STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
THOMAS FIXLER,	)	CHARGE NO.: **2017CA0260**
	)	
Complainant,	)	EEOC NO.: **21BA61932**
	)	
and	)	ALS NO.: **17-0335**
	)	
GENESCO, INC., d/b/a JOHNSTON & MURPHY	)	
	)	
	)	
Respondent.	)	

ORDER

This matter coming before the Commission pursuant to a Recommended Order and Decision and the Complainant's Exceptions filed thereto.

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named as an additional party of record. The Illinois Department of Human Rights did not participate in the Commission's consideration of this matter.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Pursuant to 775 ILCS 5/8A-104(E)(1) & (3), the Commission has **DECLINED** further review in the above-captioned matter. The parties are hereby notified that the Chief Administrative Law Judge's Recommended Order and Decision, entered on July 12, 2022, has become the Order of the Commission.

STATE OF ILLINOIS)
) **Entered this 14th day of February 2023.**
HUMAN RIGHTS COMMISSION)

Commissioner Elizabeth A. Coulson

Commissioner Demoya R. Gordon

Commissioner Stephen A. Kouri II

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF: THOMAS FIXLER, Complainant, v. GENESCO, INC. (d/b/a JOHNSTON & MURPHY), Respondent.	IDHR Charge No.: 2017-CA-0260 EEOC No.: 21-BA-61932 ALS Case No.: 17-0335 Chief Administrative Law Judge Brian Weinthal

RECOMMENDED ORDER AND DECISION

Before this administrative court is a motion for summary decision filed by Respondent Genesco, Inc., which does business under the trade name "Johnston & Murphy" ("Respondent"). Complainant Thomas Fixler ("Complainant") alleges that Respondent unlawfully discriminated against him based on age when the company ended his employment in March of 2016. Complainant filed a complaint of civil rights violations before the Illinois Human Rights Commission (the "Commission") on November 3, 2017. On December 21, 2018, Respondent filed a motion for summary decision under 56 Ill. Admin. Code § 5300.735(a), after which Complainant opposed Respondent's motion January 24, 2019. Respondent filed its reply on February 8, 2019, at which time this motion became ripe for decision. For the reasons discussed below, Respondent's motion for summary decision is GRANTED.[1]

[1] When Respondent filed for summary decision in December of 2018, it does not appear that a copy of the instant motion was served on the Illinois Department of Human Rights (the "Department") as required by 56 Ill. Admin. Code § 5300.730(a)(3)(A). To cure this deficiency, on April 28, 2022, the Commission served the Department with a copy of all pleadings associated with Respondent's motion for summary decision. *See* Cert. of Service (filed Apr. 28, 2022). The Department has not filed a brief or otherwise elected to intervene in this matter under 56 Ill. Admin. Code § 5300.730(b).

RESPECTIVE CONTENTIONS OF THE PARTIES

Respondent operates a chain of retail shoe and clothing stores throughout the United States and Canada.[2] On August 7, 1992, Complainant began working for Respondent as a sales associate. In September of 1993, Respondent elevated Complainant to the position of "Store Manager" (a singular leadership role at each of Respondent's commercial locations). Later, between 1995 and 2003, Complainant served as an "Area Supervisor" for Respondent, which made him responsible for five subordinate stores located in his assigned geographic region (Chicagoland). On June 8, 2003, Complainant returned to the role of "Store Manager," working initially at Respondent's flagship emporium on Michigan Avenue (in Chicago). In 2004, Complainant accepted an invitation from his supervisor to become the store manager at a location referred to by the parties as the "LaSalle Street store" (located at 33 N. LaSalle Street in Chicago).

At issue in this case are the events surrounding the closure of the LaSalle Street store in February of 2016, at which time Complainant's employment with Respondent came to an end. According to Complainant (who was fifty-nine years old in February of 2016), Respondent had a policy or practice of transferring store managers to different locations upon the closures of their respective stores until new leadership positions could be identified. *See* Complainant's Response to Respondent's Mot. for Summ. Decision ("Response") at 3 (filed Jan. 24, 2019). Complainant contends that Respondent discriminated against him based on age when it terminated his employment rather than transferring him to a new retail location upon the closure of the LaSalle Street store. *See id*. To support this charge, Complainant points to other store managers who were

[2] Unless otherwise indicated, the background facts summarized in this section are either uncontested or admitted by the parties in their respective submissions. Where facts are disputed, citations to documents and other exhibits appearing in the evidentiary record are provided.

offered different positions upon the shuttering of their stores, whereas Complainant was told by Respondent that his employment was finished. *See id*.

Respondent denies this version of events, arguing that at the time the LaSalle Street store closed, there were no available positions in the Chicagoland area into which Complainant could be transferred. *See* Mem. in Supp. of Mot. for Summ. Decision ("Mem.") at 4 (filed Dec. 21, 2018). Respondent further argues that such transfers were the exception (rather than the rule), and that Respondent had no official policy of retaining store managers whose stores were closing by placing them into different roles. *See* Reply in Supp. of Mot. for Summ. Decision ("Reply") at 6 (filed Feb. 8, 2019). While Respondent acknowledges that such transfers sometimes occurred (and that the title "Manager-in-Waiting" existed within the company), *see id*. at 7-8, Respondent claims that Complainant has no evidence that the decisions made in his particular situation were based on age. *See id*. at 6-8. Respondent also contends that after learning of the impending closure of the LaSalle Street store, Complainant made the voluntary election to retire—thereby precluding the characterization of his treatment as a "termination" or other adverse personnel action. *See* Mem. at 7-8. Respondent argues that for these reasons, Complainant cannot successfully articulate a *prima facie* case of age-related discrimination.

I. The Responsibilities of a Store Manager

From April of 2004 until March of 2016, Complainant's direct supervisor was Mr. Joseph Palm ("Palm"), who served as a "Regional Sales Manager" for Respondent. *See* Mem., Ex. 1 ("Palm Aff.") ¶¶ 2, 7. In connection with his affidavit in support of Respondent's motion for summary decision, Palm provides an excerpt from Respondent's human resources archive entitled "Job Description for Store Manager." *See* Palm Aff., Ex. A at 1. According to that document, Respondent's store managers are required to perform the following duties (among others):

- Monitor sales/inventory to ensure maximum turn of sales merchandise;
- Assist Area/Regional Manager with the development of individual store standards of performance in all key performance areas;
- Develop a weekly sales budget for the store with assistance from the Area/Regional Manager;
- Organize human and product resources to ensure maximum sales, productivity, and profits;
- Creatively organize shoe and accessory displays by category to maximize sales;
- Direct employees to attain personal sales goal weekly;
- Report at least weekly to the Area/Regional Manager on performance vs. standards; and
- Train and motivate employees in the utilization of the six basic selling steps daily.

See id. at 1-3. Complainant does not dispute that he was required to fulfill these responsibilities while working for Respondent, nor does he offer opposing or contradictory evidence showing that his duties as a store manager were different than those presented by Respondent.

II. The Assessment of Complainant's Performance as a Store Manager

As noted above, store managers are responsible for working with their Area/Regional Managers to assess individual store standards in key performance areas. To measure performance, Respondent relies on a monthly and annual aggregate report known as the Johnston & Murphy Metrics ("J.A.M.M.") Report. A further human resources document authenticated by Palm explains that the periodic J.A.M.M. Report acts a "report card" for the performance metrics imposed on Respondent's individual stores. *See* Palm Aff., Ex. B at 1. According to the year-to-date J.A.M.M. Reports for February of 2014, February of 2015, and February of 2016 (each of which summarizes the end of Respondent's previous fiscal year), the LaSalle Street store fell short of its annual sales goals by 11.9 percent, 21.0 percent, and 15.9 percent (respectively). *See* Palm

Aff., Ex. C at 3, Ex. D at 3, Ex. E at 3. By whatever supporting metrics are used to calculate the "Overall Rank" of each of Respondent's stores (which is the order in which the stores reflected on the J.A.M.M. Reports are listed), this placed the performance of the LaSalle Street store 81st out of 84 stores in 2014, 84th out of 84 stores in 2015, and 82nd out of 82 stores in 2016. *See id*.

This lackluster execution resulted in a significant number of individual performance warnings and admonitions delivered to Complainant by Palm between November of 2014 and September of 2015. During that time, Palm generated at least three reports for the LaSalle Street store (store "1821" on the J.A.M.M. Report) that featured the following reproaches:

- "Tough year at 1821, have to focus on getting better," Palm Aff., Ex. F at 1;
- "Need to improve in every metric category," *id*.;
- "We need to improve in all metrics. 1821 should not be on the bottom of the JAMM Report," *id*. at 2;
- "No more last place finishes. Show that you are not a last place manager," Palm Aff., Ex. G at 1;
- "Get off the last page of the JAMM Report. Make the necessary corrections and lead by example," *id*. at 2;
- "Send Richie and I an action plan to improve all metrics and improve on JAMM Report," *id*.;
- "Passion to make improvement on JAMM Report," Palm Aff., Ex. H at 1;
- "Well below company avg in every YTD metric," *id*.;
- "Keep the team motivated for the Holiday Season. Improve from last place position on JAMM Report," *id*.; and
- "Work as a team to improve JAMM Report standing. Currently in last place out of 84 Classic stores," *id*. at 2.

The foregoing reports set specific deadlines by which Complainant was supposed to correct the performance deficiencies noted. *See, e.g.*, Palm Aff., Ex. F at 2. Respondent also required

Complainant to affix his digital "signature" to the reports to confirm that he had received them. *See, e.g.*, Palm Aff., Ex. H at 2 (indicating Complainant's name).

Complainant attempts to refute Respondent's evidence of subpar performance in two ways. Initially, Complainant points to antiquity, claiming that when he worked at Respondent's Michigan Avenue location in 2003 and 2004, the store enjoyed "record sales." *See* Response, Ex. 1 ("Fixler Aff.") ¶ 22. Complainant notes that he received an award in 2004 for achieving the "largest dollar increase" at the Michigan Avenue store, *see id*. ¶ 23, and that as the result of his efforts, Respondent selected him as a member of the company's "Dream Team" that same year (*i.e.*, in 2004). *See id*. ¶ 24. Complainant even provides a photocopied picture of the "Dream Team" windbreaker that was given to him by Respondent to substantiate his outstanding performance at that time. *See* Response, Ex. 3.

Next, Complainant argues that because the LaSalle Street store was in a business district rather than a commercial shopping district (like the Michigan Avenue store), there was no way the LaSalle Street store could ever succeed. *See* Response at 7. Complainant asserts that at the time he became the store manager of the LaSalle Street store, foot traffic in the area was low, and most customers who visited the store only did so to buy a single item of need (such as a belt or a shoelace). *See* Fixler Aff. ¶¶ 37-38. Complainant also contends that because the LaSalle Street store was closed on Saturdays and Sundays, *see id*. ¶ 30, it could never achieve the sales goals set by Respondent in the J.A.M.M. Report. *See id*. ¶ 31. Although Complainant claims he implemented certain "outside of the box" pitches to attract additional customers and increase sales, *see id*. ¶¶ 39-40, these ideas were ultimately unsuccessful. Nevertheless, Complainant argues that any underwhelming metrics associated with the LaSalle Street store should not be attributed to

him, as the LaSalle Street store was "incomparable to all of Respondent's other stores." *See* Response at 7.

III. The Closure of the LaSalle Street Store

Respondent's multi-year lease on the LaSalle Street store was scheduled to expire at the end of February of 2016. Palm Aff. ¶ 19. Because Respondent's landlord was planning to raise the rent upon renewal of the lease—and because sales had sharply declined—Respondent's President and its Vice President of Sales made the decision to permanently close the LaSalle Street store upon the impending expiration of the lease. *See id*. ¶ 20; *see also* Mem., Ex. 2 at 22-23. Respondent claims this decision was predicated on "failing sales performance." Mem., Ex. 2 at 23. Complainant appears to agree, admitting: "We believe Respondent when it states that it closed the LaSalle Street store where [Complainant] worked because the store was not doing well." Response at 4. As such, there appears to be no genuine dispute that negative profitability forced the LaSalle Street store out of business, although Complainant decries any responsibility for the flat sales that ultimately led to the store's demise.

IV. The End of Complainant's Employment

The parties disagree regarding whether Complainant was terminated or whether he voluntarily elected to retire. On January 13, 2016, a human resources executive working for Respondent (Angela Kusnir) sent an internal e-mail to Respondent's Employee Relations Supervisor advising that she (Kusnir) had spoken to Palm, who had indicated that the LaSalle Street store would be closing on February 29, 2016. *See* Response, Ex. 13. The message went on to note that only Complainant and a sales associate named William Gaudry ("Gaudry") still worked at the LaSalle Street store, and that Palm would be notifying these two employees of the

impending closure of the store "in a couple weeks." *Id*. The e-mail further announced: "[Palm] does not have positions for them anywhere else so the plan is to lay them off." *Id*.

On February 1, 2016, Palm traveled to Chicago to notify Complainant and Gaudry that the LaSalle Street store would be closing at the end of the month. *See* Mem., Ex. 2 at 18. After an inadvertent e-mail alerted some number of company personnel to the closure of the LaSalle Street store in advance, Palm preemptively called Complainant and Gaudry to deliver this news on February 1, 2016, after which Palm's first in-person meeting with these employees occurred on February 2, 2016. *See* Mem., Ex. 2 at 18-19. In communicating Respondent's plans for the LaSalle Street store, Palm purports to have individually advised Complainant and Gaudry that he had no other available positions to offer, and thus "could only offer severance and provide information on [Respondent's] retirement benefit plan." Palm Aff. ¶ 21.

Complainant and Gaudry recall further elements of their respective conversations with Palm that Respondent (via Palm) denies. For example, Gaudry claims that after asking Palm about other positions within the company, Palm mentioned to Gaudry that Respondent was considering opening a store near Midway Airport and that he (Palm) might later consider Gaudry for a position at that prospective store if one became available. *See* Response, Ex. 5 ("Gaudry Aff.") ¶¶ 24, 26. After learning of this supposed exchange between Gaudry and Palm, Complainant contends that he confronted Palm, who then indicated that he was "just joking" when he suggested that Gaudry might be considered for a subsequent position working for Respondent. *See* Fixler Aff. ¶¶ 45-46.

Palm does not recall engaging in conversations regarding continued employment and claims that Complainant never asked him about transferring to a different job when the LaSalle Street store closed. Palm Aff. ¶ 23. Yet while the details of these conversations might differ, there appears to be no dispute that Palm did not have any immediately available local positions for

Complainant or Gaudry to fill in February of 2016. Indeed, Respondent did not have a store near Midway Airport at that time, nor does Complainant present evidence in this case showing that Palm had other open positions in the Chicagoland area for which Complainant was qualified to perform work. As such, having been given no option to continue working for Respondent, Complainant accepted a pre-determined severance package and applied for (and received) a lump-sum retirement benefit on March 18, 2016. *See* Mem., Ex. 2 at 34.

V. The Obligation to "Transfer" Complainant in Lieu of Discharge

Complainant's main allegation in this case is that upon the closure of a retail store, Respondent would automatically find alternative assignments for younger store managers to avoid losing them as employees. To accomplish this unlawful aim, Complainant claims that for any store managers who "were not 60 years old when their stores closed," Respondent would transfer these individuals to different commercial locations at which they would serve as "Managers-in-Waiting" or "Assistant Managers" until new leadership positions became available. *See* Response at 3. Complainant contends that this practice was an ingrained or *de facto* aspect of Respondent's regular business operations, describing the procedure as Respondent's "transfer policy" and suggesting at multiple points that "[Respondent's] policy had always been to offer a transfer to the manager to another position within the company." *See, e.g.*, Response at 3.

Respondent concedes that certain store managers were periodically transferred to "Manager-in-Waiting" or "Assistant Manager" positions upon the closure of their respective stores, but denies that such decisions were based on age. *See* Reply at 6-7. According to Respondent, if an alternative position was open and available within the same region at the time one of its retail stores closed, Respondent would consider offering that position to a store manager that the company wished to retain. *See* Mem. at 8-9. Unspoken behind this explanation is the idea

that for any number reasons, Respondent would also identify certain store managers (like Complainant) that it did *not* wish to retain upon the closure of specific stores. But in any event, Respondent presents evidence showing that at the time the LaSalle Street store closed, only five management-level positions were available in the entire company. *See* Mem., Ex. 2 at 19-20. Two of these were store manager positions on the east coast—both of which were outside the region controlled by Palm (*i.e.*, the region in which Complainant worked). *See id.* The remaining three positions were assistant manager roles located in Niagara Falls (NY), Toronto (Ontario, CAN), and Grand Rapids (MI). *See id*. at 20.

VI. The Experiences of Complainant's Comparators

To demonstrate that other store managers received more favorable treatment from Respondent, Complainant points to four co-workers that he believes were similarly situated. *See* Response at 17. For each of these store managers, Complainant claims that upon the closure of the respective store at which he or she worked, Respondent offered to transfer that individual, rather that effecting a termination. *See id*. The other store managers to whom Complainant compares himself are: (1) Steven Gran; (2) Steve Lapinski; (3) Veronica Hailey; and (4) Gaudry. *See id*. The evidence associated with each of these employees is set forth below, in addition to evidence of a fifth potential comparator that Complainant does not discuss.

A. Steven Gran

In April of 2013, Respondent closed its store located in Glendale, Wisconsin. *See* Mem., Ex. 2 at 26. At that time, the store was managed by Steven Gran, who was twenty-five (25) years old. *See id*. Upon the closure of the Glendale store, Respondent transferred Gran to a manager-in-waiting position at a store located in Kenosha, Wisconsin. *See* Response, Ex. 11 at JM_000132-000133. Four months later, Respondent moved Gran to an assistant manager position in

Rosemont, Illinois. *See id*. No information is provided regarding Respondent's rationale for closing the Glendale store, nor does either party present evidence to suggest that Gran was experiencing any performance-related issues at the time the Glendale store closed. As with each of Complainant's alleged comparators, Respondent claims that Gran's transfer in 2013 was contingent on the availability of an open role into which Gran could be transferred within the same region. *See* Reply at 7-8.

B. Steve Lapinski

Steve Lapinski is at least two years *older* than Complainant. *See* Mem., Ex. 2 at 30. In 2011—when Lapinski was fifty-seven (57) years old—the Michigan Avenue store at which he worked as a store manager was closed by Respondent, whereupon Lapinski was transferred to a managerial role at a different location in the Chicagoland area. *See id*. at 29. No information is provided by either party regarding the closure of the Michigan Avenue store, nor does either party offer evidence to suggest that Lapinski was underperforming. Like Complainant's other comparators, Respondent asserts that Lapinski's transfer in 2011 was contingent on the availability of an open managerial position into which Lapinski could be transferred within the same region. *See id*. at 30.

C. Veronica Hailey

Veronica Hailey was forty-five (45) years old in 2010, at which time Respondent closed its store in Schaumburg, Illinois at which she worked as a store manager. *See id*. at 27. Although Respondent concedes that Hailey's performance was "below company average," *see id*. at 28-29, Palm offered Hailey an assistant manager position at the Michigan Avenue store when the Schaumburg location closed. *See id*. at 28. Respondent claims that it extended this offer to Hailey "because the position was available," *see id*., and because Palm believed that Hailey's performance

might improve working for the store manager at the Michigan Avenue store (presumptively Lapinski at that time). *See id*. at 28-29. Notwithstanding the availability of this role in proximity to her former store, Hailey rejected the proposed transfer and apparently sought employment elsewhere. *See id*. at 28.

D. William Gaudry

Although Complainant points to Gaudry to show more favorable treatment of a co-employee, Gaudry was a year older than Complainant and was divested of his employment at the same time as Complainant upon the closure of the LaSalle Street store. *See* Gaudry Aff. ¶ 23. Gaudry was also a "Sales Associate" at the time the LaSalle Street store closed, as opposed to a similarly situated managerial-level employee. Nevertheless, Complainant looks to Gaudry for historical evidence, noting that Gaudry was formerly a supervisory employee who Respondent previously transferred upon the closure of one of its stores. *See* Response at 9-10.

Gaudry began working for Respondent in 1978, when he was twenty-two (22) years old. Gaudry Aff. ¶ 3. He was eventually promoted to store manager, at which time he worked at Respondent's retail store in Lombard, Illinois. *Id*. ¶¶ 4-5. Gaudry maintains that in 1991, his title was changed to "Manager-in-Waiting," after which he was transferred to Respondent's Schaumburg location. *Id*. ¶ 6. Thereafter, in 1998, Gaudry was transferred to Respondent's "Harlem and Irving store" (in Chicago), where he worked until Respondent closed that store several years later. *Id*. ¶ 9.

Gaudry claims that his title remained "Manager-in-Waiting" for a lengthy period (almost seventeen (17) years), *id*. ¶ 11, and that his transfer to a new location in Bloomingdale, Illinois was essentially automatic upon the closure of the "Harlem and Irving store." *Id*. ¶¶ 10, 12. Gaudry was at least forty-two (42) years old at the time this transfer occurred. *See id*. ¶ 3. Later, Gaudry

was laid off when Respondent's Bloomingdale store closed in 2008, *id*. ¶¶ 13-14, although a subsequent protest of age discrimination by Gaudry resulted in Respondent reassigning Gaudry to work for Complainant as a sales associate at the LaSalle Street store approximately two weeks after the Bloomingdale store closed. *Id*. ¶¶ 19-21.

E. Michelle McCracken

Absent from Complainant's presentation of the evidence in this case is any discussion of Michelle McCracken. McCracken was a store manager who previously worked in Palm's region. *See* Mem., Ex. 2 at 31. Her name was provided by Respondent in response to an interrogatory propounded by Complainant that sought to identify any store managers who were terminated "in the same year as Complainant" rather than "offered an alternative position or store." *Id*. While the circumstances surrounding McCracken's termination are unclear from the evidence before this administrative court, she apparently sits in parity to Complainant in that she was a store manager who was fired (rather than transferred) at Palm's direction. *See id*. McCracken was forty-three (43) years old at the time she was terminated by Respondent in 2016. *Id*.

VII. The Composition of Respondent's Workforce

In his affidavit opposing Respondent's motion for summary decision, Complainant claims that while he worked as an "Area Supervisor" for Respondent from 1995 through 2003, he traveled on behalf of the company and attended many "high-level company meetings" at which he was able to make physical observations of Respondent's upper-ranking workforce. *See* Fixler Aff. ¶ 13. According to Complainant, "[T]he majority of the managers who attended the yearly meetings were in their 20s and low 30s." *Id*. ¶ 17. Gaudry offers a similar assessment, noting that in or around 2008, he "observed that the managers who worked for Respondent were younger than [him], with most appearing to be in their 20s." Gaudry Aff. ¶ 16. Complainant attempts to ground

these observations by adding that when he attended meetings of the senior leadership between 1995 and 2003, he would often hear Respondent's president discuss the company's hiring priorities, "such as the need for younger and more female employees." Fixler Aff. ¶ 15. Complainant contends that such comments constitute additional "direct" evidence of age discrimination on the part of Respondent. *See* Response at 18.

FINDNIGS OF FACT

I make the following findings of fact based on the evidence submitted in this case and the pleadings before me:

1. On August 7, 1992, Complainant began working for Respondent as a sales associate.

2. In September of 1993, Respondent elevated Complainant to the position of "Store Manager" (a singular leadership role at each of Respondent's commercial locations).

3. In 2004, Complainant accepted an invitation from his supervisor to become the store manager at the LaSalle Street store.

4. From April of 2004 until March of 2016, Complainant's direct supervisor was Palm, who served as a "Regional Sales Manager" for Respondent.

5. Store Managers working for Respondent were required to perform the following duties (among others): (a) monitor sales/inventory to ensure maximum turn of sales merchandise; (b) assist Area/Regional Managers with the development of individual store standards of performance in all key performance areas; (c) develop a weekly sales budget for the store with assistance from the Area/Regional Manager; (d) organize human and product resources to ensure maximum sales, productivity, and profits; (e) creatively organize shoe and accessory displays by category to maximize sales; (f) direct employees to attain personal sales goal weekly; (g) report at

least weekly to the Area/Regional Manager on performance vs. standards; and (h) train and motivate employees in the utilization of the six basic selling steps daily.

6. To measure performance, Respondent relies on a monthly and annual aggregate report known as the Johnston & Murphy Metrics ("J.A.M.M.") Report. The periodic J.A.M.M. Report acts a "report card" for the performance metrics imposed on Respondent's individual stores.

7. According to the year-to-date J.A.M.M. Reports for February of 2014, February of 2015, and February of 2016 (each of which summarized the end of Respondent's previous fiscal year), the LaSalle Street store fell short of its annual sales goals by 11.9 percent, 21.0 percent, and 15.9 percent (respectively). This placed the performance of the LaSalle Street store 81st out of 84 stores in 2014, 84th out of 84 stores in 2015, and 82nd out of 82 stores in 2016.

8. A significant number of individual performance warnings and admonitions were delivered to Complainant by Palm between November of 2014 and September of 2015. During that time, Palm generated at least three sales reports for the LaSalle Street store (store "1821" on the J.A.M.M. Report) that included the following reproaches: (a) "Tough year at 1821, have to focus on getting better;" (b) "Need to improve in every metric category;" (c) "We need to improve in all metrics. 1821 should not be on the bottom of the JAMM Report;" (d) "No more last place finishes. Show that you are not a last place manager;" (e) "Get off the last page of the JAMM Report. Make the necessary corrections and lead by example;" (f) "Send Richie and I an action plan to improve all metrics and improve on JAMM Report;" (g) "Passion to make improvement on JAMM Report;" (h) "Well below company avg in every YTD metric;" (i) "Keep the team motivated for the Holiday Season. Improve from last place position on JAMM Report;" and (j)

"Work as a team to improve JAMM Report standing. Currently in last place out of 84 Classic stores."

9. The sales reports created by Palm set specific deadlines by which Complainant was supposed to correct the performance deficiencies noted. Respondent was also required to affix his digital "signature" to the reports to confirm that he had received them.

10. Respondent's multi-year lease on the LaSalle Street store was scheduled to expire at the end of February of 2016.

11. Because Respondent's landlord was planning to raise the rent upon renewal of the lease—and because sales had sharply declined—Respondent's President and its Vice President of Sales made the decision to permanently close the LaSalle Street store on January 13, 2016.

12. The parties do not disagree that Respondent made to the decision to close the LaSalle Street store based on "failing sales performance."

13. On January 13, 2016, a human resources executive working for Respondent sent an internal e-mail advising that she had spoken to Palm, who had indicated that the LaSalle Street store would be closing on February 29, 2016. The message went on to note that only Complainant and Gaudry still worked at the LaSalle Street store, and that Palm would be notifying these two employees of the impending closure of the store "in a couple weeks." The internal e-mail further announced: "[Palm] does not have positions for them anywhere else so the plan is to lay them off."

14. On February 1, 2016, Palm traveled to Chicago to notify Complainant and Gaudry that the LaSalle Street store would be closing at the end of the month. His first in-person meeting with these employees occurred on February 2, 2016.

15. When Palm spoke with Complainant on February 2, 2022, he advised that the LaSalle Street store was closing, and that he (Palm) had no available positions into which Complainant could be transferred.

16. Complainant accepted a pre-determined severance package and applied for (and received) a lump-sum retirement benefit on March 18, 2016.

17. At the time the LaSalle Street store closed, only five management-level positions were available. Two of these were store manager positions on the east coast—both of which were outside the region controlled by Palm. The remaining three positions were assistant manager roles located in Niagara Falls (NY), Toronto (Ontario, CAN), and Grand Rapids (MI).

18. In April of 2013, Respondent closed its store located in Glendale, Wisconsin. The store was managed by Steven Gran, who was twenty-five (25) years old.

19. Upon the closure of the Glendale store, Respondent transferred Gran to a manager-in-waiting position at a store located in Kenosha, Wisconsin.

20. Four months later, Respondent moved Gran to an assistant manager position in Rosemont, Illinois.

21. Steve Lapinski is at least two years *older* than Complainant.

22. In 2011—when Lapinski was fifty-seven (57) years old—the Michigan Avenue store at which he worked as a store manager was closed by Respondent, whereupon Lapinski was transferred to a managerial role at a different location in the Chicagoland area.

23. Veronica Hailey was forty-five (45) years old in 2010, at which time Respondent closed the store in Schaumburg, Illinois at which she worked as a store manager.

24. Although Respondent concedes that Hailey's performance was "below company average," Palm offered Hailey an assistant manager position at the Michigan Avenue store when the Schaumburg location closed.

25. Gaudry began working for Respondent in 1978, when he was twenty-two (22) years old. He was eventually promoted to store manager, at which time he worked at Respondent's retail store in Lombard, Illinois. In 1991, his title was changed to "Manager-in-Waiting," after which he was transferred to Respondent's Schaumburg location. Thereafter, in 1998, Gaudry was transferred to Respondent's "Harlem and Irving store" (in Chicago), where he worked until Respondent closed that store several years later.

26. Gaudry was transferred to a new location in Bloomingdale, Illinois upon the closure of the "Harlem and Irving store." He at least forty-two (42) years old at the time this transfer occurred.

27. Gaudry was subsequently terminated when Respondent's Bloomingdale store closed in 2008, although a protest of age discrimination resulted in Respondent reassigning Gaudry to work for Complainant as a sales associate at the LaSalle Street store approximately two weeks after the Bloomingdale store closed.

28. McCracken was a store manager who previously worked in Palm's region. She was terminated in the same year as Complainant and Gaudry and was not transferred or offered an alternative position. She was forty-three (43) years old at the time she was terminated by Respondent.

CONCLUSIONS OF LAW

I make the following conclusions of law based on the evidence submitted in this case and the pleadings before me:

1. This administrative court has jurisdiction over this matter and over the parties who have appeared in this case.

2. As an individual over the age of forty (40) years, Complainant is a member of a statutorily protected class under the Illinois Human Rights Act.

3. Respondent was previously Complainant's "employer" as that term is defined under the Illinois Human Rights Act.

4. Complainant was terminated by Respondent in February of 2016.

5. Complainant has failed to introduce any direct or circumstantial evidence of age discrimination that would be admissible at a public hearing.

6. Complainant fails to introduce evidence creating a genuine issue of material fact on each element of his *prima facie* case of age discrimination under the indirect, burden-shifting approach that is alternatively used to analyze such claims.

7. Complainant cannot demonstrate that he was performing his work in a satisfactory manner when he was terminated by Respondent in February of 2016.

8. Complainant fails to introduce evidence showing that Respondent treated a similarly situated, substantially younger employee more favorably at or near the time Complainant was terminated by Respondent in February of 2016.

9. The comparators to whom Complainant attempts to liken himself were each involved in reductions in force that were too attenuated in time and circumstance to be available to Complainant as a viable basis to allege disparate treatment based on age.

10. Complainant fails to show the existence of a triable issue of fact that might prove (or lead to the inference) that Respondent terminated him for a reason related to his age.

11. Respondent is entitled to judgment as a matter of law.

LEGAL STANDARD

Section 8-106.1 of the Illinois Human Rights Act authorizes any party to move for summary decision "as to all or any part of the relief sought." 775 ILCS 5/8-106.1. Summary decision is the "procedural analogue" to a motion for summary judgment filed under the Illinois Code of Civil Procedure. *Cano v. Vill. of Dolton*, 250 Ill. App. 3d 130, 138, 620 N.E.2d 1200 (1st Dist. 1993). As such, summary decision (or summary judgment) is only granted where the pleadings, depositions, admissions, and affidavits on file—when viewed in the light most favorable to the non-moving party—demonstrate that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Adams v. N. Illinois Gas Co.*, 211 Ill. 2d 32, 43 809 N.E.2d 1248 (2004). "Material" facts are those that might affect the outcome of the case under the applicable substantive law. *GreenPoint Mortgage Funding, Inc. v. Hirt*, 2018 IL App (1st) 170921, ¶ 17, 97 N.E.2d 66 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

Summary judgment is not granted where material facts are in dispute, or where reasonable persons might draw different inferences from undisputed facts in the record. *Adams*, 211 Ill. 2d at 43. At the same time, a court may not weigh the evidence or assess the credibility of a witness when ruling on a motion for summary judgment. *See Hollenbeck v. City of Tuscola*, 2017 IL App (4th) 160266, ¶ 34 (citing *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396, 893 N.E.2d 303 (2008)). This is because the purpose of summary judgment is not to try a question of fact, but rather to determine if one exists. *See Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186, 766 N.E.2d 1118 (2002). Because summary judgment is a "drastic" method of resolving litigation, it is generally granted only where the right of the moving party is "clear and free from doubt." *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill. 2d 511, 518, 622 N.E.2d 788 (1993) (citations omitted).

DISCUSSION

Under the Illinois Human Rights Act, a complainant can prove discrimination either through direct and/or circumstantial evidence, or through the indirect, burden-shifting approach first announced by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Here, because Complainant relies on certain "direct" evidence of discrimination to avoid summary judgment, this administrative court will analyze the facts under both theories of persuasion. Yet for either approach, Complainant is unable to show a genuine issue of material fact that might lead to the conclusion that Respondent treated him unlawfully (or even differently) based on his age.

I. Complainant Fails to Show Direct and/or Circumstantial Evidence of Discrimination

To support his allegations of age discrimination, Complainant presents affidavits in which both he and Gaudry claim that after visually inspecting Respondent's workforce over some number of years, the two men concluded that most store managers were "in their 20s and low 30s." *See, e.g.*, Fixler Aff. ¶ 17. But without corroborating evidence (which Complainant has failed to offer), these observations are nothing more than speculation, which is "insufficient to avoid summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328, 722 N.E.2d 227 (2d Dist. 1999) (*citing Sanchez v. Firestone Tire & Rubber Co.*, 237 Ill. App. 3d 872, 874, 604 N.E.2d 948 (3d Dist. 1992)). Indeed, because speculation is not admissible at trial, Complainant cannot advance this evidence to refute summary judgment by claiming that Respondent had a proclivity towards hiring younger employees. *See Rodriguez v. Frankie's Beef/Pasta & Catering*, 2012 IL App (1st) 113155, ¶ 14, 976 N.E.2d 507 ("Evidence not admissible at trial cannot be used to support or oppose a motion for summary judgment."). As such, any 'eyeball' conjecture regarding

the average or relative ages of Respondent's other workers is not a permissible form of direct evidence on which Complainant can rely to oppose summary judgment.

Similarly unavailing is Complainant's charge that Respondent's president periodically referred to the company's "need for younger and more female employees." Fixler Aff. ¶ 15. As a temporal matter, Complainant asserts that he overheard these statements while he worked as an area supervisor in 2003—which was thirteen *years* before Respondent purportedly terminated him based on age in 2016. Under these facts, the distance between the alleged statements and the adverse personnel action at issue is simply too attenuated to allow for the inference that Respondent was carrying through on a contiguous plan to eliminate older employees when it ended Complainant's employment nearly a decade-and-a-half later. *See Young v. Ill. Human Rights Comm'n*, 2012 IL App (1st) 112204, ¶ 44, 974 N.E.2d 385 ("To be actionable, there must be a causal connection between the discriminatory remark and the adverse employment action, or the comment must be made contemporaneously with the adverse action.").

And even if the passage of time did not ablate the significance of this evidence, I find that without some further proof of discriminatory animus or motivation, the comments attributed to Respondent's president are merely ambiguous statements of brand reinvention that do not give rise to an inference of discrimination. *See Sola v. Human Rights Comm'n*, 316 Ill. App. 3d 528, 542, 736 N.E.2d 1150 (1st Dist. 2000). The desire to hire more younger employees does not imply a corresponding threat to eliminate older workers, nor does Complainant offer evidence showing that Respondent carried through on its purported overture to eradicate senior employees at the time such statements were made. I also find that by including "female employees" in the comments made by Respondent's president, the natural construal of these words suggests nothing more than a desire to diversify Respondent's workforce to connect with additional target customers.

Complainant presents no evidence that would enable me to interpret these remarks in a contrary or different manner.

In sum, under the direct approach, Complainant fails to offer admissible evidence creating a genuine issue of fact that would preclude Respondent's request for judgment as a matter of law.

II. Complainant Fails to Show Evidence of Discrimination by Burden-Shifting

Without sufficient direct evidence to maintain his cause of action for age discrimination, Complainant must proceed using the indirect, burden-shifting approach developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*. The three-stage analysis articulated in *McDonnell Douglas* was subsequently adopted by the Illinois Supreme Court in *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 178, 545 N.E.2d 684 (1989). To prove discrimination under those cases, Complainant must first establish a *prima facie* case of discrimination by a preponderance of the evidence. *Owens v. Dep't of Human Rights*, 403 Ill. App. 3d 899, 919 (1st Dist. 2010) (citing *Zaderaka*, 131 Ill. 2d at 179-80). If Complainant does so successfully, a rebuttable presumption arises that Respondent engaged in unlawful discrimination against him. *See id*. To overcome that presumption, Respondent must articulate (but not prove) a legitimate, non-discriminatory reason for its employment decision. *See Zaderaka*, 131 Ill. 2d at 179. If Respondent does so, the rebuttable presumption drops away, at which point Complainant must prove—again, by a preponderance of the evidence—that Respondent's articulated reason was really a pretext for unlawful discrimination. *See id*. Regardless of the shifting burden of production, the burden of persuasion on the question of unlawful discrimination rests always with Complainant. *See id*. (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 207 (1981)).

Viewing the evidence in the light most favorable to Complainant (the non-moving party), I find that under the burden-shifting framework summarized above, no genuine issue of material fact exists in this matter, and that Respondent is entitled to judgment as a matter of law.

A. Complainant's *Prima Facie* Case

To establish a *prima facie* case of age discrimination in a reduction-in-force case, Complainant must show: (1) that he was a member of a protected class; (2) that he was performing his work satisfactorily; (3) that he suffered an adverse employment action despite his satisfactory performance; and (4) that Respondent treated a similarly situated, substantially younger employee more favorably under similar circumstances. *In re Diaz*, 2019 ILHUM LEXIS 1029, at *6 (July 24, 2019) (citing *Marinelli v. Human Rights Comm'n*, 262 Ill. App. 3d 247, 253 (2d Dist. 1994)). The Illinois Human Rights Act provides that all persons over forty (40) years of age are members of a statutorily protected class, *see* 775 ILCS 5/1-103(A), while a "substantially younger" employee must be at least ten (10) years younger than Complainant. *See Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 619 (7th Cir. 2000) (citing *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 893 (7th Cir. 1997)); *see also In re Stone v. Bourn and Koch Machine Tool Co.*, 1998 ILHUM LEXIS 236, at *20 (July 24, 1998). The parties do not dispute that Complainant was over forty, but they disagree markedly regarding the remaining factors necessary to maintain a *prima facie* case of age-based discrimination.

1. The Adverse Employment Action

Addressing the *prima facie* factors slightly out of order, there is no question that Complainant suffered an adverse employment action in this matter. Two weeks before Palm traveled to Chicago to advise Complainant and Gaudry of the closure of the LaSalle Street store, an internal e-mail among Respondent's human resources professionals advised that because Palm

did not have alternative positions for Complainant and Gaudry, the plan was to "lay them off." *See* Response, Ex. 13. A "layoff" is a discharge for the purposes of the Illinois Human Rights Act, *see Corp. Bus. Cards, Ltd. v. Ill. Human Rights Comm'n*, 2012 IL App (1st) 112142-U, ¶ 44 (citing Black's Law Dictionary at 906 (8th ed. 2004)), and the Illinois courts have found that a layoff undertaken by an employer is a sufficiently adverse personnel action to support a *prima facie* case of discrimination. *See Interstate Material Corp. v. Human Rights Comm'n*, 274 Ill. App. 3d 1014, 1022-23, 654 N.E.2d 713 (1995). These prior rulings are instructive in this matter, where Palm traveled to Chicago for the express purpose of permanently ending Complainant's employment. Regardless of whether that effort is termed a "layoff," a "reduction-in-force," or a "termination," the resulting situation—in which Complainant found himself without employment—is sufficiently adverse to sustain his *prima facie* case.

Respondent challenges this version of events, arguing that it took no adverse personnel action against Complainant, who "voluntarily retired" upon learning of the closure of the LaSalle Street store. *See* Mem. at 7. The problem with this contention, however, is that Complainant was given no option *but* to retire upon the closure of the LaSalle Street store. When Palm spoke with Complainant on February 2, 2022, he advised that the LaSalle Street store was closing, and that he (Palm) had no available positions into which Complainant could be transferred. This is known as getting "fired" in any context other than Respondent's pleadings. And while Respondent refutes this interpretation of the facts by pointing to *Cigan v. Chippewa Falls School District*, 388 F.3d 331 (7th Cir. 2004), that case offers no support for Respondent's position.

In *Cigan*, a disabled schoolteacher applied for retirement after the superintendent announced that he planned to recommend that the board of education not renew the schoolteacher's contract for the following academic year. *See id*. at 332. Although the schoolteacher gave notice

of her retirement six months prior to the end of the academic year in which the superintendent had communicated his intentions, the schoolteacher's election to retire obviated any subsequent consideration of her contract by the board of education, and she was permitted to continue working for the duration of her final year without any impact on her pay, benefits, or position. *See id*. at 333. Thereafter, the schoolteacher brought a lawsuit for disability discrimination, arguing that she was not required to show any immediately adverse consequences to her job "when a prospect of discharge lurks in the background." *Id*. Rejecting the schoolteacher's claims, the Seventh Circuit found that the trial court had properly granted summary judgment in the school district's favor.

In ruling for the employer, the Seventh Circuit found that notice of a possible discharge could not be described as a "completed discharge" where the employer had not "undermine[d] the employee's position, perquisites, or dignity in the interim." *Id*. In so holding, the Seventh Circuit engaged in a lengthy discussion of the events that could have halted or interrupted the employee's potential discharge in *Cigan*, ultimately finding that the prospect of termination in that case was too speculative to allow a cause of action for discrimination to proceed:

> Even if, as Cigan contends, this superintendent's earlier recommendations had carried the day with the board of education, how could a court know the probability that *this* recommendation would do so? How, indeed, could a judge or jury be confident that the superintendent would not have changed his mind once Cigan responded to the initial proposal? Perhaps Cigan could have shown that she was still able and willing to perform; arrangements and assurances satisfactory to both sides may have been possible. School districts give teachers several opportunities to respond and justify their conduct, and the [Americans with Disabilities Act] itself requires a collaborative process to come up with accommodations; to assume at the outset that these exchanges are pointless, as Cigan does, is to deny the virtue of statutes and collective bargaining agreements that provide for the exchange. . . . The only way to know how matters will turn out is to let the process run its course. Litigation to determine what *would* have happened, had the employee contested the recommendation, is a poor substitute for the actual results of real deliberation within the employer's hierarchy.

Id. at 333-34 (emphases in original). These observations doom Respondent's arguments in the present case and aptly demonstrate why the facts of *Cigan* are inapposite. Here, there was nothing "prospective" or "potential" about Complainant's termination. When Palm arrived in Chicago on February 2, 2022, Complainant was going to be fully and permanently terminated when the LaSalle Street store closed on March 1, 2016. There was nothing he could have done to avoid this outcome, nor did his subsequent efforts to collect the retirement benefits he was owed somehow cast his decision to retire as "voluntary." On the contrary, Complainant was terminated by Respondent without an alternative option to continue working, and his termination constitutes a sufficiently adverse employment action on which to maintain this prong of his *prima facie* case.

2. Complainant's Performance

Despite the adverse employment action he suffered, Complainant fails to show that he was performing his work in a satisfactory manner at the time of his discharge. As the manager of the LaSalle Street store, Complainant's primary responsibilities were to drive sales and liaise with regional sales managers to achieve specific milestones in key performance areas. *See* Palm Aff., Ex. A at 1-3. Complainant was aware of these responsibilities before accepting a leadership position at the LaSalle Street store and does not offer evidence suggesting that his duties were otherwise. In fact, Complainant walks this administrative court through a litany of creative measures he employed to improve sales at the LaSalle Street store, arguing that he should receive credit for his ideas as an attempt to "make the proverbial lemonade from lemons." Response at 8-9. Complainant repeatedly describes his work as "stellar" and claims that any effort by Respondent to vilify his performance as a store manager is a "reinvention of history." *Id*. at 16.

Yet for as self-assured as Complainant appears to be of his stewardship of the LaSalle Street store, the evidence submitted by Respondent thoroughly contradicts Complainant's mental

image of his successes in that role. At the time of Complainant's discharge in 2016, the LaSalle Street store was nearly 16.00 percent shy of its annual sales goal and ranked dead last (82nd out of 82 stores) in the performance metrics measured by the annual J.A.M.M. Report. *See* Palm Aff., Ex. E at 3. While Complainant contends that Respondent "never told him that he had poor performance," *see* Response at 12, such statements represent the true "reinvention of history" in this case, as Complainant's digital signature appears on multiple reports created by Palm advising Complainant of his subpar execution. *See, e.g.*, Palm Aff., Ex. H at 2. These reports warned Complainant of his shortcomings in the most emphatic possible terms, using phrases such as "Well below company avg in every YTD metric," "Improve from last place position on the JAMM Report," and "Show that you are not a last place manager." *Id*. at 1-2. Such evidence firmly establishes that Complainant was failing to meet Respondent's legitimate performance expectations at time he was fired.

Complainant advances two arguments in opposition to Respondent's empirical assessment of his performance. First, Complainant points to record sales he achieved in 2004 as the manager of a different store, which earned him a congratulatory windbreaker that commemorated his selection to Respondent's "Dream Team" for that year. *See id*. ¶ 24. But as Respondent points out, these accolades preceded Complainant's termination by over twelve (12) years. In Illinois, the assessment of an employee's performance is made at the time of termination, and even a period as short as one year can reliably chart a decline from excellence to inadequacy. *See Stern v. St. Anthony's Health Center*, 788 F.3d 276 (7th Cir. 2015) (finding that a favorable performance review in 2009 did not create an issue of fact regarding whether the employee was performing his job when he was terminated in 2010); *see also Wells v. Advocate Christ Med. Ctr.*, 2018 IL App (1st) 171465-U (same result for declining performance between 2006 and 2007). As such, because

Complainant offers no evidence showing that he was attaining Respondent's sales goals in 2016, his lookback to his better years fails to create an issue of fact regarding whether Complainant was performing his work satisfactorily at the time of his termination.

The second argument made by Complainant in defense of his performance is the idea that the LaSalle Street store "could never acquire a high score on its J.A.M.M.S. report" because it was "incomparable to all of Respondent's other stores." *See* Response at 7. At base, this argument is really a challenge to the legitimacy of the sales expectations that were placed on Complainant. But in determining what constitutes a "legitimate" expectation, it is not the role of this administrative court to second-guess whether an employer's decisions are the product of sound business judgment. Therefore, for the purposes of assessing discrimination claims, an employer's expectations are "legitimate" where they are: (1) objectively reasonable; and (2) adequately communicated to the employee. *Mills v. First Federal Savings & Loan Ass'n of Belvidere*, 83 F.3d 833, 843 n. 7 (7th Cir. 1996) (citing *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 463 (7th Cir. 1986)). Here, Respondent's expectations were routinely communicated to Complainant in exhaustive detail. At the same time, apart from his personal opinions regarding the challenges facing the LaSalle Street store, Complainant offers no evidence showing that any performance metric imposed on him was objectively unreasonable. Indeed, if it was impossible for the LaSalle Street store to succeed, there would be no reason for Complainant to attempt the "out of the box" solutions he claims should now justify his inability to increase sales. *See* Response at 8-9.

In the end, neither argument asserted by Complainant creates a genuine issue of fact regarding his performance. While Complainant relies (exclusively) on self-serving testimony to refute the quantitative evidence presented by Respondent, the controlling law is that "[the employee's] perception of himself . . . is not relevant. It is the perception of the decision maker

which is relevant." *Weihaupt v. American Med. Ass'n*, 874 F.2d 419, 428 (7th Cir. 1989) (quoting *Dale*, 797 F.2d at 464-65) (further quotation omitted). Consequently, an employee's individual self-assessment (without more) is insufficient to avoid summary judgment. *See, e.g., Karazanos v. Navistar Int'l Transport Corp.*, 948 F.2d 332, 338 (7th Cir. 1991) (employee's claim that performance problems were "99% the fault" of others was insufficient to create an issue of fact as to whether his termination was discriminatory); *see also Mills*, 83 F.3d at 843-44 (employee failed to meet legitimate business expectations notwithstanding her assertion that she "always completed her work in acceptable manner").

And while Complainant argues that his performance was not the reason cited by Respondent for his termination, *see* Response at 16, this argument misses the point. The closure of the LaSalle Street store initially occasioned Complainant's discharge, whereupon Respondent was unable to offer a new or different position to Complainant based on the lack of available jobs in the Chicagoland area at that time. But even if a managerial role had been available, Respondent would not have been obligated to offer that position to Complainant where his performance was unacceptable. This is because Complainant had an ongoing responsibility to meet his employer's legitimate performance expectations both to retain his position and to (later) argue that his discharge was unlawful. Stated differently, to be granted a public hearing (*i.e.*, a trial) on his claim of age discrimination, Complainant is required to introduce admissible evidence showing that a factual dispute exists as to each and every element of his *prima facie* case. *See Benson v. City of Chicago*, 2014 IL App (1st) 121899-U, ¶ 22. By neglecting to offer such evidence in opposition to Respondent's charge that his performance was unsatisfactory at the time of his termination, Complainant cannot maintain this segment of his *prima facie* case, which in turn entitles Respondent to summary judgment on Complainant's cause of action for age discrimination.

3. The Treatment of Substantially Younger Employees

By itself, Complainant's failure to perform his work in a satisfactory manner is legally sufficient to justify summary judgment in Respondent's favor. Yet notwithstanding this conclusion, I find that Complainant further fails to show that any similarly situated, substantially younger employees received more favorable treatment under similar circumstances. Of the four comparators to whom Complainant points in grieving his treatment, two are *older* than Complainant, whereas a third is less than ten years his junior (*i.e.*, not "substantially younger"). And for all of Complainant's comparators (even the fourth and final store manager that was substantially younger than Complainant), the respective closures of their retail stores occurred a minimum of three years (and in some cases as many as eight years) before Respondent closed the LaSalle Street store. As a result, Complainant cannot show a contemporaneous action by Respondent that led to more favorable treatment of a substantially younger employee.

Prior to addressing Complainant's comparators in detail, I note preemptively that Complainant is without evidence demonstrating the most fundamental component of his cause of action for age discrimination. According to Complainant, for store managers who "were not 60 years old when their stores closed," Respondent would automatically transfer these individuals into "made-up" titles (such as "Manager-in-Waiting") or into other impromptu (and spontaneously created) roles (such as "Assistant Manager") until new leadership positions could be identified. *See* Response at 3. But Complainant has failed to introduce evidence establishing that Respondent either created certain titles or transferred younger employees to stores where no budgeted positions had previously been available. In fact, the evidence submitted by Respondent demonstrates not only that the "Manager-in-Waiting" position was an official title within the company, *see* Mem., Ex. 2 at JM_000132-000133, but that managerial roles within the company were finite, and offered

only in locations where Respondent had such positions open/ budgeted. *See id*. at 28, 30. Complainant offers no evidence to challenge these facts, nor does he present any argument (beyond speculation) to create the inference that Respondent was fashioning positions for younger employees in stores where none previously existed.

And yet even assuming, *arguendo*, that Complainant could show that Respondent was inventing certain 'transitory' roles for 'favored' employees, such conduct is not *per se* unlawful. This administrative court does not sit as a super-personnel department to examine an employer's business decisions, even if such decisions are unfair, disloyal, or just flat-out wrong. *See Brummett v. Ill. Human Rights Comm'n*, 2021 IL App (4th) 200451-U, ¶ 81. On the contrary, the law gives Respondent the absolute discretion to hire, fire, or retain at-will employees at its sole option, including via the use of transfers to retain employees who might otherwise face termination upon the closure of a retail store. What Respondent cannot do, however, is condition its business decisions on Complainant's membership in a protected class (such as age), which is why Complainant must invoke the circumstances of similarly situated, substantially younger employees to maintain his *prima facie* case. *See Zaderaka*, 131 Ill. 2d at 179-80.

But the comparators identified by Complainant do not support his theory of liability. In fact, the comparators selected by Complainant largely disprove that any decision made by Respondent was predicated on age.

Lapinski and Gaudry are both older than Complainant, which precludes either individual from serving as an example of preferential treatment shown towards a younger employee. But even if either manager could serve as a proper comparator, there is no evidence that age played a differentiating role in the personnel decisions made in reference to either employee. In 2011—at age 57—Lapinski was transferred to a new location in the Chicagoland area upon the closure of

the Michigan Avenue store. *See* Mem., Ex. 2 at 29. While Complainant argues that Respondent "does not appear to transfer managers who are 60 and above," *see* Response at 5, Lapinski's age at the time of his transfer was virtually identical to Complainant's age at the time of his termination (57 versus 59). As such, any distinction between the two (at least based on age) is practically meaningless, as Complainant fails to present evidence showing that Respondent considered this two-year age disparity to be substantial or meaningful in some way. *See Hartley*, 124 F.3d at 894.

Complainant's comparisons to Gaudry fare no better. Although Gaudry was sixty years old when Respondent terminated his employment, the elimination of Gaudry's position was occasioned by the same personnel action that ended Complainant's employment (*i.e.*, the closure of the LaSalle Street store). As noted above, Complainant and Gaudry were the only two employees who worked at the LaSalle Street store. When the store closed, Respondent laid off both employees and was unable to offer either individual a different job based on the lack of available positions within the Chicagoland region. *See* Palm Aff. ¶ 22; *see also* Response, Ex. 17. Had Respondent retained a younger employee who worked at the LaSalle Street store after firing Complainant and Gaudry, this case might illustrate the discriminatory animus that Complainant insists was at work. But this is not what happened. The evidence shows that no employee (regardless of age) survived the reduction in force that occurred at the LaSalle Street store, so Complainant cannot point to Gaudry's age (or even his own age) as evidence that employees "approximately 60 years old" were somehow treated less favorably than substantially younger employees.

Complainant's efforts to liken himself to Veronica Hailey are similarly unavailing. Hailey is only eight (8) years younger than Complainant, so she fails to qualify as a "substantially younger" employee for the purposes of age discrimination under the Illinois Human Rights Act.

See Diaz, 2019 ILHUM LEXIS 1029, at *6 (citation omitted). Further detrimental to Complainant's evidence is his failure to distinguish himself from Michelle McCracken—a store manager who previously worked in Palm's region. *See* Mem., Ex. 2 at 31. Although Complainant argues in multiple places that Respondent had a "transfer policy" that effectively assured new positions to store managers upon the closures of their stores, *see, e.g.*, Response at 14, McCracken's contemporaneous termination in 2016 (at the age of 43) soundly rebuts Complainant's naked allegation that a transfer was all but guaranteed to substantially younger employees who "were not 60 years old when their stores closed." *See id*. at 3.[3]

Finally, Complainant's attempt to contrast himself to Steven Gran fails to salvage his *prima facie* case. Although Gran was "substantially younger" than Complainant when Respondent transferred him from a closing store in 2013, *see* Mem., Ex. 2 at 26, Gran was not "similarly situated" to Complainant for the purposes of an age discrimination analysis. To draw a proper comparison to Gran, Complainant must show that Gran was similarly situated "with respect to performance, qualifications, and conduct." *Soliman v. Northrup Grumman Corp.*, 2001 U.S. Dist. LEXIS 2060, at *15 (N.D. Ill. Feb. 21, 2001) (quoting *Radue*, 219 F.3d at 617). In the instant case, no evidence has been presented suggesting that Gran was suffering from the same pervasive performance deficiencies as Complainant at the time Gran's store closed. Such deficiencies have long been recognized as means of disrupting the potential comparison between two (or more) similarly situated employees. *See Soliman*, 2001 U.S. Dist. LEXIS 2060, at *15. As such, Respondent could have relied on Complainant's unsatisfactory performance to terminate him

[3] Although he refers to Respondent's "transfer policy" at various points in his opposition brief, Complainant has provided no corresponding evidence of a written policy, procedure, or protocol that ensured continued employment in situations where Respondent closed one of its retail stores. In fact, the "Severance Pay Policy" submitted by Complainant expressly contemplates the extension of severance to "employees whose job is eliminated due to the closing of a store." *See* Response, Ex. 12.

while keeping Gran, even if Palm had identified an open managerial position at the time of Complainant's termination. Complainant thus fails to show that he was similarly situated to Gran for the purposes of advancing his *prima facie* case.

But even where this administrative court was to assume relative parity between the performances of Complainant and Gran (which is contrary to the evidence presented in this case), Complainant's *prima facie* case of discrimination still could not proceed. Gran was transferred from a closing store by Respondent in 2013—three years before Complainant's termination. *See* Mem., Ex. 2 at 26. In a reduction in force case (like this one), a complainant must show that a younger employee was treated more favorably at or near the same time the aggrieved employee suffered the adverse personnel action at issue. *See Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 322 (7th Cir. 2003) (citing *Radue*, 219 F.3d at 618). If this requirement was not in place, an aggrieved employee could simply compare the adverse personnel action from which he or she suffered to the experience of any similarly situated, substantially younger employee that had been retained during any other reduction in force conducted during the company's history. Such analogies would lead to incongruous results in age discrimination cases, such as the argument that an older employee could serve as a current comparator merely because he or she had survived a reduction in force at a younger age.

And yet, this is exactly what Complainant attempts to argue in the instant case. Pointing to Lapinski, Gaudry, Hailey, and Gran, Complainant argues that because each store manager survived a reduction in force that occurred between three (3) and eight (8) years prior to Complainant's termination, each of these employees is not only similarly situated, but "younger" than Complainant as well (in the sense that he or she was either below or further below Complainant's static age of 59 at the time his termination occurred in 2016). *See, e.g.*, Response

at 17. These arguments are without merit, as are Complainant's repeated assertions that the previous reductions in force conducted by Respondent were "in the same time frame" or "around the same time" as the closure of the LaSalle Street store in 2016. *See id*. at 18.

In sum, whether evaluating the experience of Gran or any other comparator proposed by Complainant, the prior closures of Respondent's other locations are simply too attenuated in time and circumstance to be available to Complainant as viable bases to allege disparate treatment based on age. As a result, Complainant's efforts to liken himself to any of these employees would not give rise to a sustainable *prima facie* case even where his comparative age and/or performance were not already fatal to his allegations of age-based discrimination. Accordingly, because Complainant fails to introduce evidence that raises a genuine issue of fact on any element of his *prima facie* case, Respondent is entitled to judgment as a matter of law.

RECOMMENDATION

For the reasons discussed above, Respondent's motion for summary decision is GRANTED, and I recommend that the Illinois Human Rights Commission affirm this Recommended Order and Decision pursuant to 56 Ill. Admin. Code § 5300.910.

NOTICE TO THE PARTIES REGARDING EXCEPTIONS

Pursuant to 56 Ill. Admin. Code § 5300.920, any party that wishes to file exceptions to this Recommended Order and Decision must do so within thirty (30) days of service of this Recommended Order and Decision. Please be advised that contrary to practices occurring during the COVID-19 pandemic, exceptions to this Recommended Order and Decision CANNOT be filed by e-mail. Instead, any party wishing to filing exceptions to this Recommended Order and Decision must ensure that such exceptions arrive at the Commission by mail, fax, or in-person service within thirty (30) days, as required by 56 Ill. Admin. Code § 5300.920.

HUMAN RIGHTS COMMISSION

BY:

BRIAN WEINTHAL
CHIEF ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: July 12, 2022