No. ___

IN THE SUPREME COURT OF THE
UNITED STATES

JAY PEMBERTON, Petitioner,

v.

BELL'S BREWERY, INC., Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit and the
United States District Court
for the Western District of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in disability discrimination and related employment discrimination cases, a court of appeals may affirm summary judgment by resolving disputed issues of fact and credibility in the employer's favor based on judge-made frameworks such as *McDonnell Douglas*, rather than applying Federal Rule of Civil Procedure 56 and viewing the evidence in the light most favorable to the nonmoving employee.

LIST OF PARTIES

Petitioner: Jay Pemberton.

Respondent: Bell's Brewery, Inc.

RELATED PROCEEDINGS

Jay Pemberton v. Bell's Brewery, Inc., No. 1:22-cv-00739 (W.D. Mich.)

Jay Pemberton v. Bell's Brewery, Inc., No. 24-1518 (6th Cir.)

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Pemberton v. Bell's Brewery, Inc.*, 150 F.4th 751 (6th Cir. 2025), and is reproduced in the Appendix at App. 1a.

The opinion of the United States District Court for the Western District of Michigan is *Pemberton v. Bell's Brewery, Inc.*, No. 1:22-cv-00739 (W.D. Mich. Mar. 18, 2024), and is reproduced in the Appendix at App. 47a. Judgment was entered on March 25, 2024.

JURISDICTION

The Sixth Circuit entered judgment on September 4, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VII: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 56(a): A party may move for summary judgment, identifying each claim or defense–or the part of each claim or defense–on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

42 U.S.C. § 12112(a): No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. §2000e-2(a): It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Bell's Brewery hired petitioner Jay Pemberton in 2002. Over nearly two decades, he rose to the position of senior brewer at Bell's Comstock facility. During that time, he sustained lower-back injuries on the job, and Bell's was aware that he had work-related physical limitations. Pemberton also has a diagnosed anxiety disorder that affects his ability to manage stress and workplace interactions.

In 2019, after another workplace injury and work restrictions, Pemberton requested light-duty work as an accommodation. Bell's denied the request and sent him home on reduced workers' compensation pay. Around that period, his supervisor, Scott Pohlmann, resisted efforts to accommodate him and made inappropriate comments about his condition. Bell's later terminated Pohlmann and, in subsequent litigation, Pohlmann called Pemberton as a witness. Bell's knew that Pemberton had given testimony adverse to the company.

In 2021, Bell's suspended Pemberton and opened an internal investigation after several co-workers made complaints about him. The company's account of the sequence and content of those complaints is sharply disputed. Pemberton testified that he was suspended before Bell's interviewed him or meaningfully investigated, and that Bell's labeled him a "toxic employee" while ignoring his own reports of a hostile environment and the impact of its actions on his anxiety disorder. As part of the investigation and later severance discussions, Bell's questioned him about a female co-worker's rape by an employee of Bell's sister company and his knowledge of that incident, while at the same time pressuring him to sign a release or a "last-chance" agreement under threat of losing his job.

Pemberton declined to sign either document. Bell's treated that refusal as the end of the employment relationship; Pemberton contends that, given his prior suspension and the ultimatum presented, he was effectively forced out.

Pemberton filed suit in the Western District of Michigan under federal and Michigan law, alleging (among other claims) failure to accommodate, disability discrimination, age discrimination, and retaliation. After discovery, the district court granted summary judgment for Bell's on all claims.

The Sixth Circuit affirmed in an opinion on September 4, 2025. It accepted Bell's characterization of the reasons for suspending and ending Pemberton's employment, held that his hostile work environment evidence was insufficient as a

matter of law, and concluded that no reasonable jury could find pretext or retaliation on this record. In doing so, the court resolved factual disputes and adopted the employer's narrative at the summary judgment stage. This petition follows.

REASONS FOR GRANTING THE WRIT

A. The Sixth Circuit's Decision Conflicts With This Court's Summary Judgment Precedent by Resolving Disputed Facts and Credibility in the Employer's Favor

This Court has repeatedly held that, at summary judgment, courts may not weigh evidence, resolve factual disputes, or make credibility determinations, and must draw all reasonable inferences in favor of the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000); *Tolan v. Cotton*, 572 U.S. 650, 657–60 (2014). The decision below is impossible to reconcile with those principles.

The record here involves a long-tenured employee with documented physical and mental health conditions whose requested accommodation was denied, who was then suspended and branded "toxic," and who ultimately was forced to choose between a punitive "last-chance" agreement and a severance package presented in the shadow of an ongoing sexual misconduct investigation against another employee. The timing and content of the complaints against him, the sequence of the suspension and investigation, the characterization of his conduct, and the nature of his "choice" at the end of his employment are all sharply disputed. There is also sworn testimony from a former co-worker – herself a rape victim of an employee of Bell's sister company – who described Mr. Pemberton as "a big teddy bear" and "just a nice guy," testimony that directly undercuts the employer's later narrative about his supposed toxicity and threat to others.

Rather than treat those disputes as issues for a jury, the Sixth Circuit accepted Bell's version of events as essentially undisputed. It adopted the company's label of Mr. Pemberton as "toxic," treated its investigation as neutral fact-finding, and discounted his testimony about what occurred, the effect of the workplace on his anxiety, and the coercive nature of the options presented to him at the end of his employment. In doing so, the court left no meaningful role for a jury to decide whether

Bell's explanation was sincere or pretextual, or whether the environment and retaliation he described were unlawful.

Under *Reeves* and *Tolan*, those are classic jury questions. By affirming summary judgment on this record, the Sixth Circuit effectively converted Rule 56 into a tool for judicial fact-finding in ADA and retaliation cases, permitting courts to prefer the employer's narrative over the employee's even where the evidence is genuinely contested. Review is necessary to preserve the integrity of the judicial system in the handling of employment discrimination claims.

B. The Decision Below Highlights the Very McDonnell Douglas Problems Identified in *Hittle v. City of Stockton* and Deepens Confusion and Division Among the Circuits

This case arrives at a moment when this Court has already been asked to confront how the judge-made *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) framework is being used at summary judgment in Title VII cases. In *Hittle v. City of Stockton*, 604 U.S. ___, 145 S. Ct. 759 (2025), the Court denied certiorari in a Title VII religious discrimination case, but Justice Thomas, joined by Justice Gorsuch, issued a detailed dissent from the denial.

In *Hittle*, the dissent described McDonnell Douglas as a "judge-created doctrine" that has "spawn[ed] enormous confusion" in the lower courts and "taken on a life of its own." *Hittle*, 145 S. Ct. at 761 (Thomas, J., dissenting) (quoting *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008)). Justice Thomas emphasized that the framework is not grounded in the text of Title VII or any other source of law, and urged this Court to reconsider what role, if any, McDonnell Douglas should play. He explained that a Title VII claim should survive summary judgment so long as the plaintiff establishes a genuine dispute of material fact as to each element of the claim, and questioned whether McDonnell Douglas "is helping anyone" perform the Rule 56 task.

The confusion is not just theoretical. Lower courts are divided on how strictly a plaintiff must attack an employer's stated reasons at summary judgment. The Eleventh Circuit has held that a plaintiff must "meet the reason proffered head on and rebut it," and that when an employer offers more than one nondiscriminatory reason, the plaintiff must rebut each one to avoid summary judgment. *Crawford v.*

City of Fairburn, 482 F.3d 1305, 1308 (11th Cir. 2007); *Chapman v. AI Transp.*, 229 F.3d 1012, 1037 (11th Cir. 2000) (en banc). By contrast, other courts read *Reeves* to mean that a discrimination plaintiff is not required to disprove every reason the employer offers. For example, the Third Circuit has explained that a plaintiff seeking to avoid summary judgment does not have to "cast doubt on each proffered reason in a vacuum"; when an employer "proffers a bagful of legitimate reasons" and the plaintiff casts substantial doubt on a fair number of them, a factfinder may rationally disbelieve the rest. *Fuentes v. Perskie*, 32 F.3d 759, 764–65 & n.7 (3d Cir. 1994). The Third Circuit's pattern jury instructions similarly focus the inquiry on whether the evidence would allow a factfinder to conclude that each proffered reason "was either a post hoc fabrication or otherwise did not actually motivate the employment action," rather than demanding that plaintiffs "refute" every detail of the employer's narrative. 3d Cir. Model Civ. Jury Instr. § 5.1.2 (Employment Discrimination).

In Justice Thomas's words, lower court decisions reflect "widespread misunderstandings about the limits of *McDonnell Douglas*," leading some courts to treat the framework not as a procedural device but as a substantive standard a plaintiff must "establish to survive summary judgment." *Hittle*, 145 S. Ct. at 762. (Thomas, J., dissenting).

The Sixth Circuit's approach in this case exemplifies the very misuse of *McDonnell Douglas* that the *Hittle* dissent identifies. Purporting to apply the framework, the panel did not simply ask the Rule 56 question – whether a reasonable jury could find that Bell's stated reasons were not the real reasons. Instead, it treated the *McDonnell Douglas* steps and the "pretext" inquiry as hurdles Petitioner failed to clear, accepted Bell's description of its own motives as essentially dispositive, blessed Bell's investigation, and then resolved factual disputes and credibility questions in the company's favor.

In circuits that have heeded decisions like *Brady* and *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016), the focus at summary judgment remains on the single question Rule 56 asks: whether the evidence as a whole would permit a reasonable jury to find discrimination, without letting *McDonnell Douglas* "become a largely unnecessary sideshow." *Brady,* 520 F.3d at 494. By contrast, the Sixth Circuit's decision here illustrates a more rigid, framework-first approach, precisely the kind of extra-textual, judge-made overlay Justice Thomas warned about

in his dissent in *Hittle*. Review is warranted to provide the guidance that two Members of this Court have already said is needed and to prevent continued divergence in how Title VII and Rule 56 operate in the lower courts.

C. The Treatment of Disability Based Hostile Work Environment and Retaliation Claims in This Case Undermines the ADA's Protection for Employees With Mental Health Conditions

This case also raises an important and recurring question: how courts should evaluate disability-based hostile work environment and retaliation claims when the disability is a mental health condition such as anxiety. The ADA and comparable state statutes are clear that mental impairments are entitled to the same protections as physical ones. Yet in practice, hostile work environment claims involving psychological conditions are often dismissed at summary judgment by characterizing repeated conduct as ordinary workplace friction and ignoring the cumulative impact on the disabled employee.

Mr. Pemberton presented evidence that he had a diagnosed anxiety disorder known to Bell's; that co-worker and supervisory conduct, including repeated comments about his appearance and demeanor and intrusive speculation about his sexual orientation, exacerbated that condition; that he sought changes and accommodation; and that instead of alleviating the problem, Bell's suspended him, labeled him "toxic," and forced an ultimatum in the midst of a sensitive sexual misconduct investigation involving a co-worker who nonetheless described him as a "big teddy bear" and "just a nice guy." A reasonable jury could view the workplace as hostile to his disability and could view the suspension and forced choice as retaliation for his protected activity.

The courts below refused to allow a jury to make that assessment. They sliced the facts into isolated episodes, characterized them as benign, and discounted the cumulative impact on someone with his diagnosed anxiety. That approach sits uneasily with this Court's instruction that hostile work environment claims must be evaluated based on the "totality of the circumstances," and it effectively writes mental impairments out of the statute by treating their real-world consequences as legally insignificant. Without guidance from this Court, disability-based hostile work

environment and retaliation claims involving mental health conditions will continue to be dismissed at summary judgment in precisely the way this case illustrates.

D. This Case Is an Appropriate Vehicle to Clarify the Limits of Judicial Fact-Finding at Summary Judgment and to Reaffirm the Jury's Role in ADA and Title VII Cases

This case is a strong vehicle for addressing these problems. The parties completed discovery; the summary judgment record includes competing accounts from the employer, the plaintiff, and third-party witnesses; and the district court granted summary judgment on all claims. The Sixth Circuit affirmed in a short opinion that clearly adopts the employer's narrative and leaves no doubt that it resolved factual disputes and competing inferences against the nonmoving party. There are no jurisdictional obstacles and no ancillary issues that would complicate review. The question presented – how Rule 56 operates in disability and discrimination pretext cases when courts rely on *McDonnell Douglas* and related doctrines – is cleanly teed up.

The case also illustrates the practical costs when courts go further and frame a citation omission as a "misstatement" by counsel, where the testimony at issue was given at a deposition defense counsel attended. The issue was a clerical exhibit/citation-labeling mismatch in the district court – including duplicate exhibit designations and the use of pseudonym labels (i.e., EE-1 vs. EE-3) to protect the identity of a rape victim – yet it was treated as if there were an intent to mislead. That kind of rhetoric chills advocacy on behalf of civil rights plaintiffs by treating clerical errors as intentional misstatements, and it can become a vehicle for discounting evidence that undermines an employer's narrative.

Granting review here would allow this Court to do what Justice Thomas urged in *Hittle*: "revisit *McDonnell Douglas* and clarify what role—if any—it ought to play in Title VII litigation," *Hittle*, 604 U.S. at ___ (Thomas, J., dissenting), and to reaffirm that summary judgment in discrimination and retaliation cases must be applied consistent with *Anderson*, *Aikens*, *Reeves*, *Tolan*, and Rule 56 itself. Clarifying that courts may not use judge-made frameworks to resolve disputed facts and credibility in the employer's favor at summary judgment would provide immediate and much-

needed guidance to lower courts and restore the central role of the jury in the kinds of fact-intensive civil rights cases Congress intended juries, not judges, to decide.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

December 3, 2025 Respectfully submitted,

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APPENDIX

United States Court of Appeals, Sixth Circuit.

Jay PEMBERTON, Plaintiff-Appellant, v. BELL'S BREWERY, INC., identified on initiating documents as Bell's Comstock Brewery, Defendant-Appellee.

No. 24-1518

Decided: September 04, 2025

Before: THAPAR, BUSH, and MURPHY, Circuit Judges.

ARGUED: Ryan E. Myers, CARLA D. AIKENS, P.L.C., Detroit, Michigan, for Appellant. Aaron D. Lindstrom, BARNES & THORNBURG, Grand Rapids, Michigan, for Appellee. ON BRIEF: Carla D. Aikens, CARLA D. AIKENS, P.L.C., Detroit, Michigan, for Appellant. Jennifer J. Stocker, BARNES & THORNBURG, Grand Rapids, Michigan, for Appellee.

OPINION

Jay Pemberton brought federal and state claims against his former employer, Bell's Brewery. He claims the Brewery failed to accommodate him, discriminated against him based on his age and disability, and retaliated against him for engaging in protected activity—all in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101; Michigan's Persons with Disabilities Civil Rights Act, Mich. Comp. Laws § 37.1202; Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The district court granted summary judgment to the Brewery, holding that Pemberton failed to timely exhaust his administrative remedies for certain claims and failed to establish pretext for others. On appeal, we are tasked with addressing, among other things, the adequacy of his Charge of Discrimination filed with the Equal Employment Opportunity Commission and the prima facie requirements for disability discrimination claims. Because the district court did not err in granting the Brewery's motion for summary judgment, we AFFIRM.

I.

A. Pemberton's Employment at Bell's Brewery

Bell's Brewery hired Pemberton as a packager in March 2002. After five years in that position, the Brewery promoted him to packaging manager. But Pemberton aspired

to work in the brewing department. So in 2010, he voluntarily took a pay cut to move into that department when the opportunity presented itself. By 2012, he was again promoted, this time to senior brewer.

The senior brewer position is physically demanding. The job description cites "frequently" lifting and moving objects "up to 25 lbs" and "occasionally" doing the same for weights of "55 lbs" as necessary job duties. According to the Brewery, the role was even more strenuous than described because there was no upper weight or frequency limit on lifting, dragging, or carrying heavy objects.

This lifting led Pemberton to injure his back while at work in December 2018. It was his second back injury, the first having occurred in 2016. After the second injury, the Brewery enrolled Pemberton into its workers' compensation program, providing him medical care and wage loss benefits.

From December 2018 to November 2019, Pemberton's physicians imposed several physical restrictions on his ability to work. These included avoiding continuous standing and refraining from lifting or pushing anything over ten pounds. Because of these restrictions, Pemberton could not perform the essential lifting and carrying duties required by the job. So, the Brewery accommodated him by assigning him "light duty" work within the brewhouse. This work included "taking temperature and pressure checks, and verifying paperwork for racks, fuge and dry hops." R. 80-4, Johnson Decl., PageID 1148–49.

Eventually, the Brewery ran out of light duty work for Pemberton. As a solution, Pemberton asked if the Brewery could create a new position for him as a "Field Marketing and Research Specialist." The Brewery declined to do so, in part because it "did not have a business need for that position." Id. Instead, the Brewery placed him on leave from March to May 2019, during which he received two-thirds his full-time wages.

By mid-May 2019, Pemberton accepted an offer to take part in the Brewery's "Transitional Work Program," through which he was paid his full-time wages while working for a non-profit partner. He participated in this program for roughly two months, before requesting to be removed. The Brewery then placed Pemberton back on leave while it continued to explore alternative work options that would sufficiently accommodate his prolonged medical restrictions.

Pemberton returned to work in October 2019 after the Brewery shifted some of his duties to other employees, allowing him to resume light duty work. And the next month, November 2019, his physician cleared Pemberton to resume his role as senior brewer without any physical restrictions.

B. The Brewery's Investigation of Josh Pohlman

In July 2018, before Pemberton's second back injury, Josh Pohlman became Pemberton's shift lead. As shift lead, Pohlman was required to evaluate Pemberton's work performance annually. Pemberton's first review was apparently unfavorable, and he complained to HR in February 2019 about how Pohlman conducted the review. He specifically complained about Pohlman's use of "shift notes," which a different employee testified was abnormal.

During its investigation of Pemberton's complaint about his supervisor, the Brewery discovered that Pohlman had disparaged Pemberton's back condition. For example, Pohlman told Pemberton that the team considered him to be a "cancer" and that many coworkers thought he was "milking" his injury. R. 80-3, Schuiling Dep., PageID 1059; R.80-1, Pemberton Dep., PageID 837.

The investigation initially resulted in Pemberton's removal from Pohlman's supervision. The Brewery eventually terminated Pohlman in March 2019 for his inappropriate comments about Pemberton's medical condition and for impeding the investigation. In June 2020, Pohlman called Pemberton as a witness in a lawsuit that he had filed against the Brewery for wrongful termination.

C. Pemberton's Job Applications

Throughout his tenure at the Brewery, Pemberton applied for several internal positions, though he was rejected for many of them. Two of those applications were for the "Field Service Representative" (FSR) role in 2020 and the "Technical Brewer" position in 2021. The Brewery ultimately hired two other internal candidates for the jobs. It explained that Pemberton was not selected for the FSR role because he lacked sales experience, as it was primarily a sales-based position. Instead, the Brewery chose Michael Dickinson, largely because of his prior experience as a distributor and the exceptional sales training he had received in that job. And as for filling the technical brewer position, the Brewery passed over Pemberton for Scott Lusk, whose

qualifications included a Bachelor of Science in Beverage Science and experience volunteering on projects typically managed by technical brewers.

D. The Brewery's Investigation of Pemberton

In May 2021 an employee, referred to as EE-1, complained to the Brewery that Pemberton had made a series of inappropriate remarks to him. EE-1 served in the United States Marine Corps and struggled with suicidal ideation, making several attempts on his life after returning from active duty. Pemberton allegedly asked him disturbing questions, such as how many people he had killed during his service and how much money his family would receive if he ended his life. The Brewery launched an investigation into EE-1's claims.

As the investigation unfolded, more allegations against Pemberton arose. A witness came forward alleging that Pemberton had made a sexually inappropriate comment about another employee, EE-2. And the Brewery learned of a recent Facebook post made by another employee, EE-3, linking Pemberton to date rape occurring at the Brewery by its employees.

In May 2021, the Brewery suspended Pemberton without pay while the investigation continued. Pemberton was not told the specific reasons for his suspension. In the suspension meeting, Pemberton asked if the investigation was related to EE-3's Facebook post. The Brewery told him that his suspension was not about EE-3's complaint, which was being handled separately by a third-party investigator.

In early June 2021, the Brewery interviewed Pemberton about the allegations involving EE-1 and EE-2. Pemberton admitted to asking EE-1 about insurance benefits in the event of suicide but denied the claims associated with EE-2. He also denied asking about EE-1's "kill count" during his military service.

The Brewery's investigation found no corroborating evidence to support or verify EE-2's allegations, but the company still decided Pemberton's admitted and alleged comments toward EE-1 warranted disciplinary action. Additionally, the Brewery informed the third-party investigator handling EE-3's date rape allegations that Pemberton might have relevant information.

Soon after the conclusion of the investigation of EE-1's and EE-2's allegations, the Brewery informed Pemberton that he was considered a "toxic employee" and

presented him with two options: either sign a "last chance agreement" (the Agreement) or accept a severance package. The Agreement would require Pemberton to, among other things, accept a demotion and undergo mandatory training, but he would not receive a pay cut. On the other hand, the severance package offered nine months' salary, continued health insurance, and outplacement services, but it also required him to participate in the third-party investigation into EE-3's allegations.

Pemberton hesitated to accept the Agreement, finding the prospect of returning to work at the Brewery uncomfortable. So, he attempted to negotiate a better severance package. He secured a pay increase to a full year's salary and extended the health insurance coverage. Nonetheless, in July 2021, Pemberton rejected the severance offer and chose not to return to work at the Brewery.

E. Pemberton's Pursuit of Legal Remedies

Pemberton first filed an Inquiry Questionnaire with the Equal Employment Opportunity Commission (EEOC) on June 21, 2021. The Questionnaire included an attached timeline comprised of multiple pages of factual allegations. One relevant passage reads:

After several weeks, no more than 4, I was told I could not return to my light duty position and was sent home . I have since discovered other employees that have been injured on the job continued light duty for months, so much so that new roles/positions have been created for them. Positions were created to retain them full time without injury risk.

R. 80-1, Inquiry Questionnaire, PageID 923. The timeline organized the facts by protected characteristic (i.e., age, disability, and retaliation) and by the year the events took place, ranging from 2010 to 2021.

On March 22, 2022, Pemberton filed a formal Charge of Discrimination (Charge) with the EEOC, alleging that the Brewery's discriminatory conduct occurred between December 1, 2018, and May 26, 2021. He amended it the next day. The substance of that Charge, as amended, is important to this appeal. It reads:

I began working for Bells Brewery Company on or about March 14, 2002, as a Packager. I was promoted to Senior Brewer in or around September 2012. In or around December 2018, I was injured resulting from an unsafe work practice

introduced in or around November 2018. I was put on light duty in or around October 2019 as a result from this injury and was sent home until I was completely recovered. Upon my return I was seen as milking it by other coworkers, which caused tension among the workforce. When applying for Technical Brewer in or around December 2020 or January 2021, I was told I was not hungry enough, nor did I possess a four-year degree. In or around May 2021, I had a conversation with Brewer [EE-1] regarding suicide and life insurance policies. I was informed by Emily Schuling of Human Resources that this conversation was creating a toxic and hostile work environment and I was told I needed to step down from Senior Brewer to Brewer. I was never fired, nor did I quit. I believe I was discriminated against by being demoted due to my disabilities, and passed up for a promotion because of my age, 43. I believe I was discriminated against because of my disability, and retaliated against for engaging in protected activity, in violation of Title I of the Americans with Disabilities Act of 1990, as amended, and because of my age (43) in violation of the Age Discrimination in Employment Act of 1967, as amended.

R. 80-1, Charge of Discrimination, PageID.932.

The EEOC issued Pemberton a Right to Sue Letter in May 2022. He filed the instant lawsuit on August 12, 2022. And he brought claims under the Americans with Disabilities Act, 42 U.S.C. § 12101; Michigan's Persons with Disabilities Civil Rights Act, Mich. Comp. Laws § 37.1201; Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The Brewery moved for summary judgment, and the district court ruled in favor of the Brewery on all counts. The court held that Pemberton failed to exhaust or timely exhaust his administrative remedies for certain claims, and that for other claims, he lacked evidence to establish pretext.

Pemberton timely appealed.

II.

We review de novo a district court's grant of summary judgment. Hyman v. Lewis, 27 F.4th 1233, 1237 (6th Cir. 2022). We will affirm summary judgment if, after viewing the facts in the light most favorable to the nonmovant, "no genuine dispute as to any material fact" exists, and "the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a); Young v. United Parcel Serv., Inc., 575 U.S. 206, 231, 135 S.Ct. 1338,

191 L.Ed.2d 279 (2015). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). We analyze whether Pemberton's claims survive this standard below.

III.

A. Americans with Disabilities Act

Pemberton brought three claims under the Americans with Disabilities Act (ADA): Count I (Failure to Accommodate), Count III (Retaliation), and Count V (Discrimination). The ADA prohibits discrimination "against a qualified individual on the basis of disability in regard to" the "terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Under the statute, "discrimination" includes a failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." Id. § 12112(b)(5)(A). But an accommodation is not reasonable if it would "impose an undue hardship on the operation of the business," in which case the employer or "covered entity" need not accommodate. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (quoting 42 U.S.C. § 12112(b)(5)(A)).

The ADA also forbids retaliating against individuals who oppose unlawful practices or participate in investigations or proceedings under the Act. 42 U.S.C. § 12203(a) (retaliation). The "ADA is not, however, a catchall statute creating a cause of action for any workplace retaliation, but protects individuals only from retaliation for engaging in . activity covered by the ADA." Rorrer v. City of Stow, 743 F.3d 1025, 1046 (6th Cir. 2014).

Before a plaintiff can bring suit in federal court alleging ADA violations, he must exhaust his administrative remedies by filing a charge of discrimination with the EEOC. Bullington v. Bedford Cnty., 905 F.3d 467, 469–70 (6th Cir. 2018). The claim must also be timely. The plaintiff has 300 days from the alleged discrimination to file a charge or else lose the right to bring the claim. See Parry v. Mohawk Motors of Mich., Inc., 236 F.3d 299, 309 (6th Cir. 2000).

As explained below, these requirements doom Pemberton's ADA claims for failure to accommodate, retaliation, and discrimination.

1. Failure to Accommodate

The Brewery sought summary judgment on the failure-to-accommodate claim based on Pemberton's failure to (1) explicitly mention this claim in his EEOC Charge and (2) bring the claim in a timely fashion. See Pemberton v. Bell's Brewery, Inc., No. 22-739, 2024 WL 1152267, at *5–6 (W.D. Mich. Mar. 18, 2024). In other words, he did not properly exhaust his claim by including it in his Charge, and even if he did, it was untimely. The district court disagreed with the Brewery's first argument but accepted the second. We agree with the Brewery that Pemberton's omission of a failure-to-accommodate claim in his Charge is fatal to his claim. We also agree that, in any event, that claim would be untimely.

a. Exhaustion

Start with exhaustion. The district court read "the Questionnaire and the Charge together" to conclude that "Pemberton sufficiently included the accommodation claim" in his Charge as amended. Id. at *5. The court acknowledged that the Amended Charge contained no mention of the Brewery's failure to accommodate. Id. But because Pemberton's Inquiry Questionnaire referenced reasonable accommodations that he had previously received and that other employees had enjoyed for longer periods, the district court decided Pemberton had cleared the first exhaustion-defense hurdle—namely, that he include the failure-to-accommodate claim in his Charge. See id. We respectfully disagree with the district court. Pemberton did not do enough to meet the procedural requirements to properly state a failure-to-accommodate claim, which is a prerequisite to properly exhaust this claim before the EEOC.

The ADA tasks the EEOC with exercising "the same enforcement powers, remedies, and procedures that are set forth in Title VII of the Civil Rights Act of 1964 when it is enforcing the ADA's prohibitions against employment discrimination on the basis of disability." E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 285, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002); see 42 U.S.C. § 12117(a). Consequently, we can rely on Title VII and its caselaw to analyze exhaustion in the ADA context. 1 Title VII says that employees must first exhaust their administrative remedies before bringing their claim and, in order to do so, they must file the claim in an EEOC "charge." See Williams v. CSX Transp. Co., 643 F.3d 502, 509 (6th Cir. 2011). The ADA incorporates that requirement in 42 U.S.C. § 12117(a). 2

We therefore can review Pemberton's claim only if either (1) he "explicitly file[d] the claim in an EEOC charge or [(2)] the claim [could] be reasonably expected to grow out of the EEOC charge." Strouss v. Mich. Dep't of Corr., 250 F.3d 336, 342 (6th Cir. 2001). The first avenue for review would be satisfied if Pemberton expressly stated his failure-to-accommodate claim somewhere in his Charge. See Hayes v. Clariant Plastics & Coatings USA, Inc., 144 F.4th 850, 865 (6th Cir. 2025); see also Abeita v. TransAmerica Mailings, Inc., 159 F.3d 246, 254 n.6 (6th Cir. 1998) (holding employee who said she "was treated differently than males, harassed, and discharged because of [her] sex, female" in her charge did not explicitly file a retaliation claim as she "neither checked the retaliation box nor described anything that indicates that she might have a retaliation claim"). Such explicit filing would give notice to the EEOC and the employer as to the employee's grievances.

The second basis for our review asks whether, notwithstanding the absence of an explicit filing, the EEOC submission included "facts related" to a claim that the employee did properly charge. The question is whether those reasonably related facts "would prompt the EEOC to investigate a different, uncharged claim." Younis v. Pinnacle Airlines, Inc., 610 F.3d 359, 362 (6th Cir. 2010). This softens the explicit filing requirement in recognition that "aggrieved employees—and not attorneys—usually file charges with the EEOC," and "pro se complaints are construed liberally." Id. at 361–62; see also Fed. Express Corp. v. Holowecki, 552 U.S. 389, 402, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008) (recognizing "laypersons, rather than lawyers, are expected to initiate the process").

But even pro se parties have obligations they must meet under the "facts related" approach. In Younis, for example, we held against a pro se employee who tried to bring a hostile-work-environment claim in federal court after only citing facts to support disparate treatment in his EEOC charge of discrimination without explicitly stating that claim in the charge. See 610 F.3d at 362. The employee failed to show harassment unreasonably interfered with his work and created an objectively hostile environment, offering "only discrete acts of alleged discrimination, limited to three or four isolated comments by his peers that occurred over a three-year period." Id. We held that this "evidence, cited in an EEOC charge to support a claim of disparate treatment, [did] not also support a subsequent, uncharged claim of hostile work environment." Id. And even more on point, we held in Jones v. Sumser Retirement

Village that a failure-to-accommodate claim did "not reasonably grow out of the facts and claims" the plaintiff asserted in a termination claim. 209 F.3d 851, 853 (6th Cir. 2000).

Based on standards recognized in cases like Younis and Jones, Pemberton did not do enough to raise his accommodation claim with the EEOC.

First, he did not explicitly file the claim with the agency. The district court acknowledged as much, stating that Pemberton's "Amended Charge contained no mention of a failure to accommodate" claim. Pemberton, 2024 WL 1152267, at *5. And Pemberton does not argue otherwise.

Second, his claim does not reasonably relate to or grow out of the facts alleged in his Charge. As an initial matter, Pemberton did not proceed pro se: he had already engaged counsel at the time of filing and even lists her name (Carla Aikens). 3 But even under the pro se standard, he did not state enough to raise the failure-to-accommodate claim. The only portions of his Charge that even arguably suggest facts for this claim are his statements that he was (1) "put on light duty in or around October 2019 as a result from this injury and was sent home until [he] was completely recovered" and (2) denied a particular new position because he was "not hungry enough" and lacked "a four-year degree." R. 80-1, Charge of Discrimination, PageID 932. These limited statements were insufficient to prompt the EEOC, or sufficiently notify it, to investigate a different, uncharged failure-to-accommodate claim. If anything, they suggest that the Brewery made reasonable efforts to accommodate Pemberton.

In response, Pemberton argues that his accommodation claim is "reasonably expected to be part of" his Charge because it "arises out of the same core discrimination." Reply Br. at 5. Not so. That position misstates the law and unduly relaxes the exhaustion requirement. As Pemberton neither explicitly filed a failure-to-accommodate claim nor stated facts that the claim reasonably related to or grew out of his charge, his accommodation claim fails.

Our analysis does not change when we consider Holowecki, 552 U.S. at 392, 128 S.Ct. 1147. It is true that Holowecki recognizes that "a wide range of documents might be classified as charges." Id. at 402, 128 S.Ct. 1147. This allows courts to interpret intake forms that accompany charges as "charges" in their own right, and to assess their

contents to decide whether the employee explicitly filed a claim, or it reasonably grew from the newly recognized charge. But Holowecki has its limits. It does not direct that we ignore the EEOC's administrative scheme. 4

As a general matter, employees should include their claims in their formal charges. See, e.g., Younis, 610 F.3d at 361. But if they do not, it is "possible under certain circumstances for an intake questionnaire itself to constitute a charge." Russ v. Memphis Light Gas & Water Div., 720 F. App'x 229, 237 (6th Cir. 2017) (citing Holowecki, 552 U.S. at 389, 128 S.Ct. 1147). A pre-charge form, here Pemberton's Inquiry Questionnaire, can be a charge if it is (1) "verified"—that is, submitted under oath or penalty of perjury, 29 C.F.R. § 1601.3(a); (2) contains information that is "sufficiently precise to identify the parties, and to describe generally the action or practices complained of," id. § 1601.12(b); and (3) complies with Holowecki. Williams, 643 F.3d at 509. But Pemberton fails to meet any of these requirements here.

We will address those requirements in reverse order, starting with whether Pemberton's Inquiry Questionnaire complies with Holowecki. Under Holowecki, "an 'objective observer' must believe that the filing 'taken as a whole' suggests that the employee 'requests the agency to activate its machinery and remedial processes.' " Id. (quoting Holowecki, 552 U.S. at 398, 402, 128 S.Ct. 1147); see Russ, 720 F. App'x at 237–38 (deciding questionnaire was not a charge because it lacked language that could be construed as asking the EEOC to take action against defendant); see also Kindred v. Memphis Light, Gas & Water, No. 22-5360, 2023 WL 3158951, at *5 (6th Cir. Feb. 27, 2023) (order), cert. denied, —— U.S. ——, 144 S. Ct. 2637, 219 L.Ed.2d 1271 (2024) (holding employee's pre-charge inquiry form was not a charge under the ADEA because it expressly stated that it was not intended as a charge and instead a tool to assess whether an employee's allegations fell within the scope of employment discrimination laws). So, even though Holowecki broadens the traditional "explicitly file or reasonably grow out of" rule for exhausting administrative remedies by liberalizing the definition of a "charge," there remains an "additional requirement": that the filing must invoke the EEOC's remedial processes. Williams, 643 F.3d at 508 (citing Holowecki, 552 U.S. at 398, 128 S.Ct. 1147).

And it is this requisite—the invocation of EEOC's authority to address the claim—that Pemberton fails to satisfy. The closest he comes is in one district court-cited statement from the attached timeline to his Inquiry Questionnaire:

After several weeks, no more than 4, I was told I could not return to my light duty position and was sent home . I have since discovered other employees that have been injured on the job continued light duty for months, so much so that new roles/positions have been created for them. Positions were created to retain them full time without injury risk.

R. 80-1, Inquiry Questionnaire, PageID 923. This language describes Pemberton's treatment compared to other employees. But nowhere does it actually request that the EEOC invoke its processes to remediate the employer's conduct.

Indeed, rather than request the EEOC to take action, the Inquiry Questionnaire explicitly states that it is not a charge. Just as in Kindred, the top of the first page of Pemberton's Inquiry Questionnaire clearly states, "This Questionnaire is not a Charge of Discrimination." R. 80-1, Inquiry Questionnaire, PageID 918. And every ensuing page of the Questionnaire reiterates in bolded, capitalized letters that "THIS QUESTIONNAIRE IS NOT A CHARGE OF DISCRIMINATION." Id. at PageID 918–21. Finally, the "Privacy Act Statement" on the Questionnaire's last page states that the form's "principal purpose" is to "solicit information about claims of employment discrimination, determine whether the EEOC has jurisdiction over those claims, and provide charge counseling, if appropriate." Id. at PageID 921. It expressly disclaims it is a charge and instead emphasizes that Pemberton "must" take an additional step to "file a charge of discrimination." Id.

In finding that Pemberton falls short in stating an accommodation claim, we garner further support in the fact that "more than half of the filings the EEOC receives each year are mere informational inquiries rather than enforcement requests." Williams, 643 F.3d at 508. The Questionnaire, after all, is an "Inquiry Questionnaire." The EEOC uses initial filings like Pemberton's as a screening tool to assess whether a claim warrants further investigation. See id. Until the agency decides there is sufficient cause to proceed, the Brewery has not received official notice or had an opportunity to respond to Pemberton's claim. A questionnaire gathers only preliminary information and rarely alleges specific legal violations. See, e.g., R. 80-1, Inquiry Questionnaire, PageID 918–28. A charge of discrimination, by contrast, formally asserts claims, triggers enforcement procedures, and puts the employer on notice of potential legal action. See Holowecki, 552 U.S. at 393, 128 S.Ct. 1147. That way, a charge gives the EEOC and the employer a chance to "settle the dispute

through conference, conciliation, and persuasion." Younis, 610 F.3d at 361. Because Pemberton's Inquiry Questionnaire explicitly reads like the form itself says—as an information inquiry rather than an enforcement request—neither the Brewery nor the EEOC has had this opportunity to resolve the failure-to-accommodate claim through the EEOC process.

The facts in Holowecki and Williams reinforce our decision that Pemberton's Questionnaire is not an enforcement request for an accommodation claim. In Holowecki, the plaintiff wanted the Court to construe her intake questionnaire as a charge because she did not file her charge of discrimination before the statutory deadline. 552 U.S. at 394, 128 S.Ct. 1147. The Court did so, in large part because the employee had attached an affidavit to her intake questionnaire, asking the EEOC to "please force [her employer] to end their age discrimination plan so [she and her coworkers] can finish out [their] careers absent the unfairness and hostile work environment created within their application of Best Practice/High-Velocity Culture Change." Id. at 405, 128 S.Ct. 1147 (cleaned up). She also had marked the "Yes" box on the intake questionnaire giving consent for the agency to disclose her identity to her employer. Id. at 406, 128 S.Ct. 1147. But sans the employee's affidavit expressly requesting relief, the Court noted that it "might agree" that the intake questionnaire's "statements do not request action." Id. at 404, 128 S.Ct. 1147.

Likewise, in Williams, our court noted the importance of claimants actually requesting relief. There, the pro se plaintiff submitted a "Charge of Discrimination" and "Charge Information Form" to the EEOC and wanted us to recognize them as charges for her sexually-hostile-work-environment claim. 643 F.3d at 509–10. We decided both were charges. The Charge Information Form, specifically, satisfied Holowecki because Williams "expressly stated" that her employer's "facility was 'a very hostile work environment' and that she 'felt that CSX owed her money damages.' " Id. at 510 (cleaned up). These statements and request for money damages indicated to an objective observer that Williams "sought the EEOC to activate its remedial machinery, rather than simply obtain information." Id. at 509.

Unlike the filings in Holowecki and Williams, Pemberton's Charge and Inquiry Questionnaire did not invoke EEOC remediation of the claim at issue—here, a failure to accommodate. An objective observer would not view Pemberton's vague references to prior accommodations, whether granted to him or to his coworkers for longer

durations, as a request for the EEOC to activate its machinery and remedial processes. There is no call to action or request for the agency to act. When considering the filing as a whole—particularly, its unequivocal statement that "THIS QUESTIONNAIRE IS NOT A CHARGE OF DISCRIMINATION"—Pemberton did not trigger an EEOC response related to his employer's failure to accommodate.

And even if we concluded otherwise, Pemberton's Questionnaire fails Williams's other requirements. The filing is unverified. Pemberton did not submit it under oath or penalty of perjury. See R. 80-1, Inquiry Questionnaire, PageID 921. Nor did he sign the Questionnaire. Nothing in the filing's contents suggests that Pemberton meets this requirement.

True, a second, verified and timely charge can amend an employee's first filing. See Williams, 643 F.3d at 509–10. But Pemberton did not do that. In Williams, the plaintiff's second filing (a Charge of Discrimination) was a sufficient charge and verified: "Williams signed her name at the bottom of the filing" and "declared under penalty of perjury that" its contents were "true and correct." Id. at 510 (cleaned up). The second filing also attested to the truth of Williams's first filing. See id. Here, by contrast, Pemberton's second filing (his Charge of Discrimination) did not incorporate the facts stated in his Inquiry Questionnaire. Also, as discussed more below, Pemberton's Charge missed the statutory deadline and is thus not an adequate charge. See R. 80-1, Charge of Discrimination, PageID 932. So, although Williams allows a charge to cure a verification defect in a pre-charge if the subsequent filing is in fact a timely charge and the two filings allege the same facts and legal violations, that was not the case here. So, Pemberton's filing remains unverified.

Pemberton's Questionnaire also fails the EEOC's specificity requirements, Williams's second prong. 643 F.3d at 509; 29 C.F.R. § 1601.12(b). This is a regulatory substantive content requirement. The filing does not describe with enough precision the action or practices relating to the Brewery's failure to accommodate his back injury. See R. 80-1, Inquiry Questionnaire, PageID 918–28. Our case is not like Williams, where the employee's charge information form "identified" the employer "and its employee" as "the offenders" and recounted the violation "in detail" and with quotations over the "course of three pages." 643 F.3d at 509. All that Pemberton's Questionnaire said was (1) he "was told [he] could not return to [his] light duty position and was sent home" after "several weeks" of "light duty" work and (2) he has "since discovered other

employees that have been injured on the job continued light duty for months, so much so that new roles/positions have been created for them." R. 80-1, Intake Questionnaire, PageID 923. He does not say who these employees are or what their new roles or positions were, nor does he provide a general description of the practices he complains about. That falls short of the regulatory requirement. See 29 C.F.R. § 1601.12(b).

Failing any of the three Williams requirements would be enough for us to rule against Pemberton's exhaustion argument. He fails all three. Because Pemberton's Charge of Discrimination did not allege failure to accommodate and his pre-charge inquiry form cannot be considered a charge, he did not exhaust his administrative remedies.

b. Timeliness

The district court resolved Pemberton's failure-to-accommodate claim by deciding it was time barred. We agree. Even if he had filed his accommodation claim in his Charge, Pemberton did not do so in a timely fashion.

A "claimant who wishes to bring a lawsuit claiming a violation of the ADA must file a charge of discrimination within 300 days of the alleged discrimination." Parry, 236 F.3d at 309; see 42 U.S.C. § 12117(a) (noting procedures from 42 U.S.C. § 2000e–5(e)(1) apply to ADA claims). And if the employee does not possess a right-to-sue letter from the EEOC, he "has not exhausted his" administrative remedies. Parry, 236 F.3d at 309.

Pemberton filed his Charge in late March of 2022. That means he needed to allege in an appropriate EEOC filing that the Brewery's discrimination occurred in or after late May of 2021 to satisfy the 300-days-prior rule. He did not, for a couple of reasons. First, he does not cite to any time when he was discriminated against based on a failure to accommodate, let alone a time after May 2021. The closest Pemberton comes to suggesting dissatisfaction with the Brewery's accommodations in any EEOC filing is in his Questionnaire—not his Charge, when he alleges that the Brewery created positions "to retain" other employees "full time without injury risk," but not him. R. 80-1, Questionnaire, PageID 923. Even then, Pemberton does not say when he became aware of the differing treatment or when it occurred.

Second, September 2020 would be the latest he could have filed a timely charge based on his facts. From the record, we know that Pemberton's physical restrictions were

fully lifted on November 26, 2019, when his physician cleared him to return to work at full capacity. See R. 80-4, Johnson Decl., PageID 1151. Pemberton returned to full duty work as a senior brewer and he neither needed nor sought any accommodation after this time. Id.; Pemberton Dep., R. 80-1, PageID 871–73, 908–09; R. 80-5, Dr. Kilmer Dep., PageID 1216–17, 1220. He filed neither the Questionnaire nor the Charge by September 2020 and therefore exceeded the 300-day limit. So, even if he had properly filed a failure-to-accommodate claim in an EEOC charge, Pemberton did not meet the ADA's statutory time requirements.

2. Retaliation and Discrimination

Pemberton assumes he timely exhausted his ADA retaliation and discrimination claims. See Appellant Br. at 12. 5 As exhaustion is not a jurisdictional question, see Fort Bend Cnty. v. Davis, 587 U.S. 541, 543, 139 S.Ct. 1843, 204 L.Ed.2d 116 (2019), we instead skip to the merits and resolve the retaliation and discrimination claims on those grounds, as the district court did. We agree with that court that Pemberton lacks sufficient evidence for these claims to survive summary judgment.

The ADA makes it unlawful for an employer to "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). And it prohibits retaliation against individuals who "opposed any act or practice" the ADA makes unlawful or who "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" the ADA. 42 U.S.C. § 12203(a). When a plaintiff lacks direct evidence of discrimination or retaliation, like here, we analyze the claims under McDonnell Douglas's familiar burden-shifting framework. See Rorrer, 743 F.3d at 1046.

As plaintiff, Pemberton bears the initial burden of establishing a prima facie case of retaliation under the ADA. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). To do so, he must establish that "(1) he engaged in activity protected under the ADA; (2) the employer knew of that activity; (3) the employer took an adverse action against [him]; and (4) there was a causal connection between the protected activity and the adverse action." Rorrer, 743 F.3d at 1046. By "protected activity," we mean an "action taken to protest or oppose a statutorily prohibited discrimination." Id.

An ADA discrimination claim also imposes a similar prima facie burden on the plaintiff. It requires that Pemberton show (1) he is disabled; (2) he is otherwise qualified for the position, with or without reasonable accommodation; (3) the Brewery knew of his disability; (4) he suffered an adverse employment decision; and (5) there was a causal connection between the disability and the adverse action. See Hedrick v. W. Rsrv. Care Sys., 355 F.3d 444, 453 (6th Cir. 2004).

The causal connection prong for retaliation and discrimination ADA claims requires Pemberton to show that his protected disability activity (retaliation) or his disability (discrimination) is the "but-for" cause for the Brewery's adverse actions. See Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 321 (6th Cir. 2012) (en banc). He must "put forth some evidence to deduce a causal connection between the adverse action and protected activity," Gray v. State Farm Mut. Auto. Ins. Co., 145 F.4th 630, 639 (6th Cir. 2025), that is "sufficient to raise the inference" that the discrimination or "protected activity was the likely reason for the adverse action," Nguyen v. City of Cleveland, 229 F.3d 559, 566 (6th Cir. 2000). To satisfy this requirement, we often look for things like temporal proximity between the protected activity and adverse action. See, e.g., Gray, 145 F.4th at 639.

Pemberton cannot establish a prima facie case for retaliation. He says he engaged in protected activity when (1) "he served as a witness to details of sexual assault and harassment claims by his colleagues" and (2) "he complained to HR about a performance review that was not conducted per [company] policy, and based upon disability discrimination." Appellant Br. at 20. And he argues the Brewery "suspended him, which is the adverse action here." Id. at 21. But neither alleged protected activity suffices.

The first fails because it is not, in fact, a protected activity. The ADA does not protect serving as a witness in sexual assault and harassment proceedings. That activity has no relation to a disability, or to an action opposing an ADA-prohibited discrimination. See 42 U.S.C. §§ 12101–12213; Rorrer, 743 F.3d at 1046. Just because sexual harassment is discriminatory does not make it discrimination under the ADA. As we have said already, the ADA is not a "catchall statute." Rorrer, 743 F.3d at 1046. Like in Rorrer, Pemberton "cannot establish a prima facie case of ADA retaliation because the ADA does not cover the activity for which he allegedly suffered retaliation." Id. at 1047.

The second activity fails because it is not causally connected to the adverse action. It refers to Pemberton's complaint to HR about Pohlman's shift notes and disparaging comments about Pemberton's back injury. But the Pohlman issue took place more than two years before Pemberton's suspension, which occurred in May 2021. Even if we interpreted Pemberton's reference to his HR complaint to encompass Pohlman's calling Pemberton as a witness in Pohlman's June 2020 lawsuit, Pemberton continued working for the Brewery for a long while after he testified. One would not infer that Pemberton's role in that investigation could cause his suspension two years or even one year after the fact. That is not temporally proximate to the alleged adverse action.

Nor is it, more relevantly, a but-for cause. First, the Brewery fired Pohlman back in 2019 for his comments about Pemberton's disability. Second, there was an intervening investigation into inappropriate comments Pemberton made to EE-1 and uncorroborated, sexual comments he allegedly made to EE-2. The Brewery began its investigation into EE-1's complaint of Pemberton in May 2021, suspended Pemberton that same month, interviewed Pemberton on June 2, 2021, and ultimately presented Pemberton with the Last Chance Agreement or severance package the next week. The Brewery told Pemberton the day it offered those two options that he was "a toxic employee." R. 80-1, Pemberton Dep., PageID 895. These facts indicate that Pemberton's complaint about an employee that the Brewery fired two years before Pemberton's suspension was not a but-for cause for his suspension. Even though satisfying the causal connection prong is not a high bar, Pemberton has failed to provide any evidence worthy of deducing a causal connection here.

Because Pemberton bases his discrimination claim on Pohlman's discrimination, thus tracking his second retaliation argument, he fails to establish a causal connection again. Pohlman's discriminatory comments occurred before he was fired in March 2019 and before Pemberton returned to work without physical restrictions in November 2019. The more than two-year period that elapsed between Pohlman's comments and Pemberton's suspension, and the intervening investigation into Pemberton's own comments to EE-1, prevent a reasonable jury from finding a causal connection. Because he cannot establish a prima facie case of discrimination or retaliation, his claims fail.

But even if Pemberton could establish the prima facie case, he does not offer sufficient evidence to create a jury issue as to pretext for either claim. In other words, he lacks proof to overcome the Brewery's legitimate non-discriminatory reason for Pemberton's termination: "Pemberton engaged in inappropriate behavior towards EE-1 based on EE-1's mental health." Appellee Br. at 44.

Pemberton tries to argue that this reason is pretextual because EE-1 was not intimidated by Pemberton, given EE-1 supposedly referred to Pemberton as a "big teddy bear." Pl. Resp., R. 90 at 17; Reply at 11. But this argument lacks evidentiary support. Pemberton's counsel identifies no place in the record where EE-1 made this statement. The lack of proof is glaring given that Pemberton's counsel was asked on countless occasions for a verifiable citation for the "big teddy bear" remark—by the Brewery, the district court, us at oral argument, and when we requested supplemental briefing on the issue. See, e.g., Pemberton, 2024 WL 1152267, at *7. In response to our most recent request, counsel claims it was EE-3 who said that line and then refers us to "a footnote on page 11" of Pemberton's Reply Brief. That footnote tells us that "Plaintiff already clarified that the teddy bear comment came from the employee who was raped, EE-3, not from EE-1." Reply at 11. But counsel also uses the "big teddy bear" comment on that same page to say, "Defendant's claim that Plaintiff was suspended due to intimidating behavior is undermined by witness testimony describing Plaintiff as a 'big teddy bear.' " Id. Counsel still has not given us a record cite. We agree with the Brewery that this is a "goose-chase," and that Pemberton's counsel makes "serious and active misstatements of the record." Appellee Br. at 45–46. 6 Pemberton has failed to set forth evidence to show pretext. The district court therefore properly granted summary judgment to the Brewery on his ADA discrimination claim.

B. Michigan's Persons with Disabilities Civil Rights Act

Pemberton brought three claims under Michigan's Persons with Disabilities Civil Rights Act (PWDCRA): Count II (Failure to Accommodate), Count IV (Retaliation), and Count VI (Discrimination). See Mich. Comp. Laws § 37.1202(1)(b); R. 1, Complaint, PageID 9, 13, 18. Each claim rests on the same facts as Pemberton's ADA claims. The district court granted summary judgment to the Brewery on each claim. Pemberton, 2024 WL 1152267, at *9–10.

The PWDCRA prohibits an employer from discriminating against a qualified individual with a disability. Mich. Comp. Laws § 37.1202(1)(b). The state law "substantially mirrors the ADA," so resolving an ADA claim will generally resolve a plaintiff's PWDCRA claim. Donald v. Sybra, Inc., 667 F.3d 757, 764 (6th Cir. 2012). That makes most of our analysis quick. We resolve Pemberton's PWDCRA discrimination and retaliation claims by relying on our analysis of his equivalent ADA claims. Because we affirm the district court's ADA decision, and because the same facts and burden-shifting framework apply to Pemberton's PWDCRA retaliation and discrimination claims, see Mich. Comp. Laws § 37.1210(1), we also affirm the district court's grant of summary judgment to the Brewery on the PWDCRA claims.

The analysis for Pemberton's state law failure-to-accommodate claim, however, is a little more involved. Though the grounds for Pemberton's PWDCRA accommodation claim are not readily discernible on appeal, we conclude after analyzing his complaint and summary judgment briefing that he bases the claim on the Brewery's refusal to create a new position for him or give him more light duty work after August 2019 and the Brewery's decision to instead place him on medical leave. 7

We cannot resolve his PWDCRA accommodation claim like his ADA claim because the state law does not share the ADA's exhaustion requirement and instead has a three-year statute of limitations. 8 See Mich. Comp. Laws § 600.5805; Garg v. Macomb Cnty. Cmty. Mental Health Servs., 472 Mich. 263, 281–82, 696 N.W.2d 646 (2005), opinion amended on denial of reh'g (July 18, 2005). So instead of deciding the claim on exhaustion and timeliness grounds as we did for Pemberton's ADA failure-to-accommodate claim, we decide the state law equivalent on the merits without deciding whether Pemberton met the statutory deadline. We conclude he does not establish a prima facie case of accommodation.

The PWDCRA follows McDonnell Douglas's framework, so Pemberton bears the first burden of proving a prima facie case. See Mich. Comp. Laws § 37.1210(1). To do so, he must establish (1) he is "disabled" as defined in the statute, (2) his disability does not prevent him from performing the duties of a particular job or position, with or without accommodation, § 37.1103(l)(i), and (3) he has been discriminated against in one of the ways set forth in the statute. See Mich. Comp. Laws § 37.1202(1)(b); Rourk v. Oakwood Hosp. Corp., 458 Mich. 25, 31, 580 N.W.2d 397 (1998) (analyzing

Handicappers' Civil Rights Act (HCRA), renamed PWDCRA); Peden v. City of Detroit, 470 Mich. 195, 204, 680 N.W.2d 857 (2004); Petzold v. Borman's, Inc., 241 Mich. App. 707, 714, 617 N.W.2d 394 (2000). In other words, the PWDCRA guarantees that a disabled individual otherwise qualified for a particular job is entitled to some accommodation as outlined in § 37.1210, like altered schedules or new equipment. See Webster v. Target Corp., No. 22-11293, 2024 WL 4063907, at *4 (E.D. Mich. June 27, 2024); Cunningham v. USF Holland, Inc., No. 310141, 2013 WL 1748563, at *5 (Mich. Ct. App. Apr. 23, 2013) (per curiam).

But those accommodations do not include an employer modifying the primary job duties. See Mich. Comp. Laws § 37.1210(15); Rourk, 458 Mich. at 31, 580 N.W.2d 397. Nor does the PWDCRA require an employer to create or offer the disabled employee a new position as an accommodation if the employee can no longer perform the essential duties of the job for which he was originally hired. See Rourk, 458 Mich. at 33–34, 580 N.W.2d 397; see also Kerns v. Dura Mech. Components, Inc., 242 Mich. App. 1, 16, 618 N.W.2d 56 (2000) ("An employer . has no duty to accommodate the plaintiff by recreating the position, adjusting or modifying job duties otherwise required by the job description, or placing the plaintiff in another position."). Unlike the ADA, which "requires accommodation in the form of reassignment," the PDWCRA lacks "a duty to transfer as a form of accommodation." Rourk, 458 Mich. at 32, 580 N.W.2d 397. In Rourk, that meant that a registered nurse who could not lift more than five pounds after a shoulder injury and therefore not perform, with or without accommodation, the essential duties of a nurse, "was not entitled to a job transfer" accommodation under state law. Id. at 36, 580 N.W.2d 397.

Pemberton suffers the same fate. The record shows that Pemberton could not perform the essential duties of his senior brewer position from March 2019 to November 2019. Not only was Pemberton unable to perform his essential job duties with or without accommodations, but he also wanted the Brewery to create a new role for him. The Brewery's decision to reject his request does not violate state law and instead falls well within Rourk's holding. Indeed, the accommodations he received after August 2019 surpass the Brewery's state law obligations. The Brewery continued to search for a job for Pemberton when he could not perform as senior brewer, gave him his full wages in the Transitional Work program, and then placed him on an approved leave of absence when the light duty work ran out. By November 2019, he returned to his

senior brewer position restriction-free. Pemberton ultimately cannot establish the prima facie case for accommodation. So we affirm the district court's grant of summary judgment.

C. Michigan's Elliot-Larson Civil Rights Act

Pemberton alleges age discrimination under Michigan's Elliott-Larsen Civil Rights Act (ELCRA). 9 Mich. Comp. Laws § 37.2202. That statute bars age-based discrimination in employment, including in matters of compensation and the terms, conditions, or privileges of employment. See Mich. Comp. Laws § 37.2202(1)(a). Pemberton claims that younger employees were "treated differently" than him "by being held to a less stringent standard" and "preferred over older workers who tended to suffer injuries after working for" the Brewery "for many years." R. 1, Complaint, PageID 20–21. The district court granted summary judgment to the Brewery because Pemberton "failed to offer sufficient evidence to create a triable issue for the jury concerning whether age was a motivating factor in Bell's employment decisions." Pemberton, 2024 WL 1152267, at *11. We agree.

To allege an ELCRA violation, Pemberton must bring suit within three years of the alleged adverse action. Mich. Comp. Laws § 600.5805. "ELCRA claims are analyzed under the same standards as federal ADEA claims." Geiger v. Tower Auto., 579 F.3d 614, 626 (6th Cir. 2009); see Drews v. Berrien County, 839 F. App'x 1010, 1012 (6th Cir. 2021). 10 Because Pemberton lacks any "direct evidence of impermissible bias," the McDonnell Douglas burden-shifting framework applies again. Hazle v. Ford Motor Co., 464 Mich. 456, 462, 628 N.W.2d 515 (2001).

That framework requires Pemberton to first establish a prima facie case of age discrimination. 11 If he does, the Brewery has the burden to advance an age-neutral reason for its employment decision to rebut the discriminatory presumption. Id. at 467, 628 N.W.2d 515. If the Brewery succeeds, Pemberton must then establish pretext, demonstrating "that the evidence in the case, when construed in" his "favor, is sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action." Id. at 465, 628 N.W.2d 515 (internal quotations omitted). This "final stage of the McDonnell Douglas framework" asks whether Pemberton's protected characteristic, his age, would have "made a difference in the contested employment decision." Id. at 466, 628 N.W.2d 515. The district court assumed without deciding that Pemberton established a prima facie case of age

discrimination. See Pemberton, 2024 WL 1152267, at *10. We do the same and resolve the issue on pretext grounds.

Pemberton provides no evidence demonstrating that age was a motivating factor in the Brewery's decisions not to promote him. The Brewery denied him two job opportunities within the ELCRA period of limitations: the technical brewer job awarded to Michael Dickinson on March 9, 2020, and the FSR position awarded to Scott Lusk on April 20, 2021. The Brewery justified its technical brewer decision because Lusk previously volunteered on projects worked on by technical brewers and he held a Bachelor of Science degree in beverage science. See Pemberton, 2024 WL 1152267, at *2 (citing R. 80-3, Schuiling Dep., at 38–39). And it supported its FSR decision with Dickinson's prior experience as a distributor, noting you "can't really beat the training that distributors provide to their sales folks." Id. Pemberton offers nothing to indicate these legitimate reasons are pretextual.

He instead focuses his appellate brief on arguing his age was a motivating factor behind the Brewery's offer of the Agreement or the severance package. Our analysis here as to pretext tracks our analysis of Pemberton's disability claims. The Brewery offered him the choice between the Agreement and the severance package because of his behavior towards EE-1. So, his age did not make a difference to the Brewery's decision. See Hazle, 464 Mich. at 466, 628 N.W.2d 515. Pemberton's attempts to argue otherwise—whether by noting the Brewery suspended him before conducting his investigation or attempting to mislead us with his description as a "big teddy bear"—do not convince us. We affirm.

D. Title VII of the Civil Rights Act of 1964

Pemberton claims the Brewery violated Title VII when it retaliated and discriminated against him. 42 U.S.C. § 2000e-3. But his Title VII claims, the district court held, share the same defects as his disability and age discrimination claims: he cannot establish pretext, or the claims fail on timely exhaustion grounds.

We need not examine whether the district court correctly granted summary judgment on the Title VII claims because Pemberton forfeited the challenge. Generally, "an appellant abandons all issues not raised and argued in its initial brief on appeal." Rose v. State Farm Fire & Cas. Co., 766 F.3d 532, 540 (6th Cir. 2014) (internal quotations omitted). And when referring to an issue "in a perfunctory manner,

unaccompanied by some effort at developed augmentation," we deem the issue forfeited. Doe v. Mich. State Univ., 989 F.3d 418, 425 (6th Cir. 2021) (cleaned up).

Pemberton references a "genuine issue of material fact regarding his Title VII claims" just once in his opening brief. See Appellant's Br. at 11. In no other place does he develop or explain why the district court's Title VII decision was wrong. Because that is a perfunctory mention of an issue without later augmentation, we affirm the district court's grant of summary judgment to the Brewery on the Title VII claims.

E. Motion to Reconsider

Finally, Pemberton asks us to reverse the district court's denial of his motion to reconsider. But like his Title VII claim, Pemberton forfeited the challenge. "A party may not raise an issue on appeal by mentioning it in the most skeletal way, leaving the court to put flesh on its bones." United States v. Hendrickson, 822 F.3d 812, 829 n.10 (6th Cir. 2016) (cleaned up).

He mentions the adverse judgment only twice in his opening brief. Although he lists it in his statement of issues, Pemberton's brief only devotes one sentence to the challenge in its body. He asserts that the district court wrongly treated his motion for reconsideration as a motion to alter or amend the judgment under Federal Rule Civil Procedure 59(e) despite him bringing the motion under Local Civil Rule 7.4. That is a skeletal mention. Despite passing references to the motion, his lack of effort to develop the argument in the body of his brief or to explain why the district court's treatment of his motion warrants reversal forecloses our review. See Rose, 766 F.3d at 540.

IV.

For these reasons, we AFFIRM the district court's grant of summary judgment to Bell's Brewery in full.

FOOTNOTES

1. We also rely on ADEA cases, given the EEOC administers that statute and the ADEA and Title VII share a "common purpose" and set up a similar "remedial scheme." Fed. Express Corp. v. Holowecki, 552 U.S. 389, 402–03, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008).

2. "The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment." 42 U.S.C. § 12117(a).

3. Ms. Aikens is the same counsel representing Pemberton on appeal.

4. Holowecki relied on Auer deference to resolve certain questions, but the relevant part of the opinion for this case relied on Skidmore deference (which survived both Kisor and Loper Bright). See Holowecki, 552 U.S. at 402, 128 S.Ct. 1147; Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944); Auer v. Robbins, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); Kisor v. Wilkie, 588 U.S. 558, 139 S.Ct. 2400, 204 L.Ed.2d 841 (2019); Loper Bright Enters. v. Raimondo, 603 U.S. 369, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024); see also United States v. Prather, 138 F.4th 963, 975 (6th Cir. 2025) ("Whatever the future of Auer deference, as a court of appeals, we are not in the business of overruling Supreme Court precedent. Auer (and Kisor) remain good law."). Therefore, we are still bound by the Supreme Court's relevant holding in Holowecki and need not engage in a new analysis.

5. His Charge asserts he "was discriminated against because of [his] disability and retaliated against for engaging in protected activity, in violation of Title I of the Americans with Disabilities Act of 1990, as amended." R 80-1, Charge of Discrimination, PageID 930, 932.

6. Attorneys are officers of the court and are expected to accurately represent the contents of the record. Misstatements of this kind—whether through carelessness or by design—undermine the integrity of the litigation process. We caution counsel that such conduct is not an acceptable litigation strategy and risks detracting from the honest advocacy owed to the client.

7. The district court also entertained an argument construing Pemberton to argue that the denial of the internal job applications was a failure to accommodate. See Pemberton, 2024 WL 1152267, at *9. But Pemberton does not raise the issue on appeal, and it would fail anyways under state law for the same reasons discussed above.

8. Pemberton filed his Complaint on August 12, 2022, so any claim premised on conduct before August 12, 2019, is time barred.

9. Pemberton did not also bring an ADEA age discrimination claim. See Complaint, R. 1, PageID 20–21.

10. But a plaintiff bringing an age discrimination claim under ELCRA need only show that he or she was replaced by a younger employee, as opposed to a "substantially" younger individual in the ADEA context. Compare Barnell v. Taubman Co., 203 Mich. App. 110, 120–21, 512 N.W.2d 13 (1993) (holding prima facie case requires a showing that plaintiff was replaced by a younger person), with Bush v. Dictaphone Corp., 161 F.3d 363, 368 (6th Cir. 1998) (holding the successful applicant must be "substantially" younger).

11. That requires Pemberton to first prove that (1) he was a member of the protected class (i.e. older than 40); (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) he was replaced by a younger person. Lytle v. Malady, 458 Mich. 153, 177, 579 N.W.2d 906 (1998).

JOHN K. BUSH, Circuit Judge.

JAY PEMBERTON, Plaintiff,
v.
BELL'S BREWERY, INC., Defendant.

Case No. 1:22-cv-739.

United States District Court, W.D. Michigan, Southern Division.

March 18, 2024.

HALA Y. JARBOU, Chief District Judge.

OPINION

This is an employment action brought under the following: the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*; Michigan's Persons with Disabilities Civil Rights Act ("PWDCRA"), Mich. Comp. Laws § 37.1201, *et seq.*; Michigan's Elliott-Larsen Civil Rights Act ("ELCRA"), Mich. Comp. Laws § 37.2101, *et seq.*; and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* Jay Pemberton alleges that his former employer, Defendant Bell's Brewery, Inc. ("Bell's" or "the Company"), failed to accommodate his disability; discriminated against him because of both his disability and his age; and fired him in retaliation for engaging in activity protected under both the ADA and Title VII. Before the Court is Bell's motion for summary judgment (ECF No. 80).

I. FACTUAL BACKGROUND

A. Pemberton's Pre-Injury History at Bell's

Pemberton began working for Bell's as a packager in March 2002. He was promoted to packaging manager in 2007. (Pemberton Dep. 56-57, ECF No. 80-1.) In 2010, he agreed to take a pay cut to move into the brewing department. (*Id.* at 58, 61-62.) He was promoted to senior brewer in 2012. (*Id.* at 88.) After his 2012 promotion, Pemberton applied for multiple "brewing lead" positions but never received one. (*Id.* at 90.) Instead, Bell's promoted other brewers; these brewers were younger than Pemberton. (*Id.*) One such brewer who received a promotion to brewing lead was Josh Pohlmann.[1]

B. Pemberton's Injury and Subsequent Work Arrangement

The senior brewer position is a "very physical job" (*Id.* at 53) that requires, among other things, the "[a]bility to frequently lift and/or move up to 25 pounds and occasionally . . . up to 55 lbs." (Senior Brewer Job Posting 4, ECF No. 80-1.) Pemberton injured his back twice while employed at Bell's—first in 2016, and then again in December 2018. (Pemberton Dep. at 27.) His 2018 injury occurred on the job, and he was taken to the emergency room. (Johnson Decl. ¶ 3, ECF No. 80-4.) As a result of his 2018 injury, Bell's accepted Pemberton into its workers' compensation program. (*Id.*)

Pemberton's treating physician placed various physical restrictions on him, including refraining from continuous standing and from lifting or pushing greater than ten pounds. (12/31/18 Vayo Treatment Form, ECF No. 80-4, PageID.1153.) These restrictions rendered Pemberton unable to fully perform the essential functions of the senior brewer position. (Johnson Decl. ¶¶ 7-8.) To accommodate these restrictions, Bell's initially located light duty work within the brew house that Pemberton could perform. (*Id.* ¶ 9.) Pemberton reported that he was satisfied with this accommodation. (Request for Accommodation ¶ 7, ECF No. 90-4.)

The light duty work ran out beginning in late March 2019. (Johnson Decl. ¶ 10.) As a solution, Pemberton suggested to Bell's that he be given a new title and position, "Field and Marketing Sales Specialist." However, the Company did not have such a position and declined to create it. (*Id.* ¶ 11.) Instead, Pemberton was placed on an approved leave of absence beginning March 22, 2019. (*Id.* ¶ 12.) While on leave, Pemberton received two-thirds of his regular pay. (Pemberton Dep. 20.)

In May 2019, Bell's offered Pemberton work in a "Transitional Work Program" whereby he could work for a non-profit partner while still being paid for full time work by the Company. (Johnson Decl. ¶ 13.) Pemberton accepted the alternative work arrangement. He participated in the program until July 2019, when he requested to be removed. (*Id.* ¶ 16.) Once again, Bell's placed Pemberton on leave while it explored other available work that could be performed within his restrictions. During this period, Bell's senior safety specialist re-evaluated the physical requirements of Pemberton's position and again confirmed that the duties would violate his restrictions. (*Id.*)

Eventually, Bell's was able to accommodate Pemberton's restrictions within the brew house by shifting certain work to other employees; he returned to work on October 9,

2019. (*Id.* ¶ 18.) Pemberton worked under this accommodation until November 26, 2019, when his restrictions were lifted by his treating physician. (Pemberton Dep. 221; *see also* Kilmer Dep. 21, ECF No. 80-5.)

C. Pemberton's Interactions with Josh Pohlmann

Josh Pohlmann became Pemberton's shift lead in July 2018. (Pemberton Dep. 107.) In February 2019, Pohlmann delivered Pemberton's annual review. (*Id.* at 68-70, 109-10.) Following this, Pemberton lodged complaints with Human Resources about Pohlmann's manner of review—namely, that he based his evaluation partially off of "shift notes," an apparently anomalous manner of conducting annual reviews. (*Id.* at 69; *see also* Yunker Dep. 47-49, ECF No. 80-2.)

While reviewing Pemberton's complaint about the review process, Bell's discovered that Pohlmann made several disparaging comments about Pemberton. For instance, Pohlmann told Pemberton that "the team believed [Pemberton] to be a cancer on the team." (Schuiling Dep. 33, ECF No. 80-3.) He also told Pemberton that many on the team believed he was faking or "milking" his injury. (Pemberton Dep. 102, 125-26.) Eventually, Bell's terminated Pohlmann for his treatment of Pemberton and for impeding its investigation into the matter. (Yunker Dep. 49.) Pemberton eventually served as a witness for Pohlmann's wrongful termination lawsuit against Bell's. (Pemberton Dep. 215.)

D. Pemberton's Internal Position Applications

Pemberton applied to several internal positions throughout the course of his career at Bell's. (Job Application List, ECF No. 80-1, PageID.929.) He was rejected for many of them. In the years following his 2019 injury, he applied for two roles which he ultimately did not receive: "field service representative" in 2020 and "technical brewer" in 2021. (*Id.*)

According to Bell's, a field service representative is a sales position—but Pemberton lacked sales experience. (Schuiling Dep. 38.) Bell's gave the field service representative position to another employee, Michael Dickinson, as he had prior experience at a distributor and "[y]ou can't really beat the training that distributors provide to their sales folks." (*Id.* at 39.)

Similarly, the technical brewer position went to another employee, Scott Lusk, who was hired over Pemberton in part because of Lusk's relevant education and experience. (*Id.* at 36.) Lusk held a Bachelor of Science degree in beverage science and had volunteered to assist on projects worked on by technical brewers. (*Id.* at 37.)

E. Bell's Investigation into Allegations Against Pemberton

In May 2021, another employee, EE-1,[2] complained to Bell's that Pemberton had made various inappropriate comments towards him. (Yunker Dep. 29-30.) EE-1 is a service veteran who served in the United States Marine Corps and who suffered from suicidal ideation and multiple suicide attempts in the years following his return from active service duty. (EE-1 Dep. 15.) Pemberton allegedly asked EE-1 questions such as how many people he had killed while on duty and how much money his family would receive if he committed suicide. (Yunker Dep. 30; EE-1 Dep. 10, 26-27.)

Bell's began investigating EE-1's complaint that same month. During the investigation, a witness told the Company that Pemberton allegedly made a sexually inappropriate comment about another employee, EE-2.[3] After learning this, Bell's suspended Pemberton without pay pending the completion of the investigation, although they did not tell Pemberton the precise reason for the suspension. (Schuiling Dep. 57-59.)

During the initial suspension meeting, Pemberton asked if the investigation had anything to do with a recent Facebook post by another employee, EE-3,[4] detailing date rape allegations. (Schuiling Dep. 31, 57, 101-02.) He was told it did not. EE-3's allegations were not being handled by Bell's and were instead referred to a third party for investigation. (*Id.* at 31.)

Bell's interviewed Pemberton regarding both EE-1 and EE-2 on June 2, 2021. Pemberton denied the allegations related to EE-2. Regarding EE-1, Pemberton admitted that he asked the question about insurance in the event of suicide but did not admit to the "kill count" question. (Schuiling Dep. 96-99; *see also* Schuiling Notes, ECF No. 90-5, PageID.1476-1477.)

Following the investigation, Bell's concluded that there was a lack of corroboration for the allegations regarding EE-2. (*See* Schuiling Dep. 118.) However, the Company decided that discipline was necessary as a result of Pemberton's admitted and alleged comments towards EE-1. (*See* Pemberton Dep. 189 (discussing Bell's communicated

reasons for disciplinary actions); *see also* Employee Discipline Form, ECF No. 80-1, PageID.977-979.) Finally, Bell's notified the third-party investigator that Pemberton might have information relevant to the separate date rape allegations related to EE-3. (Seaborn Decl. ¶¶ 4-5, ECF No. 80-7.)

F. Bell's Offers to Pemberton Post-Investigation

On June 9, 2021, Bell's told Pemberton he was a "toxic employee" and offered him two options. (Pemberton Dep. 185-87.) He could choose to either stay and agree to a so-called "last chance agreement" or he could accept a severance package. The last chance agreement would result in various sanctions, including a demotion from senior brewer to brewer and mandatory training, though not a pay cut. Alternatively, the severance package would result in nine months' pay, health insurance assistance, and outplacement assistance. The severance package also came with an agreement that Pemberton would participate in the third-party investigation of EE-3's date rape allegations. (*Id; see also* Proposed Severance Agreement ¶ 10, ECF No. 80-1.)

G. The End of the Employment Relationship

Pemberton was reluctant to return to Bell's under the last chance agreement because "[i]t would have been uncomfortable." (Pemberton Dep. 197-98.) He began negotiating the terms of the severance agreement, securing at least some improvements, including an increase in the payout to a full year's salary and prolonged health insurance coverage. (*Id.* at 193-97; *see also* Brodie Decl. ¶¶ 3-4, ECF No. 80-8.) Nevertheless, Pemberton, through counsel, rejected the severance agreement on July 8, 2021. (*See id.* at 198; 7/8/2021 Aikens Email, ECF No. 80-8, PageID.1285.)

H. Pemberton's Pursuit of Administrative and Legal Remedies

Pemberton filed a Charge of Discrimination ("Charge") with the Equal Employment Opportunity Commission ("EEOC") against Bell's on March 22, 2022. He noted the earliest date that discrimination took place as December 1, 2018, and the latest date as May 26, 2021. In the "particulars" section of the Charge, he explained:

In or around December 2018 I was injured resulting from an unsafe work practice introduced in or around November 2018. I was put on light duty in or around October 2019 as a result from this injury and was sent home until I was completely recovered. Upon my return I was seen as milking it by other co-workers, which caused tension

among the workforce. When applying for Technical Brewer in or around December 2020 or January 2021, I was told I was not hungry enough, nor did I possess a four-year degree. In or around May 2021, I had a conversation with [EE-1] regarding suicide and life insurance policies. I was informed by Emily Schuling of Human Resources that this conversation was creating a toxic and hostile work environment and I was told I needed to step down from Senior Brewer to Brewer. I was never fired, nor did I quit. I believe I was discriminated against by being demoted due to my disabilities, and passed up for a promotion because of my age, 43. I believe I was discriminated against because of my disability, and retaliated against for engaging in protected activity, in violation of Title I of the Americans with Disabilities Act of 1990, as amended, and because of my age (43), in violation of the Age Discrimination in Employment Act of 1967, as amended.

(Charge of Discrimination, ECF No. 80-1.) Pemberton also laid out more details in his EEOC Inquiry Questionnaire ("Questionnaire"), many of which have been discussed by the Court in the preceding sections. (*See* EEOC Inquiry Questionnaire, ECF No. 80-1, PageID.918-928.)

The EEOC declined to pursue charges on its own and issued Pemberton a Right to Sue Letter on May 16, 2022. (Pemberton Dep. 104-05.) He then initiated this lawsuit on August 12, 2022.

I. The Complaint

In Count I of the complaint, Pemberton alleges that Bell's failed to accommodate his disability—his lower back complications—in violation of the ADA. He references Bell's refusal to allow him to take light duty work, instead placing him on a temporary leave of absence.

Count II claims a violation of Michigan's PWDCRA by largely repeating the facts alleged in Count I.

Counts III and IV repeat the allegations in Counts I and II under the headline "retaliation." Count III is under the ADA, Count IV is under the PWDCRA.

Counts V and VI repeat the allegations contained in Counts I through IV under the headline "disability discrimination." Count V is under the ADA, Count VI is under the PWDCRA.

Count VII claims age discrimination in violation of ELCRA. Pemberton alleges that younger employees were treated differently than him and were held to less stringent standards.

Count VIII claims retaliation for engaging in activity protected under Title VII. Pemberton alleges that Bell's took adverse employment actions against him due to him serving as a witness in Pohlmann's wrongful termination lawsuit.

Count IX claims retaliation for engaging in activity protected under Title VII. Pemberton alleges that Bell's took adverse employment actions against him due to his knowledge of facts surrounding the investigation into EE-3.

II. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact is genuinely disputed when there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249 (citing *First Nat'l Bank of Ariz. v. City Serv. Co.*, 391 U.S. 253, 288-89 (1961)). Further, summary judgment on affirmative defenses is appropriate. *Speedeon Data, LLC v. Integrated Direct Marketing, LLC*, 718 F. App'x 333, 337 (6th Cir. 2017). "For an affirmative defense, the defendant has the burden to show that it is entitled to the defense." *Id.*

Summary judgment is not an opportunity for the Court to resolve factual disputes. *Anderson*, 477 U.S. at 249. The Court "must shy away from weighing the evidence and instead view all the facts in the light most favorable to the nonmoving party and draw all justifiable inferences in their favor." *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 410 (6th Cir. 2021).

III. ANALYSIS

A. ADA Claims (Counts I, III, and V)

The ADA prohibits an employer from discriminating against an otherwise qualified individual because of his or her disability. 42 U.S.C. § 12112(a). At its most basic, this prohibition covers "discrimination that is a `but-for' cause of the employer's adverse decision." *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 321 (6th Cir. 2012)

(quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)). Failing to make a reasonable accommodation for an otherwise qualified individual also falls within the ADA's definition of discrimination. *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir. 2007).

The ADA also prohibits discrimination against individuals who complain or file a charge alleging violations of the statute. 42 U.S.C. § 12203(a). The "ADA is not however, a catchall statute creating a cause of action for any workplace retaliation, but protects individuals only from retaliation for engaging in . . . activity covered by the ADA." *Rorrer v. City of Stow*, 743 F.3d 1025, 1046 (6th Cir. 2014).

An ADA plaintiff must first exhaust administrative remedies. *Bullington v. Bedford Cnty.*, 905 F.3d 467, 469-70 (6th Cir. 2018). To exhaust, "a plaintiff must file a timely charge with the [EEOC]." *Id.* This requirement is satisfied if the plaintiff explicitly sets forth the claim in the EEOC charge, or if the claim "can be reasonably expected to grow out of" the administrative charges. *Strouss v. Mich. Dep't of Corrs.*, 250 F.3d 336, 342 (6th Cir. 2001).

Pemberton filed two documents with the EEOC—the Questionnaire and the Charge. The Sixth Circuit has not definitively answered whether charges contained only in an EEOC intake questionnaire may be considered for exhaustion purposes. *See Russ v. Memphis Light Gas & Water Div.*, 720 F. App'x 229, 237 (6th Cir. 2017). Still, courts within this circuit do sometimes consider allegations contained within the questionnaire, particularly when there is also a properly filed charge. *See, e.g., Sullivan v. Progressive Cas. Ins. Co.,* No. 221CV02314SHMCGC, 2022 WL 1274429, at *4 (W.D. Tenn. Apr. 28, 2022) (collecting district court cases within the Sixth Circuit). And in *Holowecki,* the Supreme Court noted, "Documents filed by an employee with the EEOC should be construed, to the extent consistent with permissible rules of interpretation, to protect the employee's rights and statutory remedies." *Holowecki,* 552 U.S. at 406. Thus, for the purposes of evaluating Pemberton's pursuit of administrative remedies, the Court will consider the Questionnaire in conjunction with the Charge.

1. Failure to Accommodate (Count I)

Bell's contends that Pemberton failed to exhaust his accommodation claim because his Amended Charge contained no mention of a failure to accommodate. While true,

Pemberton's separate Questionnaire *did* contain facts which would support an accommodation claim. For instance, just prior to his March 2019 leave of absence, Pemberton reported,

After several weeks [of working light duty], no more than 4, I was told I could not return to my light duty position and was sent home . . . I have since discovered other employees that have been injured on the job continued light duty for months, so much so that new roles/positions have been created for them. Positions were created to retain them full time without injury risk.

(EEOC Inquiry Questionnaire, PageID.923.) Reading the Questionnaire and the Charge together, the Court concludes that Pemberton sufficiently included the accommodation claim in his pursuit of an administrative remedy. He referenced reasonable accommodations that he had previously received and that others had enjoyed for longer. This is sufficient to survive the first exhaustion defense hurdle.

Timeliness is another matter. Bell's argues in the alternative that Pemberton failed to *timely* exhaust his accommodation claim. "[A] claimant who wishes to bring a lawsuit claiming a violation of the ADA must file a charge of discrimination within 300 days of the alleged discrimination." *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 309 (6th Cir. 2000). Pemberton filed his Charge on March 22, 2023; any claims based solely on events taking place before May 26, 2021 are thus untimely.

Even reading Pemberton's Charge and Questionnaire liberally, the last time Pemberton complains of some sort of failure to accommodate was in 2018. Indeed, Pemberton has failed to establish even during this litigation that he made any reasonable accommodation request to Bell's following his physician's medical release beginning November 29, 2019. And "[p]laintiffs must . . . propose a reasonable accommodation to succeed" on an ADA accommodation claim. *Tchankpa v. Ascena Retail Group, Inc.*, 951 F.3d 805, 812 (6th Cir. 2020).

Without an allegation in the Charge or Questionnaire that Bell's failed to make a reasonable accommodation requested by Pemberton after May 26, 2021, the Court concludes that Pemberton failed to timely exhaust his accommodation claim. The Court will grant Bell's summary judgment motion related to Count I.

2. Retaliation and Discrimination (Counts III and V)

Bell's also contends that Pemberton failed to properly exhaust his administrative remedies as to his ADA discrimination and retaliation claims. Exhaustion on these claims is a closer issue. In his Charge, Pemberton wrote, "I believe I was discriminated against by being demoted due to my disabilities . . . ." (Charge of Discrimination, PageID.932.) He checked the boxes for disability discrimination and retaliation on his Questionnaire. (EEOC Inquiry Questionnaire, PageID.918.) And in the narrative attached to the Questionnaire, he detailed instances of coworkers viewing him as "milking" his injury, averred that other employees with on-the-job injuries were able to perform light duty work for longer, and generally described an antagonistic environment with his coworkers. Arguably, Pemberton described an uncomfortable work environment in which his disability played at least some role, culminating in an adverse employment action, within the 300-day administrative remedy period.

To be sure, the EEOC documents do not paint a clear picture of how or when Pemberton was either discriminated against because of his disability or was retaliated against for seeking accommodation. But discrimination and retaliation claims often involve some degree of extrapolation as they are typically established with circumstantial evidence rather than direct evidence, unlike accommodation claims. *Compare* Rorrer, 743 F.3d at 1046, *with* Kleiber, 485 F.3d at 868. Thus, given a policy of construing documents to preserve a plaintiff's statutory rights and the indirect way these claims are resolved on the merits, the Court finds it prudent to pause on the exhaustion issue and turn its focus to the merits. For sake of analysis, the Court will assume without deciding that Pemberton has properly exhausted his administrative remedies as to his ADA discrimination and retaliation claims.

Moving on to the merits, courts analyze these indirect evidence claims under the familiar *McDonnell-Douglas* burden-shifting framework. Rorrer, 743 F.3d at 1046. "Establishing a prima facie case . . . is a `low hurdle.'" *Id.* For discrimination, a prima facie case involves a showing by a plaintiff that (1) he is disabled; (2) he is otherwise qualified for the position, with or without reasonable accommodation; (3) the employer knew of his disability; (4) he suffered an adverse employment decision; and (5) there was a causal connection between the disability and the adverse action. *See* Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 453 (6th Cir. 2004); *see also* Rorrer, 743 F.3d at 1046.

The prima facie case is similar for retaliation, requiring a showing that (1) Plaintiff engaged in protected activity under the ADA, (2) the employer knew of that activity, (3) Plaintiff suffered an adverse employment action, (4) there was a causal connection between the protected activity and the adverse action. *Rorrer*, 743 F.3d at 1046.

In either case, if a plaintiff establishes a prima facie case, the burden then shifts to the defendant to offer a legitimate explanation for its action. If the defendant satisfies this burden of production, the plaintiff must then introduce evidence showing that the proffered explanation is pretextual. *Id.*

Here, Pemberton's prima facie case is relatively tenuous. Given that Bell's offered Pemberton a chance to keep his job at the same pay (albeit with a loss of title) or, in the alternative, a full year's severance package, it is not immediately evident that he suffered a cognizable adverse employment action when he chose to walk away. Further, the causal connections for both the retaliation claim and the discrimination claim rely on significant logical leaps. Still, the biggest hurdle for Pemberton is that Bell's has offered a convincing legitimate explanation for any adverse action. Thus, like administrative exhaustion, the Court again finds it prudent to assume without deciding that Pemberton has established his prima facie case.

Bell's has met its burden of production by proffering a legitimate, nondiscriminatory, and nonretaliatory reason for its actions—Pemberton's inappropriate behavior towards EE-1. At this point, Pemberton can demonstrate pretext "in three interrelated ways: (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer's action, or (3) that they were insufficient to motivate the employer's action." *Romans v. Mich. Dep't of Human Servs.*, 668 F.3d 826, 839 (6th Cir. 2012). He has failed to do so.

The only response Pemberton gives related to EE-1 is that EE-1 was not intimidated by Pemberton and viewed him as "essentially a big teddy bear." (Pl.'s Resp. 17, ECF No. 90.) First, the Court cannot locate this quote in the deposition transcripts provided by either party. Second, even assuming EE-1 made that comment, the comment would be out of context at best and actively misleading at worst. EE-1 explicitly testified that he found Pemberton intimidating (EE-1 Dep. 13), that he was "uncomfortable" with Pemberton's questions and remarks (*id.* at 9, 24, 73), that Pemberton's comments made him feel "emotionally distraught" (*id.* at 26, 51), and

that his comments "brought back quite a bit of bad memories . . . a lot of triggering emotions," (*id.* at 46).

Further, Pemberton does not dispute the veracity of at least some of the comments he made to EE-1. For instance, Bell's has adduced evidence that Pemberton admitted to asking EE-1 about the insurance payout in the event of EE-1's suicide merely because "he was curious about the benefits." (Schuiling Dep. 91-92.) Pemberton thus has not shown that Bell's proffered reason had no basis in fact. Nor does Pemberton point to evidence establishing that the proffered reason did not actually motivate the employer's action or how it was somehow insufficient to do so.

Indeed, the evidence points the other way. The last chance agreement offered to Pemberton was documented in the "Employee Discipline Form" provided to him during the relevant discussion. In that form, the reasons given for the discipline were that:

Jay Pemberton engaged in inappropriate and damaging statements/questions to a veteran employee regarding employee's, known to Jay, mental health and personal health history. After this event, Jay acknowledged that he saw a difference in employee and planned on addressing but failed to do so directly or indirectly.

(Employee Discipline Form 2, ECF No. 80-1.) Pemberton acknowledges that he was given the same reason during the discussion. (Pemberton Dep. 189.) Bell's Human Resources representative, Emily Schuiling, testified in her deposition that Pemberton's comments regarding EE-1 were the reason for the investigation and featured prominently in her interview with Pemberton on June 2, 2021. (Schuiling Dep. 15-16). In her deposition, Bell's executive vice president explained, "So the issue with [Pemberton] asking triggering questions to someone with mental health issues is just that. It's someone's private mental health information. We fired [Pemberton's] boss [, Pohlmann,] for discussing his medical condition when we told him not to. We have to treat those situations similarly." (Yunker Dep. 105.) In short, Bell's has proffered a legitimate reason for taking adverse action against Pemberton and has substantiated that reason with testimony.

"An employee is not protected when he violates legitimate rules and orders of his employer, disrupts the employment environment, or interferes with the attainment of his employer's goals." *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304,

1312 (6th Cir. 1989). Here, Pemberton was EE-1's supervisor. Pemberton's comments, some of which he has admitted he made, disrupted the working environment for EE-1. It was reasonable for Bell's to take some sort of action against Pemberton. Bell's offered two ways out for Pemberton, one of which would have allowed him to keep working in the brew house in exchange for a title demotion and employee training. Pemberton has failed to put forth evidence that addresses Bell's proffered legitimate reason for taking adverse action against him; summary judgment for Bell's on Counts III and V is warranted.

B. PWDCRA Claims (Counts II, IV, and VI)

The "PWDCRA `substantially mirrors the ADA, and resolution of a plaintiff's ADA claim will generally, though not always, resolve the plaintiff's PWDCRA claim.'" *Donald v. Sybra, Inc.*, 667 F.3d 757, 763 (6th Cir. 2012) (quoting *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593, 598 (6th Cir. 2002)). Bell's argues that the PWDCRA's definition of "disability" differs from the ADA's. Pemberton does not argue that the Court should treat the PWDCRA claims differently than the ADA claims.

Bell's emphasizes the PWDCRA's definition of disability as *"unrelated"* to the individual's ability to perform the duties of a particular job or position. *See* Mich. Comp. Laws § 37.1202(1)(b) (emphasis added). Consequently, because lifting, pushing, and pulling are all inherent in the senior brewer position, Pemberton's lower back injury is *related* to his ability to perform his duties and therefore he is *not* disabled under the PWDCRA. But neither Sixth Circuit case law nor Michigan case law stresses a difference between the ADA and the PWDCRA's definition of disability; indeed, authorities regularly indicate the opposite. *See* *Donald*, 667 F.3d at 763; *Chmielewski v. Xermac, Inc.*, 580 N.W.2d 817, 821-822 (Mich. 1998) ("Because the [PWDCRA] definition [of disability] mirrors that of the ADA, we examine federal law for guidance."). But this case can be resolved on summary judgment without interpreting the PWDCRA's definition of disability.

The Court's analysis for the PWDCRA retaliation and discrimination claims reaches the same result as for the related ADA claims. Assuming Pemberton can establish a prima facie case, Bell's has proffered a legitimate, nondiscriminatory and nonretaliatory reason for its action against Pemberton. Pemberton has failed to adduce evidence indicating pretexts and thus summary judgment for Bell's is also warranted for Counts IV and VI.

The PWDCRA accommodation issue requires further analysis. There is no exhaustion requirement under the PWDCRA; thus, it cannot be said that Pemberton failed to timely exhaust his PWDCRA accommodation claim, unlike his ADA claim. The PWDCRA does, however, carry a three-year statute of limitations. *See* *Garg v. Macomb Cnty. Cmty. Health Servs.*, 696 N.W.2d 646, 658 (Mich. 2005); Mich. Comp. Laws § 600.5805. The Complaint was filed on August 12, 2022; any claim premised on conduct before August 12, 2019, is time barred.

Pemberton's accommodation request appears to center on Bell's refusal to give him light duty work. But there is no evidence of Pemberton actively requesting light duty work, or any other accommodation, after August 12, 2019. Nevertheless, assuming that Pemberton's requests prior to August 12, 2019 (whether light duty work or the creation of a new position) can be viewed as standing requests that carry into the statute of limitations period, Pemberton's claims fail as a matter of law.

Under the PWDCRA, "An employer . . . has no duty to accommodate the plaintiff by recreating the position, adjusting or modifying job duties otherwise required by the job description, or placing the plaintiff in another position." *Kerns v. Dura Mech. Components, Inc.*, 618 N.W.2d 56, 64 (Mich. Ct. App. 2000). Here, Pemberton agrees that the senior brewer position was "a very physical job" and that "the essential duties and responsibilities . . . [were] continual lifting, dragging . . . and lifting regularly throughout the duration of the shift." (Pemberton Dep. 53.) Both Pemberton and Bell's thus view light duty work as an adjustment or modification of job duties otherwise required by the senior brewer position—an accommodation which Bell's had no obligation to offer under the PWDCRA.

Still, it is worth emphasizing the accommodations Bell's *did* make. Bell's offered light duty work for several months following Pemberton's December 2018 injury. When the light duty work ran out, despite Bell's active search for such (*see* Johnson Decl. ¶ 9-10; Johnson Emails, ECF No. 80-4, PageID.1173-1198), it placed Pemberton on paid medical leave. It then placed Pemberton with a nonprofit partner and funded his full-time salary. When Pemberton no longer wanted to work at the nonprofit, it placed him back on paid medical leave until it located additional light duty work in October of 2019. A month later, his medical restrictions were lifted by his physician. This simply is not indicative of a failure by Bell's to accommodate Pemberton's asserted

disability. Indeed, Bell's appears to have gone beyond what the PWDCRA requires of employers.

Finally, to the extent Pemberton argues that Bell's rejections of his internal job applications to field service representative and technical brewer in 2020 and 2021 represent further failures to accommodate, his argument is unavailing. First, Pemberton received a release by his physician to return to his full duties in November 2019. There is no record of him explicitly seeking an accommodation after that time, so the Court would need to interpret these job applications as accommodation requests. Second, again, the PWDCRA does not require an employer to place an employee in another position simply because they ask to be reassigned. *Kerns*, 618 N.W.2d at 64. And Bell's ultimately chose applicants whose experience and education credentials better fit the requirements of those roles—it chose an employee with sales experience for the field service representative position and an employee with a background in beverage science for the technical brewer position. Pemberton lacked both sales experience and relevant post-secondary education. The PWDCRA did not require Bell's to hire Pemberton over more qualified applicants merely because he characterizes his application as a request for reasonable accommodation.

For the foregoing reasons, summary judgment is also warranted for Bell's on Count VI, Pemberton's PWDCRA accommodation claim.

C. ELCRA Age Discrimination Claim (Count VII)

Count VII lodges Pemberton's age discrimination complaint under Michigan's ELCRA. He does not specifically cite the ADEA, but the analysis is the same. *Geiger v. Tower Auto.*, 579 F.3d 614, 626 (6th Cir. 2009). For purposes of analysis, the Court will thus construe the Complaint as bringing both an ADEA and an ELCRA claim.

Because ELCRA does not have the same exhaustion requirements as the ADEA and has a longer statute of limitations period, the Court will examine the merits of Pemberton's state claim first. Like the PWDCRA, ELCRA has a three-year statute of limitations period. *See Loffredo v. Daimler AG*, 666 F. App'x 370, 377 (6th Cir. 2016) (citing Mich. Comp. Laws § 600.5805(1), (10)). Again, the conduct about which Pemberton complains must have occurred after August 12, 2019.

A prima facie case of age discrimination is similar to a prima facie case for disability discrimination and also uses the *McDonnell-Douglas* framework. *Hazle v. Ford Motor*

Co., 628 N.W.2d 515, 521 (Mich. 2001). Pemberton must offer evidence that (1) he belongs to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. If established, Bell's may then offer an age-neutral justification for its actions. If Bell's meets its burden of production, "the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is `sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action.'" *Id.* at 521-22.

Here, Pemberton is over forty years old and is thus covered by ELCRA. Unlike in the ADEA, he does not need to show that he was replaced or passed over "by a substantially younger employee. An ELCRA plaintiff need only show replacement by a younger individual." *Gibbs v. Voith Indus. Servs., Inc.*, 60 F. Supp. 3d 780, 793 (E.D. Mich. 2014). Within the statute of limitations period, Pemberton applied for two jobs which he did not receive, and he was ultimately offered the choice between a demotion or a severance package. The Court will assume each of these was an adverse employment action. Although he has not presented evidence of such, the Court will also assume that he was qualified for the positions he sought. In other words, the Court will assume without deciding that Pemberton has established a prima facie case of age discrimination.

Bell's proffered nondiscriminatory reasons for all three adverse employment actions have already been discussed. The field service representative and technical brewer jobs went to more qualified individuals. And Pemberton was offered the choice between the last chance agreement and a severance package as a result of his inappropriate behavior towards EE-1. He has failed to offer evidence that suggests these stated reasons were pretext.

Indeed, the only evidence that Pemberton provides suggesting age discrimination is that he regularly felt compelled to compete with younger employers and that he felt that some younger employers were given a pass on behavior that he would be punished for. For instance, he thought that EE-1 "was always freaking out, yelling and throwing things. If I were to act like that I would have been terminated on the spot." (Pemberton Dep. 84). But, as Pemberton acknowledges, he "was not terminated

for freaking out, yelling and throwing things" (*id.*), nor does he suggest that was why he was passed over for the other internal positions.

Pemberton "must offer evidence showing something more than an isolated decision to reject a minority applicant." *Hazle,* 628 N.W.2d at 471. Although he has invoked several adverse actions against him, he has failed to offer evidence rebutting Bell's proffered legitimate reasons. Pemberton has failed to offer sufficient evidence to create a triable issue for the jury concerning whether age was a motivating factor in Bell's employment decisions. Summary judgment is thus appropriate for Bell's on Count VII.

D. Title VII Retaliation Claims (Counts VIII and IX)

Pemberton's final claims charge Bell's with taking adverse employment actions against him in retaliation for him serving as a witness in two separate employment-related proceedings— EE-3's sexual harassment investigation and Pohlmann's wrongful termination suit. These claims fail for several reasons.

First, like Pemberton's other claims, Title VII retaliation claims are analyzed under the *McDonnell-Douglas* framework. *Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2006). Pemberton runs into precisely the same issue with his Title VII claims as he did with his disability and age discrimination claims—even assuming he can establish a prima facie case of retaliation, he has not met Bell's proffered legitimate reasons with sufficient evidence of pretext. This is sufficient to grant summary judgment to Bell's.

Second, Pemberton's Title VII claims are similar to his ADA accommodation claim in that he failed to properly exhaust his administrative remedies. Neither the Questionnaire nor the Charge indicates that Pemberton complained of retaliation for engaging in activity protected under Title VII. Under the "retaliation" section of the Questionnaire, the only reference to Pemberton serving as a witness in either proceeding is when he notes, "I was named as a key witness" in Pohlmann's lawsuit and that "[d]uring deposition, Mark Wilkeson, accused me of being in cahoots with HR to terminate [Pohlmann]." (EEOC Inquiry Questionnaire, PageID.926.) Even when reading the documents liberally, it is not clear in either the Questionnaire or the Charge that Pemberton was accusing Bell's of retaliating against him for serving

as a witness in any investigation. Without that clarity, the Court concludes that Pemberton failed to exhaust these claims.

Third, the premises of the claims themselves do not hold up to scrutiny. With respect to Pohlmann, Pemberton complained to Bell's that Pohlmann was creating an uncomfortable environment for Pemberton because of his workplace injury. Bell's investigated Pemberton's complaint and then fired Pohlmann as a result. Pohlmann then, apparently, initiated a wrongful termination lawsuit against Bell's in which Pemberton was deposed as a witness. Pemberton does not articulate how or why his participation as a witness in Pohlmann's wrongful termination lawsuit—a lawsuit initiated by Bell's in response to Pemberton's own internal complaint— motivated Bell's to then take adverse action against Pemberton. Further, it is unclear whether Pohlmann's wrongful termination suit was brought under Title VII; if it was not, Pemberton's participation in that lawsuit was not protected under Title VII anyways. *See* *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2020) ("A plaintiff must demonstrate that her opposition was reasonable and based on a good-faith belief that the employer was acting in violation of Title VII.").

With respect to EE-3, the Company actively tried to get Pemberton to engage with the third-party investigators, but Pemberton refused. This was an explicit condition of the last chance agreement that Pemberton rejected. Pemberton testified that he never cooperated in that investigation. (Pemberton Dep. 192.) But even if Pemberton ultimately did participate in some investigation or lawsuit related to EE-3, he has failed to connect the dots to establish this as the motivating factor behind Bell's employment actions rather than his behavior towards EE-1.

Based on the foregoing, Bell's is entitled to summary judgment on Pemberton's Title VII retaliation claims in Counts VIII and IX.

IV. CONCLUSION

The Court concludes that summary judgment for Bell's is warranted as to each claim. Pemberton has failed to create a genuine dispute of material fact for any of his claims. The Court will grant Bell's motion.

An order will enter consistent with this Opinion.

[1] The parties use various spellings of "Pohlmann." In his complaint, Pemberton refers to "Pullman." In its summary judgment motion, Bell's refers to "Pohlman." The deposition transcripts tend to use the "Pohlmann" spelling, which the Court will also use.

[2] Both parties refer to the non-party employee as "EE-1" given the sensitive nature of the pertinent facts. The Court will use the same delineation.

[3] Both parties refer to the non-party employee as "EE-2." The Court will do the same.

[4] Both parties refer to the non-party employee as "EE-3." The Court will do the same.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAY PEMBERTON,

Plaintiff,
Hon. Hala Y. Jarbou

Case No. 1:22-cv-739

v.

BELL'S BREWERY, INC.,

Defendant.

_____/

JUDGMENT

In accordance with the Order entered this date:

IT IS ORDERED that the case is DISMISSED.

Dated: March 18, 2024

/s/ Hala Y. Jarbou

HALA Y. JARBOU

CHIEF UNITED
STATES DISTRICT JUDGE

JAY PEMBERTON, Plaintiff,
v.
BELL'S BREWERY, INC., Defendant.

Case No. 1:22-cv-739.

United States District Court, W.D. Michigan, Southern Division.

June 5, 2024.

HALA Y. JARBOU, Chief District Judge.

OPINION

Jay Pemberton brought this action against his former employer, Bell's Brewery, Inc. ("Bell's"), under various Federal and Michigan State employment laws. He claimed Bell's failed to accommodate his disability following a workplace injury, and subjected him to disability discrimination, age discrimination, and retaliation. On March 18, 2024, the Court issued an opinion and order granting Bell's motion for summary judgment and dismissing the case (ECF Nos. 110, 111, 112). Before the Court are several motions.

I. DISCOVERY-RELATED SANCTIONS

On November 20, 2023, Magistrate Judge Ray Kent issued an order disposing of several discovery-related issues related to the deposition of Dawn Wood, Pemberton's therapist (ECF No. 100). The magistrate judge awarded Bell's the fees associated with bringing its motion to compel Wood's second deposition testimony. Although Bell's motion to compel a second deposition was ultimately denied, the fees awarded were a sanction for Pemberton's counsel's conduct at Wood's *first* deposition. Pemberton objects to the magistrate judge's sanctions order (ECF No. 105). A district court reviews objections to a nondispositive order under a clear error or contrary-to-law standard. Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A).

During Wood's deposition, Bell's counsel sought information related to potential sources of Pemberton's alleged anxiety and emotional distress. (Wood Dep. 86-89, ECF No. 61-1.) When the topic turned to potential childhood trauma, Pemberton's counsel, LaTasha Brownlee, instructed Wood not to answer. At the time, Brownlee explained "I'm saying the details of those [incidents] are not relevant to the case. The

fact that he had childhood trauma, relevant. The details of what that childhood trauma was, not relevant." (*Id.* 87.) When pressed, Brownlee explained her objection further, "because those details are personal . . . and private and have nothing to do with this[.]" (*Id.*) Despite Bell's explanation as to the reasoning for its line of questioning, Brownlee remained resolute that "We can move forward, or we can end the deposition." (*Id.*) Brownlee also stated that she would file for a protective order, which she eventually did, though only after Bell's moved to compel a second deposition. (ECF No. 65.)

The magistrate judge concluded that Brownlee violated Federal Rules 30 and 32 when she instructed Wood not to answer. As he explained, "you don't have the authority to order a nonclient witness to not answer and your objections were improper . . . . [I]f you read both rules in their entirety, it's clear that the intent of the rules is to keep the deposition moving." (11/20/2023 Mot. Hr'g Tr. 25-26, ECF No. 116 (cleaned up).) Indeed, Rule 30(c)(2) is clear that "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." Fed. R. Civ. P. 30(c)(2). And sanctions, including attorney's fees, are available against "a person who impedes delays, or frustrates the fair examination of the deponent." Fed. R. Civ. P. 30(d)(2).

Pemberton makes three arguments; none is persuasive. His strongest argument is that Brownlee rightfully instructed Wood not to answer under Rule 30(d)(3)(A). That rule, which is referenced as a specific exception to Rule 30(c)(2), allows a party *on a motion to the Court* to "terminate or limit" a deposition "on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses or oppresses the deponent or party." Fed. R. Civ. P. 30(d)(3)(A). The issue for Pemberton is that it is not clear from the record that Brownlee presented a proper 30(d)(3)(A) motion which would have triggered the relevant exception. The rule contemplates an exception when a *motion* is made to the Court, not merely an objection raised during the deposition. But such motion was never filed. Pemberton eventually filed for a *protective order* to prevent Wood from sitting for a second deposition. But this was filed nearly a month after Wood's initial deposition, only after Bell's moved to compel, and did not cite 30(d)(3)(A) as grounds.

Furthermore, when pressed for her authority to instruct Wood not to answer, Brownlee repeatedly cited *relevance* as her grounds. But relevance is not a proper ground to instruct a witness not to answer. In fact, a relevance objection has little place in a deposition as it is preserved even if not raised. Fed R. Civ. P. 32(d)(3)(A). The motion hearing transcript confirms that relevance was the animating force behind Brownlee's instruction. (*See, e.g.,* 11/20/2023 Mot. Hr'g Tr. 6.) Determining relevance is the province of the court, not the parties. Without a proper Rule 30(d)(3)(A) motion clear from the record, it was not clearly erroneous or contrary to law for the magistrate judge to sanction Pemberton for Brownlee's improper instruction.

Pemberton also argues that Rule 37(a)(5) prohibits fees in this instance because the magistrate judge ultimately denied Bell's motion to compel Wood's second deposition. Indeed, Pemberton argues that *he* should be awarded attorney's fees. Pemberton is mistaken. If a motion to compel is granted, Rule 37(a)(5)(A) requires "the party or deponent whose conduct necessitated the motion [to compel] . . . to pay the movant's reasonable expenses incurred in making the motion." Fed. R. Civ. P. 37(a)(5)(A). Conversely, if the motion is denied, the rule requires the movant to pay the opposing party's reasonable expenses. *Id.* 37(a)(5)(B). This award rests on the outcome of a motion to compel and is agnostic as to the circumstances which led to the motion. But the magistrate judge explicitly sanctioned Pemberton for its counsel's conduct during the deposition. Rule 30(d)(2) explicitly allows for such a sanction. Rule 37(a)(5) does not override a Rule 30(d)(2) sanction merely because the judge ultimately arrived at the same conclusion as the party who initially overstepped his or her authority. That would impede the function of Rule 30, which is to keep the deposition moving. In any event, Rule 37(a)(5) provides an escape hatch "if the motion was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5). Here, Brownlee's deposition conduct warranted Bell's motion to compel.

Pemberton warns of the "chilling effect" on litigants if they "had to have harmful and/or embarrassing information disclosed, and then later come to Court to seek a protective order[.]" (Pl.'s Objs. to 11/20/2023 Order 6.) But discovery is inherently a process where embarrassing information may come to light. This is a cost of bringing litigation. And the Rules already provide the mechanism Pemberton seeks. If a deposition is being conducted in a bad faith manner or is unreasonably embarrassing

or oppressing a party, counsel may *motion the Court* to terminate or limit the deposition. When the motion is made, the deposition may be suspended "for the time necessary to obtain an order." Fed. R. Civ. P. 30(d)(3)(A). This is the appropriate process. It allows for a party to raise an issue with the Court who may then analyze the issue and rule—it does not allow that party to act as the arbiter of what is and is not appropriate. Pemberton's objection will be overruled.

II. MOTION TO ALTER OR AMEND THE JUDGMENT

Pemberton seeks reconsideration of this Court's opinion and order granting Bell's summary judgment motion. (Pl.'s Mot. for Recons., ECF No. 115.) The Court will construe this motion as a motion to alter or amend judgment under Rule 59(e). "A court may grant a Rule 59(e) motion to alter or amend if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005) (citing *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999)). Pemberton advances several arguments. Again, none is persuasive.

A. Interactive Process and Failure to Accommodate

Pemberton cites *Blanchett v. Charter Communications, LLC*, 27 F.4th 1221 (6th Cir. 2021), for its proposition that "once an employee requests an accommodation, the employer has a duty to engage in an interactive process." *Id.* at 1232 (cleaned up) (citing *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857 (6th Cir. 2018)). He argues, "This Court stated that Plaintiff did not make specific requests for accommodations; however the Court fails to take into consideration Defendant's failure to engage in the interactive process. The Court found that Plaintiff, as a matter of law, could not do his job with any accommodation, but Defendant never engaged in any process to discover that with Plaintiff while he was employed." (Pl.'s Mot. for Recons. 3-4.)

Pemberton's argument is difficult to square with both the record and this Court's opinion. As an initial matter, his implication that an employer's duty to engage in an interactive process to find an accommodation precedes an employee's duty to request that accommodation is wrong in both law and logic. *Blanchett* makes clear that the employer's duty attaches "*once* an employee requests an accommodation." *Blanchett*, 27 F.4th at 1232 (emphasis added). But here, as the Court noted, "there is no evidence of Pemberton actively requesting light duty work, or any other accommodation, after

August 12, 2019 [, the applicable statute of limitations period]." (3/18/2024 Op. 17.) Thus, Pemberton has failed to adduce evidence that Bell's had a duty to engage in any process. This alone is sufficient to deny Pemberton's instant motion on this issue.

But the Court did not end its analysis there. Rather, it concluded Pemberton's claims failed as a matter of law even "assuming that [his] requests prior to August 12, 2019 . . . can be viewed as standing requests that carry into the statute of limitations period." (*Id.*) This conclusion rested, in part, on the degree to which Bell's worked with Pemberton to find a fitting accommodation:

Still, it is worth emphasizing the accommodations Bell's did make. Bell's offered light duty work for several months following Pemberton's December 2018 injury. When the light duty work ran out, despite Bell's active search for such (see Johnson Decl. ¶ 9-10; Johnson Emails, ECF No. 80-4, PageID.1173-1198), it placed Pemberton on paid medical leave. It then placed Pemberton with a nonprofit partner and funded his full-time salary. When Pemberton no longer wanted to work at the nonprofit, it placed him back on paid medical leave until it located additional light duty work in October of 2019. A month later, his medical restrictions were lifted by his physician. This simply is not indicative of a failure by Bell's to accommodate Pemberton's asserted disability. Indeed, Bell's appears to have gone beyond what the [Persons with Disabilities Civil Rights Act] requires of employers.

(*Id.* at 17-18). Pemberton's unsupported assertion that Bell's failed to engage in an interactive process to accommodate his injury is without merit.

B. Pretext

Pemberton argues the Court inappropriately weighed competing evidence when it determined that Pemberton failed to establish that Bell's proffered reason for his termination was pretextual. Again, this argument is belied by the opinion. First, the Court found that Pemberton's prima facie case was "relatively tenuous." (*Id.* at 13.) It then assumed, without deciding, that Pemberton had made his prima facie case in order to analyze Bell's explanation for its adverse action. The Court concluded "Bell's has met its burden of production by proffering a legitimate, nondiscriminatory, and nonretaliatory reason for its actions—Pemberton's inappropriate behavior towards EE-1.[1]" (*Id.*)

The Court noted Pemberton's only response to Bell's proffered reason was that EE-1 must have lied to Bell's about Pemberton's inappropriate behavior towards EE-1 because EE-1 had, at some point, referred to Pemberton as "essentially a big teddy bear." (*Id.* at 14.) Notably, the Court "[could not] locate this quote in the deposition transcripts provided by either party." (*Id.*) But it *once again* assumed, for the sake of analysis, that EE-1 had made the comment. The Court then concluded that the comment "would be out of context at best and actively misleading at worst" because it was directly contrary to EE-1's other testimony. (*Id.*) Further, EE-1's supposed characterization of Pemberton as a "big teddy bear" does nothing to counter the fact that Pemberton made highly inappropriate comments towards EE-1, a fact which Pemberton admits. Pemberton therefore has not shown that Bell's "relie[d] on false information for a determination or basis for termination." (Pl.'s Mot. for Recons. 4.)

The Court made several assumptions in favor of Pemberton—first, that he had established a prima facie case, and second, that he had put forth *some* evidence of pretext. But *some* evidence of pretext is not enough. "To survive summary judgment, a plaintiff `must produce *sufficient* evidence from which a jury could reasonably reject [the defendant's] explanation of why it' took an adverse employment action against the plaintiff." *Redlin v. Grosse Pointe Pub. Sch. Sys.*, 921 F.3d 599, 612 (6th Cir. 2019) (emphasis added, alteration in original) (quoting *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir. 2009)). A jury could not reasonably reject Bell's explanation here. Pemberton has failed to carry his burden.

C. Retaliation

Pemberton argues this Court erred in determining that he did not engage in protected activity under Title VII when he relayed to Bell's information pertinent to another employee's sexual assault allegations. Pemberton glosses over much of this Court's opinion to make this argument.

The Court noted three independent reasons to grant Bell's summary judgment on Pemberton's Title VII retaliation claim: (1) assuming Pemberton established his prima facie case, he failed to establish Bell's reason for termination was pretextual; (2) Pemberton failed to exhaust his administrative remedies; and (3) Pemberton failed to establish his prima facie case for retaliation. Each is a reason to grant Bell's summary judgment; Pemberton's motion addresses only reason (3).

Regardless, Pemberton's argument is unpersuasive. The Court did not *only* rely on his failure to show that he was engaged in a protected activity to conclude that he failed to establish his prima facie case. Indeed, the Court noted that "he has failed to connect the dots to establish [his serving as a Title VII witness] as the motivating factor" behind Bell's employment actions. And there must be "a causal connection between the protected activity and the adverse employment action." *Rorrer v. City of Stow*, 743 F.3d 1025, 1046 (6th Cir. 2014). Here, Bell's actively tried to get Pemberton to participate in the Title VII investigation. His participation was an explicit condition of the last chance agreement—which Pemberton rejected—that would have allowed him to keep his job. Pemberton is correct that the prima facie burden is easily met, he simply has not met it.

Based on the foregoing, Pemberton's motion to alter or amend the judgment under Rule 59(e) will be denied.

III. BELL'S BILL OF COSTS

As the prevailing party, Bell's seeks certain costs as authorized by Federal Rule of Civil Procedure 54(d)(1) and 28 U.S.C. § 1920. Specifically, Bell's seeks deposition and transcript costs of $3,756.85 under § 1920(2) as well as $446.83 in costs associated with obtaining third party medical records under § 1920(4). Bell's has supported its Bill of Costs with invoices and a declaration by counsel. (Stocker Decl., ECF No. 113-2.)

A. Deposition Costs

"[T]he costs of taking and transcribing depositions reasonably necessary for the litigation are allowed to the prevailing party." *Sales v. Marshall*, 873 F.2d 115, 120 (6th Cir. 1989). Bell's asks the Court to tax Pemberton its costs associated with five depositions: Pemberton, Carrie Yunker, Emily Schuiling, EE-1, and Paul Kilmer. It does not seek costs associated with depositions not used in its summary judgment motion. Indeed, Bell's cited each of these asserted depositions in its summary judgment motion and the Court in turn cited each in its summary judgment opinion.

A few examples of how the Court relied on these depositions follow. Yunker provided details surrounding Bell's decision to terminate Pemberton. (3/18/2024 Op. 4-5.) Schuiling detailed some of the considerations that went into offering certain accommodations and alternative employment conditions to Pemberton. (*Id.* at 4-6.)

EE-1 corroborated Bell's proffered reason for its adverse employment actions against Pemberton. (*Id.* at 4-5, 15.) Kilmer substantiated the timing of Pemberton's injuries and his resulting medical restrictions. (*Id.* at 3.) And, of course, Pemberton's deposition was referenced throughout the opinion. Each of these factored into this Court's conclusion. Thus, contrary to Pemberton's assertions, these depositions were not "merely investigative, preparatory, or useful for discovery." (Pl.'s Objs. to Def.'s Bill of Costs 4 (citing *Baker v. First Tenn. Bank Nat'l Ass'n,* No. 96-6740, 1998 WL 136560, at *5 (6th Cir. Mar. 19, 1998)).) Further, it is immaterial that some deposition testimony overlaps. Overlapping and corroborating evidence is often necessary to prove a case.

Finally, Pemberton's assertion that Bell's failed to substantiate its motion with invoices is incorrect—the invoices were attached to its counsel's declaration. (Stocker Decl., PageID.1861-1865.) His assertion that "[t]he maximum transcript rate for an original transcript in the thirty-day turnaround time in this Court is $4.00 per page, and $1.00 for a copy" is also incorrect. Pemberton cites the fee schedule for requesting transcripts from the court reporter—this is not a maximum fee schedule for *other* transcript services.

The Court concludes Bell's deposition costs were reasonably necessary for its summary judgment motion. It will therefore tax the costs to Pemberton over his objections.

B. Medical Records Costs

Bell's seeks $446.83 in costs associated with obtaining copies of Pemberton's medical records. Pemberton argues that the costs of obtaining medical records are not authorized by 28 U.S.C. § 1920. But other courts in this circuit have concluded otherwise. *See, e.g., Lensing v. Potter*, No. 1:03-cv-575, 2015 WL 10892073, at *17 (W.D. Mich. Aug. 20, 2015) (awarding medical records costs and noting "[a]lthough the Sixth Circuit has not addressed whether medical records may be awarded as costs under § 1920, other circuits have found that the district court did not abuse its discretion when awarding costs under § 1920(4) for medical records where the records were necessary for the litigation . . . ."); *Thompson v. Fresh Prod., LLC,* No. 3:18-cv-1243, 2020 WL 11860872, at *2 (N.D. Ohio Jan. 31, 2020) (allowing costs for copies of medical records); *Anderson v. Jo-Ann Stores Inc.,* No. 3:09-1042, 2011 WL 3608560, at *2 (M.D. Tenn. Aug. 15, 2011) (same). Thus, there is persuasive authority for

taxing these costs to Pemberton so long as they were reasonably necessary to Bell's defense.

The Court finds that these costs were reasonably necessary. Although neither Bell's nor the Court referenced these medical records directly, the records were referenced by Bell's during its deposition of Kilmer. The Court found Kilmer's deposition reasonably necessary. Furthermore, "the fact that the documents were not used at summary judgment is not dispositive." *Thompson,* 2020 WL 11860872, at *2. And more importantly, this case centered around Pemberton's asserted physical disability. A disability case will necessarily involve some evidence about the diagnosis and treatment of that disability. To echo the court in *Thompson,* "this was a disability case—meaning Plaintiff's medical history was clearly `at issue.'" *Id.* (citing *Roll v. Bowling Green Metal Forming, LLC*, No. 1:09-cv-81-TBR, 2010 WL 3069106, at *1 (W.D. Ky. Aug. 4, 2010)).

As with its deposition costs, Bell's has substantiated its medical records costs with invoices. The Court concludes these copying costs were reasonably necessary and will thus tax the costs to Pemberton over his objections.

IV. CONCLUSION

Based on the foregoing, the Court will: (1) deny Pemberton's objections to the magistrate judge's sanctions order; (2) deny Pemberton's motion for reconsideration of its summary judgment motion, which the Court construes as a motion to alter or amend the judgment; and (3) approve Bell's bill of costs over Pemberton's objections.

An order will enter consistent with this Opinion.

[1] Both parties refer to the non-party employee as "EE-1" given the sensitive nature of the pertinent facts. The Court will use the same delineation.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAY PEMBERTON,

Plaintiff, Case No. 1:22-cv-739

v. Hon. Hala Y. Jarbou

BELL'S BREWERY, INC.,

Defendant.

_____/

ORDER

In accordance with the opinion entered this date,

IT IS ORDERED that Plaintiff's objections to the magistrate judge's order issuing discovery-related sanctions (ECF No. 105) are OVERRULED.

IT IS FURTHER ORDERED that Plaintiff's motion for reconsideration of this Court's summary judgment order and opinion (ECF No. 115), which the Court construes as a motion to alter or amend the judgment under Rule 59(e), is DENIED.

IT IS FURTHER ORDERED that Defendant's proposed bill of costs (ECF No. 113) is APPROVED in the amount of $4,203.68.

IT IS FURTHER ORDERED that Plaintiff's objections to Defendant's proposed bill of costs (ECF No. 114) are OVERRULED.

Dated: June 5, 2024

/s/ Hala Y. Jarbou
HALA Y. JARBOU

CHIEF UNITED
STATES DISTRICT JUDGE