

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BAY CITY DIVISION**

EDWARD BARTOSZEK,

Plaintiff,

v.

DELTA COLLEGE,

Defendant.

Case No. 21-CV-11923

Honorable George Caram Steeh

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DELTA COLLEGE'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Defendant, DELTA COLLEGE, by and through its undersigned counsel, Cummings, McClorey, Davis & Acho, and for its Motion for Summary Judgment, posits as follows:

1. The instant case comprises Plaintiff Edward Bartoszek's age discrimination claims against Defendant Delta College ("Delta") leveled both under the Age Discrimination in Employment Act (ADEA) embodied in 29 U.S.C § 621 *et seq.* and the Elliott-Larsen Civil Rights Act under MCL § 37.2101 *et seq.*
2. The Plaintiff alleges that Defendant Delta College – which was his employer at the pertinent times – refused to grant him an open position which he applied for because of his age.
3. The Plaintiff attended the University of Detroit without obtaining a bachelor's degree and was subsequently accepted at the University of Detroit Dental School, where he earned a Doctor of Dental Surgery (DDS) in 1975.
4. Thereafter, Plaintiff ran a general dentistry practice from 1975 to 2009 which consisted of “restoring teeth primarily, doing exams, surgery, root canals.” (**Exhibit A**, Plaintiff's Deposition Transcript p. 24, 6-9).
5. In 2010, Plaintiff became an Adjunct Professor at Delta College teaching pharmacology in both the Dental Hygiene Department and the nursing program, as well as anesthesia in the Dental Hygiene Department. (**Exhibit A**, p. 15).
6. In 2019, Defendant Delta College posted an open position with the job description of “Biology (Anatomy & Physiology) Instructor – Tenure Track”. (**Exhibit B**, Job Description).

7. Required Qualifications for the job were listed as: Master of Science in a Biological Science or related field, with an emphasis in Anatomy and Physiology, from a regionally accredited institution of higher education attained by December 2019; Minimum of two years teaching experience; and Demonstrated currency in the field of Anatomy and Physiology. (**Exhibit B**, p. 4).
8. Candidates could only complete an application online. Mandatory documents to include with the application were a resume, cover letter and transcript, whereas optional documents included letters of recommendation and transcripts other than graduate transcripts directly related to the position (**Exhibit A**, p. 40, 7-18) (**Exhibit H**, Ronald Schlaack's Deposition, p. 16, 11-20). (**Exhibit M**, Application Packet)
9. As is its custom when looking to fill an open position, Delta College formed a "Search Committee" comprising Kristopher Nitz, Ronald Schlaack, Cynthia Drake, Paula Cornell, Donovan Traverse and Charles Dykhuizen.
10. Each Search Committee featured a Chair and an Inclusion Advocate, in this case Kristopher Nitz and Charles Dykhuizen respectively, the later of whom had "received training in recognizing conscious and unconscious bias. Such biases included speaking ability, language, race, religion, sexual orientation *and age*." (**Exhibit D**, Charles Dykhuizen's Deposition Transcript, pp. 29-30.)

11. The Inclusion Advocate had no concerns for bias for the Search Committee regarding the Plaintiff. While some of the members of the Search Committee knew him, others did not and were entirely unaware of his age. (**Exhibit D**, Charles Dykhuizen’s Deposition Transcript, pp. 29-30).
12. Plaintiff submitted an application, but rather than attaching his transcripts as was required, he merely attached a one-page document stating that: “All Transcripts on file in HR.” (**Exhibit M**, Application Packet). (**Exhibit C**, Darrin Johnson’s Deposition Testimony, p. 41, 12-18). (**Exhibit A**, Edward Bartoszek’s Deposition Transcript, pp. 52-53).
13. This was a competitive, nationwide search for which there were 21 applicants. Interviewing applicants was a three-part process. This case involves the very beginning of the process, including the Search Committee’s initial review to select individuals to be given an interview.
14. The Search Committee’s initial review was set forth in a Screening Matrix which summarized the thoughts of the members, assigning numbers from 0 to 3 to the candidates: 0 meant “doesn’t meet qualifications,” 1 meant “don’t interview, reservations,” 2 meant “hold, maybe interview, and 3 meant “definitely interview. (**Exhibit F**, Paula Cornell’s Deposition Transcript, pp. 10-11). (**Exhibit I**, Screening Matrix)

15. Plaintiff scored a designation of 2 and was not granted an interview as a result. It was clearly noted on his application “Need transcripts. No letters. Letter was not clearly defining job responsibilities. Hold candidate.” (**Exhibit I**, Screening Matrix).
16. The Plaintiff’s Application Package was not just lacking necessary documents, but as Search Committee members noted, he made no effort whatsoever to distinguish himself or to match his experiences to the requirements of the open academic position. *See e.g. Exhibit E*, Kristopher Nitz’s Deposition Transcript pp. 20-21. *See also, Exhibit K*, Cynthia Drake’s Deposition Transcript, p. 16-19.
17. Plaintiff was upset that he was not selected; it was his “personal opinion” that he was the most qualified candidate and that therefore the only reason he was not selected was because of his age. (**Exhibit A**, p. 74, 1-7; p. 17, 16-25; p. 19, 11-14).
18. Whether under federal or state law, Plaintiff cannot establish that his failure to obtain the position at issue was based on age discrimination.
19. To establish discrimination “because of [his] age” under the ADEA, Plaintiff must “prove by a preponderance of the evidence that age was the ‘but-for’ cause of the challenged employer decision.” *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 323-24 (6th Cir. 2021) citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177-78, (2009) (parenthesis omitted).

20. A claim of age discrimination may be established by direct evidence or circumstantial evidence. *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997).

21. “[D]irect evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” *Jacklyn v. Schering–Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999).

22. Plaintiff’s conclusion that age played a role in the decision making process is entirely subjective and he has admitted that no one at Delta College made any statements to him which would indicate that age was a factor. (**Exhibit A**, p. 52, 9-12).

23. Direct evidence is evidence which “does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group.” *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 573 (6th Cir. 2000) citing *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000).

24. Precedents are clear that “[m]ere personal beliefs, conjecture and speculation are insufficient to support an inference” of discrimination.” *Grizzell v. City of Columbus Div. of Police*, 461 F.3d 711, 724 (6th Cir. 2006).

25. A plaintiff may also establish a claim of discrimination with circumstantial evidence, which is analyzed according to the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

26. Under *McDonnell's* first prong, Plaintiff must establish a prima facie case of discrimination by establishing that “(1) he is a member of a protected group, (2) he is qualified for the position in question, (3) his employer took an adverse employment action against him, and (4) there are ‘circumstances that support an inference of discrimination.’” *Willard v. Huntington Ford, Inc.*, 952 F.3d 795, 808 (6th Cir. 2020).

27. Under the second *McDonnell* prong, once Plaintiff has established a prima facie case of discrimination, the burden then shifts to Delta College to “articulate some legitimate, nondiscriminatory reason” for the employment action at issue. *Johnson*, 319 F.3d at 856-66.

28. In this case, some members of the Search Committee agree that they would have voted for Plaintiff to proceed to the interview stage with his qualifications, but all agree that they did not reach such a vote because Plaintiff’s application was incomplete and poorly done.

29. Under the third and final *McDonnell* prong, Plaintiff cannot establish “that [Delta College’s] proffered reason was actually a pretext to hide unlawful discrimination.” *Id.*

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**BRIEF IN SUPPORT OF DELTA COLLEGE'S MOTION FOR SUMMARY
JUDGMENT**

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ISSUES PRESENTED

- I. Is summary judgment appropriately granted on the Plaintiff's age discrimination claim when his Application for the position of tenured professor was substantially inadequate and did not provide basic information required by the Defendant's Search Committee?**

Defendant Answers: Yes

Plaintiff Answers: No

- II. Is summary judgment appropriately granted on the Plaintiff's age discrimination claim when he did not meet some of the criteria being sought after by Plaintiff's Search Committee?**

Defendant Answers: Yes

Plaintiff Answers: No

- III. Is summary judgment appropriately granted on the Plaintiff's age discrimination claim when has no direct evidence of discrimination, and admits that Defendant Delta College's employees never alluded to his age?**

Defendant Answers: Yes

Plaintiff Answers: No

- IV. Is summary judgment appropriately granted on the Plaintiff's age discrimination claim when some members of the Search Committee had never met him, did not know what he looked like and made their decision without knowledge of his age?**

Defendant Answers: Yes

Plaintiff Answers: No

- V. Is summary judgment appropriately granted on the Plaintiff's age discrimination claim when he has no circumstantial evidence of age discrimination and Defendant had a legitimate reason for not offering him the position?**

Defendant Answers: Yes

Plaintiff Answers: No

STATEMENT OF FACTS

A. Plaintiff's Educational Background

Post-secondary school, Edward Bartoszek (also "Plaintiff") attended the University of Detroit. He did not obtain a bachelor's degree, but rather transferred his classes to the University of Detroit Dental School, where he earned a Doctor of Dental Surgery (DDS) in 1975. (**Exhibit A**, Plaintiff's Deposition Transcript p. 7-8). He obtained a Master of Science Administration from Central Michigan University, (**Exhibit A**, pp. 8-9). Plaintiff was in private practice from 1980-1983 in Auburn, MI. From 1983 to 1996, he worked with the Blue Care Network of Michigan serving in an administrative capacity as Associate Dental Director. (**Exhibit A**, p. 11). He opened a practice in Bay City in 1996. *Id.* pp. 12-13. By the year 2010, he had developed a health condition which prevented him from being a practicing dentist. *Id.*

In 2010, Plaintiff then applied for and was retained as an Adjunct¹ Professor in the Dental Hygiene Department at Defendant Delta College (also "Delta"), where he taught pharmacology and anesthesia. He also taught pharmacology in the nursing program. *Id.* at p. 15. In 2019, he applied for an open position with a job description of "Biology (Anatomy & Physiology) Instructor – Tenure Track" at the College.

¹ Adjunct professors are part time instructors, maxing out at 12 teaching credit hours. (**Exhibit E**, Kristopher Nitz's Deposition Transcript, p. 6, 1-9).

(**Exhibit B**, Job Description). There was a competitive, nationwide search by Delta College for the position which garnered 21 applicants “which is a high number for an academic position.” (**Exhibit E**, Kristopher Nitz’s Deposition Transcript, pp. 23-24). Required qualifications for the job were listed as: Master of Science in a Biological Science or related field, with an emphasis in Anatomy and Physiology, from a regionally accredited institution of higher education attained by December 2019; Minimum of two years teaching experience; and Demonstrated currency in the field of Anatomy and Physiology. (**Exhibit B**, p. 4).

There were other considerations for the position. These were listed in the job posting under “Additional Experiences Considered”: “Biology teaching experience in a community college setting; Experience using a variety of teaching technologies and methodologies; Demonstrated current and ongoing professional growth; Experience working with non-traditional students from diverse backgrounds and with varying academic skills; Experience teaching diverse student populations; Experience with teaching courses for dual enrollment initiatives; and Ph.D in a Biological Science with emphasis in Anatomy and Physiology.” (**Exhibit B**, p. 4).

B. A Search Committee is Formed

Delta College uses ad hoc Search Committees to select candidates for interviews and make recommendations for open positions. Darrin Johnson as the Manager of Recruitment was “responsible for all the hiring activities here from

posting through making offers to the candidates.” (**Exhibit C**, Darrin Johnson’s Deposition Transcript, pp. 3-4; p. 4, 10-13). The hiring process begins with posting the position. After applicants electronically submit their applications, a Search Committee is then formed and given an orientation by the Human Resources Department. *Id.* at p. 5, 14-25; p. 6, 21-25. The Search Committee is formed by the Dean, the Associate Dean and the Discipline Coordinator of Delta College. (**Exhibit C**, p. 20, 20-25).

During the orientation, the members of the Committee are instructed on Delta College’s commitment to nondiscriminatory, inclusive and diverse hiring. (**Exhibit C**, pp. 18. 4-13). The Committee is specifically instructed on age discrimination. *Id.* at pp. 34-35. The Search Committee in this case comprised Kristopher Nitz, Ronald Schlaack, Cynthia Drake, Paula Cornell, Donovan Traverse and Charles Dykhuizen. Each Search Committee featured a chairperson (“Chair”), in this case Kristopher Nitz. Each such committee also included an Inclusion Advocate, in this case Mr. Dykhuizen, who had “received training in recognizing conscious and unconscious bias. Such biases included speaking ability, language, race, religion, sexual orientation *and age*.” (**Exhibit D**, Charles Dykhuizen’s Deposition Transcript, pp. 29-30).

Mr. Nitz is the Biology Department Coordinator and a Biology Professor at Delta College. (**Exhibit E**, Kristopher Nitz’s Deposition Transcript, p. 4, 9-12; p. 7,

6-9). He was Plaintiff's direct supervisor and therefore knew him. Ms. Cornell has been on more than ten Search Committees. She was not acquainted with the Plaintiff, did not know of Plaintiff's work history with Delta College and had never seen his face. (**Exhibit F**, Paula Cornell's Deposition Transcript, pp. 14-15; p. 36). Ms. Drake has been on about three Search Committees. Mr. Dykhuizen has been on about six Search Committees. He was not aware of Plaintiff's age or the age of the successful applicant. (**Exhibit D**). Donovan Traverse has been on Search Committees about four times. He knew the Plaintiff. (**Exhibit G**, Donovan Traverse's Deposition Transcript). Ronald Schlaack is a Professor of Physics at Delta College. (**Exhibit H**, Ronald Schlaack's Deposition Transcript). It is unclear whether he knew the Plaintiff beforehand.

C. The Deliberations and Findings of the Search Committee

Candidates upload their application packet with required documents online through a computer program called PeopleAdmin. (**Exhibit C**, Darrin Johnson's Deposition, p. 6, 21-25). The application recognizes when a document is attached and indicates "pdf complete." *Id.* at p. 8, 15-24. The application has no way of determining whether the uploaded documents are sufficient. *Id.* at pp. 10-11. The Search Committee was specifically instructed that, in order to maintain fairness for all candidates, all decisions made could only derive from the submissions of the applicants. (**Exhibit E**, Kristopher Nitz's Deposition Transcript, p. 12, 18-25). The

members of the Committee had no authority to seek any external information on any candidate. *Id.*

The Search Committee conducted an initial evaluation to select candidates for an interview. It created a Screening Matrix with a summary of the member's findings for each candidate. Numbers from 0 to 3 were assigned to the candidates: 0 meant "doesn't meet qualifications," 1 meant "don't interview, reservations," 2 meant "hold, maybe interview," and 3 meant "definitely interview." (**Exhibit F**, Paula Cornell's Deposition Transcript, pp. 10-11). (**Exhibit I**, Screening Matrix). Every applicant who was selected for an interview and scored a "3" submitted at least his or her graduate transcript.² (**Exhibit C**, Darrin Johnson's Deposition Transcript, p. 36, 9-23). This was of critical importance because among other things, the Search Committee needed to scrutinize the transcripts to ensure that each applicant had 18 credits in biology as is required by the Higher Learning Commission (HLC). (**Exhibit C**, Darrin Johnson's Deposition Transcript, p. 38, 10-22; p. 45, 17-23). (**Exhibit E**, Kristopher Nitz's Deposition Transcript, p. 10, 20-25). For a candidate like Plaintiff who did not actually have a Master's of Science in Biological Sciences,

² One of the applicants, Rostern Tembo, was selected for a phone interview but did not attach his undergraduate transcript. Notably, he did attach his graduate transcript which was sufficient to determine whether he met the HLC requirements. Hence the committee noted "Undergrad transcripts not included – would need to see."

it was especially important to review his transcript to ensure compliance with the HLC. (**Exhibit C**, pp. 45-47).

Plaintiff's application was shoddily done. Three documents were marked as "Required Documents" in the Application, including a resume, cover letter and transcript. (**Exhibit M**, Application Packet). *He did not attach any transcripts whatsoever, instead attaching a one-page document stating that "All Transcripts on file in HR."* (**Exhibit B**, Plaintiff's Application) (**Exhibit C**, Darrin Johnson's Deposition Testimony, p. 41, 12-18). (**Exhibit A**, Edward Bartoszek's Deposition Transcript, pp. 52-53). Every member of the Search Committee "remarked on not seeing the transcripts." (**Exhibit H**, Ronald Schlaak's Deposition Transcript, p. 8, 16-17). (**Exhibit E**, Kristopher Nitz's Deposition Transcript, p. 10, 3-21).

They did not have authority to approach Human Resources for the transcript. P. 12, 18-25. (**Exhibit E**, p. 12, 18-25). "Optional Documents" in the Application included other transcripts, a curriculum vitae and letters of recommendation, *none of which Plaintiff submitted*. In answer to a query in the Application about "Continuing Professional Development" Plaintiff merely wrote "See attached Resume." (**Exhibit B**, Plaintiff's Application). When asked to "please describe any special job-related skills and qualifications acquired from employment or other experience," Plaintiff curtly responded "see resume." (**Exhibit B**).

All members of the Search Committee agreed that Plaintiff's application was insufficient. (**Exhibit K**, Cynthia Drake's Deposition, p. 20-21). Search Committee members noted that Plaintiff cursorily mentioned experience he had garnered in the private sector, but made no attempt to clarify how it would translate to the academic position he was seeking. *See e.g.* **Exhibit L**, p. 19, 10-17). The fact that Kristopher Nitz and some other members of the committee knew Plaintiff never came up, because his application was structurally defective. (**Exhibit E**, Nitz Deposition, p. 13).

Plaintiff scored a designation of 2 and was not granted an interview.³ It was clearly noted on his application "Need transcripts. No letters. Letter was not clearly defining job responsibilities. Hold candidate."⁴ (**Exhibit I**, Screening Matrix). Delta College Human Resources Office sent Plaintiff an email thanking him for his interest on November 26, 2019 and informing him that "after a careful review of the of the application materials received, we regret to inform you that you were not selected as a finalist for this position." (**Exhibit J**, Rejection Letter). The letter encouraged Plaintiff to seek other future employment openings with Delta College.

³ But a designation of "2" also meant that if none of the candidates selected for an interview worked out, the Plaintiff could be interviewed and considered. (**Exhibit E**, Mr. Nitz's Deposition Transcript, pp. 27-28).

⁴ It was beyond the ambit of the duties of the Search Committee to inform a candidate of deficiencies to his or her application. (**Exhibit F**, Paula Cornell's Deposition Transcript, p. 30-31).

Timothy McGuire was selected for the position. Like Plaintiff, he was already an employee of Delta College at the time he applied.⁵ Unlike Plaintiff, Mr. McGuire “read the requirements and made sure to include all necessary information.” pp. 31-32. (**Exhibit E**, Kristopher Nitz’s Deposition). McGuire has a Master’s degree in Biology, as required by the Application. (**Exhibit B**, Application, p. 6, Question 3). Plaintiff does not, although he misrepresented that he did. (**Exhibit A**, Plaintiff’s Transcript, pp. 46-47). The six applicants who were selected for an interview were qualified, provided the most information and most clearly answered the questions. (**Exhibit K**, Cynthia Drake’s Deposition Transcript, p. 12, 2-12). None of the members of the Search Committee were apprised of the fact that Plaintiff had filed an age discrimination Complaint with the U.S. Equal Employment Opportunity Commission (EEOC), nor did they participate in the position statement submitted in response. (**Exhibit K**, Cynthia Drake’s Deposition Transcript, p. 33-34) (**Exhibit C**, Darrin Johnson’s, p. 30, 4-7).

At the conclusion of their deliberations, the Search Committee submitted the Screening Matrix which contained their impressions of each candidate and their

⁵ Because she wrote a recommendation letter on behalf of McGuire, Cynthia Drake recused herself during the deliberations when it came to him. (**Exhibit C**, Darrin’s Deposition Transcript, p. 32, 11-17).

listing of each candidate selected for an interview.⁶ p. 26. (**Exhibit L**, Affidavit of Darrin Johnson).

STANDARD OF REVIEW

Summary judgment is properly granted where “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” *Jones v. Byrnes*, 585 F.3d 971 (6th Cir. 2009). *See also*, Federal Rule of Civil Procedure 56. Where a reasonable jury may return a verdict for the party opposing the summary judgment, such an entry is not warranted. *Id.* To avoid summary judgment, the opposing party must elicit enough evidence on the record as would permit a reasonable jury to find for it at trial. *Matsushita Elec. Ind. v. Zenith Radio Corp.* 475 U.S. 574 (1986).

Where reasonable minds may differ as to the significance of the evidence, a verdict should not be directed. *Id.* The moving party retains the burden of showing an absence of evidence to support the non-moving party’s case. *Celotex v. Catrett*, 477 U.S. 317 (1986). The court must consider the evidence in the light most favorable to the non-moving party but may juxtapose competing inferences.

⁶ Mr. Nitz testified that Human Resources retained the private notes of the individual Search Committee members, but this is inaccurate. Nitz is not in a position to know, as he is not part of Human Resources.

Matushita, 475 U.S. at 574. The relevant inquiry becomes whether the evidence presents enough of a disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

LAW AND ARGUMENT

A. Introduction

In a nutshell, Plaintiff Edward Bartoszek is angry that he was not chosen for a coveted position he sought with his former employer, Delta College. As he testified, “I was upset.” (**Exhibit A**, p. 19, 11-14; p. 17, 16-25. He therefore voluntarily retired and sent an email to Kristopher Nitz and Associate Dean Colleen Thomas informing them of his decision.⁷ He had previously applied for a full-time position in the Dental Hygiene Department but admits that “unfortunately it involved mostly clinical work as opposed to classroom so I was not qualified there.” (**Exhibit A**, p. 25, 1-7). He had also previously “applied for a position in the Biology Department, but I didn’t allegedly have enough experience.” (**Exhibit A**, p. 25, 6-8). He now thinks that he was wrongfully passed over for that job in 2017 “in

⁷ Implausibly, despite the fact that he left his employment with Delta College voluntarily, Plaintiff is claiming “back pay and benefits,” “front pay and benefits,” “lost future income and benefits” and damages for emotional distress in his Complaint.

retrospect.”(Exhibit A, pp. 26-27).⁸ The Plaintiff’s feeling that he was entitled to the subject position was his undoing, as he invested minimal efforts compared to other applicants in completing his online application. He even acknowledges that Timothy McGuire – the successful applicant – was qualified for the job. (Exhibit A, p. 28, 19-21).

Plaintiff’s age discrimination claims are predicated upon Age Discrimination in Employment Act (ADEA) embodied in 29 U.S.C § 621 *et seq.* and the Elliott-Larsen Civil Rights Act under MCL § 37.2101 *et seq.* He cannot establish a claim based on either statute. To establish discrimination “because of [his] age” under the ADEA, Plaintiff must “prove by a preponderance of the evidence that age was the ‘but-for’ cause of the challenged employer decision.” *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 323-24 (6th Cir. 2021) citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177-78, (2009) (parenthesis omitted). A claim of age discrimination may be established by direct evidence or circumstantial evidence. *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997). Plaintiff can do neither.

B. There is no Direct Evidence of Age Discrimination under Federal Law

Direct evidence is evidence which “does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group.”

⁸ Plaintiff’s Complaint is not based on the two prior rejections.

Johnson v. Univ. of Cincinnati, 215 F.3d 561, 573 (6th Cir. 2000) citing *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000). Plaintiff's application was quite simply rejected because it had defects which did not permit the Search Committee to grant him an interview. No one – let alone a decision maker in this case – has mentioned race. “Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age” could establish direct evidence of discrimination. *Pelcha v. MW Bancorp, Inc.*, 455 F. Supp. 3d 481, 498 (S.D. Ohio 2020) citing *Scott v. Potter*, 182 F. App'x 521, 526 (6th Cir. 2006).

Plaintiff admits that it is his “personal opinion” that he was the most qualified candidate and that therefore the only reason he was not selected was because of his age. (**Exhibit A**, p. 74, 1-7). Precedents are clear that “[m]ere personal beliefs, conjecture and speculation are insufficient to support an inference” of discrimination.” *Grizzell v. City of Columbus Div. of Police*, 461 F.3d 711, 724 (6th Cir. 2006). He expressly acknowledges that no one at the college had informed him that age had anything to do with the decision not to interview him. (**Exhibit A**, p. 52, 9-12). Plaintiff testified that he understood that submitting the transcripts “was one of the mandatory” requirements (**Exhibit A**, p. 53, 13-16) and yet he declined to provide transcripts for review by the Search Committee.

C. There is no Circumstantial Evidence of Discrimination under Federal Law

In the absence of direct evidence, a plaintiff may also establish a claim of discrimination with circumstantial evidence, which is analyzed according to the tripartite analytical framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) and subsequently modified in *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 792 (1973). Under McDonnell's first prong, Plaintiff must establish a prima facie case of discrimination by establishing that "(1) he is a member of a protected group, (2) he is qualified for the position in question, (3) his employer took an adverse employment action against him, and (4) there are 'circumstances that support an inference of discrimination.'" *Willard v. Huntington Ford, Inc.*, 952 F.3d 795, 808 (6th Cir. 2020).

Under the second *McDougal* prong, once Plaintiff has established a prima facie case of discrimination, the burden then shifts to Delta College to "articulate some legitimate, nondiscriminatory reason" for the employment action at issue. *Johnson*, 319 F.3d at 856-66. This is merely a burden of production, not of persuasion. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). Finally, once the employer has met its burden of production by producing its legitimate, nondiscriminatory reason, the burden shifts back to the plaintiff to demonstrate by a preponderance of the evidence that the legitimate reason produced by the employer is not its true reason but was pretext for discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000).

The first *McDonnell* prong requires Plaintiff to make out a prima facie case of discrimination. Of the four factors required to establish such a prima facie case, he cannot establish that there are “circumstances that support an inference of discrimination.” Regardless of his qualifications, the inadequacy of Plaintiff’s application ensured that he never got to the interview stage. Plaintiff’s application suffered several deficiencies, the strongest of which was his purposeful omission of a transcript. Plaintiff dismissingly testified that he did not submit his transcript “because the school already had them.” (**Exhibit A**, p. 52, 13-21). Plaintiff fails to take into account that it was not Human Resources that was conducting the search. This was a Search Committee specially formed for the task which had no access to any information other than what was uploaded by the applicants. He also ignores that other candidates may not be current employees of the College. The Search Committee had no authority and no access to any external information. Ironically, the Plaintiff seems to think that he deserved special treatment.

Moreover, the Search Committee members were specifically instructed not to seek or use any external information not contained in the applications. (**Exhibit G**, Donovan Traverse’s Deposition Transcript, p. 21, 17-25). In order to be fair, every applicant was treated in the same fashion. (**Exhibit F**, Paula Cornel’s Deposition Transcript, pp. 34-35). There were other defects. Plaintiff’s cover letter and application were deficient and did not clearly address professional development

related to teaching Anatomy and Physiology. Plaintiff focused on his private sector accomplishments as opposed to attributes relevant to teaching. (**Exhibit F**, Paula Cornel's Deposition Transcript, P. 16, 12-25. Plaintiff's age was never mentioned at all. (**Exhibit D**, Charles Dykhuizen's Deposition Transcript, p. 31, 8-11). Plaintiff admits that his response to work performed was cursory. (**Exhibit A**, pp. 54-55). He "assumed" that the college would know his work experience. He expected them to know about his experience and qualification beyond what he entered into his application. (**Exhibit A**, p. 56). Plaintiff's severely deficient application leaves him entirely unable to establish "circumstances that support an inference of discrimination."

The inadequacy of the Application certainly "articulate[s] some legitimate, nondiscriminatory reason" for the employment action at issue, i.e. not granting Plaintiff an interview for the position he sought. The third and final McDonnell factor requires "the plaintiff to demonstrate by a preponderance of the evidence that the legitimate reason produced by the employer is not its true reason but was pretext for discrimination." Plaintiff cannot make such an offering, given the legitimacy of Defendant's position. Plaintiff both implicitly and explicitly acknowledges that his Application was deficient. On his application he was asked to "briefly explain how you maintain currency in the field of Anatomy and Physiology" to which he curtly responded that "[s]tate license renewal requires 60 hours of continuing education

during every three-year licensing period.” (**Exhibit G**, Application, p. 6, Question 4). (**Exhibit A**, p. 57, 3-9).

Asked why he did not develop a better answer, the Plaintiff claimed that he thought his answer was “self-explanatory,” and that he could have provided more answers when granted an interview. (**Exhibit A**, p. 57, 17-25). This ignores that a candidate cannot be selected for an interview unless he or she submits required materials and prepares an Application Packet that impresses the Search Committee to move him or her to the interview phase. Plaintiff acknowledged at his deposition that there was no provision that applicants who happened to work for the College could rely on Human Resources for their transcripts. (**Exhibit A**, p. 39, 18-23). In short, Plaintiff was aware that his Application did not meet standards, but nonetheless submitted it in subpar condition.

D. There is Neither Direct nor Circumstantial Evidence of Age Discrimination under State Law

The arguments made in *infra* as it relates to Plaintiff’s federal claims under the ADEA apply with equal force on his state age discrimination claim brought under the Elliott-Larsen Civil Rights Act. “Michigan's Elliott–Larsen Act provides in pertinent part that it shall be unlawful for an employer to discriminate against an employee ‘because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status....’ *Jackson*, 191 F.3d at 658 citing MCL §

37.2102(1). Much like in Title VII cases, the elements of a civil rights claim under Michigan law may be proved by either direct or circumstantial evidence. *Hazle v. Ford Motor Co.*, 464 Mich. 456, 462; 628 N.W.2d 515 (2001).

“Although originally created for use in race discrimination cases, *we have adopted the McDonnell Douglas approach for use in age and gender discrimination cases brought under the Michigan Civil Rights Act as well.*” *Hazle*, 464 Mich. at 462-63; 628 N.W.2d at 521 citing *Lytle v. Malady*, 458 Mich. 153, 172–178, 579 N.W.2d 906 (1998). Michigan courts rely on federal precedents for guidance in determining whether a claim has been established in discrimination cases. *Radtke v. Everett*, 442 Mich. 368, 382; 501 N.W. 2d 155 (1993). The same evidentiary requirements also apply as in the analogous Federal Civil Rights Act cases. *Hazle*, 464 Mich. at 462; 628 N.W. 2d at 520. *See also, In re Rodriguez*, 487 F.3d 1001, 1007 (6th Cir. 2007) (holding that “cases brought pursuant to the ELCRA are analyzed under the same evidentiary framework used in Title VII cases”). The Plaintiff has proffered no evidence of the alleged age discrimination. The availing evidence cuts against him.

CONCLUSION

Plaintiff Edward Bartoszek submitted an incomplete Application which failed to meet the requirements plainly set forth to be considered for the Tenure Track position. His Application was lacking on its face, as well as upon its merits based

upon the information in the possession of the members of the Search Committee – some of whom did not know him and had never met him – at the time. For this reason, Plaintiff can tender neither direct nor circumstantial evidence of race discrimination, and his case is aptly dismissed.

Apparently, although claiming discrimination against himself, this Plaintiff would have this Court believe that he was deserving of special treatment by Delta College and not be required to submit a complete or well-prepared Application Packet as required for the other job applicants.

WHEREFORE, the Defendant Delta College prays that this Honorable Court grant its Motion to Compel Discovery as brought herein, along with any other remedies whether legal or equitable deemed warranted under the circumstances.

Respectfully Submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, PLC

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Dated: February 16, 2023

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 16, 2023, she caused the foregoing document to be filed with the Court's electronic court filing system, which system will serve all parties of record.

/s/ Deborah L. Van Steenis
Deborah L. Van Steenis