

# EXHIBIT 9

**U.S. DEPARTMENT OF LABOR**

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

EDWARD BARTOSZEK,

EEOC No. 471-2020-04069

Claimant,

v

DELTA COLLEGE,

Respondent.

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**RESPONDENT'S POSITION STATEMENT**

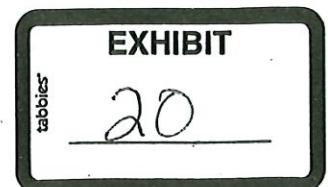
**I. INTRODUCTION**

Mr. Edward Bartoszek (Claimant) alleges age discrimination against Delta College (the College) under the Age Discrimination in Employment Act of 1967 (ADEA), 20 U.S.C. § 621 et. seq. (Ex. 1, Charge). Specifically, Claimant alleges that in the Fall of 2019 he applied for a full-time faculty teaching position with the College and was not hired because of his age (68). The College denies this allegation as untrue. Claimant lacked the required educational requirements for the Position. Also, while the individual hired for the Position was younger than Claimant that individual was "significantly" more qualified than Claimant for the Position. Accordingly, the present Charge should be dismissed.

**II. FACULTY BACKGROUND**

**A. DELTA COLLEGE**

Delta College is a Michigan Community College offering associate degrees, certificates, and a wide range of continuing education and business and industry training. The College is an equal opportunity institution, affording enrollment, employment and services without distinction based on age. (Ex. 2, Delta College EEO Policy). The College has adopted an Equal Educational and



Employment Opportunities and Non-Discrimination Policy which expressly precludes discrimination on any basis, including age. (Ex. 2). Additionally, all hiring decisions are guided by the College's Search Committee Guide (Ex. 3, Search Committee Guide 2019-2020). This Search Committee Guide provides information to search committee members regarding the hiring process, as well as applicable equal opportunity policies and laws. (Ex. 3). The Search Committee Guide addresses the College's commitment to inclusion. (Ex. 3). The Search Committee Guide explains the role of the Inclusion Advocate who sits on the Search Committee to ensure that no candidate is excluded because of a protected characteristic, such as age. (Ex. 3). All Search Committee Members receive training and guidance from the College's Human Resource Department regarding the hiring process and the contents of the Search Committee Guide.

#### **B. THE HIRING DECISION**

In the Fall of 2019, the College sought to hire a Full-Time Tenure Track Biology Instructor who would be assigned to teach anatomy and physiology courses. (Ex. 3). The listed Required Qualifications included:

- Master of Science in a Biological Science, or closely 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 of teaching experience
- Demonstrated currency in the field of Anatomy and Physiology

Additional qualifications the College was looking for included:

- 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
- Ph.D. in a Biological Science with an emphasis in Anatomy and Physiology

This is the Position that the Claimant applied for and claims he did not get because of his age.

The College uses an electronic application tracking system to administer the application process. Applicants are responsible for submitting their application and application materials electronically. Once the application submission phase of the process is completed the applications are opened to the search committee for review. With respect to this Search, the search committee members reviewed the application materials submitted and then ranked each candidate and determined which candidates they wished to interview. In connection with ranking each candidate the search committee documented the reason why candidates were not selected for an interview, as well as documenting the reason why candidates were selected for an interview. This process is documented by the Search Committee Chair on a Matrix which is forwarded to the Human Resources Department for review.

The Human Resources Department then reviews the Matrix for the purpose of ensuring that no individual was excluded from the process based upon a protected category such as age. In addition to this review, one of the Search Committee Members acts as an "Inclusion Advocate." The role of the Inclusion Advocate is to work with the Search Committee Chair and the Human Resources Department to ensure that the Search Committee is not excluding any candidates on the basis of a protected characteristic. To accomplish this the Inclusion Advocate provides oversight over the Search Committee Process to make sure there are no deviations from the established Hiring Process. (Ex. 3).

This was how hiring for the Position was conducted in this case. There were twenty applicants for the Position. The Search Committee selected six candidates for interview. Claimant was not selected for an interview. The Search Committee reviewed the application materials and determined that Claimant had chosen not to submit a complete application. Additionally, the Search Committee determined that other candidates were better qualified than Claimant for the Position. (Ex. 4, Committee Review of Candidates).

Claimant was not qualified for the Position because the Position requires a master's degree in Biology or related field. Claimant's Master of Science Degree is in Healthcare Administration. Claimant has no undergraduate degree at all since he was accepted into Dental School during his junior year. Claimant's primary employment experience has been as a Dentist. Claimant's teaching experience is limited to working as an adjunct at Delta College in the Dental Hygiene Program since Winter of 2010. Claimant's application materials contain very little information related to his teaching experience. Also, on the Application for employment that Claimant completed, he represented that he had a Master of Science Degree in Biology. This is not a true statement. Claimant retired from his adjunct position with the College with an end date of September 1, 2020. (Ex. 5, Application Edward Bartoszek and Ex. 6, Employment File).

The College hired Mr. Timothy McGuire for the Position. Mr. McGuire was employed by the College as an anatomy and physiology instructor at the College at the time of the application. Mr. McGuire holds a bachelor's degree in physical science with a minor in Biology and a master's degree in Biology. Mr. McGuire had seventeen years teaching advanced placement biology at secondary level, dual enrollment physiology courses through Davenport University, as well as two years teaching at the post-secondary level as an adjunct at the College. Mr. McGuire also had taken 20 additional Biology Graduate credits beyond the master's degree level. He also had over 18 graduate credits in anatomy and physiology. Mr. McGuire included all of this information in the application materials he submitted to the College when applying for the Position. (Ex. 7, Application Timothy McGuire).

### III. LEGAL POSITION

A claim of age discrimination may be established by producing direct evidence or circumstantial evidence of discrimination. *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997). In this case, Claimant cannot show discrimination based upon direct evidence. Claimant has not, and cannot, identify any communication from a "decision maker" that shows the reason he was not hired for the Position was because of his age. *Preston v. Berendsen Fluid Power*, 125 F. Supp. 2d 245 (W.D. Mich. 2000) ("To establish direct evidence of discrimination

through a supervisor's comments made in the workplace, the remarks must be "clear, pertinent, and directly related to decision-making personnel or processes.") In the present case, there are no allegations that a decision maker made any comment regarding Claimant's age. *Campbell v. Univ. of Akron*, 211 Fed. Appx. 333, 347 (6th Cir. 2006). Furthermore, the courts have long held 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). Accordingly, because there exists no direct evidence of discrimination, the present Charge should be dismissed.

Similarly, claimant is unable to establish a claim of age discrimination based upon circumstantial evidence. Circumstantial evidence requires analysis under the three-step burden-shifting framework used for employment discrimination in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and subsequently modified in *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981). See, e.g., *Lindsay v. Yates*, 498 F.3d 434, 440 n. 7 (6th Cir. 2007); *Wanger v. G.A. Gray Co.*, 872 F.2d 142, 147 (6th Cir. 1989). This framework places the burden on Claimant to establish a prima facie case of discrimination by a preponderance of the evidence. *Burdine*, 450 U.S. at 253.

Claimant must show the following to establish a prima facie case of employment discrimination in connection with a hiring decision: (1) that he is a member of a protected class; (2) that he applied for and was qualified for the Position; (3) that he was considered for and denied the Position; and (4) another individual of similar qualifications who was not a member of the protected class received the Position. *Grizzell v. City of Columbus Div. of Police*, 461 F.3d 711, 719 (6th Cir. 2006).

Once the Claimant establishes the prima facie case, the burden shifts to the College to offer evidence of a legitimate, non-discriminatory reason for awarding the other individual the Position over Claimant. *Burdine*, 450 U.S. at 253; *McDonnell Douglas*, 411 U.S. at 802. Finally, once the College states a legitimate, non-discriminatory reason, the Claimant is required to provide additional evidence, beyond the evidence provided to establish the prima facie case, that the College's stated reason was not the true reason, but merely a pretext for discrimination.

*Burdine*, 450 U.S. at 253; see *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) (“[O]nce the employer has come forward with a nondiscriminatory reason for [its actions] the plaintiff must produce sufficient evidence from which the jury may reasonably reject the employer's explanation.”)

In the present case, the College acknowledges that Claimant is a member of a protected class based upon his age and that he applied for the Position. However, Claimant is unable to establish a prima facie case as Claimant was not qualified for the Position and he was not similarly situated to the individual hired by the College. Claimant's did not meet the required education criteria for the Position. The Job Description provides that the candidate needs a Master of Science Degree in Biology, or closely related field; two years teaching experience, and demonstrated currency in the field of Anatomy and Physiology. The application materials submitted by Claimant do not provide any information which establish that Claimant meets the Required Qualifications. Also, Health Administration is not a closely related field to Biology. Also, Claimant has no undergraduate degree because he went into Dental School during his junior year of College.

Claimant's primary employment experience has been as a Dentist or Health Administrator. Claimant's teaching experience is limited to working as an adjunct at Delta College in the Dental Hygiene Program since Winter of 2010. Claimant's application materials contain very little information related to his teaching experience. Also, on the Application for employment that Claimant completed, he represented that he had a master's degree in biology. This is not a true statement. Based upon the information provided by Claimant, he as not qualified for the Position and he cannot therefore establish a prima facie case of discrimination based upon age.

Claimant is also unable to establish a prima facie case since the individual hired was better qualified for the Position than Claimant. *Nickell v. Memphis Light, Gas & Water Div.*, 16 Fed. Appx. 401, 402–03 (6th Cir.2001)(concluding that because the plaintiff was less qualified in all relevant respects for the vacant position than the successful applicant, he failed to demonstrate that he was similarly situated and thus did not make out a prima facie Title VII case); *White v. Columbus*

*Metro. Hous. Auth.*, 429 F.3d 232, 243–44 (6th Cir. 2005), and *Leadbetter v. Gilley*, 385 F.3d 683, 691–92 (6th Cir. 2004)(both concluding in context of failure to promote discrimination claims that because the successful candidates had superior experience and qualifications regarding material and relevant aspects of vacant job openings, plaintiffs were not similarly situated to successful candidates as required to meet the fourth prong of the prima facie burden). *Young v. Oakland Cty.*, 176 F. App'x 644, 650–51 (6th Cir. 2006).

Claimant is required to establish that he was similarly situated to the individual hired for the Position. Similarly situated requires a “general weighing” of the comparative qualifications of Claimant and the person hired. *Provenzano*, 663 F.3d at 813; see also *White v. Columbus Metro. Hous. Auth.*, 429 F.3d 232, 243 (6th Cir. 2005) (a court must “conduct an independent review of the relative qualifications of the plaintiff and the person selected for the Position based on the evidence presented in order to determine whether the plaintiff has satisfied the fourth prong of her prima facie burden”). Claimant has to show that he was similar in all of the relevant aspects. *Donald v. Buckman Labs., Inc.*, 527 Fed. Appx. 443, 448 (6th Cir. 2013).

The individual hired by the College for the Position, Mr. Timothy McGuire, educational background better qualifies him for the Position than Claimant. Mr. McGuire holds a bachelor’s degree in Physical Science with a minor in Biology and a master’s degree in Biology. As noted above, Claimant’s master’s degree is in Health Administration and he has no undergraduate degree. Mr. McGuire also has taken 20 additional Biology Graduate credits beyond the master’s level. He also had over 18 graduate credits in anatomy and physiology. Claimant had none of the additional educational experience. Mr. McGuire included all of this information in the application materials he submitted to the College when applying for the Position. (Ex. 7, Application Timothy McGuire).

Mr. McGuire, was also employed by the College as an anatomy and physiology instructor at the College at the time of the application. Mr. McGuire had seventeen years teaching advanced placement biology at secondary level, dual enrollment physiology courses through Davenport University, as well as two years teaching at the post-secondary level as an adjunct at the College. While Claimant was an adjunction, he was teaching in the Dental Hygiene Program, his



employment experience was as a dentist or health administrator. (Ex. 6). *Wilson v. Ford Motor Co.*, 513 Fed. Appx. 585, 588 (6th Cir. 2013); *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 585 (6th Cir. 2009); see also *Anthony v. BTR Auto. Sealing Sys., Inc.*, 339 F.3d 506, 516 (6th Cir. 2003) (in determining whether a plaintiff has satisfied the qualification prong of the prima facie test, the inquiry focuses on objective criteria). Therefore, because Claimant cannot show that he is similarly situated to Mr. McGuire, he cannot establish a prima facie case and the present Charge should be dismissed.

Furthermore, the present Charge should also be dismissed because the College has a legitimate, non-discriminatory supporting its hiring decision: Mr. McQuire's educational and prior employment experience rendered him more qualified for the Position than Claimant. It is well established that hiring a candidate who is more qualified for a position than the claimant constitutes a legitimate, non-discriminatory reason. *Jones v. Memphis Light, Gas & Water Div.*, 346 Fed. Appx. 38, 43 (6th Cir. 2009). The differences between Mr. McQuire's educational and employment experience clearly show he is more qualified than Claimant and they are not similarly situated. Mr. McQuire's education met the Required Qualifications. Claimant's did not. Therefore, because the College can articulate a legitimate, non-discriminatory reason for hiring Mr. McQuire over Claimant, the present Charge should be dismissed.

#### **IV. CONCLUSIONS**

In conclusion, the Charge of age discrimination against the College should be dismissed. Claimant cannot establish a prima facie case of age discrimination because he cannot establish that he was qualified for the Position or that he was similarly situated to the individual hired for the Position. Likewise, the fact that the individual hired educational and employment experience made him significantly more qualified for the Position than Claimant constitutes a legitimate, non-discriminatory reason, further supporting dismissal of the Charge.

Respectfully submitted,

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

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By:

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