UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-2019

ROBERT D. WHITTAKER, III,

Plaintiff - Appellant,

v.

HOWARD COUNTY, MARYLAND; HOWARD COUNTY FIRE AND RESCUE SERVICES,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Beth P. Gesner, Magistrate Judge. (1:21-cv-02108-BPG)

Argued: January 27, 2026 Decided: August 20, 2026

Before HARRIS and BENJAMIN, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished opinion. Judge Benjamin wrote the opinion, in which Judge Harris and Senior Judge Floyd joined.

ARGUED: Adam L. Shaw, HIJAZI & CARROLL, P.A., Washington, D.C., for Appellant. Erin Brady Purdy, HOWARD COUNTY OFFICE OF LAW, Ellicott City, Maryland, for Appellee. ON BRIEF: Levi S. Zaslow, Abdullah H. Hijazi, HIJAZI, ZASLOW & CARROL, P.A., Bowie, Maryland, for Appellant. Gary W. Kuc, County Solicitor, Jamar B. Herry, HOWARD COUNTY OFFICE OF LAW, Ellicott City, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

DEANDREA GIST BENJAMIN, Circuit Judge:

Robert Whittaker was selected by the Howard County Department of Fire and Rescue Services (the "Department") to participate in its training academy. At age 46, he was the oldest trainee in his class. Whittaker advanced through the Department's training academy (the "Academy") but was terminated just before graduation. That termination was based on Whittaker's insubordination and poor performance at the Academy. Whittaker sued Howard County, Maryland, alleging that he was actually terminated due to his age in violation of the Age Discrimination in Employment Act.

The magistrate judge granted summary judgment for Howard County finding that Whittaker did not make a prima facie case of age discrimination and that he failed to show that the Department's nondiscriminatory reasons were mere pretext.

We affirm, holding that Whittaker fails to make a prima facie case because there is no genuine dispute as to whether he met the Department's legitimate expectations.

I. Whittaker's Training Academy Experience

At age 46, Robert Whittaker applied for a trainee position with the Department. He was selected from 1,800 applicants after passing all disqualifiers (i.e., criminal background check, drug testing, driving history, etc.), a written test, a physical agility test, a panel interview, a background check, a psychological examination, and a physical examination. In January 2018, he started the Academy as the oldest trainee. As a trainee, Whittaker was a probationary employee.

The Academy lasts for approximately six months and consists of different units used to prepare trainees for firefighting duties and measure their abilities to perform those duties. The training program covered academic coursework in Emergency Medical Technician (EMT), Emergency Vehicle Operator, HAZMAT Tech, HAZMAT Operations, Swiftwater Awareness, Confined Space, Trench Rescue, and Firefighter I and Firefighter II units. Trainees were assessed on each unit and received a certificate to signify their successful completion of each unit. Trainees also engaged in practical exercises like ladder and maze exercises. Academy staff evaluated each trainee throughout the Academy and discussed training progress with the trainees and Department leadership. During the Academy,[1] Whittaker says that Captain Douglas Welsh, the head instructor for Whittaker's training class, told him "you don't do half bad for an old guy." J.A. 0007.[2] If a performance issue arose during training, Academy staff issued Student Counseling/Status Report Forms ("Counseling Reports"). Each report was discussed with and then signed by the trainee.

Whittaker successfully completed all the academic instruction necessary to become a firefighter. And his fellow trainees did not observe any deficiency with his performance.

[1] As noted by the magistrate judge: "neither party provides a date for this incident. [the Department] suggests that Captain Welsh referred to plaintiff as 'an old guy' shortly after [Whittaker] began Firefighter 1 training. [Whittaker] merely asserts that the statement was made during [his] time at the Academy." *Whittaker v. Howard Cnty., Maryland*, No. CV BPG-21-2108, 2023 WL 5336993, at *3 n.1 (D. Md. Aug. 17, 2023).

[2] Citations to "J.A." refer to the joint appendix filed by the parties. The J.A. contains the record on appeal from the lower court. Page numbers for citations to the J.A. utilize the "J.A. #" numbering at the bottom of the page on each document.

However, as included in the timeline of events below, Academy staff documented concerns regarding Whittaker's performance during his training:

Date	Event(s)
January 28, 2018	Whittaker was hired as a trainee for the Academy.
April 16, 2018	Whittaker received a Counseling Report regarding an incident from April 13 where he did not complete a ladder climbing scenario and requested to evacuate into the interior of the structure due to his hesitancy around heights. He later completed the objective on April 16.
April 17, 2018	An Academy captain sent an internal memo to Welsh discussing Whittaker's disorientation during a maze exercise and his reaction to stress.
April 18, 2018	Whittaker received a Counseling Report related to exercises from April 17 noting that he "became disoriented in the maze," "[had] issues with ladder operations" and "becam[e] insubordinate" "when placed under minimal stressful situations." J.A. 1301. Whittaker rejected the characterization of his conduct as insubordinate. Whittaker successfully completed a ladder climbing scenario. Though, an Academy captain and Welsh sent internal memos discussing his struggle with ladder and maze exercises and stress.
April 24, 2018	Assistant Chief Jose Sanchez sent an internal memo to Deputy Chief Daniel Merson discussing Whittaker's training: "[S]everal deficiencies have been documented for which [Whittaker] has been counseled involving ladders, navigating mazes, and talking back to instructors when he becomes stressed or flustered delaying the task completion when ordered to do so." J.A. 1186.
May 3, 2018	Whittaker received a Certificate of Completion for Firefighter I on his second attempt. He also received a Counseling Report noting a "pattern" where Whittaker "becomes frustrated" and was "quick to quit . . . and becomes insubordinate." J.A. 1187.
May 17, 2018	A captain sent an internal memo to Sanchez and Battalion Chief Shawn Utz calling Whittaker's performance "beneath satisfactory" and noting that "Trainee Whittaker was successful with the minimal requirements set by University

	of Maryland Fire & Rescue Institute to pass Firefighter 1 but still demonstrates poor performance when expected to conduct those same skill sets under stress in a team environment." J.A. 1193. Department captains exchanged emails about Whittaker's lack of fireground speed and noting that the issue was discussed "at length" with Whittaker, J.A. 1302, and about two incidents where Whittaker did not properly attach his breathing apparatus.
May 18, 2018	Sanchez recommended dismissing Whittaker in a formal memo to Deputy Chief William Anuszewski noting that "[a]lthough performing at a minimal level academically, Trainee Whittaker's overall proficiency and behavior do not embody the principle to which this Department holds its prospective academy class graduates." J.A. 1299–1300. Another captain sent an internal memo to Sanchez and Utz noting that Whittaker's performance had caused concern to many instructors. The memo noted that while Whittaker had "shown acceptable progress in the academic portion of the course," Whittaker became "frustrated and insubordinate" when it was time to perform the tasks in real life. J.A. 1194. He also noted that Academy staff delayed their final recommendation to dismiss Whittaker to determine whether Whittaker could implement the skills he learned but that he continued to struggle. *Id*.
May 21, 2018	Whittaker received a Certificate of Completion for Firefighter II.
May 24, 2018	Whittaker was terminated from the Academy and the Department by then-fire chief John Butler.

In November 2019, Captain John Merson, who was not directly connected to the Academy, shared a link to an article on Facebook about a 51-year-old rookie at another fire department and expressed his objection to a trend of hiring older firefighters.[3] Other members of the Department commented on the article with similar sentiments.

[3] Specifically, Merson's post stated:
(Continued)

II. Procedural History

Whittaker sued Howard County, Maryland[4] alleging one count of age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634.[5] *See Whittaker v. Howard Cnty., Maryland*, No. CV BPG-21-2108, 2023 WL 5336993 (D. Md. Aug. 17, 2023). In support of the claim, he identified Welsh's comment during the Academy and Merson's Facebook post as direct evidence.

The county moved for summary judgment, which the magistrate judge granted. *Id.* at *10. The magistrate judge first dismissed Whittaker's direct discrimination evidence finding neither Welsh's comment about Whittaker's old age nor the 2019 Facebook post

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> I will never understand this. It has nothing to do with a 51-year-old not being able to do the job. I'm pushing 50 and I'm on the way out. In my opinion it's irresponsible. One of, if not the leading cause of firefighter fatalities is cardiac related. Yet fire departments all over the country hire personnel in prime heart attack years. The earliest retirements are 20 years. We are asking these people to work until they are 70 in a field that will probably kill them. There is no way a department or community will get the return on this employee. They are endangering him, his fellow firefighter[s] and the citizens he has sworn to protect. But it does make for a good Facebook post. And that's what it's all about.

J.A. 1028–31.

[4] As Howard County represents the interests of the Department in this case, we refer to the county and the Department interchangeably.

[5] Prior to filing in district court, Whittaker filed a charge of discrimination with the Equal Employment Opportunity Commission in September 2018 and subsequently received a right to sue letter.

by Merson sufficient to show direct evidence of age discrimination. The magistrate judge then considered whether Whittaker established a circumstantial case using the *McDonnell Douglas* burden-shifting test. Following *McDonnell Douglas*, the magistrate judge first concluded that Whittaker failed to make out a prima facie case of age discrimination, in part because he did not fulfill the legitimate expectations of his employer. The magistrate judge next established that, even if Whittaker made out a prima facie case, the Department put forth a legitimate, nonretaliatory explanation for dismissing him—his poor performance and insubordination. And the magistrate judge last concluded that Whittaker did not raise a genuine dispute that the Department's reason was pretext for age discrimination.

Whittaker appeals. He argues that the magistrate judge erred in granting summary judgment because record evidence shows that he was meeting the Department's legitimate expectations and there are highly disputed issues of facts about the Department's stated reasons for termination.

We review pursuant to our jurisdiction under 28 U.S.C. § 1291.

III. Standard of Review

We review a grant of summary judgment de novo. *Pueschel v. Peters*, 577 F.3d 558, 563 (4th Cir. 2009). "Summary judgment is appropriate only 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Aleman v. City of Charlotte*, 80 F.4th 264, 283 (4th Cir. 2023) (quoting FED. R. CIV. P. 56(a)). We view all facts and make all reasonable inferences

in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). But the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 n.3 (1986) (quoting FED. R. CIV. P. 56(e)). The nonmoving party may not rely upon mere allegations or denials of allegations to defeat a motion for summary judgment. *Id*. at 324.

IV. *McDonnell Douglas* Test for Age Discrimination

For individuals aged 40 and older, the ADEA prohibits employers from "fail[ing] or refus[ing] to hire . . . any individual or otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). To succeed on an ADEA claim, "[a] plaintiff must prove by a preponderance of the evidence . . . that age was the 'but-for' cause of the challenged employer's decision." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177–78 (2009) (citing *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 652–55 (2008)). This evidence can be direct or circumstantial. *Id.* at 178. In the employer/employee context, direct evidence "[i]s evidence that the employer 'announced, or admitted, or otherwise unmistakably indicated that age was a determining factor.'" *Palmer v. Liberty Univ., Inc.*, 72 F.4th 52, 63 (4th Cir. 2023) (quoting *Cline v. Roadway Express, Inc.*, 689 F.2d 481, 485 (4th Cir. 1982)).

In cases where a plaintiff has no direct evidence of discrimination, the Supreme Court established a three-step burden shifting test to support a case of discrimination based

only on circumstantial evidence. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–02 (1973). It is commonly known as the "*McDonnell Douglas* test."

First, a plaintiff "must prove by the preponderance of the evidence a prima facie case of discrimination." *Monroe v. Burlington Indus., Inc.*, 784 F.2d 568, 570 (4th Cir. 1986). In the ADEA context, the plaintiff must show that: "(1) she is a member of a protected class; (2) she suffered adverse employment action; (3) she was performing her job duties at a level that met her employer's legitimate expectations at the time of the adverse employment action; and (4) the position remained open or was filled by similarly qualified applicants outside the protected class." *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004) (en banc) (citing *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 607 (4th Cir. 1999)), *overruled in part on other grounds by Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). This burden is not onerous and "creates a presumption that the employer unlawfully discriminated against the employee." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

If a plaintiff makes a prima facie showing, "the burden then shifts to the [Department], who must establish that there was 'a legitimate nonretaliatory reason' for the adverse employment action." *Anderson v. Diamondback Inv. Grp., LLC*, 117 F.4th 165, 174 (4th Cir. 2024) (quoting *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142 (2000)). "This burden is one of production, not persuasion" and "involve[s] no credibility assessment." *Id*. An "employer meets this burden merely by offering 'reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.'" *Id.* at 177 (emphasis in

original) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993)). If the employer makes this showing, the burden shifts back to the plaintiff to show that the proffered reason is mere pretext. *Id.* at 174–75.

On appeal, Whittaker does not challenge the magistrate judge's determination that there is no direct evidence of discrimination.[6] Thus, we address only whether he satisfied his burdens under *McDonnell Douglas*. We conclude that he did not. Based on the record before us, Whittaker did not make a prima facie showing that he was meeting the Department's legitimate expectations.

V. Analysis

Neither party disputes that Whittaker meets the first two elements of the prima facie case. He is a member of the class protected by the ADEA and suffered an adverse employment decision by being fired. However, the parties dispute whether Whittaker was meeting the Department's legitimate expectations.

To satisfy the legitimate expectations element of the prima facie case, " 'a plaintiff must show only that [he] was qualified for the job and that [he] was meeting [his] employer's legitimate expectations.' " *Sempowich v. Tactile Sys. Tech., Inc.*, 19 F.4th 643, 650 (4th Cir. 2021) (quoting *Haynes v. Waste Connections*, 922 F.3d 219, 225 (4th Cir. 2019)). But he need not "show that he was a perfect or model employee." *Id.* (quoting

[6] As such, we consider this argument abandoned. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999) (noting that the Federal Rules of Appellate Procedure require appellants to include their "contentions and the reasons for them" in their briefs, so issues not briefed or argued are abandoned).

Haynes, 922 F.3d at 225). Importantly, "[i]t is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000) (internal quotation marks omitted) (quoting *DeJarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998)); *see also id*. (describing the opinions of the plaintiff and her co-workers about the quality of her work as "close to irrelevant"). As such, the employer may offer "evidence defining the expectations" and "evidence that the employee was not meeting those expectations." *Warch v. Ohio Cas. Ins. Co*., 435 F.3d 510, 516 (4th Cir. 2006).

An employee may then offer evidence or qualified opinion testimony assessing and evaluating his performance "in light of those expectations." *King v. Rumsfeld*, 328 F.3d 145, 150 (4th Cir. 2003). An employee may also introduce evidence that generates a question of fact about whether the "proffered 'expectation' " is "legitimate at all." *Sempowich*, 19 F.4th at 650 (quoting *Warch*, 435 F.3d at 517).

The Department asserts that Whittaker was not meeting their legitimate expectations based on the record evidence of Whittaker's poor performance and insubordination. Appellee's Br. (ECF No. 23) at 18–20 (hereinafter "Response Br."). [7] After reviewing the record, we agree. Counseling Reports and emails show that in the two months before his termination, Whittaker was made aware of staff concerns about his performance in core firefighting skills, including his trouble navigating mazes, hesitancy during ladder

[7] Page numbers for citations to ECF documents utilize the page numbers in the red header on each document.

exercises, and lack of fireground speed. *See e.g.,* J.A. 1144, 1146, 1188, 1301. Contemporaneously prepared internal memoranda and emails further note the same performance issues and raise concerns about his insubordination, detailing incidents where he talked back to instructors, J.A. 1186, and became "frustrated and insubordinate" under stress or when asked to complete tasks in real life scenarios, J.A. 1194. The insubordination alone is a legitimate, nondiscriminatory basis for termination as an employee is not "meeting [his] employer's legitimate expectation if [he] was insubordinate." *Everroad v. Scott Truck Sys., Inc.*, 604 F.3d 471, 478 (7th Cir. 2010). But taking it together with the performance concerns, no reasonable jury would conclude that Whittaker was meeting the Department's legitimate expectations.[8]

Whittaker responds with two pieces of evidence to show that he was meeting the Department's legitimate expectations: (1) his fellow trainees' deposition testimony that his performance was not deficient, and (2) his academic record showing that he passed all objective criteria to become a firefighter, including the comprehensive Firefighter I and II assessments. Appellant's Br. (ECF No. 16) at 22–23 (hereinafter "Opening Br."). Neither are availing.

[8] Whittaker also disputes individual facts in the situations cited by the Department. *See* Opening Br. at 28–47. But, "[f]aced with such abundant evidence," we cannot find a genuine dispute by "cherry-picking the record to find one isolated instance where he arguably performed better than" expected. *Warch*, 435 F.3d at 518; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) ("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.").

First, the testimony of Whittaker's fellow trainees alone cannot show whether he was meeting the Department's legitimate expectations. *See Hawkins*, 203 F.3d at 280 (identifying that " '[i]t is the perception of the decision maker which is relevant, not the self-assessment of' " Whittaker or his fellow trainees (quoting *DeJarnette*, 133 F.3d at 299)). As such, the assessment cited by Whittaker from one of his fellow trainees that he "met all the needs, like the rest us of did," J.A. 0658, and similar testimony from his other colleagues doesn't help him. Even if "certain co-workers . . . [documented that Whittaker] was doing a good job, they fail to address whether *management* honestly believed that [Whittaker] was doing a good job." *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 444 (4th Cir.1998), *overruled on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

Second, Whittaker's objective academic record is insufficient to prove that he was meeting the Department's legitimate expectations. While Whittaker passed all the academic coursework, academics were not the full expression of the Department's legitimate expectations. Response Br. at 28. The Department expected trainees to complete tasks to a "mastery level." J.A. 1286–87. So, even if he performed at a minimal level academically, his overall performance still could be, and was, considered unsatisfactory. J.A.1299 (the assistant chief noting that while "he performed at a minimal level academically" his "overall proficiency and behavior [did] not embody the principle to which this Department holds its prospective academy class graduates"); *see also* J.A. 1187 (describing Whittaker's performance as "beneath satisfactory" because of his "poor performance when expected to conduct the skills of [Firefighter I] under stress").

Ultimately, his successful progression through the Academy's academic program is insufficient to generate a dispute of material fact as to whether he was meeting the legitimate expectations of the Department.

At bottom, Whittaker did not meet the Department's legitimate expectations and thus fails to make a prima facie case of age discrimination.

VI. Conclusion

As we find that Whittaker did not meet the Department's legitimate expectations, we need not address whether Whittaker proves the fourth element—that the position remained open or another younger employee was hired.[9] We also need not address the remaining elements of the *McDonnell Douglas* test.

The decision of the magistrate judge is

AFFIRMED.

[9] We note that the magistrate judge applied a different standard for the fourth element, asking whether "similarly situated employees outside the protected class received more favorable treatment." *Whittaker*, 2023 WL 5336993, at *6. This difference does not change our outcome. As Whittaker cannot show that he was meeting the Department's legitimate expectations, he cannot under any articulation of the prima facie case "create[] a presumption that the employer unlawfully discriminated against the employee." *Burdine*, 450 U.S. at 254; *see also e.g., Charleston Area Med. Ctr., Inc. v. Blue Cross & Blue Shield Mut. of Ohio, Inc.*, 6 F.3d 243, 250 n.5 (4th Cir. 1993) (while "troubled" with a part of the lower court's reasoning, the court noted that "[b]ecause we decide the case on other grounds we need not here resolve the issue").