCA) to the manager of the desired job opportunity sought by the existing FedEx employee. (Id., Ex. 5 at 15.) But FedEx's policy cautions:

> Active Warning Letters do not automatically prohibit an employee from submitting a JCA if the skills required in the posted position are different from the problem areas noted in the current position. Employees must understand, however, that selection for open positions at FedEx . . . is highly competitive and behavioral problems may reduce their probability of being the successful candidate.

(Id., Ex. 17 at 5.) Lastly, if any employee receives three Warning Letters within a 12-month period (a "recurrent pattern"), the Acceptable Conduct policy provides that "termination normally occurs" as follows:

> When an employee receives a second deficiency notification within 12 months (e.g., Warning Letter and/or Performance Reminder), the second deficiency notification should advise the employee that termination normally occurs if a third notification is received within a 12-month period, regardless of the type of the third notification.

(Id., Ex. 17 at 4.)

II. Mr. Barker transfers from Indianapolis to Bradenton for a part-time courier position.

In 2015, Mr. Barker moved to Bradenton, Florida to take a position as a part-time pickup courier. (Doc. 49-3 at 124:17–125:3, 179:19–21.) His complaint

provides that sometime in May 2017—while in Bradenton—he "applied for another route that would provide full[-]time status, only to be passed over by someone [younger]." (Doc. 1 at ¶ 9.) In his deposition, Mr. Barker testified that someone named "Charles" received the route, but he did not recall any other details about "Charles," like what position he was seeking transfer from or if he had any pending disciplinary issues.[1] (Doc. 49-3 at 125:6–7.) According to Mr. Barker, his manager in Bradenton—Marcia Burns—explained to him he was originally going to be awarded the full-time route. (Id. at 140:19–141:3.) But one week before he believed he would receive the route, Mr. Barker got a written Performance Reminder regarding his failure to achieve his stops-per-hour goals for four straight months. (Id. at 142:12–19; Doc. 49-4, Ex. 7 at 15–16.) As a result of this letter, "Charles" got the route instead. (Doc. 49-3 at 125:6–126:16.)

Specifically, the Performance Reminder memo, dated June 11, 2016,[2] reiterates four prior Performance Reminders—issued on February 10, March 1, May 13, and June 9, 2016—where Mr. Barker had been counseled regarding his failure to meet FedEx's stops-per-hour goals. (Doc. 49-3 at 143: 9–16; Doc. 49-4, Ex. 7 at 15.) The last paragraph of the Performance Reminder indicates that, due to

[1] Charles's exact age is unclear. The complaint provides that Mr. Barker was replaced by someone in his twenties, but his handwritten post-termination notes—which were admitted as an exhibit during his deposition—indicate that Charles was in his thirties. (Doc. 1 at ¶ 9; Doc. 49-4, Ex. 9 at 2.)

[2] The performance reminder letter is dated June 11, 2016, which does not seem to square with the May 2017 date in the Complaint. (Doc. 49-4, Ex. 7.) Regardless, Mr. Barker confirmed that the 2016 performance letter was cited by Ms. Burns as a reason for not giving him a full-time route. (Doc. 49-3 at 142:15–19.)

Mr. Barker's unsatisfactory performance, he may not apply to change his job for the next six months unless the skills required for the posted job are different from the problem areas noted in the letter as follows:

> In accordance with policy, this Performance Reminder will remain active for six months; therefore, a Job Change Application [JCA] may only be submitted if the skill required in the posted position are different from the problem areas noted in this Performance Reminder. In addition, three notifications of deficiency [i.e., and combination of warning letters and/or Performance Reminders within a 12-month period may result in termination.

(Doc. 49-4, Ex. 7 at 15.)

Mr. Barker believes the Performance Reminders were unfair because he met "99.6" out of "100 percent" of his stops-per-hour goals. (Doc. 49-3 at 141:15–142:11.) But during his deposition, Mr. Barker never suggested that younger employees were treated less harshly under comparable circumstances, or that Ms. Burns made any remark to him that suggested age discrimination. (Id. at 126:17–20.)

FedEx's business records also indicate that Mr. Barker received another warning letter on October 12, 2017—while still in Bradenton—indicating that he had violated FedEx's hours-of-service policy by working for more than fourteen hours, in violation of U.S. Department of Transportation regulations. (Doc. 49-2 at 102:3–8; Doc. 49-4, Ex. 6 at 8–9.) Mr. Barker believes this warning letter was unfair because he had been sent on an assignment to pick up two boxes, but there were actually two-hundred boxes at the pickup location. (Doc. 49-2 at 35:19–25.) In other words, the reason he worked so long was due to the unexpected number of boxes. But, again, Mr. Barker does not contend that younger employees were

treated differently, or that the manager who gave him the letter (Tom Brown) said anything to him regarding his age. (Id. at 35:7–15, 36:1–8.) In fact, Mr. Barker testified that Mr. Brown also received a violation for this incident. (Id. at 35:7.) Mr. Barker's warning letter stated that it would be "active for twelve months," and "any active discipline [such as the letter] . . . may be considered" in the selection process for other positions that he applied for. (Doc. 49-4, Ex. 6 at 8.)

III. Mr. Barker transfers to Punta Gorda to take a full-time swing delivery driver position.

Sometime in December 2017 or January 2018—within the "active period" of the October 2017 warning letter—Mr. Barker was hired to be a full-time swing courier in FedEx's Punta Gorda office. (Doc. 49-2 at 66:4–6; Doc. 49-7 at ¶8.) The parties agree that as a condition of Mr. Barker's employment in Punta Gorda, he was required to remain a swing courier for at least twenty-four months. (Doc. 49-2 at 46:10–22, 66:1–18.)

The parties also mostly agree as to the responsibilities of a swing courier assignment, as opposed to a regular courier assignment. The basic difference between a full-time swing courier and full-time courier is that a swing courier does not have a dedicated shift or route for each workday. (Doc. 49-7 at ¶ 9.) Unlike regular couriers, who are assigned to a particular route and shift, swing couriers may be asked to cover different routes within a designated area and during different shifts. (Id.; Doc. 49-2 at 43:5–23.) For instance, a swing courier may fill in for a regular courier who is sick, absent, or on vacation. (Doc. 49-2 at 43:24–44:5.) A swing courier may also fill in when FedEx needs extra employees to handle

unusually large amounts of freight. (Id. at 44:6–8). Although he was a swing courier—not a regular courier—Mr. Barker apparently took the job in Punta Gorda believing that he would eventually be assigned a regular route. (Id. at 68:11–18; Doc. 49-3 at 124:17–25.) In Mr. Barker's view (and without further evidentiary support), employees take swing driver positions "to get a regular route," or at least in the hopes of getting one because "that's how it works." (Doc. 49-2 at 68:11–18.). Similarly, in paragraph 10 of his complaint, Mr. Barker states that he "transferred from Bradenton to Punta Gorda . . . for a full-time route."[3] (Doc. 1 at ¶10.)

Regardless of whether this reassignment was technically possible under FedEx's policies, it is undisputed that Mr. Barker was not reassigned from a swing route to a regular route. Barker's complaint alleges that he was "passed over" for a regular route in favor of a "younger person" with "less experience." (Id.) During his deposition, Mr. Barker identified Chris Carlini, who he estimated to be thirty years old, as an individual who received a regular courier route "over him." (Doc. 49-2 at 27:23–28:1; Doc. 49-3 at 133:9–21.). But Mr. Barker also gave vague and contradictory deposition testimony about the nature of Mr. Carlini's employment at FedEx. At different points in the deposition, Mr. Barker describes Mr. Carlini as either a "regular courier at the time in Bradenton" who received another regular route after transferring to Punta Gorda, or as a part-time courier with a regular route in Bradenton who was hired as a swing-route driver in Punta Gorda but later

[3] During his deposition, he further clarified that he was not seeking a "promotion" to a different position; he simply wanted to be assigned to an "open route." (Doc. 49-3 at 132:11–133:3.)

received a full-time route. (Doc 49-2 at 65:17–22; Doc. 49-3 at 134:1–25, 135:3–136:6.) Mr. Barker also listed a group of five "young guys" (identified by name, including Mr. Carlini) who he claimed were given regular courier routes by FedEx. But he did not know whether any of these "young guys" were originally hired as regular couriers or swing couriers, or whether they had 24-month commitments to remain in their prior positions. (Doc. 49-2 at 27:23–24, 66:19–21, 68:1–3.)

Later in his deposition, Mr. Barker recalled a conversation he had in the summer of 2018 with one of the managers of the Punta Gorda FedEx facility, Ronald "Bryan" Deatherage and a 60-year-old, hourly employee named either "Zeke Wilson" or "Zealand Wilson."[4] (Doc. 49-3 at 140:9–14.) According to Mr. Barker, he, Mr. Deatherage, and Mr. Wilson "were just talking about things," and Mr. Wilson asked Mr. Deatherage "if he could ever get full time and Brian says, no, you're too old to have a route and have full time." (Doc. 49-2 at 61:25–62:7.) But Mr. Barker did not report this conversation to anyone because he thought Mr. Deatherage was "kidding." (Id. at 62:3–7, 64:19.)

IV. FedEx suspends Mr. Barker after he receives three warning letters in a three-month period.

FedEx's business records reflect that Mr. Barker was subject to several disciplinary measures in the Punta Gorda office, and that he received three warning letters within a three-month period. As previously noted, FedEx policy provides that receiving "three notifications of deficiency within a three-month period

[4] Mr. Barker estimated that he and Mr. Wilson were approximately the same age. (Doc. 49-3 at 140:9–14.)

normally results in termination." (Doc. 49-4, Ex. 17 at 5.) Two of the warning letters were for falsification of company records, which FedEx considers to be a particularly serious offense that could have resulted in his immediate termination. (Id. at 1–2.) Mr. Barker agrees that FedEx takes "a hard line" on falsification. (Doc. 49-2 at 93:11–12.)

Specifically, on August 15, 2018, Mr. Barker received a warning letter for falsifying his delivery records from Alan Gunnar Trench, a FedEx operations manager in Punta Gorda. (Doc. 49-4, Ex. 5 at 14–15.) Upon reviewing Mr. Barker's delivery records, Mr. Trench noticed that Mr. Barker recorded four delivery stops within a span of five minutes, all to different addresses. (Doc. 49-7 at ¶ 12.) Mr. Trench determined that delivering these packages in such a short time frame was impossible given the distance between the addresses, and therefore Mr. Barker must have been scanning packages before they were delivered to avoid being late.[5] (Doc. 49-7 at ¶17.) As with the previous warning letter from Punta Gorda, the August 2018 warning letter notified Mr. Barker that it would be "active" for twelve months and "may be considered" in the selection process for any new positions. (Doc. 49-4, Ex. 5 at 15.)

Mr. Barker received another warning letter on October 25, 2018 from Bryan Deatherage[6] because he had worked for more than seven hours on October 15, 2018

[5] FedEx employees use a device called a "PowerPad" to scan packages upon pickup and delivery. (Doc. 49-2 at 87:25–88:3.) It is used to record information about the time of each pickup and delivery, which is then made accessible to managers.

[6] Gunnar Trench is listed as the issuing manager, but it was Bryan Deatherage who issued the letter. (Doc. 49-7 at ¶ 19.)

without taking any breaks—a violation of FedEx's hours-of-service policy. (Doc. 49-3, Ex. 4 at 17–18.) This letter contains a comment from Mr. Barker that he simply "forgot to take a break this day." (Id. at 17.) Once again, the warning letter indicated that it would be active for twelve months and may be considered in the selection process for any jobs. (Id.)

Mr. Barker stated that he did not initially recall the circumstances around this letter, but he later confirmed the accuracy of an e-mail that Mr. Deatherage had written about the incident to Lourdes A. Aparicio Hernandez—a human resources advisor. (Doc. 49-3 at 156:9–23.) In that e-mail, Mr. Deatherage stated that when he spoke to Mr. Barker about the break violation, Mr. Barker asked him to falsify FedEx's records by "putting [a break] in for [him]," which Mr. Deatherage declined to do. (Doc. 49-4, Ex. 22 at 1.) Attached to the e-mail from Mr. Deatherage to Ms. Hernandez was a statement from Mr. Barker in which he admitted that the violation occurred because he "didn't have time," but it was unintentional and would not happen again. (Id. at 2.)

On November 8, 2018, Mr. Barker received a letter from FedEx suspending his employment because management believed that he had again falsified his pickup records. (Doc. 49-3 at 159:23–25.) According to Mr. Trench's sworn declaration, he discovered that Mr. Barker had logged four pickup stops during a two-minute period on November 7, 2018—all at different locations within a "four-mile business area." (Doc. 49-7 at ¶ 21.) Due to this perceived discrepancy, Mr. Trench again suspected Mr. Barker of falsifying records to avoid late pickups. (Id.

at ¶¶ 23–24.) Mr. Barker disputes that he falsified the records and testified during his deposition that the pickup locations were "all in the same parking lot." (Doc. 49-3 at 162:12–13.) Mr. Barker apparently discussed the discrepancies with Mr. Trench on the day that the suspension letter was issued and, in a handwritten statement, maintained his innocence. (Doc. 49-4, Ex. 24 at 8; Doc. 49-7, Ex. 4.)[7]

Throughout 2018, Mr. Barker also received "compliment and counseling forms" (OLCC forms) about minor failures in paperwork and recordkeeping. (Doc. 49-4, Exs. 18–21.) When shown the forms, he either did not recall them or took responsibility for the minor violations in the letters. (Doc. 49-3 at 151:14–152:6, 154:7–155:22.)

V. Mr. Barker submits an EEOC complaint and is terminated.

On November 11, 2018—three days after he was suspended—Mr. Barker signed an EEOC complaint charging FedEx with discriminating against him because of his age.[8] (Doc. 49-3, Ex. 2.) Mr. Barker agrees that his date of termination from FedEx is November 15, 2018. (Doc. 49-2 at 17:16–19.) On that date, Mr. Trench asserts that he met with Mr. Barker to review the information regarding his alleged falsification of pickup times. (Doc. 49-7 at ¶ 28.) That same

[7] He also contended he had been suspended in October 2018 for similar reasons, but his previous suspension did not result in his termination. (Doc. 49-2 at 10:25–12:9; Doc. 49-3 at 196:21–23.) No documentary evidence of this suspension has been provided to the Court.

[8] Mr. Barker testified that his attorney e-mailed the complaint to FedEx, although he did not personally witness him do so. (Doc. 49-3 at 215:3–216:5.) Accordingly, this testimony is not based on personal knowledge. FedEx disputes that the complaint was ever sent.

day, Mr. Trench issued Mr. Barker his third warning letter, which informed Mr. Barker that he was being terminated. (Id., Ex. 7.) During his deposition, Mr. Barker testified that Mr. Trench specifically brought up his EEOC complaint during the termination meeting. (Doc. 49-3 at 184:17–185:9, 188:18–22.)

FedEx argues that the decision to terminate Barker was already made five days before, on November 10. On that day, Mr. Trench sent an e-mail to Ms. Hernandez—copying Mr. Deatherage—with the subject line "Warning letter for Steve Barker 4697865." (Doc. 49-7, Ex. 6.) The November 10 e-mail reads:

> Here you go. Please double check the codes at the top and I used a date of Thursday the 15th to issue the letter. I will be on vacation next week and the managers have a meeting at FMY on Wednesday so I thought it would be better to do on a day when Brian was at PGD to have a witness if needed. Thanks for the help and let me know of any necessary changes. I will be checking email while out on vacation.

(Id.) In his declaration. Mr. Trench states that the purpose of the e-mail was to "verif[y] . . . the codes to finalize the termination of Barker's employment." (Id. at ¶ 27.) Mr. Deatherage and Ms. Hernandez likewise declare that the purpose of the November 10 e-mail was to finalize Mr. Barker's termination. (Doc. 49-6 at ¶ 15; Doc. 49-8 at ¶ 13.)[9] Mr. Trench further declares that he received approval to

[9] Throughout his deposition, Mr. Barker also discusses several other attempts he purportedly made to verbally complain about his problems with FedEx. These complaints cannot support a retaliation claim because, as relevant: (1) he was not able to reach anyone by phone and actually complain; (2) the purported complaints had nothing to do with practices or proceedings covered by the ADEA; (3) he never alleged that he suffered any adverse employment action as a result of these complaints. (Doc. 49-2 at 20:9–21:13, 73:12–74:17, 76:20–22; Doc. 49-3 at 136:10–139:7, 210:8–13.) Mr. Barker's deposition testimony makes clear that the only basis for his retaliation count is the EEOC complaint.

terminate Mr. Barker from senior manager Mark F. Chiappetta on November 9. (Doc. 49-7 at ¶ 26.).

SUMMARY JUDGMENT STANDARD

Summary judgment is only appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "In other words, summary judgment is warranted if a jury, viewing all facts and any reasonable inferences therefrom in the light most favorable to plaintiffs, could not reasonably return a verdict in plaintiffs' favor." Hale v. Tallapoosa Cnty., 50 F.3d 1579, 1581 (11th Cir. 1995) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact . . . ." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Id.

Where the non-movant "fail[s] to make a sufficient showing 'to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' there exists no genuine issues of material fact." Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986)). In such instances, the moving party can simply point out the absence of evidence supporting the non-moving party's case, without filing affidavits or similar material negating the non-

moving party's claim. See Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993) (indirectly quoting Celotex Corp., 477 U.S. at 323–24).

DISCUSSION

Mr. Barker claims that he suffered from two types of adverse employment action impermissibly based on his age: (1) disciplinary actions that were "not based on merit"; and (2) being "passed over" for a "full time route" in favor of a "younger person." (Doc. 1 at ¶¶ 11–12.) The Court holds that Mr. Barker fails to state a prima facie case for age discrimination on either ground. And even if the Court were to assume that he has presented a prima facie case for age discrimination, Mr. Barker has neglected to rebut FedEx's proffered legitimate nondiscriminatory reason for his termination—that he committed three violations of FedEx's policies within a 12-month period.

I. The ADEA and FCRA

Under the ADEA, an employer may not "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The phrase "because of" in the ADEA "means that a plaintiff must prove that discrimination was the 'but-for' cause of the adverse employment action." Sims v. MVM, Inc., 704 F.3d 1327, 1332 (11th Cir. 2013) (citing Gross v. FBL Fin. Servs. Inc., 557 U.S. 167, 176 (2009)).

The FCRA mirrors the ADEA. See Fla. Stat. § 760.10(1)(a); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996) ("Federal case law interpreting Title VII and the ADEA is applicable to cases arising under the

[FCRA].”). As such, it is appropriate to analyze ADEA and FCRA claims together. See Cardelle v. Miami Beach Fraternal Ord. of Police, 593 F. App'x 898, 901 n.6 (11th Cir. 2014) (citation omitted).

To establish a prima facie age discrimination case under the ADEA or FCRA, a plaintiff must show that they: (1) belong to a protected age group (over the age of 40); (2) were subject to an adverse employment action; (3) were qualified to do their job; and (4) were replaced by or otherwise lost a position to someone younger. See Chapman v. AI Transport, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc) (citing Benson v. Tocco, Inc., 113 F.3d 1203, 1207–08 (11th Cir.1997)). An “adverse employment action” is any “ultimate employment decision, such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment.” Van Voorhis v. Hillsborough Cnty. Bd. of Cnty. Comm’rs, 512 F.3d 1296, 1300 (11th Cir. 2008) (internal quotation and citation omitted).

“A claim of unlawful age discrimination . . . may be established through direct or circumstantial evidence.” Kragor v. Takeda Pharm. Am., Inc., 702 F.3d 1304, 1308 (11th Cir. 2012) (citing Van Voorhis, 512 F.3d at 1300). “[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age . . . constitute direct evidence of discrimination.” Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989). If a statement merely suggests a discriminatory motive, then it is, by definition, circumstantial evidence. See Burrell v. Bd. of Trs. of Ga. Mil. Coll., 125 F.3d 1390, 1393 (11th Cir. 1997).

To establish a case of discrimination based on circumstantial evidence, we adhere to the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this framework, a plaintiff must first establish a prima facie case of discrimination. Sims, 704 F.3d at 1332 (citing Chapman, 229 F.3d at 1012). Next, the defendant must articulate a legitimate, non-discriminatory reason for the challenged employment action. Id.[10] And if the employer articulates one or more legitimate, nondiscriminatory reasons, the employee is then "afforded an opportunity to show that the employer's stated reason is a pretext for discrimination." Id. (quoting Kragor, 702 F.3d at 1307).

"The burden of persuasion always remains on the plaintiff in an ADEA case to proffer evidence sufficient to permit a reasonable fact finder to conclude that the discriminatory animus was the 'but-for' cause of the adverse employment action." Id. (citing Gross, 557 U.S. at 176). "[T]he plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." Id. at 1333 (internal quotation and citation omitted). "A triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." Id. (internal quotation and citation omitted).

[10] The employer's burden to articulate a non-discriminatory reason for the failure to hire is "'exceedingly light.'" Turnes v. AmSouth Bank, NA, 36 F.3d 1057, 1060–61, (11th Cir. 1994) (quoting Meeks v. Computer Assocs. Int'l, 15 F.3d 1013, 1019 (11th Cir. 1994)).

A. Mr. Barker fails to make a prima facie age discrimination case due to FedEx's disciplinary actions.

Mr. Barker clearly fails to state a prima facie case of age discrimination based on FedEx's disciplinary actions. According to his own deposition testimony, Mr. Barker's only problem with FedEx's disciplinary actions is that he believed they were generally unfair, not that they were discriminatory. See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. 1999) ("We are not in the business of adjudging whether employment decisions are prudent or fair." (citation omitted)). Although Mr. Barker has offered absolutely no circumstantial evidence, let alone a "mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination," Sims, 704 F.3d at 1332, the Court will recount each disciplinary action of which he complains as follows:

- **June 2016 performance reminder letter:** Mr. Barker felt this discipline was unfair because he met "99.6" out of "100 percent" of his stops-per-hour goals, and he was not told if other employees received a similar letter. (Doc. 49-3 at 141:15–142:11.) But he never suggested that younger employees were treated less harshly or pointed to other circumstantial evidence of discrimination.
- **October 2017 warning letter:** Mr. Barker committed a service-hours violation because he was sent on an assignment to pick up two boxes, when there were actually two-hundred boxes. (Doc. 49-2 at 34:22–25.) Again, Mr. Barker felt this letter was unfair under the circumstances, but he never suggested that younger employees were treated better; in fact,

his supervisor told him that he would also be receiving a violation for this incident. (Id. at 35:7.)

- **August 2018 warning letter:** Mr. Barker testified that he had never seen this warning letter before and did not recall it. (Id. at 33:17–20.) He also agreed that FedEx takes "a hard line" against falsification. (Id. at 93:11–12.) Given that he did not even remember the letter, Mr. Barker obviously pointed to no evidence of discriminatory intent behind it.
- **October 2018 warning letter**: Mr. Barker admitted that he committed a break violation because he simply forgot to take a break, and he wrote a statement promising that it would not happen again. (Doc. 49-3 at 156:9–23; Doc. 49-4, Ex. 22 at 1–2.) Again, he did not remember what was said to him regarding this violation, he did not identify any younger employees who were treated better, and he did not point to any other circumstantial evidence of discrimination. (Doc. 49-2 at 31:18–20.)
- **November 2018 letters**: Mr. Barker believes Mr. Trench incorrectly accused him of falsifying delivery records; contrary to Mr. Trench's suggestion, it was possible for Mr. Barker to make four pickup stops during a two-minute period to buildings in the same parking lot, and Mr. Trench refused to go on a ride-along to let Mr. Barker prove it. (Doc. 49-3 at 162:12–13., 165:4:18.) But he never identifies any employees who were not terminated after three warning letters within twelve months or any other circumstantial evidence that this discipline was motivated by age.

In fact, he agreed that FedEx takes "a hard line" against falsification. (Doc. 49-2 at 93:11–12.) At most, Mr. Barker claimed that he had been suspended earlier in October 2018 for similar conduct, which ultimately did not result in termination, although the Court has no written record of this incident. (Id. at 10:25–12:9; Doc. 49-3 at 196:21–23.) Again, this is an unfairness argument, not a discrimination argument.

- **OLCC Forms**: Mr. Barker either did not recall the OLCC letters or agreed that he committed the minor violations in the letters. (Doc. 49-3 at 151:14–152:6, 154:7–155:22.) He never suggested that younger employees were treated less harshly for the same minor errors or that any remarks about age were made to him.

"A plaintiff does not shift the burden to the defendant under McDonnell Douglas merely by stating that he was fired or treated unfavorably." Morris v. Emory Clinic, Inc., 402 F.3d 1076, 1082 (11th Cir. 2005). Rather, the aggrieved employee must point to some circumstantial evidence that the adverse employment actions at issue are discriminatory, like a comparator or less-than-direct remarks which tend to show discriminatory intent. See id.; Ross v. Rhodes Furniture, 146 F.3d 1286, 1291 (11th Cir. 1998). Mr. Barker has presented no circumstantial evidence whatsoever to carry this burden, and we decline his invitation to evaluate whether FedEx's disciplinary actions were unfair. Accordingly, Mr. Barker fails to make a prima facie case of discrimination based on FedEx's disciplinary actions. See, e.g., Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1325 ("Because she

failed to establish valid comparators and presented no other circumstantial evidence suggesting racial discrimination, Burke-Fowler did not establish a prima facie case of race discrimination." (citation omitted)).

B. No genuine issues of material fact remain as to Mr. Barker's claim of age discrimination because of FedEx's failure to assign him to a regular courier route.

For similar reasons, Mr. Barker fails to state a prima facie case for age discrimination based on FedEx's failure to assign him a regular courier route. He claims that a group of "young guys" in their twenties and thirties—who Mr. Barker identifies by name—were assigned full time routes, despite him having more seniority. (Doc. 49-2 at 57:20–58:1, 65:17–22.) FedEx disputes that Mr. Barker was qualified to receive a regular route because: (1) Mr. Barker was required to remain a swing courier for at least twenty-four months according to his offer letter; and (2) Mr. Barker's disciplinary letters prohibited him from seeking other positions anywhere from six to twenty-four months. (Doc. 49 at 13, 15.) FedEx makes these arguments as to both the prima facie prong and the nondiscriminatory reason prong of McDonnell Douglas. (Id.)

According to Mr. Barker, one of the "young guys" assigned to a full-time route was Chris Carlini. Mr. Barker believes that Mr. Carlini received a regular courier route because he was younger than him. (Doc. 49-3 at 133:9–21.) The Court has not been provided with Mr. Carlini's personnel file, nor does it appear that Mr. Carlini has been deposed in this case. In fact, the Court has received no information about Mr. Carlini's job responsibilities beyond the incomprehensibly vague statements in Mr. Barker's deposition. Initially, Mr. Barker stated that he

did not know if any of the "young guys," including Mr. Carlini, had regular routes before they arrived in Punta Gorda. (Doc. 49-2 at 68:1–3.) Then he said Mr. Carlini was a regular courier in Bradenton. (Doc. 49-3 at 134:1–17.) Then he testified that Mr. Carlini was a "part-time" employee in Bradenton—like Mr. Barker was—who transferred into a full-time swing driver position in Punta Gorda and received a regular route. (Id. at 134:22–135:7.)

While it is true that the Court must view the summary judgment record in favor of the non-moving party, it is also true that the summary judgment record must contain enough information for a trier of fact to make an "informed decision" about whether the comparators are materially similar to Mr. Barker. Williams v. Ala. Dep't of Transp., 509 F. Supp. 2d 1046, 1058 n.5 (M.D. Ala. 2007); see also Lewis v. City of Union City, 918 F.3d 1213, 1226 (11th Cir. 2019) (en banc) ("[A] plaintiff proceeding under McDonnell Douglas must show that she and her comparators are similarly situated in all material respects." (internal quotation marks omitted)). Here, after a careful review of Mr. Barker's deposition testimony, the Court deems it impossible to make an informed decision about Mr. Carlini's value as a comparator at the prima facie stage.

Moreover, at the time of Mr. Barker's transfer from Bradenton to Punta Gorda, he was under an active warning letter for violating FedEx's hours-of-service policy by working for more than fourteen hours. (Doc. 49-2 at 102:3–8; Doc. 49-4, Ex. 6 at 8–9.) FedEx's policy, which Mr. Barker acknowledged receiving multiple times during his tenure with FedEx, states that although warning letters do not

"automatically prohibit" an employee from seeking a job chance, positions at FedEx are "highly competitive" and "behavioral problems may reduce their probability of being the successful candidate." (Doc. 49-4 at 42.) And the warning letter itself provides that "any active discipline related to the position [regular courier route] you apply for may be considered in the selection process." (Doc. 49-4, Ex. 6 at 8.) The record contains zero facts from which the a trier of fact could infer that Mr. Barker and Mr. Carlini had similar disciplinary records when they transferred to Punta Gorda.[11] Likewise, Mr. Barker brings no evidence that any of the "young guys" who received regular routes "over him" were under active discipline when they were awarded regular courier decisions over him. See Lewis, 918 F.3d at 1228 (noting that a valid comparator "will share the plaintiff's employment or disciplinary history" (emphasis added)).

As for the comment made by Mr. Deatherage, where he allegedly stated that Mr. Wilson was "too old to have a route and have full time," the comment would be circumstantial evidence of discrimination if taken in isolation. (Doc. 49-2 at 60:13–62:7.) But Mr. Barker himself admits that he thought Mr. Deatherage was "kidding," (id. at 64:19), which is why Mr. Barker did not: (1) report this incident to a supervisor; (2) include it in any complaint to FedEx; or (3) even make this claim in his recent EEOC complaint. Moreover, there is less information in the record about

[11] Likewise, Mr. Barker offers no evidentiary support besides his self-serving statements that "Charles" receiving his desired Route in Bradenton is further circumstantial evidence of age discrimination under the ADEA and FCRA, when considered together with his other testimony. (Doc. 49-3 at 125:6–7.)

Mr. Wilson than there is about Mr. Carlini—Mr. Barker could not even consistently remember Mr. Wilson's first name, let alone whether he was similarly situated to Mr. Barker in all material respects.

Even if Mr. Barker had presented a prima facie claim of age discrimination based on circumstantial evidence, he neglected to rebut FedEx's legitimate nondiscriminatory reasons for not assigning him a regular route. When Mr. Barker transferred to Punta Gorda, he: (1) did not occupy that position for the minimum twenty-four-month period; and (2) was in the midst of an active disciplinary action for violating FedEx policy. Apart from Mr. Barker's belief that his disciplinary action was unfair, there is nothing to suggest that it was pretextual. This is clearly insufficient to survive summary judgment. See Mitchell v. City of LaFayette, 504 F. App'x 867, 870–71 (11th Cir. 2013) ("The plaintiff must meet the employer's reason head on and rebut it, and may not simply quarrel with the wisdom of the reason." (citing Brooks v. Cnty. Comm'n of Jefferson Cnty.,446 F.3d 1160, 1163 (11th Cir. 2006))). Accordingly, the Court grants FedEx's motion for summary judgment on Mr. Barker's age discrimination claims.

C. Mr. Barker has failed to demonstrate that he was fired as retaliation for his filing of an EEOC complaint.

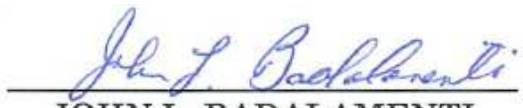
Lastly Mr. Barker alleges that FedEx retaliated against him because it fired him after he filed his EEOC complaint. (Doc. 1 at ¶10.) EEOC complaints are generally considered to be protected activity under various antidiscrimination statutes. See e.g., Satchel v. Sch. Bd. of Hillsborough Cnty., 251 F. App'x 626, 628 (11th Cir. 2007). But Mr. Barker fails to show causation. The undisputed evidence

shows that the decision to terminate Mr. Barker was made on November 10, 2018—one day before he signed his EEOC complaint on November 11, 2018. (Doc. 49-6 at ¶ 15; Doc. 49-7, Ex. 6; Doc. 49-8 at ¶13.) While Mr. Barker cites portions of his deposition transcript which he claims refute FedEx's argument, these portions appear irrelevant. Accordingly, the Court grants summary judgment on Mr. Barker's retaliation claim as well.

CONCLUSION

For the reasons explained above, it is **ORDERED** that FedEx's Motion for Summary Judgment (Doc. 49) is **GRANTED.** The Clerk is **DIRECTED** to enter judgment in favor of FedEx, terminate all pending deadlines, and close the case.

ORDERED in Fort Myers, Florida, on March 31, 2021.



JOHN L. BADALAMENTI
UNITED STATES DISTRICT JUDGE