Circuit Court for Prince George's County
Case No. CAL 16-02114

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1235

September Term, 2017

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RICHARD EICHEN

v.

JACKSON AND TULL CHARTERED ENGINEERS, *et al.*

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Berger,
Arthur,
Leahy,

JJ.

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Opinion by Leahy, J.

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Filed: August 22, 2019

Appellant Richard Eichen worked for Jackson and Tull Chartered Engineers, ("J&T") as a Transportation Management Specialist from August 1, 2012 to May 23, 2014. Eichen's employment with J&T arose out of his previous employment with TRAX International Corporation ("TRAX"). TRAX is a government contractor that subcontracted the import/export control portion of its logistics operation contract ("logistics contract") with the National Aeronautics and Space Administration Goddard Space Flight Center ("Goddard") to J&T around August 2012. As a result of this subcontract, J&T hired Eichen, then age 64, as an at-will employee to continue in the role of a Transportation Management Specialist in the import/export control group.

Eichen's primary supervisor at J&T was the Vice President of Information Systems, Bill Smoot (together with J&T as "Appellees"). About two years into Eichen's employment, Smoot received several complaints from TRAX concerning Eichen's workplace behavior. These complaints led Smoot to recommend that J&T terminate Eichen's employment. On May 23, 2014, Smoot, on behalf of the Human Resources Department, delivered a termination letter to Eichen. Eichen was 66 years old at the time of his termination.

After first exhausting his administrative remedies before the Equal Employment Opportunity Commission ("EEOC"), Eichen filed a five-count complaint against J&T and Smoot individually in the Circuit Court for Prince George's County on February 4, 2016. In his claims against J&T, Eichen alleged age discrimination (Count 1) and failure to pay overtime wages (Count 2). In his claims against Smoot, Eichen alleged civil conspiracy

(Count 3); interference with his employment contract with J&T (Count 4); and interference with his economic relations (Count 5).

On July 12, 2016, the circuit court granted Smoot's motion to dismiss all three of Eichen's claims against him. J&T subsequently moved for summary judgment on both the overtime wage claim and the age discrimination claim. The trial court held a hearing on the motion on March 31, 2017, and granted summary judgment on the overtime claim but denied summary judgment as to the age discrimination claim.

Thereafter, the age discrimination claim against J&T proceeded to trial before a jury. On the first day of trial, the court granted J&T's motion *in limine* to exclude evidence concerning its disciplinary treatment of two other employees. The third day of trial ended with a jury verdict in favor of J&T.

In this appeal, Eichen presents seven questions for our review, which we have consolidated and rephrased as follows:[1]

[1] In his opening brief, Eichen phrased these issues as eight questions presented:

1. "Whether the Circuit Court erred in dismissing the claim for Conspiracy against Defendant Bill Smoot in Count Three of the complaint.
2. Whether the Circuit Court erred in dismissing the Plaintiff's claim for interference with Plaintiff's contract against Defendant Bill Smoot set forth in Count Four of the complaint.
3. Whether the Circuit Court erred in dismissing the claim for interference with Plaintiff's economic relations against Defendant Bill Smoot set forth in Count Five of the complaint.
4. Whether the Circuit Court erred in granting summary judgment in favor of the Defendant on Plaintiff's claim for overtime wages in Count Two of the Complaint.
5. Whether the Circuit Court erred in granting Defendant's *Motion in Limine* to exclude that Rob Raper and Travis Moss, two other J&T

1. Did the circuit court err in dismissing Eichen's claims against Smoot for civil conspiracy, interference with contract, and interference with economic relations?

2. Did the circuit court err in granting J&T's motion for summary judgment on Eichen's claim for overtime wages?

3. Did the circuit court err in excluding evidence that J&T issued warnings to two other employees rather than terminating their employment?

4. Did the circuit court err in admitting into evidence the email that prompted Eichen's termination?

5. Did the circuit court err in admitting testimony of Eichen's conduct prior to his employment by J&T?

We hold that the circuit court did not err in granting J&T's motion to dismiss because Eichen failed to state a cause of action for either civil conspiracy, intentional interference with a contract, or intentional interference with economic relations. Furthermore, we discern no error in the summary judgment ruling on Eichen's overtime claim as he failed to meet his burden of proving J&T's actual or constructive knowledge

employees, were not terminated for conduct which was more serious than the allegations against Plaintiff.

6. Whether the Circuit Court erred in granting Defendant's *Motion in Limine* to exclude evidence of investigations conducted by J&T into allegations of misconduct by Rob Raper and Travis Moss, two other J&T employees, to show that the Plaintiff was not afforded the benefit of such investigations.
7. Whether the Circuit Court erred in denying Plaintiff's motion to exclude an April 24, 2014 email authored by originally authored by [*sic*] Jean Mannall, an employee of Trax International Corporation (sometimes referred to herein as "Trax").
8. Whether the Court erred in admitting, over objection, witness testimony of Plaintiff's alleged misconduct before he was hired by Defendant."

of the overtime hours he allegedly worked. Finally, we affirm the trial court's evidentiary rulings that Eichen contests on appeal.

## BACKGROUND

### A. Employment History

In 1985, Eichen began his employment in government contracting as a Transportation Supervisor at Raytheon, which, at that time, was the prime contractor for the Goddard logistics contract. At some point, Raytheon transferred Eichen to its transportation management department to work as a supervisor. In 1989, Goddard awarded the logistics contract to a different prime contractor, Ogden Logistics. Then, in 2005, Goddard awarded the same contract to Cortez III Service Corp., Inc., which later changed its name to TRAX. Eichen continued working as a Transportation Management Specialist under each prime contractor, although he later became involved in assisting TRAX's export control group—a subdivision of its transportation department.

Around August 2012, TRAX subcontracted the transportation portion of the Goddard logistics contract work, including its import/export control work, to J&T. J&T is a small, minority-owned company that provides technology and manufacturing services to the aerospace industry. Because J&T did not have any employees to work on the TRAX/Goddard subcontract at the time, J&T hired Eichen, then 64 years old, for the Transportation Management Specialist role on an at-will basis. Two other TRAX employees, Don Landis and Joe Kowalski, were also hired by J&T to work as Import/Export Control Specialists.

During his time at J&T as a Transportation Management Specialist from August 1, 2012 to May 23, 2014, Eichen continued working at Goddard instead of working at J&T's headquarters. Chuck Chidekel was Eichen's supervisor at J&T until August 2013, when Smoot became Eichen's supervisor. As Vice President, Smoot was responsible for J&T's business operations with customers and the employees assigned to its contracts.

Kowalski left J&T in November 2013 and Landis retired in March 2014. Prior to Eichen's termination in May 2014, J&T filled Kowalski's position with then-31-year-old Jeff Trettin and Landis' position with then-41-year-old Nomer Abueg.

**B. The Termination**

On April 28, 2014, Smoot learned of workplace problems with Eichen through an email from TRAX's Transportation Branch Manager, James Pavey. Pavey's email contained a forwarded email thread ("Manall Email") between Jean Manall, TRAX's Traffic Management Specialist, and Greg Warner, TRAX's Vice President and Contract Project Manager. In the email, Manall outlined four allegations of inappropriate workplace behavior that contractor employees raised against Eichen: (1) an incident in which Eichen berated and embarrassed Darnetta Evans, the supervisor of the Mail Services Center, in front of a customer for completing a shipment form incorrectly; (2) a complaint from employees working on ASTRO-H, one of TRAX's spacecraft projects, that requested Eichen's removal from the project due to his refusal to cooperate in handling shipments; (3) a complaint from OSIRIS-REx, another spacecraft project, again complaining about Eichen's refusal to cooperate; and (4) a complaint from Gail Allen, the administrator for

the J&T's subcontract, who claimed that Eichen would "come up behind her when she [was] at the copier or sitting at her desk and just [stare] at her," making her "very uncomfortable." Pavey's forwarding email also contained his own observations of Eichen's workplace behavior:

> 1. [Eichen] feels that no one should check upon him regarding assigned tasks (feels his judgment is being questioned and gets upset).
> 2. [Eichen] feels that he knows everything and thus feels above others.
> 3. [Eichen] at times operates in an unprofessional manner.

Pavey had already called Smoot in late April and again in early May to inform him that Eichen had been removed from two projects at the request of customers and that Eichen became "loud and angry" when Trettin asked about an email Eichen was supposed to send. Smoot also received a phone call from Abueg, who relayed Warner's discontentment with Eichen's behavior and indicated that his behavior would adversely affect J&T's performance ratings.

Smoot discussed these complaints with Eichen over the phone on May 9, 2014, and in-person on May 12, except that he did not discuss the sexual harassment allegation in the Manall Email "due to the extreme sensitive nature." It was clear to Smoot, based on Eichen's response, that Eichen was not going to do anything to change his behavior. Consequently, Smoot sent an email on May 14, 2014, to Jessica Remson,[2] the Senior Human Resources Generalist, in which he copied and pasted the contents of Pavey's email

[2] It was established at trial that at the time of her employment with J&T, Jessica Remson was known by her maiden name, Jessica Jones.

and the Manall Email. He observed that the complaint regarding the Astro-H project was the "most critical item" in the Manall Email. On May 15, 2014, after receiving the call from Abueg, Smoot emailed Remson and recommended Eichen's termination.

On May 23, 2014, Smoot, on behalf of the Human Resources Department, delivered a termination letter to Eichen, who was 66 years old at the time. Smoot testified at trial that he was unaware of Eichen's age "until this whole situation came to light." Following Eichen's termination, in October 2014, J&T changed Eichen's vacant position to an import/export control specialist position. At the request and recommendation of TRAX, J&T hired then 41-year-old Valerie Townsend, another TRAX employee, to fill that position.

### C. The Underlying Lawsuit

Eichen filed a discrimination claim with the EEOC on November 19, 2014.[3] On February 4, 2016, Eichen filed the five-count complaint against J&T and Smoot and

[3] Eichen alleges in his complaint that the EEOC issued a Notice of Right to Sue on December 9, 2015. The record reveals nothing about when the EEOC issued a Notice of Right to Sue or its disposition on the matter. Section 20-1013 of the State Government Article provides that a complainant may bring a civil action against a respondent alleging unlawful employment practice if:

> (1) the complainant initially filed a timely administrative charge or a complaint under federal, State, or local law alleging an unlawful employment practice by the respondent;
> (2) at least 180 days have elapsed since the filing of the administrative charge or complaint; and
> (3) the civil action is filed within 2 years after the alleged unlawful employment practice occurred.

Here, Eichen properly initiated a civil action in the circuit court because; (1) he filed an administrative charge with the EEOC on November 19, 2014; (2) he subsequently filed suit in the circuit court on February 4, 2016 (clearly more than 180 days after he filed the

demanded a jury trial.[4] In support of his discrimination claim, Eichen asserted that in the spring of 2014, J&T hired "two significantly younger employees, 4[1] years of age and 3[1] years of age, to perform the same Export Control work that was being performed by [Eichen]." According to the complaint, when J&T and TRAX realized that the hires resulted in overstaffing, they "entered into an agreement that [Eichen] would be terminated, even though [he] was more qualified, more experienced and more productive than the two newly hired employees." With regard to the overtime wages claim, Eichen sought overtime wages of $17,820.36, plus an additional $35,640.72, because "the unpaid wages and expenses [we]re not the result of a bona fide dispute, and more than two weeks ha[d] elapsed since the payment of the wages and expenses w[ere] due."

In his claims against Smoot, Eichen alleged, among other things, that Smoot agreed with TRAX to fabricate disciplinary complaints against Eichen that were "calculated to interfere" with his contractual relationship with J&T.

On April 18, J&T filed an answer denying Eichen's allegations and requesting that the action be dismissed with prejudice due to a failure to state claims on which relief can be granted, as well as four affirmative defenses. That same day, Smoot moved to dismiss

administrative charge); and (3) he filed the civil action within two years of his termination on May 23, 2014.

[4] Eichen sought $300,000 in damages against J&T for emotional distress and $500,000 in punitive damages. Eichen also requested attorney's fees and a "permanent injunction prohibiting [J&T] from engaging in future discriminatory and/or retaliatory acts against [Eichen] and reinstatement, back pay and fringe benefits, or, in the alternative, front pay and fringe benefits."

Eichen's claims against him and requested a hearing, which the court granted. The court granted Smoot's motion to dismiss Eichen's claims against him individually.

On January 23, 2017, J&T filed a motion for summary judgment and a request for a hearing. In the motion and at the subsequent hearing, J&T argued that Eichen had failed to offer legally sufficient evidence, direct or circumstantial, to support his claims for age discrimination and overtime wages. On March 31, 2017, the court denied summary judgment on the age discrimination claim but granted summary judgment on the overtime claim.

### D. Jury Trial

The trial on the age discrimination claim proceeded before a jury over three days from July 17 to 19, 2017. Eichen testified and called Smoot; Remson; Pavey; and Carolyn Lott, Goddard's Assistant Export Control Administrator, as his witnesses. J&T called as witnesses Manall; Kelly Bigley, another TRAX Traffic Management Specialist; Abueg; Warner; and Trettin. The testimony of Smoot and Manall are material to the evidentiary rulings Eichen challenges on appeal.

#### 1. Smoot's Testimony

Eichen called Smoot as his first witness. On direct examination, counsel for Eichen focused on Smoot's lack of personal knowledge of the alleged incidents of workplace misconduct for which he recommended terminating Eichen. Many of these incidents were those alleged in the Manall Email.

On cross examination, Smoot confirmed, again, that he initially came to learn of Eichen's workplace issues through an email from Pavey, which contained a forwarded email thread between Manall and Warner. When counsel for J&T then asked Smoot to go through each of the incidents alleged in the Manall Email, Eichen objected, arguing that the Manall Email contained hearsay and was irrelevant because the incidents contained therein took place prior to Eichen's employment with J&T. Despite agreeing with these contentions, the trial court overruled Eichen's hearsay and relevance objections because the testimony "provide[d] a motivation. It provides the basis in response to a lot of questions which [Eichen] asked [Smoot] on direct." The court received into evidence only the portion of Pavey's email containing the Manall email.

Smoot then elaborated on his understanding of each of the incidents alleged in the Manall email, the job description of the complaining employees involved, and the extent of his investigation into the allegations. Smoot testified repeatedly that he neither personally investigated nor spoke to the complainants of the alleged incidents because TRAX was J&T's customer, so he accepted the customer's version of events "since they, themselves, had the day-to-day supervision" and he "had no reason to disbelieve" them. According to Smoot, he was "quite upset" about some of these allegations because issues between J&T's employees and its customers could not only adversely affect the company's relationship with TRAX and Goddard, but could also adversely affect the company's

performance ratings,[5] "which then makes the company less competitive on future procurements." Smoot also testified that he had learned of another workplace incident involving a verbal altercation between Eichen and Trettin through a phone call with Pavey on May 9.

Smoot testified that J&T did not have a written discipline policy. He explained, however, that after receiving the Manall Email and speaking with Pavey on the phone, he called Eichen to discuss the Trettin altercation over the phone on May 9, 2014. Subsequently, he met with Eichen in person on May 12 to discuss the incidents alleging his removal from two projects. When he confronted Eichen with these allegations, Smoot testified that Eichen "kind of played it off" and "he didn't seem to accept responsibility [for] what he had done." Smoot testified that after meeting with Eichen on May 12, he learned, further, that Warner had expressed concerns about Eichen's actions adversely affecting J&T's performance ratings. This led Smoot to email Human Resources on May 14, 2014, recommending Eichen's termination because, "given the behavioral incidents that I'd been made aware of and his responses . . . and the fact that these incidents took place within a customer's environment, which—and actually upset the customer's environment, I felt that he wasn't owning up to what he had done."

[5] At trial, Smoot explained that every six months, the federal government evaluates the performance of the contract and the prime contractor over that six-month period. The prime contractor (TRAX, in this case) in turn evaluates the performance of the subcontractor, J&T. Low performance ratings can make a contractor less competitive for future procurements. Employee behavior can impact not only J&T's performance ratings, but also TRAX's performance rating from the government.

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**2. Manall's Testimony**

Manall explained her responsibilities as a Traffic Management Specialist at TRAX and her working relationship with Eichen during his employment with TRAX. She did not have a good working relationship with Eichen because he was "very difficult to deal with on a daily basis." She opined, "[h]e's not a team player, he likes to keep everything to himself. . . . You know, he just wouldn't give you any information when you needed it because he was always too busy or whatever, but he just—he was impossible to work with."

Counsel for J&T then asked Manall if she "ever witness[ed] any inappropriate behavior by [] Eichen in the workplace" while employed with TRAX. Eichen objected, arguing that testimony about incidents beyond those raised in the Manall Email would be "overly prejudicial . . . because all they w[ould] be doing is throwing aspersions when [] Smoot did not rely on [] any of those other instances . . . in reaching his decision." J&T contended that the testimony was permissible because Eichen's case-in-chief presented testimony about his performance as a TRAX employee. J&T also argued that because Eichen's claim challenges the allegations in the Manall Email as fabrications, Manall's testimony would establish consistency between the allegations concerning Eichen's behavior in the Manall Email and his behavior as a TRAX employee. The trial court overruled Eichen's objection:

> I think what's happened is we do have a little overlap between his original employment with TRAX and his employment with [J&T], and I essentially have given the plaintiff the leeway on that in allowing me to sort of hold off and not separate the actions of each company independently, but that comes with I guess the consequence that **whatever he did at . . . TRAX is at issue and has been raised and has been discussed.** And the allegation is failure

> to investigat[e] and the allegation is there's a denial of pretty much everything they allege he ever did. So I think that the defense has fair game in calling witnesses on those issues.

(Emphasis added). The court did, however, subsequently grant Eichen a continuing objection with respect to the remainder of Manall's testimony.

Accordingly, Manall testified to witnessing numerous instances of Eichen's inappropriate workplace behavior. On several occasions, she witnessed Eichen acting inappropriately towards other female colleagues and speaking in a "very demeaning manner to customers, he would yell at them, [and] raise his voice at them over the phone."

Manall also testified about what prompted her to send the Manall Email to Warner. Specifically, TRAX had been receiving a lot of customer complaints about Eichen "just not being cooperative with people when they needed things done." She then explained that she learned from Kathleen Mill, the logistics program manager on one of TRAX's spacecraft projects (ASTRO-H), that ASTRO-H requested that Eichen be removed from the project. With respect to the Evans incident—that Eichen berated and embarrassed her in front of a customer—Manall testified that she spoke to Evans personally about the incident. When counsel for J&T asked Manall whether the Evans incident was "consistent with prior behavior that [she] had observed from [] Eichen," she responded, "[o]h, yes, very much so." Manall also testified about receiving a phone call from the logistics program manager on the OSIRIS-REx project, another of TRAX's spacecraft projects, complaining about Eichen's refusal to cooperate on an emergency shipment and asking for Manall's assistance. Finally, Manall confirmed that the allegation concerning Eichen's

sexual harassment in the workplace was consistent with behavior she had observed from him in the past.

After the parties gave their closing arguments, the jury returned a verdict in favor of J&T, finding that J&T did not "discriminate[] on the basis of age against . . . Eichen in his termination."

Eichen subsequently noted his timely appeal to this Court on August 15, 2017. We will include additional facts as necessary throughout our discussion of the issues.

## DISCUSSION

## I.

## Motion to Dismiss

### A. Relevant Factual Background

Eichen raised three claims against Smoot: civil conspiracy; interference with his contract with J&T; and interference with economic relations. The complaint alleged that Smoot agreed with TRAX to fabricate disciplinary complaints against Eichen, "calculated to interfere" with his contractual relationship with J&T. Smoot moved to dismiss Eichen's claims against him for a failure to state claims on which relief could be granted. Specifically, Smoot argued that (1) Eichen's civil conspiracy claim could not stand because he failed to allege an underlying tort; (2) Eichen could not maintain a claim for interference with a contract because he was an at-will employee of J&T; and (3) because Smoot was an employee and agent of J&T, Eichen could not maintain a claim for interference with economic relations because he failed to allege interference by a third party.

Eichen filed his opposition to Smoot's motion on May 2, 2016, arguing that a civil conspiracy claim requires, *inter alia*, proof of an unlawful or tortious act in furtherance of the conspiracy. He argued that a separate tort was not required because Smoot's fabricated disciplinary violations resulted in Eichen's termination in violation of State Government Article § 20-606.

With respect to his claim of interference with a contract, Eichen maintained that Maryland recognizes such a tort within the context of at-will employment relationships. Furthermore, he argued that Smoot's fabrication of false disciplinary violations as alleged in the complaint constituted the tort of injurious falsehood. Relying principally on a case out of Colorado, Eichen also contended that he stated a claim for interference with economic relations because Smoot's fabricated disciplinary violations were intended to injure and damage Eichen personally and economically. Eichen argued, further, that Smoot's actions went beyond his authority as an agent of J&T, and therefore, he could be personally liable for interfering with J&T's contractual relations.

After a hearing, in a memorandum opinion entered on July 12, 2016, the trial court granted Smoot's motion to dismiss Eichen's complaint against him. With respect to the civil conspiracy claim, the trial court concluded:

> Pursuant to the guidelines set forth in *Hoffman v. Stamper* and *Manikhi v. Mass Transit Administration*, a civil conspiracy requires two or more persons "acting to accomplish an unlawful act or to use unlawful means to accomplish an unlawful act not in itself illegal, with the further requirement that the act or means employed must result in damages to the plaintiff." *See Hoffman v. Stamper*, 385 Md. 1, 24 (2005); *Manikhi v. Mass Transit Admin.*, 360 Md. 333, 360 n.6 (2000). The plaintiff has failed to state and cite an underlying tort to support his claim of civil conspiracy.

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In regard to Eichen's intentional interference claims, the court noted Eichen's inability to present any "binding precedent" for the court to consider with regard to interference with a contract by an employee who is bound to the same contract. The trial court concluded that "[s]ince Eichen is an at-will employee and since [Smoot] is also an employee of the same company, [Smoot] is a party to the relationship and not a third party[.]"

**B. Parties' Arguments on Appeal**

On appeal, the "standard of review of the grant or denial of a motion to dismiss is whether the trial court was legally correct." *Blackstone v. Sharma*, 461 Md. 87, 110 (2018) (citations omitted). In making this assessment, "we must determine whether the complaint, on its face, discloses a legally sufficient cause of action." *Schisler v. State*, 177 Md. App. 731, 743 (2007) (citations omitted). Our review is confined to the four corners of the complaint and any incorporated exhibits, and we construe "[a]ll well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them . . . in the light most favorable to the plaintiff." *Morris v. Goodwin*, 230 Md. App. 395, 400-01 (2016) (internal quotations omitted) (citation omitted). We will not consider "bald assertions [or] conclusory statements, and [will] construe[] against the plaintiff [a]ny ambiguity or uncertainty in the [factual] allegations[.]" *Id*. at 401 (internal quotations omitted). Accordingly, the dismissal will be upheld only if "the allegations do not state a cause of action for which relief may be granted." *Id*. at 401 (internal quotations omitted) (citation omitted).

We will now address in turn the legal sufficiency of each of the claims Eichen raised against Smoot.

**1. Civil Conspiracy**

On appeal, Eichen argues that the circuit court's dismissal of the civil conspiracy claim should be reversed because a claim for conspiracy does not require proof of a tort, and the act of terminating his employment based on age, Eichen avers, constitutes the unlawful act supporting his conspiracy claim. According to Eichen, the allegation in his complaint on an unlawful act was that Smoot and Trax entered into an agreement to "fabricate disciplinary violations" to terminate Eichen and replace him with younger employees in violation of Maryland Code (1984, 2014 Repl. Vol.), State Government Article ("SG"), § 20-606.

Appellees responds that a claim for conspiracy will not stand unless the plaintiff alleges a cognizable tort or unlawful act underlying the claim, something which Eichen failed to do in his complaint. According to Appellees, "fabrication of disciplinary violations" is not a recognized cause of action in Maryland and Eichen's claim could not survive without an actionable underlying tort. Appellees further assert that Eichen's argument that the unlawful act underlying the claim is his illegal termination must fail because supervisors cannot be held individually liable for age discrimination under Maryland law.

A claim of civil conspiracy consists of three elements:

1) A confederation of two or more persons by agreement or understanding;

> 2) [S]ome unlawful or tortious act done in furtherance of the conspiracy or use of unlawful or tortious means to accomplish an act not in itself illegal; and
> 3) Actual legal damage resulting to the plaintiff.

*Lloyd v. General Motors Corp.*, 397 Md. 108, 154 (2007) (internal quotations omitted) (citations omitted). The Court of Appeals has consistently upheld the principle that "'conspiracy' is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff." *Id*. at 154 (citations omitted); *see Alleco Inc. v. Harry & Jeanette Weinberg Foundation, Inc.*, 340 Md. 176, 190 (1995) (affirming dismissal of claims for conspiracy to defraud and to breach fiduciary duty because the petitioner failed to adequately allege underlying torts). "The fact of conspiracy is [a] matter of aggravation, and, as we have before stated, it only becomes necessary, in order to entitle the plaintiff to recover in one action against several, that the fact of the combination or conspiracy should be proved." *Alleco*, 340 Md. at 190 (internal quotations omitted). Consequently, "the [t]ort actually lies in the act causing the harm to the plaintiff," *Mackey v. Compass Marketing, Inc.*, 391 Md. 117, 128 (2006) (internal quotations omitted) (alteration in original), and thus, "[n]o action in tort lies for conspiracy to do something *unless the acts actually done, if done by one person, would constitute a tort*." *Alleco*, 340 Md. at 190 (quoting *Domchick v. Greenbelt Services*, 200 Md. 36, 42 (1952) (internal citations omitted)) (emphasis added).

In Count 3 for civil conspiracy, after incorporating the preceding paragraphs, the complaint sets out specific facts on which Eichen relies for support of the conspiracy claim:

> 25. Defendant Bill Smoot's fabrication of disciplinary violations pursuant to an agreement with Trax International, Incorporated, constituted participation in an unlawful civil conspiracy.
>
> 26. As a result of the said civil conspiracy Plaintiff was, *inter alia*, discriminated against on the basis of his age.
>
> 27. Defendant Smoot's actions in entering into an agreement with Trax was intentional, malicious, and intended to injure the Plaintiff personally and economically.
>
> 28. As a result of the Defendant's participation in the aforesaid civil conspiracy, the Plaintiff was damaged, as aforesaid.

Eichen's complaint, on its face, alleges that the underlying tort that caused injury was Smoot's "fabrication of disciplinary violations." We are unaware of any Maryland case, nor has Eichen provided us with any, that recognizes a tort cause of action for "fabrication of disciplinary violations." Even assuming that Eichen has alleged a cognizable tort, the bald allegation that Smoot's "fabrication of disciplinary violations pursuant to an agreement with Trax . . . constituted participation in an unlawful civil conspiracy" is still insufficient to survive a motion to dismiss. *See Alleco*, 340 Md. at 195. There was no evidence of an agreement to fabricate violations. Moreover, even if Eichen adequately pleaded Smoot's fabrication of disciplinary violations, a claim for illegal termination on the basis of age lies against his employer, J&T, not against Smoot. *See* SG § 20-606 (prohibiting unlawful employment practices by an "employer"); *cf. Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. 602, 630 (2005) (interpreting the term "employer" in Maryland's Fair Employment Practices Act as excluding personal liability of supervisors for backpay). Accordingly, the circuit court did not err in dismissing the civil conspiracy

claim because Eichen failed to allege that Smoot committed any act that would constitute a tort.

**2. Intentional Interference with an Existing Contract**

Eichen argues that the allegations in Count Four were sufficient to set forth a claim for interference with contractual relations because "Smoot's fabrication of false disciplinary violations by [Eichen] was intentional and willful[,]" causing J&T to terminate Eichen's employment.[6] Despite recognizing his at-will employee status, Eichen posits that Maryland case law recognizes "the tort of intentional interference with an at-will employment relationship."

Appellees aver that Eichen failed to allege the existence of a contract with which Smoot interfered given that he was an at-will employee. According to Appellees, Eichen "improperly conflates his claim for interference with contractual relationship and interference with economic relations," suggesting that claims of interference with an at-will contact are properly brought as claims for interference with economic relations.

This Court has recognized that there exists "a distinction between actions for intentional interference with contract and actions for intentional interference with economic relations." *Kramer v. Mayor & City Council of Baltimore*, 124 Md. App. 616, 638 (1999) (citations omitted). In *Kramer*, this Court explained:

> The former action requires proof that a **valid existing contract** was interfered with, while the latter pertains to prospective business relations, or

[6] Eichen notes that, because his claims for interference with contract and interference with economic relations have similar elements, his argument is intended to address both claims.

> to contracts terminable at will[.] The actions also differ in that the right of an individual to interfere, which is narrowly restricted in an interference with contract action, is treated more broadly in an action claiming interference with economic relations.

124 Md. App. at 637.

This distinction stems from the Court of Appeals' decision in *Macklin v. Robert Logan Associates*, 334 Md. 287 (1994). In that case, respondent, Robert Logan Associates ("the Owner"), owned and operated a billiard room in a leased retail space. *Id*. at 292. The Owner renegotiated its lease in February of 1985; the new lease was for a term of five years and provided each party the option to cancel the lease, with 90 days' notice, due to the possibility that the shopping center would be sold. *Id*. at 293-94. The lease also provided that the landlord must pay the respondent $5,000 if the landlord terminated the lease. *Id*. at 294. The following year, the shopping center was sold to GLM ("the Landlord") and in 1989, the Landlord exercised its option to terminate the lease after unsuccessful attempts to renegotiate the Owner's lease. *Id*. at 294. When the Owner received the cancellation notice on May 16, 1989, it attempted to renegotiate the lease with the Landlord. *Id*. Refusing, the Landlord told the Owner that it had already leased the premises to a new tenant, whom the Owner later discovered to be the petitioners, Mr. and Mrs. Macklin. *Id*. The Macklins and the Landlord negotiated a five-year lease prior to executing it on May 26, 1989. *Id*. Prior to executing the lease, however, the Macklins were aware of the Owner's lease with the Landlord having conducted some business dealings together and had stated on several occasions that it intended to take away their business. *Id*. at 296.

The Owner sued the Macklins for intentional interference with its lease by inducing the Landlord to cancel the lease prior to its termination. *Id*. at 291, 298. A jury rendered a verdict in favor of the Owner on the intentional interference claim. *Id*. at 291. Before this Court could consider the matter, the Court of Appeals granted certiorari to address, among other issues, "whether the [Macklins] tortuously interfered with the [Owner's] lease by negotiating with the [Owner's] landlord for the lease of premises." *Id*. at 292-93.

The Court explained that the tort of intentional interference with a contract has "two general manifestations:" (1) intentional interference that "induces a breach of an existing contract" or (2) "absent an existing contract, maliciously or wrongfully infring[ing] upon an economic relationship." *Id*. at 296 (citations omitted). Looking to the allegations of the Owner's complaint, the Court determined that the Owner "view[ed] this case as involving the breach of an existing contract" since the allegations focused on "the [Macklin's] inducement of the landlord to cancel the lease, perhaps because of the [Owner's] recognition that, until the operation to cancel is exercised, a lease terminable at will is an existing contract." *Id*. at 298. The Court reasoned, however, that:

> Notwithstanding that a lease terminable at will is an existing contract until it is cancelled, neither party to it has a vested interest in its continuation—it may or may not continue at the sole option of one of the parties. Thus, as *Natural Design* [*Inc. v. Rouse Company*] recognizes, **a contract terminable at will is more closely akin to the situation where no contract exists.** 302 Md. [47, 69-70 (1984)].

*Id*. at 299 (emphasis added). Accordingly, the Court concluded that "because the effect of the exercise of the option to cancel is interference with prospective economic relationships,

it is that branch of the tort," rather than intentional interference with a contract, "that is implicated when the termination of such a contract is induced." *Id*.

Returning to the case at bar, Count Four of Eichen's complaint alleges that Smoot interfered with his employment contract with J&T. It is clear that Eichen views Count Four "as involving the breach of an existing contract," *Macklin,* 334 Md. at 298; his complaint expressly entitles Count Four as "Smoot Interference with [Eichen's] Contract with [J&T] and Count Five as "Smoot Interference with [Eichen's] Economic Relations." Count Four alleges, however, that "Smoot was clearly aware that [Eichen] was in an *at-will* contractual relationship" with J&T. (Emphasis added). Since "a contract terminable at will is more closely akin to the situation where no contract exists," Eichen cannot assert a claim for intentional interference with an *existing* contract. *Id*. at 299; *Kramer*, 124 Md. App. at 637. The circuit court, therefore, did not err in dismissing Count Four of Eichen's complaint.

### 3. Intentional Interference with Economic Relations

Eichen maintains that Smoot can be held personally liable for interference with economic relations in his capacity as an agent of J&T. Eichen asserts, specifically, that Smoot's actions as an agent were "personal and went beyond his authority, and [were] carried out with the intent of injuring [Eichen] by removing him from the corporate payroll." In response, Appellees aver that Eichen's cannot stand because his complaint is devoid of any allegations that Smoot acted outside the scope of his employment with J&T.

Generally, "[t]he tort of intentional interference with economic relations pertains to prospective business relations, or to contracts terminable at will[.]" *Carter v. Aramark Sports & Entertainment Services, Inc.*, 153 Md. App. 210, 240 (2003) (internal quotations omitted) (alteration in original). In *Kramer*, this Court set forth the elements of this tort:

> (1) intentional and willful acts; (2) calculated to cause damage to the plaintiff[] in [his] lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting.

124 Md. App. at 637 (citation omitted) (alteration in original). It is well established, however, "that in order to state a cause of action for tortious interference with a business relationship, a plaintiff must allege that a *third party* . . . intentionally interfered[.]" *Bleich v. Florence Crittenton Services of Baltimore, Inc.*, 98 Md. App. 123, 146 (1993) (citations omitted). Accordingly, the Court of Appeals "has consistently taken the position that the tort of wrongful interference with economic relations will not lie where the defendant is a party to the economic relationship with which the defendant has allegedly interfered." *Kaser v. Financial protection Marketing, Inc.*, 376 Md. 621, 630 (2003) (citations omitted).

This Court in *Bleich* addressed when such claims may be asserted against an employer's corporate officer. 98 Md. App. at 146. Bleich worked for a decade as a full-time teacher for Florence Crittenton Services of Baltimore ("FCS"), "a non-profit agency that provides residential and educational programs and services for adolescent females in personal crisis." *Id*. at 126. In the last year of her employment with FCS, Bleich raised concerns on several occasions to both her immediate supervisor and Anne Davis, the

executive director of FCS, about the unsafe environment that had been developing amongst FCS residents. *Id*. at 126-27. When it appeared to Bleich that Davis was neglecting these concerns, Bleich wrote a letter to the State licensing specialist on March 13, 1992, insisting that it conduct an investigation into FCS. *Id*. at 127-28. A week before she sent the March 13 letter, however, Bleich and Davis exchanged memoranda about wages for taking residents to job interviews. In a March 6 memo, Davis informed Bleich that she would be paid her normal hourly wage for taking residents on job interviews, provided that FCS could acquire the appropriate funding. *Id*. at 129. Bleich responded with a memo sent to Davis, her direct supervisor, and the president of the FCS Board of Directors, dated March 7, advising that she would not be taking a FCS resident job hunting and stated that it was a "disgrace" that funding had not already been made available. *Id*. at 128-29. On March 16, Bleich received a letter dated March 13 from Davis, indicating that her employment was terminated effective immediately on the basis of her March 7 memo. *Id*. at 128.

Bleich filed a two-count complaint against FCS and Davis. *Id*. at 130. Count Two of her complaint asserted a claim against Davis, individually, for intentional interference with Bleich's business relationships with FCS. *Id*. at 131. Davis filed a "motion to dismiss, or in the alternative, a motion for summary judgment," and the circuit court entered an order granting Davis's motion to dismiss.

In addressing whether Bleich properly asserted a claim of intentional interference with economic relations against Davis in her individual capacity as a corporate officer, this Court began with the premise that,

> when an employee acts within the scope of her employment, or as an agent of her employer, she cannot be held liable for interfering with the contract, business relationships, or economic relationships, between the employer and another.

*Id*. at 147 (citations omitted). This Court nevertheless announced that to properly allege a claim of intentional interference with business relationships against a corporate officer, "a plaintiff [must] allege that the corporate officers acted out of personal motive *and without intent to further the interests of their [corporate] principal*." 98 Md. App. at 147-48 (citing *Fuller Co. v. Chicago College of Osteopathic Medicine*, 719 F.2d 1326, 1333 (7th Cir. 1983)).

Applying this standard to Bleich's claim, this Court observed that although she had alleged that Davis acted out of malice and personal motives, Bleich "ha[d] utterly failed to allege that Davis's actions were not within the scope of her authority or 'without the intent to further the interests of her [corporate] principal.'" *Id*. at 148 (citations omitted). Thus, this Court held that Bleich had failed to state a cause of action for tortious interference with economic relations against Davis and the circuit court did not err in granting Davis's motion to dismiss. *Id*.

Looking to the underlying complaint in the instant case, Eichen asserts the following in support his claim of tortious interference against Smoot:

> 35. Defendant Bill Smoot was clearly aware that the Plaintiff was in an at-will contractual relationship with Jackson and Tull Chartered Engineers
>
> 36. By fabricating the disciplinary complaints against the Plaintiff, Defendant Bill Smoot intentionally interfered with the economic relations which the Plaintiff enjoys with Jackson and Tull Chartered Engineers.

> 37. Defendant Smoot's unlawful conduct was intentional and calculated to cause damage to Plaintiff's economic relations which he enjoyed with Jackson and Tull Chartered Engineers.
>
> 38. Defendant Smoot's unlawful conduct was done with the unlawful purpose of causing the damage aforesaid.
>
> 39. As a result of Defendant Smoot's unlawful conduct the Plaintiff was damaged, as aforesaid.

Merely alleging that Smoot's "unlawful conduct was intentional and calculated to cause damage" does not amount to an allegation that Smoot acted out of malice or personal motives. *See Bleich*, 98 Md. App. at 147-48. In any event, Eichen's claim also fails to allege the second element required by *Bleich*: he "utterly failed to allege that [Smoot's] actions were not within the scope of h[is] authority or without the intent to further the interests of [J&T]." *Id*. at 148. There is no allegation that Smoot was a third party or that he acted as a third party. Eichen, thus, failed to state a cause of action for tortious interference with economic relations against Smoot, his supervisor.

For these reasons, we affirm the circuit court's dismissal of Eichen's claims against Smoot for civil conspiracy, intentional interference with a contract, and intentional interference with economic relations.

## II.

## Motion for Summary Judgment

### A. Relevant Factual Background

On January 23, 2017, J&T moved for summary judgment, arguing that Eichen failed to offer legally sufficient evidence—direct or circumstantial—to support his claims for age

discrimination and overtime wages. With respect to the overtime claim, J&T argued that evidence that the company knew of a few isolated incidents of Eichen working from home was insufficient to establish that it had actual or constructive knowledge of Eichen's overtime work claims.

Eichen filed a response to J&T's motion on February 27, 2017, claiming that he was "entitled to be paid for the overtime work performed by him at his home," which entailed daily correspondence with the shipping agents on a NASA project in order to resolve a shipment issue overseas. Citing to his own affidavit attached as an exhibit, Eichen claimed that he worked "approximately 5 hours per week of overtime during the period between August 1, 2012 and May 23, 2014," for which he was owed $17,820.36.

The trial court held a hearing on the motion for summary judgment on March 31, 2017.[7] Counsel for Eichen argued, "[o]n the overtime issue, we don't have any evidence other than [that] presented in the affidavit because [] Eichen did this in the evenings because the people he dealt with on the west coast worked later than he did during the course of the day."

[7] At the hearing, counsel for J&T admitted that Eichen had stated a *prima facie* case for employment discrimination; namely, that at 66 years of age, he was in a protected class, was terminated by J&T, and was replaced by a younger individual, Valerie Townsend. But counsel also pointed out that, even if the trial court found that Eichen had established a *prima facie* case, "the burden then shifts under *McDonnell-Douglas*, to [J&T], to produce a nondiscriminatory reason for firing him," which they had done. Additionally, counsel asserted that there was no evidence from which a reasonable juror could conclude that J&T's nondiscriminatory reasons for firing Eichen were pretextual.

The trial court denied summary judgment as to the age discrimination claim but granted summary judgment as to the overtime claim, concluding that there were no "disputed facts sufficient to warrant not granting the summary judgment."

**B. Parties' Arguments on Appeal**

Eichen complains that he was entitled to be paid $17,820.36 for overtime work he performed at home. According to Eichen, he worked one hour per night, five days per week from August 1, 2012, through May 23, 2014, for which he was not compensated. Eichen insists that Appellees' "denial is a classic dispute of material fact[,] which should not have been decided on summary judgment." In response, Appellees contend that the overtime claim failed as a matter of law because Eichen's time sheets fail to reflect overtime hours and, further, evidence of J&T's knowledge of an isolated incident of Eichen working from home was insufficient to demonstrate J&T's actual or constructive knowledge of Eichen's alleged overtime work.

We review a trial court's grant of summary judgment without deference. *Pinnacle Group, LLC v. Kelly*, 235 Md. App. 436, 465, *cert. denied*, 459 Md. 188 (2018).

> Summary judgment is appropriate where "there is no genuine dispute as to any material fact and . . . the party in whose favor judgment is entered is entitled to judgment as a matter of law." Thus, on appeal, we conduct an independent review of the record "to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law."

*Id*. (internal citations omitted). There is no dispute of material fact "[w]here a dispute regarding a fact can have no impact on the outcome of the case." *Newell v. Runnels*, 407 Md. 578, 607 (2009) (internal quotations omitted). "We review the record in the light most

favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Id*. at 138 (citation omitted). Accordingly, we may affirm the circuit court's grant of summary judgment on only the grounds on which the circuit court relied. *Rodriguez v. Clarke*, 400 Md. 39, 70 (2007).

In the instant case, however, the circuit court did not state, on the record, its reasons for granting summary judgment. Instead, the court ruled: "I think that [J&T] is entitled to summary judgment . . . I just don't think there's enough disputed fact. I don't believe there's disputed facts sufficient to warrant not granting the summary judgment." We will, therefore, "affirm the judgment so long as the record discloses it was correct in so doing." *See Smigelski v. Potomac Ins. Co. of Illinois*, 403 Md. 55, 61 (2008) (internal quotations and brackets omitted).

The Maryland Wage and Hour Law ("MWHL") is the "State parallel" to the federal Fair Labor and Standards Act ("FLSA"). *Campusano v. Lusitano Const. LLC*, 208 Md. App. 29, 37 (2012) (citing *Newell v. Runnels*, 407 Md. 578, 649 (2009)). In general, the MWHL requires that "each employer [] pay an overtime wage of at least 1.5 times the usual hourly wage" for "each hour over 40 hours that an employee works during 1 workweek." Maryland Code (1991, 2016 Repl. Vol.), Labor and Employment Article ("LE"), §§ 3-415(a), 3-420(a). "[T]he MWPCL provides a cause of action for wrongfully withheld wages, including overtime[.]" *Pinnacle Group*, 235 Md. App. at 453 (citing *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646 (2014); *Marshall v. Safeway*, 437 Md. 542 (2014)). In general, to recover overtime wages, "an employee must prove that the employer had

actual or constructive knowledge of the overtime work." *Newell*, 407 Md. at 655. It is insufficient for an employer to show, merely, that an employer knew of "'isolated incidents' of overtime work by an employee." *Id.* (citations omitted).

The Court in *Newell* addressed whether the circuit court properly granted summary judgment in favor of the County Commissioners for Caroline County (the "County Commissioners") on claims for improperly compensated overtime work brought by public employees under the FLSA and MWHL. 407 Md. at 654. Runnel and Cooper had worked for the State's Attorney's Office ("SAO") as a Victim Witness Coordinators ("VCW") until the newly appointed State's Attorney, Newell, discharged them upon taking office. *Id*. at 590. Following their termination, the employees sued Newell, the State, and the County Commissioners, alleging, among other things, back pay for improperly compensated overtime hours in violation of the FLSA and MWHL. *Id*. at 591.

While they worked at the SAO, the SAO maintained a "dual time-keeping scheme," which required the employees to record on "time cards" "that they worked eight hours each day, whether true or not," and record and on "comp sheets," the number of hours they worked in excess of eight each day. *Id*. at 598-99. The County compensated the employees based on the "time cards," while the SAO used the "comp sheets" as a way of "allow[ing] staff members that worked longer than the eight hour workday to exchange the extra hours at a later time without reporting on their 'time cards' that they worked less than eight hours on the day that they used their comp-time." *Id*. at 599. The State's Attorney, Greenleaf,

under whom the employees had worked, and Greenleaf's predecessor, implemented this time keeping system at the behest of the County. *Id*.

The County moved for summary judgment, which the circuit court granted. *Id*. at 605. The court concluded that summary judgment was appropriate, *inter alia*, because the employees "failed to advance a *prima facie* showing that the County knew of their overtime work." *Id*. On appeal to this Court, we reversed the judgment of the trial court and held that a trier of fact reasonably could have concluded that the County had actual or constructive knowledge of the employees' overtime work. *Id*. at 606. The Court of Appeals granted certiorari to consider, among other issues, whether the employees generated a triable issue as to whether the County had actual or constructive knowledge of their overtime work. *Id*. at 607. In addressing the issue, the Court of Appeals discussed an employee's burden of proof with respect to overtime wage claims. *Id*. at 655. The Court announced:

> To hold an employer . . . liable for overtime wages, an employee must prove that the employer had actual or constructive knowledge of the overtime work. *Bailey v. County of Georgetown*, 94 F.3d 152, 157 (4th Cir. 1996). An employer's knowledge of "isolated incidents" of overtime work by an employee, however, is not sufficient to demonstrate actual or constructive knowledge of overtime work by the employee beyond those specific incidents. *Id.*; *Pforr v. Food Lion, Inc.*, 851 F.2d 106, 109 (4th Cir. 1988). Thus, **an employee "must show by actual knowledge or by a pattern and/or practice** that the employer 'suffered' or allowed the [overtime] work claimed."

*Id*. (emphasis added). In light of this test, the Court concluded that "[w]hile the County could not have been expected to know of every hour of overtime work in the SAO," the employee nevertheless had "put forth evidence of a pattern of overtime work sufficient to

permit a fair inference that the County may have known of the practice." *Id*. The Court observed that former State's Attorneys had stated that they repeatedly asked the County to budget for overtime pay; the County was aware of the SAO's increasing caseload; the former State's Attorneys implemented the comp-time policy after an incident in which the County Administrator had approved one of the employees for overtime pay but later changed his mind and asked the SAO to return the money; both employees stated that they had discussed, in some form, the SAO's comp-time policy with the County; Cooper used her comp time while on maternity leave; and Runnels stated that when she talked to the County about cashing-out her comp-time, the individual "did not seem surprised at the amount of comp-time she had accumulated." *Id*. at 655-56. The Court of Appeals, therefore, affirmed this Court's judgment and held that "a trier of fact reasonably could conclude that the County had constructive knowledge, at least, of a pattern of improperly compensated overtime work by the SAO staff generally and by [the employees] specifically." *Id.* at 656.

The Court in *Newell* relied on two Fourth Circuit cases, *Pforr* and *Bailey*, that also help guide our analysis. In *Pforr*, two Food Lion employees, Pforr and Belcher, sued for unpaid overtime wages. 851 F.2d at 107. The employees worked as full-time clerks and received overtime. *Id*. Although their supervisors authorized full-time clerks to work overtime hours as needed, Food Lion had a stated policy against off-the-clock work. *Id*. At trial, there was conflicting testimony as to the extent of Food Lion's knowledge of the employees' off-the-clock work. *Id*. Notwithstanding, the district court found that the

employees' proved that Food Lion knew of their off-the-clock work. *Id.* The court based its finding on Food Lion's concession that it had "no doubt" that the employees actually worked off-the-clock hours, that it knew or should have known about some of these off-the-clock hours, and that the employees' supervisors and managers were aware of three to four instances of the employees' off-the-clock work. *Id*. at 107-08. The district court accepted the employees' estimates that they worked a combined 1,350 hours off-the-clock over a period of three years. *Id*. at 108.

On appeal, the Fourth Circuit concluded that, although the district court did not err in defining the employees' burden of proof, the court "erred in basing its finding of such a large number of off-the-clock hours on such [] few incidents of employer knowledge." *Id*. The Fourth Circuit reasoned:

> **It is not enough for a plaintiff to establish his employer's knowledge of a few incidents of off-the-clock work,** and upon this claim of knowledge, submit a record of his three years of alleged off-the-clock work. . . . This does not mean proof of each hour claimed, on each date, but **plaintiff must show by actual knowledge or by pattern and/or practice** that the employer "suffered" or allowed the off-the-clock work claimed.

*Id*. (emphasis added). Accordingly, the Court concluded that, although the employees' exhibits were sufficient estimates of their overtime hours, "they do not reflect any measure of proof of employer allowance of such work." *Id*. Because of this, the Fourth Circuit reversed and remanded to the district court "to require [the employees] to prove by a 'just and reasonable inference' *Food Lion permitted them to work their claimed off-the-clock hours*. *Id*. at 109-110 (emphasis added).

In *Bailey*, 47 current and former deputy sheriffs filed FLSA claims against Georgetown County ("the County"), alleging that the County failed to pay them for overtime work as required under the statute. 94 F.3d at 153. Each deputy was paid a specified annual salary and received overtime pay if the deputy worked more than 171 hours during a given 28-day cycle; the overtime rate was one-half of the deputy's adjusted hourly rate, which was calculated by dividing the deputy's base salary for a 28-day period by the total number of hours worked. *Id*. at 153-54. At trial, the parties disputed "whether the County had known that approximately twenty of the forty-seven deputies had been working hours that were not being recorded on their time sheets." *Id*. at 155. The district court entered a directed verdict in favor of the County, finding that there was "not one iota of evidence" showing the County's knowledge of "a consistent plan of working off-the-clock hours[.]" *Id*.

On appeal, the Fourth Circuit framed the deputies' burden of proof as follows:

> In order to recover unpaid wages for overtime hours that were not recorded on their time sheets, [the deputies] were [] required to prove that the County knew, either actually or constructively, that they were working unrecorded overtime hours.

*Id*. at 157. The deputies, accordingly, argued that the following evidence was sufficient to survive the County's motion for a directed verdict: (1) the County's payroll supervisor testified that she had been told that some of the deputies were not recording all of their hours; (2) that same supervisor also testified that one of the deputies had told her he had not reported a couple of hours on his time sheet; and (3) another deputy testified that he told the County that deputies were not allowed to record all of the hours they worked. *Id*.

The Fourth Circuit, nevertheless, affirmed the judgment of the district court and held that "[t]he evidence presented by the deputies f[ell] short of the degree of proof required to enable a reasonable juror to conclude that the County knew that the deputies, as a matter of course, were not recording all of their hours during that period in question." *Id*. It agreed with the district court that "those apparently *isolated incidents* were not sufficient to put the County on notice that, over the three-year period in question, deputies routinely did not report all of the hours they worked." *Id*. (emphasis added).

Returning to the record before us, we observe that, at the motions hearing, Eichen stated that the only evidence he had in regard to the overtime claim was his affidavit that he had attached to his motion. In his affidavit, he asserted that he worked "approximately 5 hours per week of overtime" while working on a NASA project between August 1, 2012 and May 23, 2014, which amounted to a total of $17,820.36 in overtime pay. At his deposition, however, he testified that he did not record any of the overtime on his timesheets because he brought it up to his other supervisor, Chidekel, who told him that J&T did not provide overtime pay. Eichen's timesheets for most of the relevant time period, attached as exhibits to J&T's summary judgment motion, also do not reveal the recording of any overtime hours.

Unlike the circumstances in *Newell*, the record in this case reveals only one "isolated incident" of the possibility that an employee of J&T may have had knowledge of Eichen's alleged overtime work. 407 Md. at 655. As described by Eichen during his deposition testimony, when he was transferred to J&T, he asked his other supervisor, Chidekel, about

recording his overtime work and was told that "there was no overtime."[8] We are not convinced that Chidekel telling Eichen there was no overtime demonstrates that Chidekel, or anyone else at J&T, knew that Eichen actually worked overtime. It is just a plausible that Chidekel believed Eichen never worked overtime after Eichen asked him about it. Clearly, Eichen's testimony falls short of generating a dispute of *material* fact—namely, that J&T *knew* or had constructive knowledge of Eichen's claimed overtime hours, as required by *Newell*. On this record, it was reasonable for the circuit court to conclude that there was no material fact in support of the claim that J&T had actual or constructive knowledge of over 400 hours of overtime that Eichen allegedly worked throughout the 21-month period in question. *Newell*, 407 Md. at 655; *see also Bailey*, 94 F.3d at 157; *Pforr*, 851 F.2d at 109. Accordingly, we affirm the trial court's grant of summary judgment.

[8] Eichen argued below that Smoot's deposition testimony recalling one incident in which Eichen had sent him an e-mail about having done some work at his home supports his contention that the company was on notice of his overtime work. For one, working from home is not the same as working *overtime*. *Cf.* LE § 3-420 ("[A]n employer shall compute the wage for overtime under [LE § 3-415] on the basis of each hour over 40 hours that an employee works during 1 workweek."). Further, Smoot explained that employees must obtain approval in advance of working overtime, and that he would not have been the one to approve overtime work for Eichen—that would have been Jim Pavel. Smoot's deposition testimony, therefore, proves nothing more than he knew about Eichen doing work from home one time.

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## III.

## Evidentiary Rulings

### A. Motion *in Limine*

#### 1. Relevant Factual Background

Eichen premised his claim for age discrimination on the theory that J&T hired two younger employees, Abueg (age 41) and Trettin (age 31), to fulfills roles similar to his, which created "an overstaffing" and "required the elimination of the older [employee, Eichen]." To demonstrate that J&T's decision to terminate him was discriminatory based on his age, Eichen proffered that J&T had in place an unwritten progressive discipline policy by which it investigated claims of employee misbehavior and issued warnings. As evidence that the unwritten policy existed but was not applied to him (*i.e.*, he was discriminated against based on age), Eichen presented the court with the warning letters that J&T had issued to Rob Raper and Travis Moss. The letter to Raper, a Manager in the Aerospace Engineering Division on J&T's Environmental Test and Integration Services ("ETIS") contract, noted that J&T had investigated claims that he had a pattern of sexual harassment in the workplace and warned him for his behavior. The letter to Moss, a Supervisor of the Cable and Thermal Blankets Group on the ETIS contract, outlined accusations levied by a union that Moss had been performing "Union work for which [he was] not trained," and detailed an internal investigation into an incident with an employee that Moss supervised. According to the letter, Moss failed to file paperwork reporting the employee and later recanted the accusation he made about the employee. Eichen asserted

that these letters proved that J&T failed to conduct an adequate investigation into the allegations against him contained in the Manall letter. Relying on *Reeves v. Sanderson Plumbing, Pods., Inc.*, 530 U.S. 133 (2000), and other federal cases, Eichen argued that the failure to conduct a fair investigation into the allegations against him created a genuine issue of material fact as to whether J&T's reasons for terminating him were pretextual.

Prior to trial, J&T moved *in limine* to exclude evidence concerning disciplinary actions J&T took against Raper and Moss. J&T reasoned that Raper and Moss held different positions than Eichen (manager and supervisor, respectively); worked on different contracts than Eichen (the ETIS contract as opposed to the TRAX subcontract); worked under different supervisors than Eichen (both were supervised by Chidekel, not Smoot); and committed different forms of misconduct from Eichen (Raper allegedly sexually harassed subordinates, while Moss allegedly conducted "Union work" and improperly handled the discipline of subordinates). Consequently, J&T argued, Raper and Moss were not "similarly situated" to Eichen and could not, therefore, "be used as comparators for the purpose of demonstrating that [J&T's] motivation for terminating Mr. Eichen was pretextual." According to J&T, such evidence was irrelevant and would only confuse or mislead the jury if introduced at trial.

Eichen responded by arguing that whether he, Raper, and Moss were "similarly situated" was a question for the jury to decide and not the court. Thus, he maintained, the evidence of J&T's progressive disciplinary treatment of Raper and Moss was relevant to establishing pretext. Eichen asserted that J&T's treating his situation in a manner that was

different from that of Raper and Moss "raises the question of whether it was on account of age." During a back and forth between counsel, J&T stated that it would stipulate to the ages of Raper and Moss only if the court denied its motion to exclude the evidence. The court then asked, "What's [Moss's] age? Roughly." Counsel for J&T was "not sure" but "th[ought] he was just above 40." After questioning how J&T's progressive discipline of Moss for "g[etting] involved in union activities inappropriately" could be "relate[d] to anything," the court then asked Eichen if there "was anything else [he] want[ed] to tell [the court] about both Mr. Raper and Mr. Moss." Eichen responded "No, Your Honor."

The trial court ultimately granted J&T's motion from the bench:

> [I]n granting it, I feel that the testimony on the first instance is **not relevant because it doesn't tend to establish [ ] either discrimination or a required procedural system that was not followed in Mr. Eichen's case**.
>
> Additionally, in reviewing the allegations, I find that Mr. Raper and Mr. Moss were not similarly situated. **They both were in different departments, and their allegations were different** from what is alleged by [J&T] as to the basis for terminating Mr. Eichen, among other things, **different supervisors**. At no time, with respect to Mr. Raper or Mr. Moss, are we actually testing the discretion of the authority in this matter, who's Mr. Smoot, who's testified here today, or the personnel policies as testified to by Ms. Jones under her new name, Jessica Jones.
>
> **Additionally,** . . . there's a distinction in this case which has been brought out that **the problems with Mr. Eichen had been known to TRAX, which is the big boss**, and had been observed by TRAX employees, and had raised the issue with TRAX; and also, there was also information in this case that got employees of Goddard who's the original contractor, had knowledge of some of the alleged problems with Mr. Eichen.
>
> So, those alone would form a sufficient distinction between the discipline to Mr. Raper and Mr. Moss from the discipline of Mr. Eichen. So, **I'm satisfied that they're not similarly situated, that the evidence would be actually prejudicial. But beyond that, it just simply is not relevant to the dismissal in this matter.** So, the motion is granted.

(Emphasis added).

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### 2. Parties' Arguments on Appeal

Eichen presents the same arguments, for the most part, as he did before the circuit court. He acknowledges that he was an at-will employee and that J&T had no formal termination procedures set out in its employee handbook, but he suggests that evidence that two other employees received more lenient punishments than he did demonstrates that J&T's grounds for firing him were "pretext for terminating an older worker."

In response, J&T maintains that Eichen was not similarly situated to Raper and Moss: "They worked in different roles, in different divisions, on different contracts, for different supervisors." J&T underscores the fact that Eichen's misconduct was "entirely different" than that of Raper and Moss—chiefly, in that J&T terminated Eichen for behavior that one of J&T's *customers* brought to its attention. J&T also refutes Eichen's contention that the court's ruling precluded him from presenting evidence of J&T's progressive discipline; J&T points to evidence adduced at trial that its supervisors could discipline an employee progressively but choosing to do so was within the supervisors' discretion. J&T posits, "the probative value of J&T's treatment of Raper and Moss was limited at best," asserting that the progressive discipline of two out of 112 employees "does not tend to make the existence of an internal progressive discipline policy more probable or less probable than it would be without the evidence."

### 3. Admissibility of the Evidence

Generally, in Maryland, "all relevant evidence is admissible." Md. Rule 5-402. Evidence is relevant if it "tend[s] to establish or refute a fact at issue in the case." *Copsey*

*v. Park*, 453 Md. 141, 157 (2017) (citation omitted). The trial court, however, may exclude the evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. Weighing relevance versus unfair prejudice, like the admission of most evidence, "is committed to the considerable and sound discretion of the trial court," and appellate courts "are generally loath to reverse a trial court unless . . . there is a clear showing of an abuse of discretion." *Copsey*, 453 Md. at 157 (citation omitted); *see also Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 619 (2011) ("[T]he 'abuse of discretion' standard of review is applicable to 'the trial court's determination of relevance.'") (citations omitted). A trial court abuses its discretion when its "decision is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.'" *Consol. Waste Indus. v. Std. Equip. Co.*, 421 Md. 210, 219 (2011) (citation omitted).

To determine the relevancy of Eichen's proffered evidence, we must first discuss the issue he sought to prove at trial. When the plaintiff in an employment discrimination case seeks to prove discrimination through circumstantial rather than direct evidence, "Maryland courts apply the three-step burden shifting analysis first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." *Belfiore v. Merchant Link, LLC*, 236 Md. App. 32, 45 (2018). First, the employee must establish a *prima facie* case of discrimination. *Id.* Second, the employer may rebut the plaintiff's case "by presenting

evidence of 'some legitimate, nondiscriminatory reason' for the alleged disparate treatment.'" *Id.* at 46 (quoting *McDonnell Douglas*, 411 U.S. at 802). Third, if the employer rebuts the plaintiff's case, the plaintiff then has "an opportunity to prove by a preponderance of the evidence that the reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* (citation omitted).

Eichen claims that J&T's progressive discipline of Raper and Moss was relevant to the third step—establishing that J&T's reason for firing him was pretextual. Maryland law, in relevant part, prohibits employers from "discharg[ing] or otherwise discriminat[ing] against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment because of[] the individual's . . . age[.]" Maryland Code (1984, 2014 Repl. Vol.), State Government Article ("SG"), § 20-606(a)(1).[9] To establish that age was a factor in the employer's termination decision, the employee may offer either direct or circumstantial evidence. *Dobkin v. Univ. of Balt. Sch. of Law*, 210 Md. App. 580, 591-92 (2013).

One form of circumstantial evidence that courts have held is competent to show that an adverse employment decision was pretext for discrimination is "comparator evidence." *See Taylor v. Giant of Md., LLC*, 423 Md. 628, 652 (2011). Through comparator evidence, a plaintiff attempts to prove discrimination "by demonstrating that 'similarly situated individuals *outside their protected class* were treated more favorably.'" *Id.* (quoting

[9] We cite to the version of the statute in effect at the time of Eichen's claim accrued. The General Assembly, in 2019, amended a different subsection of SG § 20-606 but those changes are immaterial to the case before us. *See* 2019 Maryland Laws Ch. 222 (H.B. 679)

*Benuzzi v. Bd. of Educ.*, 647 F.3d 652, 662 (7th Cir. 2011) (emphasis added) (bracket omitted)); *see also Dobkin*, 210 Md. App. at 594 ("Pretext may be demonstrated by establishing that the employer favored other similarly situated applicants, *who were not members of the protected class*, and disfavored him or her.") (emphasis added). To be relevant, a comparator must be both (1) similarly situated and (2) outside of the plaintiff's protective class. *See Taylor*, 423 Md. at 652; *see also Anderson v. WMBG-42*, 253 F.3d 561 (11th Cir. 2001) ("[T]he plaintiff must show that the comparator employees are 'involved in or accused of the same or similar conduct' yet are disciplined in a different, more favorable manner." (citation omitted)).

The Court of Appeals in *Taylor* addressed "the issue of appropriate comparator evidence" as a question of first impression in Maryland. *Id.* Taylor was a female who Giant had employed as a tractor-trailer driver until Giant terminated her based on a medical examination she failed after returning to work from an absence caused by a gynecological condition. *Id.* at 631-32. Following her termination, Taylor sued Giant and prevailed at trial on claims of sex discrimination and retaliatory termination. *Id.* at 632-33. At trial, Taylor adduced evidence that four of her male coworkers also suffered from serious health problems, including diabetes, Parkinson's Disease, and severe dizziness, but that Giant did not require those male coworkers to undergo a medical analysis before returning to work. *Id.* at 656. This Court reversed the judgment against Giant on federal preemption grounds but concluded that, even if Taylor's claims were not preempted, she failed to adduce legally sufficient evidence of discrimination and retaliatory termination. *Id.* at 633-34. The Court

of Appeals granted certiorari to consider, in part, whether this Court "created a new, impossible standard for comparator evidence and 'adverse employment action[.]'" *Id.* at 634.

After examining several cases in which federal courts had addressed the alleged substantial similarity of comparators, the Court of Appeals concluded that "one who alleges discrimination need not identify and reconcile every distinguishing characteristic of the comparators." *Id.* at 655. We are looking for substantial similarities between employees, not whether they are a perfect clone. *Id.* The Court reasoned that requiring Taylor to produce a comparator with a gender-specific ailment who also did not have to undergo a medical evaluation "would essentially [] eradicat[e] disparate treatment based on gender-specific ailments as an actionable form of discrimination altogether." *Id.* at 656. Looking to the other facts that Giant held up as distinguishing, the Court concluded that courts should not "parse out every individual aspect and employment factor[] rather than consider the single most relevant fact." *Id.* at 658. In Taylor's case, that single most relevant fact was "that each of the male drivers used as comparators had significant health conditions but were not required to submit to an independent medical examination." *Id.*

In a case on which Eichen relies, *Anderson v. WBMG-42*, the United States Court of Appeals for the Eleventh Circuit considered the trial court's exclusion of comparator evidence in an employment discrimination case based on claims of racial discrimination. 253 F.3d at 564. Anderson, an African American news producer for a local television station, alleged that her termination for "unprofessional behavior" was pretext for racial

discrimination. *Id.* at 563-64. She sought to put forward evidence that her employer disciplined two white employees guilty of "unprofessional behavior" more leniently than her. *Id.* at 563-64. The two proferred comparators were an executive producer who repeatedly did not follow the production direction of the news director (although there was no evidence the news director reported this behavior to the general manager) and a newsroom photographer who lost his temper and used profanity in the newsroom. *Id.* at 563. Like J&T, the employer in *WGMG-42* did not have published employee policies with set disciplinary procedures. *Id.* at 564. The district court excluded Anderson's proffered comparator evidence, ruling that the evidence's probative value was outweighed by considerations of undue delay or waste of time. *Id.* at 563-64.

The Eleventh Circuit affirmed. The court reasoned that determining the similarity of comparators is easier in some cases than others; "for example, when two employees have violated the identical rule or expressed work policy." *Id.* at 564. In Anderson's case, however, the term "unprofessional behavior" was undefined because WBMG had "no rules of conduct or employee manuals" and "no disciplinary procedures available due to a lack of published employee policies." *Id.* When the employer's decision-making is so subjective and ad hoc, comparator evidence can create an inference that the employer possessed a discriminatory motive. *Id.* Thus, the Court rejected WBMG's arguments that, to be relevant, comparators must be so similarly situated that they have the same supervisor and commit identical offenses. *Id.* at 565. Moving on to Anderson's comparators, the Court held that the proffered comparators were relevant because they were in the same

supervisory chain of command as Anderson and also committed "unprofessional behavior" according to the term's plainly understood meaning. *Id.* at 565-66. Despite this baseline relevance, however, the Court affirmed the district court's exercise of discretion in excluding the comparator evidence. *Id.* at 566-67. The Court reasoned that "permitt[ing] a lengthy examination and perhaps lengthier rebuttal encompassing the efficacy of WGMG's management, or [the general manager's] role or ability as a supervisor, would have in effect generated a mini-trial on collateral issues which would not relate to the racial discrimination alleged in Anderson's claim." *Id.*

Applying the teachings of these cases to Eichen's claim, we conclude that the trial court did not err or abuse its discretion by excluding Eichen's comparator evidence. For one, Eichen failed before the circuit court to proffer Raper's age. Comparator evidence is relevant evidence of pretext only if the "the employer favored other similarly situated applicants, *who were not members of the protected class*[.]" *Dobkin*, 210 Md. App. at 594. An employer treating two employees differently simply cannot tend to show that the basis for the disparate treatment was age discrimination if the proponent of that evidence does not demonstrate that the two employees were different ages. *See Copsey*, 453 Md. at 157 (Relevant evidence "tend[s] to establish or refute a fact at issue in the case." (citation omitted)). Because a trial court has no discretion to admit irrelevant evidence, the court's

exclusion of evidence concerning Raper was correct.[10] *See* Md. Rule 5-402 ("Evidence that is not relevant is not admissible.").

As for Moss, however, J&T represented to the circuit court that Moss was "[r]oughly" over 40 years old. Because Moss was over 20 years younger than Eichen, evidence that J&T disciplined him differently than Eichen would be relevant evidence of pretext if Moss was situated similarly to Eichen. *See, e.g., Damon v. Fleming Supermarkets of Fl., Inc.*, 196 F.3d 1354, 1360 (11th Cir. 1999) (holding that a five-year age gap was sufficient to establish a *prima facie* case for age discrimination); *Barber v. CSA Distr. Servs.*, 68 F.3d 694, 699 (3d Cir. 1995) (reasoning that a *prima facie* case of age discrimination does not require "a particular age gap").

A perfectly probative comparator would be situated similarly to the plaintiff in every material way except that the comparator does not share the trait that the plaintiff claims as the basis for the employer's discrimination. *See Anderson*, 253 F.3d at 564; *Taylor*, 423

[10] For the first time in his reply brief to this Court, Eichen represents that Raper was "younger than the Plaintiff." Unlike his assertion of Moss's age—which includes a citation to J&T's representation at the hearing *in limine* that Moss was just above 40—Eichen offers no record support for his subsequent assertion that "Raper was also younger the Plaintiff." Appellate courts "cannot be expected to delve through the record to unearth factual support favorable to [the] appellant." *Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 201 (2008) (citation omitted). Even so, our own review of the record did not reveal any reference Raper's age at the time of the motion *in limine*. And when the trial court asked Eichen if there "was anything else [he] want[ed] to tell [the court] about both Mr. Raper and Mr. Moss?" Eichen responded "No, Your Honor."

Moreover, even if Eichen had proffered Raper's age before the trial court, we would conclude that the court acted within its discretion in excluding the evidence relating to Raper for the same reasons that support the court's exclusion of evidence relating to Moss.

Md. at 652. But perfection is not the standard for relevance; requiring a plaintiff to reconcile every dissimilarity between himself or herself and a comparator would create an "impossible standard." *See Taylor*, 423 Md. at 634, 655. That said, each difference in the situations of the plaintiff and the proffered comparator(s)—whether it be that they held a different position for the employer, had a different supervisor, or violated a different policy—detracts from the probative value of the evidence. And the Maryland Rules vest the trial court with discretion to exclude otherwise relevant evidence when "danger of . . . confusion of the issues, or misleading the jury, or by considerations of undue delay" its substantially outweighs the probative value. Md. Rule 5-403.

In this case, J&T has highlighted the following differences in the situations of Eichen and Moss: Moss was a supervisor and Eichen was not; Moss worked on the ETIS contract while Eichen was on the TRAX subcontract; Moss was supervised by Chidekel and Eichen was supervised by Smoot; and the two men committed different types of misconduct. Specifically, Moss's misconduct involved working on Union work improperly and failing to handle the discipline of his subordinates in a professional manner; by contrast, Eichen's misconduct related directly to (and was reported by) a customer, TRAX.

Although Eichen is correct that none of these distinctions are singularly dispositive, each distinction makes his proffered evidence less probative. As this Court in *Belfiore* reasoned, comparators who work in different departments and have "different skills and responsibilities" than the plaintiff militate against concluding that disparate treatment was

discriminatory. 236 Md. App. at 48. Similarly, because J&T did not have a written discipline policy, Chidekel's method for disciplining employees under his supervision has only limited (if any) probative value to show how Smoot tends to discipline employees under his supervision. *Cf. Anderson*, 253 F.3d at 564-65 (explaining why disparate treatment by the *same* supervisor can be probative evidence of pretext when an employer lacks a written discipline policy). Further, the trial court credited J&T's representation that it deemed Eichen's misconduct to be more detrimental to the company than that of Moss because a customer that had "day-to-day supervision" of Eichen witnessed and reported his behavior. According to J&T, Eichen's misconduct jeopardized J&T's performance ratings and its relationship with TRAX and NASA Goddard, hurting the company's chances to procure future contracts. It was within the trial court's discretion to credit that representation.[11]

Given the dissimilarities in the situations of Eichen and Moss, the trial court's conclusion that the prejudicial effect of this evidence substantially outweighed its probative value was not "removed from any center mark." *See Consol. Waste Indus.*, 421 Md. at 219; *see also Anderson*, 253 F.3d at 566-67 (reasoning that dissimilarly situated comparator evidence "would have in effect generated a mini-trial on collateral issues"). Accordingly, we discern no abuse of discretion.

[11] We give little credence to Eichen's subjective interpretation that the behavior that led to the progressive discipline of Raper and Moss was less severe than Eichen's own behavior. *Cf. Dobkin*, 201 Md. App. at 605 ("[A] disgruntled employee's self-serving statements about his [or her] qualifications and abilities generally are insufficient to raise a question of fact about an employer's honest assessment of that ability.").

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**B. The Manall Email**

Next, Eichen contests the circuit court's admission of the Manall Email at three different points during trial, "because the majority of the allegations in the Manall email were without foundation and uncorroborated hearsay." He asserts that "the testimony of [J&T's] witnesses centered on a discussion of the hearsay allegations contained in the Manall email even though the witnesses, with few exceptions, had no independent information about the allegations of the email." Eichen then challenges the truthfulness of the email's contents, complaining that J&T failed to produce testimony proving the truth of the allegations contained in the email.[12]

Appellees respond that the Manall Email is not hearsay because it was not offered for the truth of the matter asserted. Rather, according to Appellees, it "offered the e-mail to demonstrate its effect on the recipient – namely, that Smoot read the e-mail and it impacted his decision to terminate Eichen. Further, "to the extent [] Eichen wanted to challenge the veracity of the email or the credibility of [] Manall, [] Warner, or [] Pavey, he had the opportunity at trial, as each of them appeared as a witness.

On direct, counsel for Eichen asked Smoot about his personal knowledge of the incidents he claimed as the basis for recommending Eichen's termination, many of which were those incidents also alleged in the Manall Email. On cross-examination, when

[12] Eichen also complains that the email is not restricted to the time period of his employment. But, as we explain in the next section, Eichen's workplace conduct prior to his transfer from TRAX to J&T was relevant to J&T's defense and Eichen opened the door for such evidence.

counsel for J&T sought to admit the Manall Email and also have Smoot go through each of the incidents alleged in the Manall Email, Eichen objected, arguing that the Manall Email contained hearsay and was irrelevant because the incidents contained therein took place prior to Eichen's employment with J&T. The trial court agreed with Eichen that the email contained a lot of hearsay but overruled Eichen's hearsay objection, observing that "it provides a motivation" and was "in response to a lot of questions . . . asked [] on direct." As Smoot testified about the allegations contained in the Manall Email, the trial court interrupted his testimony to apprise the jury that the matters Smoot was testifying about were reported in an email but "[w]e're not really addressing whether or not these events happened. What we're addressing here *is the decision making of [J&T] and [Smoot]*, okay?" The contents of the Manall email were also admitted, over Eichen's same hearsay objections, as part of other defense exhibits.

This Court recently iterated that "Maryland Rule 5-802 prohibits the admission of hearsay, unless it is otherwise admissible under a constitutional provision, statute, or another evidentiary rule." *Wallace-Bey v. State*, 234 Md. App. 501, 536 (2017). Hearsay is "[a] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Evidence is not hearsay merely because it includes "words spoken by another person out of court." *Wallace-Bey*, 234 Md. App. at 536. An out-of-court declaration is not hearsay, and should not be excluded as such, unless it is (1) a statement and (2) offered for the truth of the matter asserted. *See Stoddard v. State*, 389 Md. 681, 688-89 (2005). Therefore, the

determination of whether an out-of-court statement is hearsay depends on the purpose for which it is offered at trial." *Dyson v. State*, 163 Md. App. 363, 373 (2005). We review without deference whether a declaration is hearsay. *Parker v. State*, 408 Md. 428, 436 (2009).

We hold that the trial court did not err by admitting the Manall Email into evidence because J&T did not offer the email to prove the truth of its contents but to show the effect of the email on Smoot and how it impacted his decision to terminate Eichen's employment. The trial court made this point clear to the jury, instructing that the focus was not the truth of the email's contents but how it affected J&T and Smoot's decision-making. Smoot's testimony was consistent with the court's instruction. He emphasized that J&T did not even investigate the complaints in the Manall Email because he and J&T were concerned only with the fact that its customer and its customer's employees raised the issues alleged in the email. As Smoot explained, customer complaints about J&T employees could adversely affect J&T's relationship with TRAX and NASA Goddard, and could also adversely affect the company's performance ratings and competitiveness on future procurements.

Because J&T offered the Manall Email for the non-hearsay use of showing the email's effect on Smoot and his decision-making in terminating Eichen—the central issue in the case—and *not* the truth of Manall's allegations, the trial court did not err by overruling Eichen's objections.

### C. Manall's Trial Testimony

Finally, Eichen insists that the circuit court erred by permitting Manall to testify about events that occurred prior to his employment with J&T. Without citation to legal precedent, Eichen asserts: "All of the testimony by Jean Manall related to the allegations in the Manall email should be stricken because it was not limited to the time [Eichen] was employed by J&T, and based on hearsay and not upon personal knowledge."

Appellees respond that Manall's testimony about her previous interactions with and observations of Eichen during their employment together at TRAX was relevant to laying a foundation for her testimony and establishing her credibility and motive for sending the Manall Email. Additionally, Appellees aver that Eichen placed at issue his performance at TRAX by testifying in his case-in-chief about the awards he received during his employment at TRAX. And regardless, Appellees assert that any error was harmless because Eichen failed to prove that the admission was "both manifestly wrong and substantially injurious."

The trial court overruled Eichen's objection to Manall's testimony because the evidence was relevant to J&T's defense to the allegation that it failed to investigate Eichen's behavior, and, because Manall's testimony was directly relevant to Eichen's assertion that he never did anything of which Manall or J&T accused him. Despite some of the behavior predating Eichen's employment with J&T, the trial court observed that there was "a little overlap between his original employment with TRAX and his employment with [J&T], and I have essentially given [Eichen] the leeway on that . . . but

that comes with I guess the consequence that whatever he did at . . . TRAX is at issue and has been raised and has been discussed."

As we explained above, relevant evidence is generally admissible unless the trial court determines that any undue prejudice from admitting the evidence would outweigh its probative value. *See Copsey*, 453 Md. at 157. We review the circuit court's decision for abuse of discretion. *Id.*

Under the three-step burden-shifting analysis set out in *McDonnell Douglas*, once an employee establishes a *prima facie* case of discrimination, the burden shifts to the employer to rebut the plaintiff's case through evidence of a legitimate, non-discriminatory reason for firing the employee. *Belfiore*, 236 Md. App. at 45. A substantial part of J&T's defense was that its legitimate reason for firing Eichen was that its customer, TRAX, supervised Eichen on a day-to-day basis and if TRAX had an issue with a J&T employee, "that adversely affects the company not only in terms of our relationship with TRAX [] but our relationship with [] NASA Goddard." Manall was a TRAX employee who had worked directly with Eichen. She was the customer's employee who raised the issue of Eichen's conduct and sent the email that led J&T to terminate Eichen's employment. Her testimony about her past experiences and impressions of working with Eichen before his transfer to J&T directly implicated her reasons for sending the email and refuted Eichen's position that he did not do what Manall accused him of.

Further, as the trial court observed, Eichen had opened the door to such testimony in his case-in-chief. When one party "opens the door" to what would otherwise be

irrelevant evidence, "the 'opening the door' doctrine [acts] as 'a rule of expanded relevancy that, under limited circumstances, 'allows the admission of evidence that is competent, but otherwise irrelevant.'" *Daniel v. State*, 132 Md. App. 576, 591 (2000) (quoting *Grier v. State*, 351 Md. 241, 260 (1998)). Under this doctrine, the adverse party may adduce evidence that "otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue, or (2) inadmissible evidence admitted by the court over objection." *Id.*

At trial, Eichen's case-in-chief was, essentially, that Manall fabricated allegations of Eichen's workplace conduct and that J&T knowingly adopted these fabricated allegations as pretext for firing him based on his age. This 'opened the door' to Manall's testimony about Eichen's workplace conduct to refute Eichen's claim that he did not behave in the inappropriate ways that Manall alleged. Further, her testimony was relevant to support J&T's defense that it fired Eichen based on TRAX's observations of his misconduct. Accordingly, we discern no abuse of discretion in the trial court's decision to permit her testimony.

For the reasons discussed above, we affirm the judgments of the circuit court.

**JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; APPELLANT TO PAY COSTS.**