UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

MARK DUNN, Plaintiff, vs. LYMAN SCHOOL DISTRICT 42-1, Defendant.	*	CIV 13-3004-RAL OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

Plaintiff Mark Dunn (Dunn) filed an Amended Complaint against Defendant Lyman School District (School District) alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, (Count I), a breach of fiduciary duty and duty of loyalty (Count II), and intentional infliction of emotional distress (Count III). Doc. 22. The School District moved for summary judgment, Doc. 41, which Dunn opposed, Doc. 51. For the reasons explained below, this Court denies the School District's motion for summary judgment on Count I, but grants the motion on Counts II and III.

II. Facts

This Court takes the facts in the light most favorable to Dunn as the non-moving party and draws the facts primarily from Plaintiff's Objections to Defendant's Statement of Undisputed Material Facts and Counter Statements of Material Facts. Doc. 50. Dunn began working as a guidance counselor for the School District in 1995. Doc. 50 at ¶ 1. He remained in this position until May 2010, when he voluntarily retired with the hope of being rehired the following year so that he could collect retirement benefits and a salary. Doc. 50 at ¶ 2. The School District paid

Dunn for his accumulated sick leave and gave him his severance. Doc. 50 at ¶ 4; Doc. 41-25. The School District made no guarantee it would rehire Dunn. Doc. 50 at ¶¶ 3, 5. In June 2010, the School Board (Board) voted to rehire Dunn for the 2010-2011 school year, with only one Board member voting in opposition. Doc. 50 at ¶ 6. Dunn was sixty years old when he was rehired. Doc. 50 at ¶ 8. Because South Dakota regulations required a ninety-day break in service between Dunn's retirement and his return to employment, Dunn could not begin working for the School District until September 1, 2010. Doc. 50 at ¶¶ 9-10.

Because of reduced tax collection caused in part by a recession, the state of South Dakota in 2011 cut its education funding by approximately fifteen percent. Doc. 50 at ¶¶ 11, 17; Doc. 41-4 at 5; Doc. 41-9 at 4; Doc. 41-10 at 2. As a result, Bruce Carrier, the School District superintendent at that time, proposed a reduction in force of certain positions to the Board. Doc. 50 at ¶¶ 12-14, 17. Those identified in the proposed reduction in force—Dunn, Renee Miller, and Beth Bacon—were three of the older employees in the School District. Doc. 50 at ¶ 21.[1] The proposed reduction in force never occurred, however, and the School District offered Dunn a new contract for the 2011-2012 school year. Doc. 50 at ¶¶ 16, 21, 25. Dunn's 2011-2012 contract did not include compensation for work before or after the school year. Doc. 50 at ¶ 25. Nor did the 2011-2012 contract include the extra-duty assignment of National Honors Society (NHS) advisor and the corresponding compensation. Doc. 50 at ¶ 25. Dunn had been the NHS advisor for several years, but the position became unpaid in 2011. Doc. 50 at ¶¶ 18, 19. Marsha

[1]According to an affidavit filed by the School District's business manager Renelle Uthe, in March 2011 when the School District was considering the proposed reduction in force, there were eleven employees older than Dunn, thirty-seven employees older than Beth Bacon, and five employees older than Renee Miller. Doc. 55-4.

Hullinger, a School District secretary, assumed the position for the 2011-2012 school year after agreeing to do so without compensation. Doc. 50 at ¶¶ 18-19. The School District reinstated pay for the position for the 2012-2013 school year. Doc. 50 at ¶ 18.

Doug Eppard (Eppard), a School District employee since 1997 who was most recently the high school principal, became superintendent for the School District in the summer of 2011. Doc. 50 at ¶¶ 28, 30; Doc. 41-12 at 2. Cooper Garnos (Garnos), another School District employee, became principal of the high school and elementary school in 2011. Doc. 50 at ¶¶ 29, 30. During the 2011-2012 school year, Dunn worked with college students Andrea Diehm (Diehm) and Brittany Reuman, nee Fuhrman, (Brittany) while they completed guidance counseling internships with the School District. Doc. 50 at ¶¶ 31-32. Brittany performed her internship during the fall semester while Diehm performed a practicum during the fall semester and an internship during the spring semester. Doc. 50 at ¶¶ 31-32. Around Christmas of 2011, Brittany became engaged to Drew Reuman (Drew), the son of Board President Marlene Reuman (Reuman). Doc. 50 at ¶¶ 89, 90. Brittany had been dating Drew when she applied for the internship and once they became engaged, she hoped to find permanent employment near Lyman where Drew worked. Doc. 50 at ¶¶ 89-90. Both Brittany and Diehm received their masters degrees in the spring of 2012. Doc. 50 at ¶ 33.

Eppard testified in his deposition that during the 2011-2012 school year, he spoke with his wife, Principal Julie Eppard, and Garnos about Dunn's job performance. Doc. 50 at ¶¶ 36-37; Doc. 41-12 at 4. When pressed for specifics, however, Eppard had trouble recalling the details of the conversations and the exact dates they took place. Doc. 50 at ¶¶ 36-37; Doc. 41-12 at 4-5. Similarly, although Garnos testified that he spoke with Eppard on several occasions about Dunn's

lack of a connection with students and his level of commitment and community involvement, Garnos was unable to name any particular students with whom Dunn had difficulty connecting. Doc. 50 at ¶ 38; Doc. 52-5 at 5, 10. Garnos further testified that he had not communicated his concerns to Dunn either verbally or in writing and that Dunn had never refused to do something Garnos asked of him. Doc. 50 at ¶ 38; Doc. 52-5 at 4-5, 9.

In January 2012, Eppard and the Board discussed not renewing Dunn's contract. Doc. 50 at ¶ 53; Doc. 41-12 at 13. Eppard testified that during these discussions, several Board members expressed concern that Dunn was not a very good guidance counselor. Doc. 50 at ¶¶ 45, 46; Doc. 41-12 at 13-14. Board member Meta Halverson testified that the Board discussed looking for someone who would be more helpful to the students. Doc. 50 at ¶¶ 46-48; Doc. 41-10 at 4-5. Eppard told the Board that there were two interns in the community who would be very good candidates. Doc. 50 at ¶ 53; Doc. 41-12 at 14. Eppard did not recall any Board member asking about Dunn's age, his receipt of retirement benefits, or whether he was going to retire. Doc. 50 at ¶ 53; 41-12 at 14; see also Doc. 41-11 at 2. At some point in either early 2012 or before, however, the Board did discuss that Dunn had retired in 2010 and was no longer a tenured employee. Doc. 50 at ¶ 53; Doc. 41-10 at 4.

In February 2012, Eppard called Dunn into his office and asked him whether he "was planning to retire that year or what [his] plans were." Doc. 50 at ¶ 40; Doc. 41-4 at 3; Doc. 52-2 at 18-19. Dunn responded that he planned to continue working for the School District rather than retiring and inquired why Eppard wanted to know. Doc. 50 at ¶ 40; Doc. 41-4 at 3; Doc. 52-2 at 18. Eppard explained that there was a "50/50" chance that Dunn's contract would not be renewed and reminded Dunn that he had lost his tenure when he retired and was then rehired.

Doc. 50 at ¶ 40; Doc. 41-4 at 3; Doc. 52-2 at 18. According to Dunn, Eppard also informed Dunn that the possible nonrenewal of his contract had "nothing to do with [Dunn's] job performance, that [Dunn] had done everything [he] had always been asked to do and done it well, but that [Eppard] had two good, young counseling interns living in the [D]istrict that [Eppard] did not want to lose to another district."[2] Doc. 50 at ¶¶ 42, 45; Doc. 41-4 at 3; see also Doc. 41-4 at 4. Eppard never called Dunn "old," mentioned Dunn's age, or told Dunn that the School District needed someone "much younger," however. Doc. 50 at ¶¶ 41, 42; Doc. 41-4 at 3-4, 12, 17.

According to the "Age Discrimination Fact Summary" Dunn filed, Eppard met with Dunn in early March 2012 to inform Dunn that he would be recommending nonrenewal of Dunn's contract at the Board meeting on March 12, 2012, because it was "time for a change at Lyman." Doc. 52-18; Doc. 50 at ¶¶ 42, 74; Doc. 41-4 at 4. Eppard told Dunn that he could resign at that time because it "would be better for [Dunn] to do that." Doc. 50 at ¶ 74; Doc. 52-18. Eppard in fact recommended at the March 12, 2012 meeting that the Board not renew Dunn's contract. Doc. 50 at ¶ 43; Doc. 41-12 at 15. Although the Board had the ultimate authority to make staffing decisions, it considered Eppard's recommendations and typically relied on his statements concerning a teacher's performance. Doc. 50 at ¶ 43; Doc. 41-10 at 2; Doc. 52-2 at 2; Doc. 52-7 at 2, 4. Neither Halverson nor Reuman independently investigated Dunn's performance. Doc. 50 at ¶ 45; Doc. 41-10 at 2; Doc. 52-7 at 2. The Board then voted not to offer Dunn a contract for the following year. Doc. 50 at ¶ 44. Six out of the nine members on the Board in 2010 when

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[2]Eppard has a different version of this conversation, Doc. 52-2 at 18-19, but this Court in ruling on a motion for summary judgment must take the facts in the light most favorable to Dunn as the nonmovant. EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 686 (8th Cir. 2012).

Dunn was rehired were also on the Board in 2012 when Dunn's contract was nonrenewed. Doc. 50 at ¶ 54. The same Board members who voted to rehire Dunn in 2010 voted to nonrenew his contract in 2012. Doc. 50 at ¶ 55.

On March 13, 2012, Dunn was given written notice that the Board had not renewed his contract. Doc. 50 at ¶ 58. The notice did not give any reason for the nonrenewal. Doc. 41-19. That same day, the School District advertised for the guidance counselor position. Doc. 50 at ¶ 60. On March 14, 2012, Brittany applied for the guidance counselor position. Doc. 50 at ¶ 92. A hiring committee consisting of Eppard, Julie Eppard, Garnos, and School District counselor Julie Muirhead (Muirhead) interviewed three applicants for the position, including Diehm and Brittany. Doc. 50 at ¶ 61; Doc. 41-12 at 18. The hiring committee asked standard questions during each interview and ranked the applicants thereafter. Doc. 50 at ¶ 62. On April 9, 2012, the Board voted to offer the position of guidance counselor and assistant girls' basketball coach to Brittany. Doc. 50 at ¶ 63. Reuman, the future mother-in-law of Brittany, had participated in the decision to nonrenew Dunn's contract. Doc. 50 at ¶ 91; Doc. 52-7 at 4. Reuman removed herself from the process of hiring a guidance counselor by not discussing the applicants with other Board members or Brittany, leaving the Board meeting when the applicants were discussed, and abstaining from the vote. Doc. 50 at ¶ 64.

On May 17, 2012, the day for staff to turn in their keys, Dunn asked Eppard for copies of all his performance evaluations from his personnel file. Doc. 50 at ¶ 86; Doc. 52-16 at 3. Although Dunn was entitled to his performance evaluations under School District policy, Eppard was unable to locate them. Doc. 50 at ¶¶ 85, 87; Doc. 52-2 at 12. Later that day, Garnos came to Dunn's office and stated that he wanted to review Dunn's performance evaluation with him.

Doc. 50 at ¶ 87; Doc. 52-16 at 3; Doc. 55-3 at 4. Dunn refused to sign the performance evaluation because he believed that it was not on the appropriate form and did not comply with the Negotiated Agreement. Doc. 50 at ¶ 80; Doc. 52-16 at 3. Garnos observed that Dunn was visibly upset. Doc. 50 at ¶ 103; Doc. 52-5 at 6. Thereafter, Dunn met with Garnos, Eppard, and School District business manager Renelle Uthe. Doc. 50 at ¶ 82. Uthe was there as a witness and she signed Dunn's performance evaluation attesting that he had refused to sign it himself. Doc. 50 at ¶ 82; Doc. 52-25; Doc. 55-1.

In June 2012, Dunn filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging age discrimination against the School District. Doc. 41-22. Eppard responded with a letter to the EEOC explaining the reasons he felt were pertinent to the nonrenewal of Dunn's contract. Doc. 50 at ¶ 109; Doc. 41-23. The EEOC dismissed Dunn's complaint, stating that although it was "unable to conclude that the information obtained establishe[d] violations of the statutes[,]" it was "not certify[ing] that the [School District was] in compliance with the statutes." Doc. 41-24.

III. Standard of Review

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is proper when "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." Summary judgment is not "a disfavored procedural shortcut, but rather . . . an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). On summary judgment, courts view "the evidence and the inferences that may be reasonably drawn from the evidence in the light most

favorable to the nonmoving party." EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 686 (8th Cir. 2012) (quoting Mayer v. Countrywide Home Loans, 647 F.3d 789, 791 (8th Cir. 2011)). A party opposing a properly made and supported motion for summary judgment must cite to particular materials in the record supporting the assertion that a fact is genuinely disputed. Fed. R. Civ. P. 56(c)(1); Gacek v. Owens & Minor Distrib., Inc., 666 F.3d 1142, 1145 (8th Cir. 2012). Although Dunn asserts that there is a "long-standing Eighth Circuit rule that summary judgment should seldom be used in employment-discrimination cases[,]" Doc. 51 at 9, the United States Court of Appeals for the Eighth Circuit held in an en banc decision that there is no "'discrimination case' exception to the application of summary judgment[.]" Torgerson v. City of Rochester, 643 F.3d 1031, 1043 (8th Cir. 2011) (en banc). Thus, this Court applies the same summary judgment standard to discrimination cases as it does to all others.

IV. Discussion

A. ADEA

The ADEA forbids discrimination against employees, age forty and over, because of their age. 29 U.S.C. §§ 623(a)(1), 631(a). To prove his claim under the ADEA, Dunn must show by a preponderance of the evidence that age was the "but-for" cause of the adverse employment action. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 (2009) ("[T]he plaintiff [in an ADEA case] retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action."); Buehrle v. City of O'Fallon, 695 F.3d 807, 813 (8th Cir. 2012) ("Under the ADEA standard, a plaintiff must 'establish that age was the "but-for" cause of the employer's adverse action.'" (quoting Gross, 557 U.S. at 177)). Dunn may have his ADEA claim survive summary judgment "either by providing direct evidence of discrimination or by creating

an inference of unlawful discrimination through the McDonnell Douglas [Corp. v. Green, 411 U.S. 792 (1973)] analysis."[3] Bone v. G4S Youth Servs., LLC, 686 F.3d 948, 953 (8th Cir. 2012). Dunn contends that he has direct evidence of discrimination and, alternatively, that he can satisfy the McDonnell Douglas test.

1. Direct Evidence

The Eighth Circuit has explained that direct evidence in this context "is not the converse of circumstantial evidence . . . [but] is evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." Bone, 686 F.3d at 953 (quoting Torgerson, 643 F.3d at 1044) (internal quotation marks omitted). This evidence "must be 'strong' and must 'clearly point[] to the presence of an illegal motive' for the adverse action." Id. (quoting Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004)). Direct evidence "may include evidence of actions or remarks of the employer that reflect a discriminatory attitude, comments which demonstrate a discriminatory animus in the decisional process, or comments uttered by individuals closely involved in employment decisions." King v. United States, 553 F.3d 1156, 1161 (8th Cir. 2009) (quoting King v. Hardesty, 517 F.3d 1049, 1058 (8th Cir. 2008)) (internal quotation marks omitted). However, "stray remarks in the workplace, statements by nondecisionmakers, and statements by decisionmakers unrelated to the decisional process do not constitute direct evidence." Id. at

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[3]The Supreme Court explained in Gross that it has not definitively decided whether the McDonnell Douglas framework applies in ADEA cases. Gross, 557 U.S. at 175 n.2. Nevertheless, the Eighth Circuit has continued to apply the framework in ADEA cases. See Tusing v. Des Moines Indep. Cmty. Sch. Dist., 639 F.3d 507, 515 (8th Cir. 2011) (upholding the continued applicability of McDonnell Douglas after Gross).

1160-61 (quoting Schierhoff v. GlaxoSmithKline Consumer Healthcare, LP, 444 F.3d 961, 966 (8th Cir. 2006)) (internal quotation marks omitted).

Dunn argues that Reuman's testimony concerning a 2010 Board meeting constitutes direct evidence that age discrimination motivated the Board's decision to nonrenew his contract in 2012. Specifically, he points to the following deposition testimony from Reuman:

> **Reuman:** At that time when [Dunn] retired we accepted his retirement. And then we discussed whether we were going to rehire him back. And that was not all in the same meeting.
> **Dunn's Counsel:** Okay. So maybe you could just help me understand when those meetings occurred. And what was discussed at each meeting.
> **Reuman:** Well, the first meeting he retired. And then we discussed--and he wanted to do the retire rehire. So we discussed whether we wanted to do that. And that is when we decided that we would advertise for the position. Then the next meeting and I can't tell you if it was the next month or two months later that we had--we had advertised for the position, and like I told you, the one applicant that we were interested withdrew her application. So then we discussed when we would--then the next meeting we discussed we would hire him back.
> **Dunn's Counsel:** Okay. And in that first meeting which board members said what regarding Mr. Dunn's retirement?
> **Reuman:** I don't remember.
> **Dunn's Counsel:** Do you remember what you said regarding Mr. Dunn's retirement?
> **Reuman:** No, I don't.
> **Dunn's Counsel:** What was the overall gist of the discussion regarding Mr. Dunn's retirement?
> **Reuman:** I would say that the overall gist was that it was time for him to retire.

Doc. 52-7 at 3. Because "retire" is not synonymous with "age," the Board's general consensus during the 2010 meeting that it was "time for [Dunn] to retire" is not, standing alone, direct evidence of age discrimination. See Scott v. Potter, 182 F. App'x 521, 526 (6th Cir. 2006) (explaining that "retire" is not synonymous with "age," and holding that without more,

employer's statement that plaintiff should "retire and make everybody happy" was not direct evidence of age discrimination); Erickson v. Farmland Indus., Inc., 271 F.3d 718, 725 (8th Cir. 2001) (employer's statement that "[t]wenty years is too long. You should have moved five years ago[,]" was not direct evidence of age discrimination absent showing that length of tenure was being used as a proxy to accomplish age discrimination). Rather, for the Board's 2010 discussion to constitute direct evidence of age discrimination, Dunn would need to show that the Board used the term "retire" as a proxy for age to articulate a discriminatory attitude. Scott, 182 F. App'x at 526; Erickson, 271 F.3d at 725. Dunn has made no such showing, but is asking for this Court to speculate and thereby to infer the existence of direct evidence based on the term "retire." The Board's discussion does not directly reflect a discriminatory attitude. Erickson, 271 F.3d at 725 (holding that employer's statement was not direct evidence where accepting statement as evidence of age animus depended on an inference).

Even if the Board had expressed a discriminatory attitude during the 2010 discussion, Dunn has failed to show a specific link between the Board's attitude and its decision to nonrenew his contract. After all, not only was there an almost two-year gap between the Board's 2010 discussion and the 2012 nonrenewal, but the Board rehired Dunn twice during this period despite him being at least sixty years old. Given these circumstances, any link between the 2010 discussion and the 2012 nonrenewal is too attenuated to constitute direct evidence. See Bone, 686 F.3d at 954 (holding that supervisors' reactions to comments did not constitute direct evidence of age discrimination where comments were made six months prior to plaintiff's discharge and were unconnected to the discharge decision); Haigh v. Gelita USA, Inc., 632 F.3d 464, 470 (8th Cir. 2011) ("We have noted it is unlikely a supervisor would hire an older

employee and then discriminate on the basis of age, and such evidence creates a presumption against discrimination." (quoting Fitzgerald v. Action, Inc., 521 F.3d 867, 877 (8th Cir. 2008))); Ramlet v. E.F. Johnson Co., 507 F.3d 1149, 1153 (8th Cir. 2007) (holding that comments made at least four months before the adverse employment action were not connected to the decision-making process and thus were not direct evidence of age discrimination).

Dunn also argues that some of Eppard's statements constitute direct evidence of discriminatory animus. The School District disagrees, contending that Eppard's statements are not direct evidence because he is not a decisionmaker. See Elam v. Regions Fin. Corp., 601 F.3d 873, 878 (8th Cir. 2010) (explaining that statements by nondecisionmakers are not direct evidence). Although Dunn does not dispute that the Board has the ultimate authority to make staffing decisions, he argues that Eppard played such a significant role in the nonrenewal that his statements can be considered direct evidence of discrimination.[4] See King, 553 F.3d at 1161

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[4]Dunn actually argues that the School District has "cat's-paw liability" for Eppard's statements but then cites a string of cases concerning employees who are closely involved in the decision making process. The cat's-paw theory describes "a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." Diaz v. Tyson Fresh Meats, Inc., 643 F.3d 1149, 1151-52 (8th Cir. 2011) (quoting Qamhiyah v. Iowa State Univ. of Science & Tech., 566 F.3d 733, 742 (8th Cir. 2009)); see also Staub v. Proctor Hosp., 131 S. Ct. 1186, 1194 (2011) (if a non-decisionmaker performs an act motivated by a discriminatory bias that is intended to cause, and that does proximately cause, an adverse employment action, then the employer has cat's-paw liability); Richardson v. Sugg, 448 F.3d 1046, 1060 (8th Cir. 2006) (explaining that the Eighth Circuit's cat's-paw rule "provides that 'an employer cannot shield itself from liability for unlawful termination by using a purportedly independent person or committee as the decisionmaker where the decisionmaker merely serves as the conduit, vehicle, or rubber stamp by which another achieves his or her unlawful design.'" (quoting Dedmon v. Staley, 315 F.3d 948, 949 n.2 (8th Cir. 2003))). The situation with Eppard is not so much a "cat's-paw liability" as a situation where Eppard, though not a direct decisionmaker, was so close to the process that his statements and actions may be considered as if being made by a decisionmaker. See Torgerson, 643 F.3d at 1044-45. Further, some courts have rejected or questioned application of the cat's-paw theory in ADEA cases after the Supreme Court's decision in Gross. See Sims v. MVM, Inc., 704 F.3d 1327, 1336 (11th Cir. 2013) ("Because the

(explaining that direct evidence may include comments by individuals closely involved with employment decisions); Mohr v. Dustrol, Inc., 306 F.3d 636, 641 (8th Cir. 2002) (finding that comments by supervisor not "officially responsible" for hiring were direct evidence where supervisor played a "pivotal role" in hiring and officials deferred to his hiring decision) abrogated on other grounds by Desert Palace, Inc. v. Costa, 539 U.S. 90, 95 (2003). There is enough evidence to create a question of fact as to whether Eppard was closely involved with and played a pivotal role in the nonrenewal decision. Eppard discussed with the Board whether it should continue employing Dunn, recommended that it nonrenew Dunn's contract, and ultimately informed Dunn that the District did not renew his employment. Doc. 50 at ¶¶ 43, 53; Doc. 41-12 at 13, 16. Further, the Board generally relied on Eppard's statements about a teacher's performance, and Halverson and Reuman testified that they had never independently investigated a superintendent's report on such issues. Doc. 50 at ¶¶ 43, 45; Doc. 52-11 at 2; Doc. 52-7 at 2. Finally, Eppard drafted on behalf of the School District a response to the EEOC setting forth the reasons he felt were pertinent to the nonrenewal. Doc. 41-12 at 9; Doc. 41-23. Eppard's statements asserted by Dunn to be direct evidence of age discrimination occurred during the February 2012 meeting when Eppard asked Dunn whether he "was planning to retire that year or what [Dunn's] plans were" and told Dunn that the possible nonrenewal of his contract had "nothing to do with [his] job performance, that [he] had done everything [he] had always been

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ADEA requires a 'but-for' link between the discriminatory animus and the adverse employment action as opposed to showing that the animus was a 'motivating factor' in the adverse employment decision, we hold that Staub's 'proximate causation' standard does not apply to cat's paw cases involving age discrimination."); Simmons v. Sykes Enters., Inc., 647 F.3d 943, 949-950 (10th Cir. 2011) (discussing application of Staub to the ADEA); Wojtanek v. Dist. No. 8, Int'l Ass'n of Machinists & Aerospace Workers, 435 F. App'x 545, 549 (7th Cir. 2011).

asked to do and done it well, but that [Eppard] had two good, young counseling interns living in the [D]istrict that [Eppard] did not want to lose to another district." Doc. 50 at ¶¶ 40, 42, 45; Doc. 41-4 at 3; Doc. 52-2 at 18-19. Dunn also points to Eppard's statement in early March 2012 that he would be recommending nonrenewal of Dunn's contract because it was "time for a change at Lyman." Doc. 50 at ¶¶ 42, 74; Doc. 41-4 at 4; Doc. 52-18.

Whether considered individually or in conjunction, these statements are not direct evidence of age discrimination. When Eppard asked Dunn about his retirement plans, the School District had a legitimate interest in knowing how long Dunn planned to work. At that time, Dunn had already retired once and was in the second half of his one-year contract. Dunn has not offered any evidence that Eppard's one-time inquiry was unreasonable or constitutes direct evidence of age discrimination. See Clark v. Matthews Intern. Corp., 628 F.3d 462, 470 (8th Cir. 2010) ("We have held that isolated inquires into the retirement plans of an employee that are reasonable and not unduly excessive are insufficient to establish age discrimination.") vacated in part on other grounds by Clark v. Matthews Intern. Corp., 639 F.3d 391 (8th Cir. 2011); Montgomery v. John Deere & Co., 169 F.3d 556, 560 (8th Cir. 1999) ("We have stated before that an employer may make reasonable inquiries into the retirement plans of its employees and that a plaintiff should not be able to rely on those inquiries to prove intentional discrimination."). Nor, as Dunn argues, do Eppard's statements that there were "two good, young" counseling interns living in the District and that it was "time for a change" show that Eppard was using the term "retire" as a proxy for age. Eppard simply used the term "young" to describe Brittany and Diehm. When, as here, employers use the word "young" to describe a person but not as a comparative or evaluative term, courts have declined to find direct evidence of discrimination.

See Buchholz v. Rockwell Int'l Corp., 120 F.3d 146, 149-50 (8th Cir. 1997); Merrick v. Farmers Ins. Grp., 892 F.2d 1434, 1438-39 (9th Cir. 1990). The Eighth Circuit in Buchholz held that a hiring supervisor's comment that the "young kids" he had hired instead of the plaintiff "sure were sharp" did not show a specific link between a discriminatory animus and the supervisor's decision not to hire the plaintiff. 120 F.3d at 149-50. Instead, the comment was a neutral remark about the capabilities of the new hires whom the "sixty-two-year-old supervisor simply described as young kids." Id. at 150 (citing Merrick, 892 F.2d at 1438-39). Similarly, the Ninth Circuit in Merrick held that an employer's comment that he chose a different applicant because the applicant was a "bright, intelligent, knowledgeable young man[,]" was a stray remark insufficient to defeat summary judgment. 892 F.2d at 1438-39.

Although Dunn points to three cases where employers used the term "young" and courts found direct evidence of discrimination, each of those cases involved statements by the employer about wanting or needing a younger employee, thereby demonstrating that age was a motivating factor in the employment decision. See Kneibert v. Thomson Newspapers, Mich., Inc., 129 F.3d 444, 452-53 (8th Cir. 1997) (decisionmaker's statement that he "had no use for a senior editor" and instead needed "three young editors" was direct evidence of age discrimination); Lindsey v. Am. Cast Iron Pipe Co., 772 F.2d 799, 801-02 (11th Cir. 1985) (employer's statement that he would be looking for a person "younger than [plaintiff]" to fill position was direct evidence of age discrimination in failure to promote case); Newsome v. KwangSung Am. Corp., 798 F. Supp. 2d 1291, 1297-98 (M.D. Ala. 2011) (decisionmaker's statement that he was going to replace employee with a "younger Korean" was direct evidence of discrimination). Here, it is undisputed that Eppard never called Dunn "old," never mentioned Dunn's age, and never told

him that the School District wanted someone younger to fill his position. Doc. 50 at ¶¶ 41, 42; Doc. 41-4 at 3-4, 12, 17. Eppard's calling Brittany and Diehm young is more like the statements in Buchholz and Merrick than the statements in Kneibert, Lindsey, and Newsome.

As for Eppard's telling Dunn that it was "time for a change," the Eighth Circuit in Erickson held that similar statements were "legitimate business concerns" rather than direct evidence of age discrimination. 271 F.3d at 725 (holding that employer's statements to plaintiff that he was "stale," "set in his ways," and that the company "needed a new focus" were not direct evidence). In sum, although the statements from Eppard and Reuman may be relevant to whether the School District's reasons for nonrenewing Dunn were pretexts for age discrimination, they do not constitute direct evidence of age discrimination.

2. McDonnell Douglas Standard

Under the burden-shifting framework set forth in McDonnell Douglas, Dunn has the initial burden of establishing a prima facie case of age discrimination by showing he: "(1) was at least forty years old, (2) suffered an adverse employment action, (3) was meeting his employer's legitimate expectations at the time of the adverse employment action, and (4) was replaced by someone substantially younger." Gibson v. Am. Greetings Corp., 670 F.3d 844, 856 (8th Cir. 2012) (quoting Morgan v. A.G. Edwards & Sons, Inc., 486 F.3d 1034, 1039 (8th Cir. 2007)). If Dunn establishes a prima facie case, then the burden of production shifts to the School District to proffer legitimate, nondiscriminatory reasons for its actions. Onyiah v. St. Cloud State Univ., 684 F.3d 711, 719 (8th Cir. 2012). If the School District meets this burden, Dunn must show that the proffered reasons were a pretext for age discrimination. Id. Dunn at all times retains the "ultimate burden of persuasion that 'age was the "but-for" cause'" of the School

District's adverse action. Id. (quoting Rahlf v. Mo-Tech Corp., 642 F.3d 633, 637 (8th Cir. 2011)). The School District agrees for the purpose of considering its summary judgment motion that Dunn is at least forty years old and that he was meeting its legitimate expectations, but disputes that Dunn suffered an adverse employment action or was replaced by someone substantially younger.

a. Adverse Employment Action

The parties' main dispute under this element concerns whether the Board's nonrenewal of Dunn's contract constitutes an adverse employment action. The School District argues that the nonrenewal was not an adverse employment action because once Dunn retired he became a nontenured employee with no expectation of a continuing contract and could therefore be nonrenewed without cause. See S.D. Codified Laws (SDCL) § 13-43-6.3 (stating that a school is not required to give a reason for nonrenewal to a nontenured teacher); Wirt v. Parker Sch. Dist. No. 60-4, 689 N.W.2d 901, 905-07 (S.D. 2004) (holding that teacher who voluntarily resigned, cashed out her sick leave, and was then rehired on a one-year contract no longer had tenure). The School District argues further that because it had only hired Dunn for one year, he could not have suffered an adverse employment action when it did not renew his contract. Dunn disagrees, arguing that this Court and several others have rejected the same arguments the School District offers here.

"An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." Thomas Corwin, 483 F.3d 516, 528-29 (8th Cir. 2007) (quoting Wedow v. City of Kan. City, Mo., 442 F.3d 661, 671 (8th Cir. 2006)). Although it appears that the Eighth Circuit has yet to address whether the nonrenewal of a plaintiff's contract

can constitute an adverse employment action, this Court in Sloat v. Rapid City Area School District No. 51-4, 393 F. Supp. 2d 922 (D.S.D. 2005), held that the nonrenewal of a teacher's one-year contract was an adverse employment action under the ADEA. Id. at 930. Like Sloat, several circuits and multiple district courts have held that the nonrenewal of an employment contract may constitute an adverse employment action. Giles v. Daytona State Coll., Inc., 542 F. App'x 869, 873 (11th Cir. 2013) (per curiam) (deeming the "2010 nonrenewal of [the plaintiff's] annual contract [to be] an adverse employment action"); Bleeker v. Vilsack, 468 F. App'x 731, 732 (9th Cir. 2012) ("Even inaction—a failure to renew or extend an employment contract—can count as an adverse employment action in some circumstances."); Leibowitz v. Cornell Univ., 584 F.3d 487, 501 (2nd Cir. 2009) ("An employee seeking a renewal of an employment contract, just like a new applicant or a rehire after a layoff, suffers an adverse employment action when an employment opportunity is denied and is protected from discrimination in connection with such decisions under Title VII and the ADEA.") superseded by statute on other grounds as recognized by Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 108-09 (2nd Cir. 2013); Wilkerson v. New Media Tech. Charter Sch., Inc., 522 F.3d 315, 320 (3rd Cir. 2008) ("The failure to renew an employment arrangement, whether at-will or for a limited period of time, is an employment action, and an employer violates Title VII if it takes an adverse employment action for a reason prohibited by Title VII . . . ."); Jadwin v. Cnty. of Kern, 610 F. Supp. 2d 1129, 1171 (E.D. Cal. 2009) ("The non-renewal of Plaintiff's contract can qualify as an adverse employment action."); Hernandez-Mejias v. Gen. Elec., 428 F. Supp. 2d 4, 8 (D.P.R. 2005) (holding that failure to renew contract was adverse employment action); Kabes v. Sch. Dist. of River Falls, 387 F. Supp. 2d 955, 975 (W.D. Wis. 2005)