

11th Circuit ADEA Pattern Jury Instructions & Selected Case Law



**11th Circuit ADEA Pattern Jury Instructions
and
Selected Case Law**

The elements of the likely claims at issue in the fact pattern before you will - of necessity - inform both the type and scope of discovery that you may wish to pursue. To that end, we are providing applicable portions of the 11th Circuit ADEA pattern jury instructions, together with several recent 11th Circuit cases involving the ADEA.

The goal - of course - is not to become an ADEA expert, let alone an employment law expert. Rather, we provide these materials based on past participant feedback so that all participants have at least a basic understanding of the types of information parties in an ADEA case might rely on at summary judgment or trial.

This is not to suggest that other claims and defenses may not be raised by the fact pattern, and you are encouraged to pursue all discovery that you deem appropriate as supported by the facts before you. Remember: at the end of the day, this is a discovery negotiation training program, and not a substantive employment law program.

We look forward to seeing you in Miami!

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PATTERN JURY INSTRUCTIONS

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Age Discrimination in Employment Act-29

U.S.C. §§ 621-634

In this case, [name of plaintiff] makes a claim under the federal law that prohibits employers from discriminating against an employee in the terms and conditions of employment because of the employee's age. The federal law applies to employees who are at least 40 years old.

Specifically, [name of plaintiff] claims that [name of defendant] [describe adverse employment action] because of [his/her] age.

[Name of defendant] denies [name of plaintiff]'s claim and asserts that [describe the defendant's defense].

To succeed on [his/her] claim against [name of defendant], [name of plaintiff] must prove each of the following facts by a preponderance of the evidence:

First: [Name of plaintiff] was [name of defendant]'s employee;

Second: Name of plaintiff was at least 40 years old at the time of [describe adverse employment action];

Third: [Name of defendant] [describe adverse employment action]; and

Fourth: [Name of defendant] took that action because of [name of plaintiff]'s age.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

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If you find that [name of plaintiff] [was [name of defendant's] employee,] was at least 40 years old, and that [name of defendant] (describe adverse employment action), you must decide whether [am f efendant] took that action because of [name of plaintiff's] age.

To determine that [name of defendant] [desc ib adverse employment action] because of (name of plaintiff's) age, you must decide that [name of defendant] would not have [describe adverse employment action] if [name of plaintiff] had been younger but everything else had been the same.

fName of defendant] denies that [he/she/it] [describe adverse em lo ment action] because of [name of plaintiff's] age and claims that it made the decision for [other reasons/another reason].

An employer may not discriminate against an employee because of age, but an employer may [describe adverse employment action] an employee for any other reason, good or bad, fair or unfair. If you believe [name of defendant's] reason[sl for [his/her/its] decision to [describe adverse employment action], and you find that [name of defendant's] decision was not because of [name of plaintiff's] age, you must not second guess that decision, and you must not substitute your own judgment for (name of defendant's) judgment-even if you do not agree with it.

[Pretext (optional, see annotations): As I have explained, [name of plaintiff] has the burden to prove that [name of defendant's] decision to [describe adverse em lo ment action] was because of [name of plaintiff's] age. I have explained to you that evidence can be direct or circumstantial. To decide whether [name of defendant's] decision (describe adverse employment action) „ was because of [name of plaintiff's] age, you may consider the circumstances of [name of defendant's] decision. For example, you may consider whether you

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believe the reason[s] [name of defendant] gave for the decision. If you do not believe the reason[s] [he/she/it] gave for the decision, you may consider whether the reason[s] [was/were] so unbelievable that [it was/they were] a cover-up to hide the true discriminatory reasons for the decision.]

[Including BFOQ affirmative defense: If you find by a preponderance of the evidence that name of defendant engaged in adverse employment action because of his/her age, you must decide whether he/she has established [his/her] affirmative defense.

To establish affirmative defense, name of defendant must prove that [he/she/it] [because age is a "bona-fide occupational qualification." It is not unlawful for name of defendant to engage in adverse employment action on the basis of age.]

To establish that age is a "bona-fide occupational qualification," name of defendant must prove both of the following elements by a preponderance of the evidence:

First: The age qualification is reasonably necessary for name of plaintiff to successfully perform [his/her] job, and

Second: name of defendant had reasonable cause to believe that all, or substantially all, persons over the age qualification would be unable to perform the job safely and efficiently.

If you find that name of defendant has proved that age is a bona-fide occupational qualification, you must decide whether name of defendant has proved

by a preponderance of the evidence that [he/she/it] [describe adverse employment action] because of the bona-fide occupational qualification.

If you find that [name of defendant] [describe adverse employment action] because of the bona-fide occupational qualification, you have found that [he/she/it] establish [his/her/its] affirmative defense, and you will not decide the issue of [name of claimant]'s damages. But if you find that [name of defendant] has not established [his/her/its] affirmative defense, you must decide the damages issue.]

[Including affirmative defense: If you find by a preponderance of the evidence that [name of defendant] [describe adverse employment action] because of [name of defendant], you must decide whether [name of defendant] has established [his/her/its] affirmative defense. If affirmative defense allows a party to limit [his/her/its] damages, you must decide whether the affirmative defense applies.

To establish [his/her/its] affirmative defense, [name of defendant] must show by a preponderance of the evidence that [he/she/it] [describe adverse employment action] because of the bona-fide occupational qualification. If the terms of a bona-fide occupational qualification for an employer to hire, promote, or transfer an employee are based on a bona-fide seniority system,

To establish that [he/she/it] was applying the terms of the bona-fide seniority system, you must find by a preponderance of the evidence:

First: [Name of defendant]'s seniority system used the employees' length of service- not the employees' age-as the primary basis for giving available job opportunities to [his/her/its] employees; and

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~~Second: [Name of defendant]'s decision to [describe adverse employment action] was consistent with its seniority system.~~

~~If you find that [name of defendant] established both these elements, you have found that [name of defendant] is/has established an affirmative defense. If you find that [name of plaintiff] compensatory damages. But if you find that [name of defendant] has not established this/their affirmative defense, you must decide the damages issue.]~~

[Without Affirmative Defense: If you find in [name of plaintiff's] favor for each fact [he/she] must prove, you must consider [name of plaintiff's] compensatory damages.]

When considering the issue of [name of plaintiff's] compensatory damages, you should determine what amount, if any, has been proven by [name of plaintiff] by a preponderance of the evidence as full, just and reasonable compensation for all of [name of plaintiff's] damages as a result of [describe adverse employment action], no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize [name of defendant]. Also, compensatory damages must not be based on speculation or guesswork.

You should consider the following element of damage, to the extent you find that [name of plaintiff] has proved it by a preponderance of the evidence, and no others: net lost wages and benefits from the date of [describe adverse employment action] to the date of your verdict.

[Mitigation of Damages: You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty

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under the law to "mitigate" those damages. For purposes of this case, the duty to mitigate damages requires [name of plaintiff] to be reasonably diligent in seeking substantially equivalent employment to the position [he] [she] held with [name of defendant]. To prove that [name of plaintiff] failed to mitigate damages, [name of defendant] must prove by a preponderance of the evidence that: (1) work comparable to the position [name of plaintiff] held with [name of defendant] was available, and (2) [name of plaintiff] did not make reasonably diligent efforts to obtain it. If, however, [name of defendant] shows that [name of plaintiff] did not make reasonable efforts to obtain any work, then [name of defendant] does not have to prove that comparable work was available.

If you find that [name of defendant] proved by a preponderance of the evidence that [name of plaintiff] failed to mitigate damages, then you should reduce the amount of [name of plaintiff's] damages by the amount that could have been reasonably realized if [name of plaintiff] had taken advantage of an opportunity for substantially equivalent employment.]

[Willful Violation: [Name of plaintiff] also claims that [name of defendant] willfully violated the law. You will only consider this issue if you find for [name of plaintiff] and award [him/her] compensatory damages.

If [name of defendant] knew that [his/her/its] [describe adverse employment action] violated the law, or acted in reckless disregard of that fact, then [his/her/its] conduct was willful. If [name of defendant] did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard about whether the law prohibited its conduct, [his/her/its] conduct was not willful.]

SPECIAL INTERROGATORIES TO THE JURY

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Do you find from a preponderance of the evidence:

- [1. That [name of plaintiff] was [name of defendant's employee]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.]

2. That [name of plaintiff] was at least 40 years old at the time of the [describe adverse employment action]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [name of defendant] [describe adverse employment action]?

Answer Yes or No _____

If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

4. That [name of defendant] took that action because of [name of plaintiff's age]?

Answer Yes or No _____

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If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

5. That [age is a bona-fide occupational qualification] 10n
[[name of defendant]'s seniority system d em-
ees' length of service and not the age of em-
plo es as the primary basis for giving available
job o rtunities to the employees]?

Answer Yes or No _____

If your answer is "No," go to Question No. 7. If your answer is "Yes," go to the next question.

6. That [name of plaintiff] took the action you found
it took bee -fide occupational age
qualificatio t 's decision to take
the actio s consistent with
name t 's seniortern]?

Answer Yes or No _____

If your answer is "Yes," this ends your deliberations and your foreperson should sign and date the last page of this verdict form. If your answer is "No," go to the next question.]

7. That [name of plaintiff] should be awarded damages?

Answer Yes or No _____

If your answer is "Yes,"

in what amount? \$-----

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[8. That [name of defendant] willfully violated the law?

Answer Yes or No _____

So SAY WE ALL.

Foreperson's Signature

DATE: -----

ANNOTATIONS AND COMMENTS

I. Cause of Action

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), prohibits employment discrimination on the basis of age. Pattern Instruction 4.10 is meant to be used for ADEA disparate treatment claims based on any adverse employment action, including but not limited to failure to hire, failure to promote, discharge, reduction in force, and elimination of position.

Pattern Instruction 4.10 is not intended to be used for ADEA retaliation claims. Pattern Instruction 4.22, *infra*, may be adapted to address such claims. An instruction on ADEA retaliation should incorporate the damages instructions of Pattern Instruction 4.10.

The Eleventh Circuit has assumed without deciding that the ADEA provides a cause of action for hostile work environment. *See E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1249 & n.7 (11th Cir. 1997). Pattern Instruction 4.10 is not intended to be used for hostile work environment claims that do not involve a tangible employment action; Pattern Instructions 4.6 and 4.7, *supra*, may be adapted to address claims for an age-based hostile work environment.

II. Elements and Defenses

A. "Employee"

To prevail on an ADEA claim (other than a failure-to-hire claim), the plaintiff must prove that he was an employee of the

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defendant. In a failure-to-hire case, the pattern charge and interrogatories should be modified so that the jury does not have to find that the plaintiff was an employee of the defendant. If there is a dispute about whether the plaintiff was an employee of the defendant, this issue should be determined as a threshold matter and should be inserted as the first fact to be considered by the jury. For example, the ADEA does not provide a cause of action for discrimination against an independent contractor. *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1495 n.13 (11th Cir. 1993). If there is a genuine fact dispute regarding the plaintiff's status as an employee or independent contractor, that issue should be determined by the jury. See *Garcia v. Copenhaver, Bell & Assocs., M.D.'s*, 104 F.3d 1256, 1266-67 (11th Cir. 1997). Please refer to Pattern Instruction 4.24, *infra*, for a pattern instruction regarding the independent contractor-employee distinction. Pattern Instruction 4.25, *infra*, addresses the "joint employer" issue, and Pattern Instructions 4.26 and 4.27, *infra*, address situations where one company may be considered the alter ego of an individual or corporation.

B. Causation

The ADEA prohibits discrimination "because of [an] individual's age," 29 U.S.C. § 623(a)(1), and the prohibition is "limited to individuals who are at least 40 years of age," *id.* § 631(a).

In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court held that a plaintiff asserting an ADEA disparate treatment claim must prove that his or her age was the but-for cause, not simply a motivating factor, of the adverse employment action and that the burden of persuasion does not shift to the employer to show that it would have taken the same action regardless of the plaintiff's age. *Id.* at 174-78. As a result, the "same decision" defense (also known as the "mixed motive" defense) is no longer viable in ADEA cases. See *Mora v. Jackson Mem'l Found., Inc.*, 597 F.3d 1201, 1203-04 (11th Cir. 2010) (per curiam). Pattern Instruction 4.10 incorporates this causation standard and does not contain a mixed motive instruction.

Pattern Instruction 4.10 includes in brackets an optional charge discussing the inference of pretext. The basis for this charge is explained in further detail in the annotations following Pattern Instruction 4.5, *supra*. See also *Mitchell v. City of Lafayette*, 504 Fed. Appx. 867, 869-70 (11th Cir. 2013) (per curiam) (explaining that, even after *Gross*, ADEA claims are analyzed under the *McDonnell Douglas* framework); *Sims v. MVM, Inc.*, 704 F.3d 1327, 1333-34 (11th Cir. 2013) (evaluating pretext in ADEA context).

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Pattern Instruction 4.10 does not contain an optional cat's paw charge based on *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011). The Supreme Court in *Staub* applied the cat's paw theory to a claim under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301, *et seq.*, which requires proof that protected military status "is a motivating factor in the employer's action." *Staub*, 131 S.Ct. at 1190-91 (quoting 38 U.S.C. § 4311(a)). A cat's paw charge may be given in an appropriate case, and the cat's paw instruction in Pattern Instruction 4.5, *supra*, may be used as a starting point, though the court should modify it because of the differences in causation standards between Title VII/USERRA ("motivating factor") and the ADEA ("but for"). A stricter causation standard applies to cat's paw claims under a "but for" statute like the ADEA. *Sims v. MVM, Inc.*, 704 F.3d 1327, 1335-37 (11th Cir. 2013) (evaluating cat's paw argument in ADEA context and finding that a different standard applies to claims under the ADEA).

III. Remedies

Pattern Instruction 4.10 contains an instruction on willful violations, which is to be used in cases where the plaintiff alleges a willful violation of the ADEA. The willful damages instruction is adapted from *Formby v. Farmers and Merchants Bank*, 904 F.2d 627, 632 (11th Cir. 1990) (*per curiam*). If the jury finds that the defendant acted willfully, then the court should award as damages the amount calculated by the jury plus an equal amount as liquidated damages. 29 U.S.C. § 626(b); *accord Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1340 (11th Cir. 1999).

Front pay should not be included in liquidated damages awards because "while liquidated damages are intended to be punitive in nature, the express terms of the ADEA limit the calculation of liquidated damages to double the amount of lost pecuniary wages. Front pay, however, is equitable rather than compensatory relief." *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1340 (11th Cir. 1999) (internal citations omitted). Therefore, liquidated damages are limited to double the amount of full back pay and lost fringe benefits. *Id.*

A court may award both prejudgment interest and liquidated damages in an ADEA case because the legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature. *See Lindsey v. Am. Cast Iron Pipe Co.*, 810 F.2d 1094, 1102 (11th Cir. 1987) (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985)). "ADEA liquidated damages

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awards punish and deter violators, while FLSA liquidated damages merely compensate for damages that would be difficult to calculate." *Id.*

"[N]either punitive damages nor compensatory damages for pain and suffering are recoverable under the ADEA." *Goldstein u. Manhattan Indus., Inc.*, 758 F.2d 1435, 1446 (11th Cir. 1985).

IV. Disparate Impact Claims

The ADEA provides a right to jury trial for all claims covered by the Act, including disparate impact claims. 29 U.S.C. § 626(c)(2). In *Smith u. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005), the Supreme Court held that the ADEA authorizes recovery on disparate impact claims in accordance with *Griggs u. Duke Power Co.*, 401 U.S. 424 (1971), which announced a disparate impact theory of recovery in Title VII cases. Pattern Instruction 4.10 does not include a disparate impact charge.

Should the court need to craft a disparate impact instruction, the following points may be useful. The disparate impact ground of recovery is narrower in the ADEA context than in the Title VII context. First, the ADEA permits a disparate impact claim "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Second, the 1991 amendment to Title VII modified the Supreme Court's holding in *Ward's Cove Packing u. Atonio*, 490 U.S. 642 (1989), in which the Court narrowly construed the employer's exposure to disparate-impact liability under Title VII. Because the 1991 amendment to Title VII did not affect the ADEA, it follows that the standards of *Ward's Cove* remain applicable to disparate impact actions under the ADEA. *Smith*, 544 U.S. at 240. Under *Ward's Cove*, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Smith*, 544 U.S. at 241 (emphasis omitted) (internal quotation marks omitted).

In an ADEA disparate-impact case, the employer may assert the affirmative defense that its employment decision was made on the basis of reasonable factors other than age, and the employer bears the burdens of production and persuasion on this defense. *Meacham u. Knolls Atomic Power Lab.*, 554 U.S. 84, 93-95 (2008).

V. Miscellaneous Issues

Trial by jury is available in ADEA disparate treatment cases. *Lorila, d u. Pons*, 434 U.S. 575, 585 (1978).

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The ADEA does not abrogate the states' sovereign immunity.
Kimel v. Fla. Bd. Of Regents, 528 U.S. 62, 92 (2000).

A court may award attorney's fees to a prevailing ADEA defendant only upon finding that the plaintiff litigated in bad faith.
Turlington u. Atlanta Gas Light Co., 135 F.3d 1428, 1437 (11th Cir. 1998).

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KeyCite Yellow Flag- Negative Treatment
Distinguished by Palermo v. Grunau Company, Inc., M.D.Fla.,
November 4, 2016

746 F.3d 1264
United States Court of Appeals,
Eleventh Circuit.

Anthony MAZZEO, Plaintiff-Appellant,
v.
COLOR RESOLUTIONS INT'L, LLC,
Defendant-Appellee.

No. 12-10250.

March 31, 2014.

Synopsis

Background: Former employee brought action against his former employer, alleging discrimination under the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Florida Civil Rights Act (FCRA). The United States District Court for the Middle District of Florida, No. 3:10-cv-01108-RBD-JRK, granted **summary judgment** in favor of employer. Former employee appealed.

Holdings: The Court of Appeals, Jordan, Circuit Judge, held that:

III affidavit of former employee's treating physician was sufficient to demonstrate a disability under the ADA, and

¹²¹fact issue precluded use of reduction-in-force standard for establishing a *prima facie* case under the ADEA at **summary judgment**.

Vacated and remanded.

Attorneys and Law Firms

*1265 David B. Sacks, Rachel A. Compton, Law Office of David B. Sacks, PA, Jacksonville, FL, for Plaintiff-Appellant.

Chelsie Joy Flynn, Jessica T. Walberg, Aaron L. Zandy, Ford & Harrison, LLP, Orlando, FL, for Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 3:10-cv-01108-RBD-JRK.
Before JORDAN and KRA VITCH, Circuit Judges, and ALBRITTON,' District Judge.

Honorable William H. Albritton, III, United States District Judge for the Middle District of Alabama, sitting by designation.

Opinion

*1266 JORDAN, Circuit Judge:

Anthony Mazzeo sued his former employer, Color Resolutions International, LLC, claiming discrimination under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (the "ADA"), the Age Discrimination and Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (the "ADEA"), and the Florida Civil Rights Act, Fla. Stat. § 760.10 (the "FCRA"). The district court granted **summary judgment** in favor of CR!. With respect to the disability claims, the district court concluded that Mr. Mazzeo did not present a *prima facie* case because he failed to show that he either suffered from a disability or was regarded by CR! as having a disability. As to the age discrimination claims, the district court ruled that Mr. Mazzeo failed to state a *prima facie* case pursuant to a reduction-in-force theory.

Mr. Mazzeo's appeal requires us to address the application of certain recent amendments to the ADA. For the reasons which follow, we conclude that, in light of these amendments, Mr. Mazzeo submitted sufficient evidence on his ADA and FCRA disability claims to make out a *prima facie* case. We also conclude that the district court erroneously applied the *prima facie* standard created for reduction-in-force cases to Mr. Mazzeo's age discrimination claims. We therefore vacate the **summary judgment** entered in favor of CR! and remand for further proceedings.

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¹¹ We review a district court's grant of **summary judgment de novo**, viewing the record and drawing all factual inferences in a light most favorable to Mr. Mazzeo. See *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1225 (11th Cir.2005). CRI, as the party moving for **summary judgment**, had the burden of demonstrating that there were no genuine issues as to any material fact, and that it was entitled to judgment as a matter of law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

²¹ Disability and age-related discrimination actions under the FCRA are analyzed under the same frameworks as the ADA and **ADEA**, respectively. See *Chanda v. Engelhard/ICC*, 234 F.3d 1219, 1221 (11th Cir.2000) (ADA); *Zaben v. Air Prods. & Chems., Inc.*, 129 F.3d 1453, 1455 n. 2 (11th Cir.1997) (**ADEA**). As a result, our discussion of the ADA and **ADEA** governs the FCRA claims.

II

Starting in 2004, CRI employed Mr. Mazzeo to provide technical and sales service to its customers in Florida and southern Georgia. Mr. Mazzeo's employment claims revolve around his termination by CRI in early 2009.

In 2007, Mr. Mazzeo was diagnosed with a herniated disc and torn ligaments in his back. The herniated disc caused pain along Mr. Mazzeo's lower back, which spread down his right leg and intermittently affected his ability to walk, sit, stand, bend, run, and lift objects weighing greater than ten pounds. In October of 2008, Mr. Mazzeo first discussed his condition with his supervisor at CRI, Hixon Boyd, and with the supervisor of human resources at CRI, Phyllis Arellano. Between January and March of 2009, Mr. Mazzeo had at least three discussions with Mr. Boyd regarding his possible back surgery, which would require him to miss two weeks of work and have three to six months of restricted activity. Mr. Boyd is ***1267** alleged to have remarked, whether in concern for Mr. Mazzeo's well-being or out of a self-serving business interest, that such a surgical procedure would likely require a longer recovery period of six to eight weeks.

On February 25, 2009, Mr. Mazzeo informed Mr. Boyd

that his back surgery had been scheduled for the second week of March. The very next day, Mr. Boyd initiated the paperwork for Mr. Mazzeo's termination. According to CRI, the reason for the termination was the declining sales revenue, over a period of several years, in Mr. Mazzeo's Florida territory. Mr. Boyd handed the termination papers to Mr. Mazzeo two days before his scheduled surgery. When CRI terminated him on March 10, 2009, Mr. Mazzeo was 46.

Ten days after Mr. Mazzeo's termination, CRI offered a similar sales position to a 23-year-old recent college graduate, Jeremy Kyzer, who began working for CRI on March 23, 2009. CRI asserted that Mr. Kyzer—who had no sales experience—was hired solely to replace a different, retiring CRI employee, Vivian Lumpkin, who covered a different territory than Mr. Mazzeo. Mr. Boyd's deposition testimony, however, suggests that, at the time it hired Mr. Kyzer, CRI intended (or at least envisioned) that he would service the areas formerly serviced by both Mr. Mazzeo and Ms. Lumpkin.

Mr. Mazzeo maintains that, prior to his termination, he had requested this same opportunity, i.e., to merge his service area with the territory assigned to the retiring Ms. Lumpkin. According to Mr. Mazzeo, Mr. Boyd rejected this request and explained that the new business opportunities arising from his Florida territory would require Mr. Mazzeo's full attention. Yet, at around this same time in early 2009, CRI had already decided to terminate Mr. Mazzeo.

III

We start with the disability claim under the ADA. In part as a reaction to Supreme Court decisions in cases like *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) (whether an individual is disabled must be determined with reference to corrective measures), and *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196-97, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002) (interpreting the phrase "substantially limits" to mean limiting to a considerable or large degree, and the phrase "major life activities" to mean activities that are of central importance to daily life), Congress made significant changes to the ADA by enacting the ADA Amendments Act of 2008 (the "ADAAA"), Pub.L. No. 110-325, 122 Stat. 3553, which became effective on

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January 1, 2009. Because the critical events in this case—Mr. Mazzeo's continued back problems, scheduled surgery, and termination—took place after the ADA Amendments Act of 2008 went into effect, we apply the post-ADAAA version of the ADA. See, e.g., *McElwee v. Cnty. of Orange*, 700 F.3d 635, 642 n. 5 (2d Cir.2012) ("The ADAAA became effective on January 1, 2009, and applies to claims, such as McElwee's, which arose after that date.").¹

All references to the ADA in this opinion, therefore, are to the Act as amended by the ADAAA.

¹³¹ The ADA prohibits discrimination by an employer "against a qualified individual on the basis of a disability" in any of the "terms, conditions, [or] privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual" is "an individual who, with or without reasonable accommodation, ***1268** can perform the essential functions of the employment position that such individual holds or desires." *Id.* at § 12111(8). To establish a *prima facie* case of employment discrimination under the ADA, a plaintiff must show that, at the time of the adverse employment action, he had a disability, he was a qualified individual, and he was subjected to unlawful discrimination because of his disability. See *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1255-56 (11th Cir.2007).¹

When it enacted the ADAAA, Congress indicated that one of its purposes was to "convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." 42 U.S.C. § 12101 note.² The ADA defines the term "disability" as (1) a physical or mental impairment that "substantially limits one or more" of an individual's "major life activities," (2) a "record of such an impairment," or (3) "being regarded as having such an impairment" as described in subsection (1). 42 U.S.C. § 12102(1). Under the ADA, "major life activities include, but are not limited to, ... sleeping, walking, standing, lifting, ... [and] bending[.]" *Id.* at § 12102(2)(A).

Congress intended "that the establishment of coverage under the ADA should not be overly complex nor difficult, and expect[ed] that the [ADAAA] will lessen the standard of establishing whether an individual has a disability for purposes of coverage under the ADA." J-1.R.Rep. No. 110-730, at 9 (2008).

¹⁴¹ Dr. Christopher Roberts, Mr. Mazzeo's treating physician, submitted an affidavit stating that degenerative disc disease and a herniated disc impacted Mr. Mazzeo's ability to walk, bend, sleep, and lift more than ten pounds, and that Mr. Mazzeo's pain would increase with prolonged sitting and standing. The district court thought this affidavit was insufficient, conclusory, and did not demonstrate that Mr. Mazzeo was disabled because it "contain[ed] no detailed discussion as to whether [the] back condition affected any of [Mr. Mazzeo's] life activities." D.E. 33 at 9. The district court cited to a pre-ADAAA Eleventh Circuit opinion for the proposition that there could be "no disability based on physician's lifting restrictions where the plaintiff testified she could still work." *Id.* (citing *Hilburn v. Murata Elecs. N Am., Inc.*, 181 F.3d 1220, 1228 (11th Cir.1999)). The district court also noted that the post-surgery work restrictions Mr. Mazzeo discussed with Mr. Boyd were no more than a transitory impairment and, therefore, insufficient to establish that CRI regarded Mr. Mazzeo as disabled. For several reasons, we disagree with the district court's analysis as to the matter of disability.

First, although the district court relied on one of our pre-ADAAA cases, *Hilburn*, 181 F.3d at 1228, to support its conclusion that Dr. Roberts' affidavit was conclusory, that case is distinguishable. In *Hilburn*, the physician opined, without articulating any specific facts, that the plaintiff was "substantially limited in performing manual tasks." *Id.* Given that the plaintiff herself testified that she could walk, run, sit, stand, sleep, eat, bathe, dress, write, work around the house, cook, and work, we held that the physician's opinion was conclusory and did not create any issue of material fact. See *id.* at 1227-28. Here, by contrast, Dr. Roberts explained that he had been treating Mr. Mazzeo for an extended period of time, that one of Mr. Mazzeo's disc herniation problems was "nerve root involvement caus[ing] radicular symptoms, that is pain radiating from the lumbar spine down Mr. Mazzeo's right leg," and that the limitations he noted (i.e., the impact on Mr. Mazzeo's ability to walk, bend, sleep, and lift more than ten pounds) were ***1269** "substantial ... and permanent." That diagnosis was not, in our view, conclusory, as it explained Mr. Mazzeo's medical condition, what specific pain the condition caused, and the limitations on "major life activities" (as that term is broadly defined by the ADA) resulting from the condition and pain. At the **summary judgment** stage, there was no need for a more "detailed discussion" of the effects of Mr. Mazzeo's back condition.'

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There is no deposition of Dr. Roberts in the record, so it appears he was not deposed. CRI, moreover, did not submit any medical testimony about Mr. Mazzeo's back condition or its effects.

¹⁵¹Second, although Mr. Mazzeo testified at his deposition that his back problems only affected his ability to play golf and have sex, the district court read that testimony too broadly. The questions that were posed to Mr. Mazzeo did not contain a specific time frame, making it unclear whether his answers referred to how he felt before his operation in March of 2009, or after his operation (which took place two days after his termination). Indeed, some of the questions were specifically about Mr. Mazzeo's post-operation/post-termination status. *See, e.g.,* Mazzeo Dep. at 157 ("Q: And from the time you had your surgery to date does your back pain affect your performance activities other than golf or sex? A: No."). We therefore do not think that Mr. Mazzeo's deposition testimony warranted **summary judgment** in favor of CRI.

Third, in passing the ADAAA, Congress stated that the Supreme Court's interpretation of the phrase "substantially limits," in cases like *Toyota Motor*, had "created an inappropriately high level of limitation necessary to obtain coverage under the ADA," and that "the primary object of attention in cases brought under the ADA should be whether entities covered by the ADA have complied with their obligations[.]" 42 U.S.C. § 12101 note. The ADA, therefore, now provides that the phrase "substantially limits" "shall be interpreted consistently with the findings and purposes of the [ADAAA]," *id.* at § 12102(4)(B), and that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active," *id.* at § 12102(4)(D). And the EEOC, pursuant to its statutory authority to issue regulations implementing the definition of "disability" in the ADA, *see id.* at § 12205a, has further explained that the phrase "substantially limits" is to be "construed broadly in terms of extensive coverage" and is "not meant to be a demanding standard." 29 C.F.R. § 1630.2G)(1)(i). The EEOC's regulations also provide that an "impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting;" the phrase "substantially limits" "shall be interpreted and applied to require a degree of functional limitation that is lower than

the standard for 'substantially limits' applied prior to the ADAAA;" (with the exception of glasses or contact lenses) the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures;" and an "impairment that is episodic or in remission is a disability if it would substantially limit a major life activity." *Id.* at § 1630.2G)(1)(ii), (iv), (vi)-(vii).

As noted earlier, the ADA now states that "major life activities include, but are not limited to, ... sleeping, walking, standing, lifting, ... [and] bending (.)" 42 U.S.C. § 12102(2)(A), and Dr. Roberts stated in his affidavit that Mr. Mazzeo's disc herniation problems and resulting *1270 pain-which had existed for years and were serious enough to require surgery-substantially and permanently limited Mr. Mazzeo's ability to walk, bend, sleep, and lift more than ten pounds. Given the new standards and definitions put in place by the ADAAA, that evidence was enough for Mr. Mazzeo to present a *prima facie* case on his ADA and FCRA disability claims:

Because we conclude that Mr. Mazzeo presented sufficient evidence that he was suffering from a disability under the ADA, we need not and do not address his alternative argument that CRI regarded him as disabled. We do, however, note that the district court addressed whether Mr. Mazzeo's impairment was "transitory and minor" without CRI raising that specific argument and without giving Mr. Mazzeo notice. Because this was procedurally improper, *see Imaging Bus. Machines, LLC v. BancTec, Inc.*, 459 F.3d 1186, 1191 (11th Cir.2006), Mr. Mazzeo can pursue his "regarded as" theory on remand if he wishes.

IV

We next address Mr. Mazzeo's age discrimination claim under the ADEA. The ADEA, whose purpose is "to promote employment of older persons based on their ability rather than age," 29 U.S.C. § 621(b), prohibits certain actions by an employer, including the termination of, or deprivation of employment opportunities against, an employee who is at least 40 years old because of that employee's age. *See id.* at §§ 623(a)(1)-(2), 631(a).

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A

¹⁶¹ ¹⁷¹ A plaintiff may support a claim under the **ADEA** through either direct evidence or circumstantial evidence. *See Mora v. Jackson Mem 'I Found., Inc.*, 597 F.3d 1201, 1204 (11th Cir.2010). To ultimately prevail, "[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." *Gross v. FBL Fin. Servs., inc.*, 557 U.S. 167, 177-78, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009).

¹⁸¹ Where, as here, a plaintiff proffers circumstantial evidence to establish an **ADEA** claim, we apply the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Sims v. MVM, Inc.*, 704 F.3d 1327 1332-33 (11th Cir.2013) (explaining how this burden-shifting framework for circumstantial evidence remains consistent with the Supreme Court's decision in *Gross*). Under this framework, a plaintiff must first establish a *prima facie* case of age discrimination. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir.2000). If he does so, the burden of production shifts to the employer "to articulate a legitimate, nondiscriminatory reason for the challenged employment action." *Id* If the defendant articulates at least one such reason, the plaintiff is then given the opportunity to show that the employer's stated reason is merely a pretext for discrimination. *See id*.

In the district court and on appeal, Mr. Mazzeo and CRI have disagreed about the appropriate *prima facie* test under the **ADEA**. Mr. Mazzeo urged the district court to use the standard version of the **ADEA** *prima facie* case. *See, e.g., Kragor v. Takeda Phann. Am., Inc.*, 702 F.3d 1304, 1308 (11th Cir.2012) (the elements of a *prima facie* case under the **ADEA** are that the plaintiff was a member of the protected group, that the plaintiff was subject to an adverse employment action, that a substantially younger person filled the position the plaintiff sought or from which he was fired, and that the plaintiff was qualified for the job in question). CRI, for its part, argued that the district court should use the version of the *prima facie* case created for reduction-in-force ("RIF") ***1271** cases. *See, e.g., Zaben*, 129 F.3d at 1457 ("in cases involving RIFs and in those where a position is eliminated entirely," the plaintiff must show that he was in the protected age

group and was adversely affected by an employment decision, establish that he was qualified for the position held (or to assume another position) at the time of discharge, and present sufficient evidence from which a reasonable jury could find that the employer intended to discriminate on the basis of age through its employment decision). *See also Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207-08 (11th Cir.1997) (same). Both parties have reiterated their positions before us.

¹⁹¹ The "establishment of a *prima facie* case [under the **ADEA**] is essentially a factual question particular to the circumstances of a given case." *Carter v. City of Miami*: 870 F.2d 578, 583 (11th Cir.1989). Whether the standard version or the RIF version of the **ADEA** *prima facie* case applies depends on Mr. Mazzeo's ability to present sufficient evidence that he was replaced by a younger individual. *See Williams v. General Motors Corp.*, 656 F.2d 120, 128 (5th Cir.1981) ("Reduction-in-force cases are obviously outside the embrace of [our standard *prima facie* criteria] since reduction-case plaintiffs are simply laid off and thus incapable of proving ... actual replacement by a younger employee.".)⁵

⁵ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent Fifth Circuit cases decided prior to October 1, 1981.

The district court granted **summary judgment** in favor of CRI because it concluded that Mr. Mazzeo's position had been eliminated and that Mr. Mazzeo was not replaced by Mr. Kyzer. As the district court read the record, Mr. Mazzeo was not replaced by anyone, and Mr. Kyzer was hired only to take over Ms. Lumpkin's territory. Using the RIF version of the **ADEA** *prima facie* case, the district court ruled that Mr. Mazzeo had failed to satisfy the last prong of that *prima facie* case—he had failed to present sufficient evidence from which a reasonable jury could find that CRI intended to discriminate on the basis of age. *See* D.E. 33 at 11-14.

B

¹¹⁰¹ ¹¹¹¹ A plaintiff may demonstrate that he was replaced by showing that, after his termination, some of his former responsibilities were delegated to another employee, in

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addition to that other employee's own responsibilities. *See Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir.1987). In our view, the district court en-ed in applying the RIF version of the *prima facie* case to Mr. Mazzeo's claim of age-based discrimination at the **summary judgment** stage.

The evidence here, viewed in the light most favorable to Mr. Mazzeo, indicates that his position was not eliminated. Shortly after his termination, the responsibilities and sales territory of Mr. Mazzeo were combined together with those of a retiring employee, Ms. Lumpkin. The duties of this consolidated position were no different from those of Mr. Mazzeo's original position, except inasmuch as the consolidated position necessarily encompassed a larger sales territory forged from the two constituent positions. CR!, moreover, hired Mr. Kyzer-a younger individual without any sales experience-shortly after Mr. Mazzeo's termination to assume this consolidated position. A reasonable jury, we think, could find that CR!, in giving Mr. Kyzer this consolidated position, replaced Mr. Mazzeo.⁶

⁶ "Question: So at the time Mr. Kyzer was hired, was it the plan that he would take over Ms. Lumpkin's territory and then eventually take over Florida as well?

Answer: We had talked about that certainly, yes."

Boyd Dep. at 71.

*1272 CR! contends that Mr. Kyzer was hired to replace Ms. Lumpkin, not Mr. Mazzeo. That is a permissible reading of the record, but it is not the only reasonable reading of the record when the evidence is viewed in the light most favorable to Mr. Mazzeo. Although, as the district court noted, Mr. Kyzer was hired to work out of Atlanta, he never handled the key CRI client in Atlanta who required a local representative. Moreover, Mr. Boyd's deposition testimony suggests that, at the time Mr. Kyzer was hired, CR! informed him that he would be servicing the territory of Ms. Lumpkin as well as the territory formerly serviced by Mr. Mazzeo. Indeed, within his first month of employment at CRI, Mr. Kyzer was accompanying Mr. Boyd to client meetings in Florida, Mr. Mazzeo's former territory, and after that he was traveling to Florida every other week. And following his training period in the summer of 2009, Mr. Kyzer officially assumed responsibility over Mr. Mazzeo's territory, as well as that of Ms. Lumpkin's.

In *Rollins*, an ADEA case, the plaintiff and the employer disputed-as Mr. Mazzeo and CR! do here-whether the plaintiff had been replaced by another employee. To support its argument that there had not been a replacement, the employer cited to evidence (1) that some of the plaintiffs responsibilities had been completely eliminated, (2) that the other employee performed "an entirely different function" in the company, and (3) that the other employee only took over some of the plaintiffs responsibilities. *See* 833 F.2d at 1529. The plaintiff, for her part, argued that she had been replaced, and cited to evidence (1) that she had to train the other employee, (2) that the other employee took over some of her duties, and (3) that other employees completed her remaining, existing duties. *See id.* Although completing some of the plaintiffs duties took up "very little" of the other employee's time, we concluded that the plaintiff had produced enough evidence to defeat the employer's motion for **summary judgment**: "We believe that Rollins [the plaintiff] has set forth enough facts to raise an issue based on this argument. Rollins has articulated specific facts from which one could infer that Richardson [the other employee] actually replaced her. Consequently, we find that [Rollins] has met her burden of presenting a *prima facie* case." *Id.*

Rollins, in our view, precludes the use of the RIF version of the ADEA *prima facie* case at the **summary judgment** stage in this case. Mr. Mazzeo presented evidence which, viewed in the light most favorable to him, suggests that Mr. Kyzer replaced him shortly after his termination. On remand, the district court will need to use the standard version of the ADEA *prima facie* case in evaluating CRI's motion for **summary judgment**. We express no view on the merits of CRI's motion under the standard version of the *prima facie* case.

V

The district court's grant of summary judgment on Mr. Mazzeo's disability and age discrimination claims under the ADA, the ADEA, and the FCRA is vacated, and the case is remanded for proceedings consistent with this opinion.

VACATED AND REMANDED.

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KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Murphy v. Center for Emergency Medicine of
Western Pennsylvania, Inc., W.D.Pa., May 8, 2013

704 F.3d 1327

United States Court of Appeals,
Eleventh Circuit.

Solomon SIMS, Jr., Plaintiff-Appellant,
v.

MVM, INC., Defendant-Appellee.

No. 11-14481.

|

Jan. 17, 2013.

Synopsis

Background: Former employee, who was 71-years-old at time of termination, brought action against former employer alleging age discrimination in violation of the Age Discrimination in Employment Act (ADEA). The United States District Court for the Northern District of Georgia, No. 1:09-cv-01333-JOF, J. Owen Forrester, J., granted employer's motion for summary judgment. Employee appealed.

Holdings: The Court of Appeals, Anderson, Circuit Judge, held that:

[1] employee failed to show that employer would have kept him on the job but-for his age;

[2] as a matter of first impression in the circuit, the proximate causation standard for cat's paw liability in Uniformed Services Employment and Reemployment Rights Act (USERRA) cases did not apply to cat's paw cases involving age discrimination under the ADEA; and

[3] subordinate supervisor's age animus was not the but-for cause of supervisor's ultimate decision to terminate employee.

Affirmed.

Attorneys and Law Firms

*1329 Edward Daniel Buckley, Cheryl Barnes Legare, Buckley & Klein, LLP, Atlanta, GA, for Plaintiff-Appellant.

Lindsey Hager McGinnis, Littler Mendelson, PC, McClean, VA, Jason M. Branciforte, Littler Mendelson, PC, Washington, DC, Richard C. McWilliams, Littler Mendelson, PC, Atlanta, GA, for Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before DUBINA, Chief Judge, and CARNES and ANDERSON, Circuit Judges.

Opinion

ANDERSON, Circuit Judge:

This is an Age Discrimination in Employment Act of 1967 ("ADEA") case. *See* 29 U.S.C. § 621 *et seq.* Solomon Sims, Jr., claims that his former employer, MVM, Inc., discriminated against him on account of his age when it terminated his employment. MVM defended its decision by denying that Sims' age, 71, was the reason for his discharge; rather, he was separated due to a reduction in force ("RIF").

Following discovery, the district court granted MVM summary judgment, concluding that no reasonable fact finder *1330 could find that MVM's decision was "but-for" his age, i.e., that MVM would have kept him on the job but-for his age. Sims now appeals, contending that material issues of fact preclude summary judgment.¹ After thorough review of the record and with the benefit of oral argument, we affirm.²

Sims also contends that the district court erred in granting MVM's motion to exclude the affidavit of B.J. Schultz. As it turned out, the district court judge considered the affidavit and concluded that it did not change his opinion of the case. We agree. Schultz merely corroborates Sims' testimony concerning discriminatory animus on the part of Davis.

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² We review a trial court's grant of a motion for summary judgment *de novo*, viewing the record and drawing all reasonable inferences in the light most favorable to the non-moving party. *HR Acquisition J Co., p. v. Twin City Fire Ins. Co.*, 547 F.3d 1309, 1313-14 (11th Cir.2008). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a).

I.

In November 2007, MVM contracted with The GEO Group, Inc., to provide secure custody and transport services for federal prisoners in U.S. Marshals Service custody that were being held by GEO at various detention centers around Atlanta, Georgia. It was a start-up contract, meaning that a previous contract did not exist. Thus, MVM had to acquire a workforce. MVM began performance of the contract in February 2008. Arnold Perkins, who had come aboard in January 2008, became Project Manager. Tom Davis was hired as Assistant Project Manager about the same time as Perkins.

Shortly after MVM entered into the contract with GEO Sims applied for a job with MVM as Operation Supervisor. On December 7, 2007, he was offered and accepted the supervisory position at the Robert A. Deyton Detention Facility in Lovejoy, Georgia. He reported for work in January 2008.

As Operations Supervisor, Sims was responsible for reviewing government manifest and remand documentation and utilizing information they provided to make the arrangements and prepare the paperwork necessary for the transportation of prisoners between different locations. Davis was Sims' immediate supervisor. In time, Davis found Sims' performance deficient in that he made more errors than other supervisors working on the MVM-GEO contract. In Davis's view, Sims never improved his performance or fully grasped his job duties.

When Perkins became Project Manager, the contract was approximately \$485,000 over budget for 2008 due to excessive hiring and costs entailed in training new hires. In March 2008, MVM Vice President Robert Matthews,

Perkins' supervisor, notified Perkins that he needed to reduce the number of supervisors, eight, working on the contract. Perkins disagreed with Matthews's assessment and delayed taking any action. On Thursday, August 7, 2008, Matthews instructed Perkins to cut two positions by the following Monday. Perkins immediately scheduled a group meeting with all eight supervisors and Davis. During the meeting, he informed them of Matthews's RIF directive that two supervisor positions had to be eliminated. After this group meeting, Perkins and Davis met with the supervisors individually to advise them of their RIF status. Perkins advised Schultz and Sims during the individual meetings that they were to be included in the RIF.

Perkins could not testify precisely as to when he finalized his decision on whom to include in the RIF because he had known *1331 for five months that he probably would have to lay off some supervisors and had been constantly evaluating the poorer performers. However, it is clear that he had reached at least a tentative decision-during his five-month evaluations and before the meetings with the supervisors and Davis-that Sims was at the bottom of the list in terms of performance. One of Perkins' jobs was to review every "mission" that was put together, and each mission contained the names of the supervisors that prepared them. In the course of going through each mission, Perkins knew which supervisors were having trouble preparing them and which were not. Based on Perkins' personal observations, Sims was at the bottom of the list in terms of, among other factors, total quality and accuracy. In addition, Perkins personally observed that Sims was uncomfortable using the computers used to produce the transportation documentation and that it was taking him longer to prepare these documents than the other supervisors. Other supervisors also told Perkins that they were occasionally correcting Sims' documentation before it was submitted to Perkins for review. Some of the supervisors cited this concern during their individual meetings with Perkins and Davis on Friday, August 8.

During the individual meetings between the supervisors and Davis and Perkins, Perkins asked the supervisors whom they would recommend for the RIF. Perkins testified that this was just for his knowledge and perspective because his RIF decisions had already been made. On the other hand, based on the fact that Perkins asked each of the eight supervisors for their input before announcing his decision, Davis was of the opinion that Perkins had not made a definitive decision until after seeking input from the supervisors. Nonetheless it is

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undisputed that each supervisor except Sims recommended that Sims be included in the RIF.

After notifying Sims that he was included in the RIF, Perkins offered Sims a position as Transportation Officer working at the same facility; Perkins believed that Sims' background education and knowledge would be valuable to MVM. Sims considered the offer a demotion and rejected it. During this conversation, the matter of Sims' age came up, but the parties dispute who first brought it up. However, it is clear that Sims told Perkins his age toward the end of the conversation.

Perkins also offered Schultz a position as a Transportation Officer; she declined.

In the charge of age discrimination he filed with the Equal Employment Opportunity Commission ("EEOC"), Sims identified the period of discrimination as May 15, 2008, through August 8, 2008. He alleged that Davis (at some point during that time span) told him that he was "too slow in performing [his] job," that, "If we have a cutback in management, I'm going to recommend you be terminated," and, "mind you, age has nothing to do with it." Although not included in his EEOC charge, Sims also asserts now that Davis at some unknown time stated, "You're old and slow." Sims does not assert that Davis made any other age-related comments that he felt were derogatory. The EEOC charge contained no other allegations aside from Perkins' statement (on August 8) that MVM needed to "cut back on the number of supervisors." Sims never heard any other manager make a derogatory age-related comment to him or about him.

II.

The ADEA prohibits employers from discharging an employee who is at least 40 years of age because of that employee's age. 29 U.S.C. §§ 623(a)(1), 631(a). The *1332 ADEA provides, in relevant part, that "[i]t shall be unlawful for an employer ... to 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." *Id.* § 623(a)(1). In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176, 129 S.Ct. 743, 744, 174 L.Ed.2d 119 (2009), the Supreme Court

held that the language "because of" in the ADEA statute means that a plaintiff must prove that discrimination was the "but-for" cause of the adverse employment action. *See id.* ("To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."); *see also id.* (explaining that the claim "cannot succeed unless the employee's protected trait actually played a role in [the employer's decision-making] process and had a determinative influence on the outcome") (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 1706, 123 L.Ed.2d 338 (1993)); W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Law of Torts* 265 (5th ed. 1984) ("An act or omission is not regarded as a cause of an event if the particular event would have occurred without it.").

¹¹ ¹² ¹³ A plaintiff can establish age discrimination through either direct or circumstantial evidence. *Mora v. Jackson Mem'l Found., Inc.*, 597 F.3d 1201, 1204 (11th Cir.2010). Prior to *Gross*, we consistently evaluated ADEA claims based on circumstantial evidence of discrimination under the burden-shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See, e.g., Chapman v. Al Transp.*, 229 F.3d 1012, 1024 (11th Cir.2000) (en banc). Under this framework, a plaintiff must first establish a prima facie case of discrimination. *Id.* at 1024. Next, the defendant must articulate a legitimate, non-discriminatory reason for the challenged employment action. *Id.* If the defendant articulates one or more such reasons, the plaintiff is afforded an opportunity to show that the employer's stated reason is a pretext for discrimination. *See Kragor v. Takeda Pharm. Am., Inc.*, 702 F.3d 1304, 1307, No. 11-16052, 2012 WL 6618360, at *2 (11th Cir. Dec. 20, 2012) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000); *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. at 1825). 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. *See Gross*, 557 U.S. at 176, 129 S.Ct. at 2350.

¹⁴ ¹⁵ Following *Gross*, we have continued to evaluate ADEA claims based on circumstantial evidence under the *McDonnell Douglas* framework. *See Kragor*, 702 F.3d at 1308, 2012 WL 6618360, at *2. This is not only consistent with our prior case law, but also it is

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entirely consistent with *Gross*, which expressly left open the question of whether this application is appropriate. *Gross*, 557 U.S. at 175 n. 2, 129 S.Ct. at 2349 n. 2 ("[T]he Court has not definitively decided whether the evidentiary framework of [*McDonnell Douglas*] utilized in Title VII cases is appropriate in the ADEA context."). *Gross* held that it is improper to shift the burden of *persuasion* to the defendant in an age-discrimination case. *Id.* at 173, 129 S.Ct. at 2348 ("[W]e must first determine whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA. We hold that it does not." (footnote omitted)). But the *McDonnell Douglas* framework does not shift the burden of persuasion to the defendant; instead, *1333 once the employee establishes a prima facie case of discrimination, the burden of *production* is shifted to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. See *Tex. Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S.Ct. 1089, 1094-95, 67 L.Ed.2d 207 (1981). If the employer offers a legitimate, non-discriminatory reason, the employee is afforded an opportunity to show that the employer's stated reason is a pretext for discrimination. See *id.* at 256, 101 S.Ct. at 1095; see also *Kragor*, 702 F.3d at 1308, 2012 WL 6618360, at *2. Importantly, throughout this entire process, the ultimate burden of persuasion remains on the employee. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993) ("It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of production to the defendant, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against remains at all times with the plaintiff.' ") (citation omitted); see also *Willis v. Conopco, Inc.*, 108 F.3d 282,286 (11th Cir.1997).

Our continued application of the *McDonnell Douglas* framework in ADEA cases is also consistent with all of our sister circuits that have addressed the issue. See *Fleishman v. Cont'l Cas. Co.*, 698 F.3d 598, 604 (7th Cir.2012) (citing *Senske v. Sybase*, 588 F.3d 501, 506-07 (7th Cir.2009)); *Shelley v. Geren*, 666 F.3d 599, 607 (9th Cir.2012); *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 106 (2d Cir.2010); *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 378 (5th Cir.2010); *Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1278 (10th Cir.2010); *Geiger v. Tower Auto.*, 579 F.3d 614, 622 (6th Cir.2009); *Smith v. City of Allentown*, 589 F.3d 684, 690-91 (3d Cir.2009); *Velez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441, 446-47 (1st Cir.2009); see also *Gibson v. Am.* -----

Greetings Corp., 670 F.3d 844, 855 (8th Cir.2012) (continuing to apply *McDonnell Douglas* to ADEA cases without discussion of *Gross*), *cert. denied*, - U.S. --, 133 S.Ct. 313, 184 L.Ed.2d 154 (2012).

¹⁶¹ Although our *Kragor* decision and our holding today reaffirm the use of the *McDonnell Douglas* framework in ADEA cases, this framework is not the *sine qua non* for a plaintiff to survive summary judgment in a discrimination case. See *Smith v. Lockheed Martin Corp.*, 644 F.3d 1321, 1328 (I I th Cir.2011). Instead, "the plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Id.* 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.* (footnote omitted) (internal quotation marks omitted).

III.

¹⁷¹ This case involves circumstantial evidence of discrimination; and we elect to apply the *McDonnell Douglas* framework to Sims' claims. The record in this case is *1334 clear that Perkins was the decision-maker. Sims makes two arguments on appeal. First, he argues that Perkins himself was biased. Second, he argues that Davis was biased and that Perkins acted as a mere cat's paw for Davis's discriminatory animus.

⁴ MVM points out that Sims never directly argues that this is a case involving direct evidence of discrimination. This is true, and the only "argument" Sims makes that there is direct evidence of discrimination is one heading titled "direct evidence" in his briefs to this Court. But, even assuming that this is enough to "argue" that any evidence is direct evidence, direct evidence must conclusively show that the employee was discriminated against without any inference or presumption. See *Wilson v. BIE Aerospace, Inc.*, 376 F.3d 1079, 1086 (I I th Cir.2004). Under the heading for "direct evidence," Sims states that "[s]uch an unsolicited age-based statement creates an *inference* of discrimination." Sims has not presented any direct evidence of discrimination.

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A.

¹⁸¹ Sims first argues that a reasonable jury could find that Perkins himself was biased and that his age discrimination was the "but-for" factor in Perkins' decision to lay off Sims. We disagree.

Assuming *arguendo*, as the district court did, that Sims has established a prima facie case of age discrimination in an RIF claim, Sims cannot sustain his burden of proving that Perkins' age discrimination was the "but-for" cause of his inclusion in the RIF. MVM clearly articulates legitimate, non-discriminatory reasons for Sims' inclusion in the RIF—namely, that budget constraints forced it to eliminate two supervisor positions. See, e.g., *Coutu v. Marlin Cnty. Bd. of Cnty. Comm'rs*, 47 F.3d 1068, 1073 (11th Cir.1995) (holding that an RIF based on budgetary constraints was a legitimate, non-discriminatory reason for termination).

There is very little, if any, evidence of pretext. There is virtually no evidence of age bias on the part of Perkins, who was 61 himself at the time.⁵ Perkins testified that, after he advised Sims that his position had to be eliminated and offered Sims a position as Transportation Officer, Sims rejected the offer and asked if his inclusion in the RIF was because of his age. Perkins said it was not; he told Sims that he was unaware of Sims' age and that he was the oldest person working on the project. In reply, Sims told Perkins he was born in 1937 and that he (Sims) was in fact the oldest on the project. Contrary to Perkins' testimony, Sims testified that it was Perkins who, after advising Sims of the RIF, first brought up age, saying out of the blue, "I'm older than you." Sims urges us to draw an inference of age bias based on the fact that Perkins followed his bad news with a denial of knowledge of Sims' age.

⁵ In fact, Sims himself testified that he is not aware of any evidence that Perkins selected him for the RIF because of his age.

Even assuming Sims' version of who first mentioned age, we are doubtful that that gives rise to a reasonable inference of age bias. Even if there were a weak inference, it would be further weakened in light of Sims' own testimony that Perkins expressed surprise after Sims told him that he (Sims) was 71, and in light of Sims' deposition testimony that he was aware of no evidence

that Perkins selected him for the RIF because of his age. We conclude that the record reveals either no evidence at all of age bias on the part of Perkins, or an inference so weak (especially as compared to the overwhelming evidence of the legitimacy of Perkins' decision) that it would fall far short of satisfying Sims' burden of proving that age bias on the part of Perkins was the "but-for" cause of Perkins' selection of Sims. It is undisputed that Perkins' own independent evaluation was that Sims was at the bottom of the list of supervisors when comparing their relative job performance. It is also undisputed that every supervisor other than Sims himself thought Sims was one of the two who should be laid off. In sum, the weak or nonexistent inference of age bias urged by Sims simply cannot carry Sims' burden in light of the record evidence.

B.

¹⁹¹ Sims also argues that Perkins, the decision-maker, acted as a mere cat's paw ***1335** for Davis's discriminatory animus, and accordingly MVM is liable.⁶ Prior to the recent Supreme Court decision in *Staub v. Proctor Hospital*, - U.S. --, 131 S.Ct. 1186, 179 L.Ed.2d 144 (2011), we applied the cat's paw analysis to ADEA cases. See, e.g., *Wright v. Southland Colp.*, 187 F.3d 1287, 1304 n. 20 (11th Cir.1999); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1270 (11th Cir.2001); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir.1999) (Title VII case).

⁶ "Cat's paw" theory of liability, also referred to as "subordinate bias theory," is liability seeking to hold an employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision. *Staub v. Proctor Hosp.*, - U.S. --, 131 S.Ct. 1186, 1190, 179 L.Ed.2d 144 (2011). For an explanation of how the term "cat's paw" was derived, see *id.* at 1190 n. 1.

Sims argues that the Supreme Court's decision in *Staub* modifies our previous case law applying the cat's paw theory and lowers the burden for plaintiffs in cases involving the ADEA. This is an issue of first impression for this Court. We consider whether, or to what extent, *Staub* has modified our cat's paw analysis in ADEA cases.

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We first examine the Supreme Court's recent *Staub* decision. In the context of an employer's alleged liability under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"),⁷ the Court defined the circumstances under which an employer could be liable when the decision-maker has no discriminatory animus but is influenced by a subordinate supervisor's action that is the product of such discriminatory animus (cat's paw liability). The Court held that the employer could be liable only if the subordinate supervisor (1) performs an act motivated by antimilitary animus that is intended to cause an adverse employment action, and (2) that act is a proximate cause of the ultimate employment action. *Staub*, 131 S.Ct. at 1194.

⁷ The USERRA prohibits adverse employment action on the basis of a person's obligation to perform military service where antimilitary animus is a motivating factor in the employer's action. 38 U.S.C. § 431 l(a), (c).

¹⁰¹ Sims urges us to apply this analysis to this case. But the text of the USERRA and the ADEA differ in important respects. The USERRA (and Title VII)⁸ requires that a plaintiff demonstrate discrimination by showing that the proscribed bias was a "motivating factor" in the adverse decision. 38 U.S.C. § 431 l(c) (USERRA); 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (Title VII). As the Court in *Staub* emphasized, this "motivating factor" causation standard is simply the traditional tort law standard of proximate cause, requiring only "some direct relation between the injury asserted and the injurious conduct alleged, and excludes only those link[s] that are too remote, purely contingent, or indirect." 131 S.Ct. at 1192 (internal quotation marks omitted). By contrast, the ADEA states that it is unlawful if an employee suffers adverse employment action "because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). Thus, "to establish a disparate-treatment claim under the plain language of the ADEA, ... a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross*, 557 U.S. at 176, 129 S.Ct. at 2350. As noted above, a "but-for" cause requires a closer link than mere proximate causation; it requires that the proscribed animus have a *1336 determinative influence on the employer's adverse decision. *Id.*

⁸ Although the Supreme Court did not directly extend its

holding in *Staub* to Title VII cases, it acknowledged that "[t]he [USERRA] statute is very similar to Title VII." *Staub*, 131 S.Ct. at 1189.

¹¹¹ ¹²¹ As the Supreme Court cautions, "we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" *Id.* at 174, 129 S.Ct. at 2349 (quoting *Fed Exp. Corp. v. Holowecki*, 552 U.S. 389, 393, 128 S.Ct. 1147, 1153, 170 L.Ed.2d 10 (2008)). And the ADEA requires more than what must ordinarily be proven under an analogous Title VII or USERRA action.⁹ See *Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 949-50 (10th Cir.2011) ("If we were to apply *Staub* directly to an age-discrimination case, the plaintiff would then only need to prove her supervisor's animus was somehow related to the termination and not that the animus was necessary to bring about the termination."). Because the 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. In so holding, we follow the same holding by the Tenth Circuit in *Simmons*, 647 F.Jd at 949-50.

⁹ Congress amended Title VII in 1991, adding that the discriminatory animus must be the "motivating factor" of the adverse action. 42 U.S.C. § 2000e-2(m); see also *Gross*, 557 U.S. at 174, 129 S.Ct. at 2349. But, even though it contemporaneously amended the ADEA in several ways, Congress did not add such a provision to the ADEA. *Gross*, 557 U.S. at 174, 129 S.Ct. at 2349. As the Court indicated in *Gross*, "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Id.* (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256, 111 S.Ct. 1227, 1234, 113 L.Ed.2d 274 (1991)).

However, *Staub* is primarily a case about agency principles and vicarious liability, and nothing in *Gross* is inconsistent with the application of agency principles to cat's paw claims under the ADEA. All relevant case law, including our own prior case law applying the cat's paw theory in ADEA cases and the Court's decision in *Staub*, suggests that it is appropriate to apply agency principles in determining vicarious liability of an employer. We have, for example, applied agency principles to determine the definition of an "employer" under the ADEA. See,

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e.g., *Garcia v. Copenhaver, Bell & Assocs., MD. 's, P.A.*, 104 F.3d 1256, 1266-67 (11th Cir.1997); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1495-96 (11th Cir.1993).

¹¹³¹ Sims urges us to apply *Staub's* agency principles as they relate to scienter, and suggests that the Supreme Court in *Staub* set forth agency principles that constitute a lower burden for plaintiffs in establishing cat's paw, vicarious employer liability, as compared to our prior ADEA case law. However, in this case we need not, and do not, decide whether *Staub* changes in any way our prior cat's paw ADEA cases with respect to agency principles as they relate to scienter, because we can accept Sims' invitation and assume *arguendo* that the *Staub* standard with respect to such agency principles does apply in the analysis for determining an employer's vicarious liability in ADEA cases. Even with this assumption, Sims cannot prevail because Sims cannot satisfy the required causation standard. In other words, with respect to agency principles relevant to the scienter element, we can assume *arguendo* that Sims must prove only *Staub's* agency standard (i.e., that Davis performed an act motivated by discriminatory animus that Davis intended to cause Sims' lay off),¹⁰ and we can assume *1337 *arguendo* that Sims has satisfied such proof. However, as noted above, an ADEA plaintiff must prove "but-for" causation-not mere proximate causation. Thus, to prevail, Sims must prove that Davis's animus was a "but-for" cause of, or a determinative influence on, Perkins' ultimate decision. For the reasons set out below, Sims cannot satisfy this causation standard.

¹⁰ The Court in *Staub* left open the issue of whether the biased supervisor must intend the precise adverse employment action that resulted or whether it would suffice to have intended an adverse, though different, employment action. *See Staub*, 131 S.Ct. at 1192 n. 2. Here, it is clear that Davis recommended that Sims be laid off and intended that Sims be laid off.

Assuming *arguendo* that a reasonable juror could find, as set forth in the *Staub* analysis, that Davis was motivated by discriminatory animus that was intended to cause Sims' lay off,¹¹ we hold that a reasonable juror could not conclude that Davis's animus was a "but-for" cause of Sims' termination. First, Perkins testified that, because he had been aware for approximately five months that he could not indefinitely put off the RIF, he had been constantly evaluating the supervisors and their relative performance. Second, he testified unequivocally that the

decision was his own decision based on his own observations and evaluations. In his opinion and based on his own personal observations, Sims was at the bottom of the list of supervisors in terms of quality and accuracy of their work product. Third, although he had consulted Davis in that they had been continually discussing the performance of all the supervisors, Perkins testified that Davis's opinion about Sims had been exactly the same as his own, thus merely confirming Perkins' own independent opinion. Fourth, in the individual meetings which Perkins and Davis held with each of the eight supervisors, in which each was asked for a recommendation as to the two who should be included in the RIF, every supervisor except for Sims himself recommended that Sims should be one of the two who had to be laid off. In sum, everyone whom Perkins consulted recommended that Sims be one of the two who had to be laid off-that is, everyone except Sims himself. In light of Perkins' own five-month long evaluations, in light of Perkins' own independent judgment that Sims was at the bottom of the list on performance, and in light of the unanimous opinion of all persons consulted (except for Sims himself), we conclude that a reasonable juror could not find that Davis's animus was a "but-for" cause of Sims' termination. It is clear that Davis's recommendation, even assuming *arguendo* it was tainted with some discriminatory animus, was not a "determinative influence" on Perkins' decision. *See Gross*, 551 U.S. at 176, 129 S.Ct. at 2350.

¹¹ We note that the evidence of discriminatory animus is rather weak. Sims asserts in his deposition, but not in his EEOC charge, that Davis told him at some unknown time that he was "old and slow." In May 2008, Davis allegedly said that Sims was slower in his work and that, if there was a cutback in staff, he would recommend Sims to be terminated, but, "Mind you, age has nothing to do with it." These are the only two instances where Sims alleges that Davis made discriminatory age-related remarks.

IV.

Because Sims has not established that a reasonable juror could find that Perkins' discriminatory animus was the "but-for" cause of his termination, and because Sims has similarly not established that Perkins acted as a mere cat's

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paw for Davis's discriminatory animus, we affirm the district court's grant of summary judgment in favor of MVM.

AFFIRMED.

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