

**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

**PLAINTIFF EDWARD BARTOSZEK’S RESPONSE BRIEF TO
DEFENDANT DELTA COLLEGE’S MOTION FOR SUMMARY
JUDGMENT**

COMES NOW the Plaintiff, Edward Bartoszek (“Bartoszek”), by counsel, and for his response to Delta College’s Motion for Summary Judgment would show the Court as follows:

A. ISSUES PRESENTED

I. Should Delta College’s Motion for Summary Judgment be denied because Bartoszek has substantial circumstantial evidence of age discrimination?

Plaintiff Answers: YES

Defendant Answers: NO

B. CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

Bartoszek concedes this is not a direct evidence case, but contends he has substantial circumstantial evidence that supports a reasonable inference of age

discrimination. The controlling or most appropriate authority for the relief he is seeking i.e., denial of Delta College's Motion for Summary Judgment is *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802-03 (1973), *Willard v. Huntington Ford, Inc.* 952 F. 3d 795, 808 (6th Cir. 2020) and *Payne v. Benteler Auto Corp.*, 2022 U.S. App. LEXIS 14588 *6-9 (6th Cir. 2022).

C. STATEMENT OF FACTS

1. BARTOSZEK'S BACKGROUND

Bartoszek was born on 6/20/1951 and was hired as an adjunct Professor at Delta College in early 2010. (Ex. 1 Bartoszek Tr. p. 6, 16-17; p. 12, 14-19).

Prior to going to teach at Delta College Bartoszek practiced dentistry in private practice in Pennsylvania and Michigan with a three-year stint in the military from 1977 to 1980 serving as a dentist in the United States Air Force. (Ex. 1 Bartoszek Tr. p. 9, 25; p. 10, 1-25; p. 11, 1-25; p. 12, 1-19). He practiced general dentistry in Bay City, Michigan from 1980 until January 2010 when he went to teach at Delta College as he could no longer practice dentistry because he had developed trochlear nerve palsy in his right eye which caused him to have double vision when he looked down and which could not be corrected by surgery. (Ex. 1 Bartoszek Tr. p. 12, 20-25; p. 13, 1-19, p. 26, 8-17).

2. BARTOSZEK'S TEACHING EXPERIENCE AT DELTA COLLEGE

In the ten years he worked at Delta College Bartoszek taught a number of classes including in the Dental Hygiene Department, Anesthesia, Pharmacology in the Nursing Program and Biology 101, BIO 130, BIO 140, BIO 152 and BIO 153 in the Biology Department. (Ex. 1 Bartoszek Tr. p. 14, 18-25; p. 15, 1-25; p. 16, 1-25; p. 17, 1-13). (See also Ex. 2, Delta College's Answer to Interrogatory no. 3, classes taught by Bartoszek). During his ten years of teaching at Delta College, Bartoszek was asked seven times if he would work that semester on a full-time basis and Bartoszek always agreed to do so. (Ex. 1, Bartoszek Tr. p. 29, 10-25; p. 30, 1-4; p. 76, 24-25; p. 77- 1-12). The times Bartoszek taught those seven semesters full time, he performed the identical job as the job that was posted that he was not hired or even interviewed for and that is the subject of this lawsuit. (Ex. 1, Bartoszek Tr. p. 76, 24-25; p. 77, 1-21). It is undisputed that at all times Bartoszek's performance as an adjunct and full time Professor was satisfactory (Ex. 14, Nitz Tr. p. 39, 17-25; p. 40, 1-8; Ex. 10, Drake Tr. p. 17, 4-25; p. 18, 1-8).

3. THE JOB POSTING

On or about August 21, 2019, Delta College posted an open position with the job description of "Biology (Anatomy & Physiology Instructor – Tenure Track." (Ex. 3 JOB DESCRIPTION). At the time the job was posted, Bartoszek had in the past performed that identical job on a full-time basis and was scheduled to teach it

on a full-time basis in the fall of 2019. (Ex. 1 Bartoszek Tr. p. 76, 24-25; p. 77, 1-21; p. 36, 21-25; p. 37, 1-3).

4. BARTOSZEK APPLIES FOR THE JOB

On 9/15/2019, Bartoszek submitted on-line his application for the full time Tenure Track position. (Ex. 4). His application contained a cover letter and resume (Ex. 4 p. 14 and pp. 11-13). On the last page of his application, he indicated to Delta College “All Transcripts on File in HR.” (Ex. 4 p. 15). When Delta College’s HR Dept. received his application under the Section “Documents Needed to Apply” “Required Documents” it noted “PDF Complete” as to the resume, cover letter and transcripts. (Ex 4. pp. 7-8).

Bartoszek received an email from Delta College’s Manager of Recruitment, Darrin Johnson, acknowledging receipt of his application. (Ex. 5). Johnson did not inform Bartoszek his application was not complete and no one from Delta College ever informed him his application was incomplete (Ex. 1 Bartoszek Tr. P. 78, 11-25; p. 79, 1-4).

5. BARTOSZEK IS NOT SELECTED FOR AN INTERVIEW, QUESTIONS WHY HE WAS NOT SELECTED EVEN FOR AN INTERVIEW AND IS GIVEN NO REASON.

On 11/26/2019, Bartoszek received an email from Delta College informing him that he was not selected as a finalist for the position. (Ex. 6). On 12/10/2019, Bartoszek sent an email to the head of Human Resources for Delta College, Scott

Lewless (“Lewless”), expressing his concerns as to why he was not selected for even an interview when he had been teaching Anatomy & Physiology classes for ten years at Delta College and questioning whether his age was a factor. (Ex. 7). Lewless responded two days later indicating he would defer his question to Darrin Johnson, Delta College’s Manager of Recruiting who “would have more insight regarding that search to share with you.” (Ex. 7). Although Johnson was copied on the email, Bartoszek never heard from him. (Ex. 1 Bartoszek Tr. P. 38, 13-25; p. 38, 1-8). It was not until long after Bartoszek filed his Charge of Discrimination (Ex. 8) with the EEOC that Delta College provided a reason he was not selected for an interview. (Ex. 1, Bartoszek Tr. P. 39, 4-21).

6. DELTA COLLEGE FINALLY ASSERTS ITS REASONS BARTOSZEK WAS NOT SELECTED FOR AN INTERVIEW

On 4/19/2021, over 16 months after Bartoszek expressed his concerns of age discrimination, Delta College finally asserted its reasons why Bartoszek was not selected for an interview when it filed “RESPONDENT’S POSITION STATEMENT” with the EEOC (Ex. 9). Delta College asserted that Bartoszek was not selected for an interview for the following reasons:

- (a) Bartoszek had chosen not to submit a complete application;
- (b) the Search Committee determined that other candidates were better qualified than Bartoszek for the Position;
- (c) Bartoszek was not qualified for the Position because the Position requires a Master’s degree in Biology or a related field;

- (d) Bartoszek's Master of Science Degree was in Healthcare Administration;
- (e) Bartoszek had no undergraduate degree at all since he was accepted into Dental School during his junior year;
- (f) Bartoszek's primary employment experience had been as a Dentist;
- (g) Bartoszek's teaching experience was limited to working as an adjunct at Delta College in the Dental Hygiene Program since winter of 2010;
- (h) Bartoszek's application materials contained very little information related to his teaching experience; and
- (i) On the Application for employment that Bartoszek completed, he represented that he had a Master of Science Degree in Biology. (Ex. 9, pp. 3-4).

7. DELTA COLLEGE'S REASONS FOR NOT SELECTING BARTOSZEK FOR AN INTERVIEW ARE PRETEXTS

Bartoszek has substantial evidence that the reasons Delta College has asserted for not selecting him for an interview are pretexts. Addressing these alleged reasons in reverse order, Bartoszek would show the Court as follows:

- (i) On the Application for employment that Bartoszek completed, he represented that he had a Master of Science Degree in Biology. (See Ex. 9 pp. 3-4).**

Bartoszek explained that on his application (Ex. 4) he checked the "yes" box on page 6 where it asked whether he had a Master's Degree in Biology because the Job Description (Ex. 3) posted for the position indicated on page one that one of the "Required Qualifications" was a "Master of Science in a Biological Science, or closely related field, with an emphasis in Anatomy and Physiology..." and he had a doctorate degree, a DDS or Doctor of Dental Surgery, in a biological field. (Ex. 1,

Bartoszek Tr. p. 46, 15-25; p. 47, -25; p. 48, 1-25; P. 49, 1). His application (Ex. 4) at pp. 2-3 clearly shows he had a doctorate degree in dentistry and his resume at p. 12 clearly shows his educational background. None of the Search Committee members testified Bartoszek was not selected for an interview because he marked “yes” on his application when asked if he had a Master’s in Biology.

h) Bartoszek’s application materials contained very little information related to his teaching experience

Bartoszek’s application materials contained very accurate and precise information relating to his teaching experience. On page 2 of his application (Ex. 4) in the “Personal Data” section he indicated he had been employed by Delta College starting in 2010 and was currently an adjunct instructor. At the bottom of page 3 he indicated he was an “Adjunct Instructor for BIO 130, 140, 152, 153 PHM 285, DH 124A, 124 B, 130, 213.” On pp. 6 and 7 he answered all questions 5 through 12 related to his teaching experience and on his resume (p. 11 of Ex. 4) he referenced as one of his accomplishments his Anesthesia students achieving a 100% pass rate on the first attempt in 2017 for the first time ever for Delta College. On p. 12 of his resume he detailed that he provided Anatomy and Physiology Instruction for students entering the health care professions, taught Pharmacology, Pathology, Pain Management and Anesthesia classes for Delta College students enrolled in the Nursing and Dental Hygiene programs in the Health and Wellness division and prepared students for state and regional board exams. On his cover letter (p. 14 of

Ex. 4) he again indicated he had almost ten years of teaching experience at Delta College in the Biology, Nursing and Dental Hygiene departments. According to Bartoszek, the information they (the Search Committee) said they didn't have was provided on his cover letter and resume. (Ex. 1 Bartoszek Tr. p. 29, 10-14; p. 65, 1-25; p. 66, 1-23). His application documents show this.

g) Bartoszek's teaching experience was limited to working as an adjunct at Delta College in the Dental Hygiene Program since winter of 2010

This asserted reason is undisputedly false. Bartoszek taught classes in the Dental Hygiene Dept., the Nursing Program, and the Biology Department. (Ex. 1, Bartoszek Tr. p. 14, 23-25; p. 15, 1-25; p. 16, 1-25) (See also, Ex. 2 Delta College's Response to Interrogatory #3 showing the numerous courses Bartoszek taught outside of the Dental Hygiene Dept., particularly in the Biology Dept). When questioned, the Search Committee members admitted that Bartoszek did not teach strictly in the Dental Hygiene Dept. (Ex. 10, Drake Tr. p. 17, 4-12; p. 37, 3-7; Ex. 14 Nitz Tr. p. 4, 1-25; p. 5, 1-3 ("the majority of his load was in the biology department"); Ex. 11 Dykhuizen Tr. p. 11, 13-25; Ex. 12, Schlaak Tr. p. 8, 22-25; p. 9, 1; Ex. 13, Traverse Tr. p. 19, 4-22; Ex. 15, Cornell Tr. p. 21, 13-25).

f) Bartoszek's primary employment experience had been as a Dentist

This statement is true, but for Delta College to use it as a reason to not select Bartoszek for an interview is a pretext. Bartoszek taught at Delta College for ten years as an adjunct Professor and in those ten years as an adjunct professor taught

on a full-time basis in seven semesters at the request of Delta College, the identical job that was posted. (Ex. 1, Bartoszek Tr. p. 76, 24-25; p. 77, 1-21). Nitz, the Biology Dept. Coordinator and Bartoszek's immediate superior and Drake who also taught in the Biology Department were on the Search Committee and would have known he taught these courses on a full-time basis. (Ex. 1, Bartoszek Tr. p. 77, 22-25; p. 78, 1-10). None of the search Committee members, all of whom were deposed, ever testified that Bartoszek's primary employment experience as a dentist was one of the reasons he was not selected for an interview.

e) Bartoszek had no undergraduate degree at all since he was accepted into Dental School during his junior year

It is true Bartoszek has no undergraduate degree because he was accepted into Dental School at the University of Detroit after his junior year in college there. (Ex. 1, Bartoszek Tr. p. 7, 19-25; p. 8, 1-13). The Search Committee members questioned about this admitted Bartoszek's lack of an undergraduate degree was not a factor in the decision to not select him for an interview. (Ex. 10, Drake Tr. p. 36, 23-25; p. 37, 1-2; Ex. 15 Cornell Tr. p. 25, 11-14; Ex. 12, Schlaack Tr. p. 22, 16-25; p. 23, 1-7).

d) Bartoszek's Master of Science Degree was in Healthcare Administration

This statement is true, but is a pretext asserted by Delta College as Bartoszek met the qualification requirement that he have a Master's degree in a biological science or closely related field, with an emphasis in Anatomy and Physiology. When

questioned under oath, all of the members of the Search Committee (except Cornell who could not recall) admitted Bartoszek met this qualification with his doctorate degree in dentistry) (Ex. 14, Nitz Tr. p.12, 1-17; Ex. 10, Drake Tr. p. 7, 3-18; Ex. 11, Dykhuizen Tr. p. 6, 23-25; p. 7, 1-13; Ex. 12, Schlaak Tr. p. 6, 1-24; Ex. 13, Traverse Tr. p. 6, 6-25).

c) Bartoszek was not qualified for the Position because the Position requires a Master’s degree in Biology or a related field

This statement is false. The members of the Search Committee all admitted Bartoszek met this qualification except Cornell who could not remember. (See Sections (d) and (i) supra; Ex. 15, Cornell Tr. p. 8. 5-25; p. 9, 1-2;).

b) the Search Committee determined that other candidates were better qualified than Bartoszek for the Position

This statement is false. The Search Committee members did not determine the six persons selected for an interview were “better qualified” than Bartoszek. When questioned under oath they admitted he was qualified for the position and would have been selected for an interview if he had only provided his transcripts rather than stating on the last page of this Application (p. 15 of Ex. 4) “All Transcripts on File in H.R.” Kristopher Nitz, Biology Dept. Coordinator, who Bartoszek reported to and who was the head of the Search Committee and was listed as a reference on Bartoszek’s Application, admitted that Bartoszek would have been selected for an interview if he had submitted his transcripts – he did not say the six selected for an

interview were more qualified. (Ex. 14, Nitz Tr. p. 39, 17-25; p. 40 1-8). Search Committee Member Paula Cornell admitted that she and the other Search Committee members would have selected Bartoszek for an interview if his application was complete. (Ex. 15 Cornell Tr. p. 34, 1-10). Search committee member Schlaak acknowledged there was no basis he was aware of to support Delta College's assertion that the Search Committee determined that other candidates were better qualified than Bartoszek for the position. (Ex. 12, Schlaak Tr. p. 22, 2-6). Search Committee member Traverse admitted that the Committee decided to give Bartoszek a 2 rather than a 3 on the Screening Matrix (Ex. 16) because he did not have transcripts with his application, not because the other candidates were better qualified. (Ex. 13, Traverse Tr. p. 11, 18-25; p. 12 1-5). Nowhere in Delta College's Motion for Summary Judgment does it even contend that other candidates were better qualified than Bartoszek for the position – apparently it has abandoned this as a reason for him not being selected for an interview and is relying now solely on a) below.

a) Bartoszek had chosen not to submit a complete application.

In submitting his application, the “Required Documents needed to Apply was a resume, cover letter and transcript. (See Ex. 4 pp. 7-8). Bartoszek submitted a resume and cover letter with his application and, as to his transcripts stated “All Transcripts on File in HR.” (Ex. 4 pp 11-15). After he submitted his application online, Delta

College noted “PDF complete” next to all three categories, resume, cover letter and transcript. (Ex. 4 pp. 7-8). The school already had Bartoszek’s transcripts. (Ex. 1, Bartoszek Tr. p. 78, 17-25; p. 49, 1) The first time Bartoszek found out the College was claiming his application was not complete was when he received a copy of Delta College’s Position Statement (Ex. 9) submitted to the EEOC some seventeen months after he was not selected for an interview. (Ex. 1, Bartoszek Tr. p. 79, 2-4).

The Search Committee members gave conflicting testimony as to Bartoszek’s failure to provide his transcripts. Committee Chair Nitz testified that if only Bartoszek had provided his transcripts he would have been selected for a first level interview. (Ex. 14, Nitz Tr. p. 39, 17-25; p. 40, 1-8). However, Committee member Drake testified that not having Bartoszek’s transcripts “was not the deciding factor in ranking of that application” but there were “other components that were – that ranked those other applicants higher on the list.” (Ex. 10, Drake Tr. p. 13, 3-10).

During depositions of the Search Committee members, they all admitted that applicant Rostern Tembo was selected for an interview even though his application was not complete because he hadn’t provided his undergraduate transcripts, but they claimed that didn’t matter because it was more important to submit one’s graduate transcripts. (See Ex. 16, Screening Matrix, 2nd applicant from the top; Ex. 14, Nitz Tr. p. 28, 14-24; Ex. 11 Dykhuizen Tr. p. 20, 23-25; p. 21, 1-25; Ex. 13, Traverse

Tr. p. 12, Schlaack Tr. p. 17, 14-25; p. 18, 1-25; Ex. 15. Cornell Tr. p. 31, 10-25, p. 32, 1-25, p. 33, 1-4).

Search Committee Chair Nitz reluctantly admitted that for Bartoszek to do the job he had been doing for the last ten years as adjunct Professor in the Biology Department he would have had to have a Master's of Science in a biological science or closely related field. (Ex. 14 Nitz Tr. p. 11, 1-25; p. 12, 1-25, p. 13, 1-19). According to Nitz, even though he knew Bartoszek (who worked under him for several years), had the required degrees, "we need to have that proof in front of us. And without the graduate academics, we cannot verify that without having that in front of us." (Ex. 14, Nitz Tr. p. 11, 19-25)".

According to Nitz, if the six applicants selected for an interview all dropped out or all said no, they would then bring Bartoszek in for an interview and "then it would be time to ask HR for the transcripts, yep." (Ex. 14, Nitz Tr. p. 27, 23-25, p. 28, 1-13).

No one on the Search Committee ever suggested they contact HR and get his transcripts. (Ex. 14 Nitz Tr. p. 13, 1-6). And Nitz never mentioned to anyone on the Committee that Bartoszek had taught for ten years the very course for which he was applying. (Ex. 14, Nitz Tr. p. 13, 7-19).

All of the members of the Search Committee were informed by Bartoszek's Application that he was an adjunct instructor at Delta College, had a doctorate

degree, and had taught in Biology, Pharmacology and Dental Hygiene and listed the courses he had taught. (Ex. 14, Nitz Tr. p. 14, 5-15; p. 15, 1-22). Nitz claims that Bartoszek listing the courses he taught was not enough, that it “would have been helpful if we had a description of what those courses were, because not everyone on the Search Committee was, you know, in the biological sciences.” (Ex. 14, Nitz Tr. p. 15, 15-22). Nitz does not recall if anyone on the Search Committee ever asked him about those courses but if they would have asked he would have been able to tell them. (Ex. 14, Nitz Tr. p. 15, 23-25; p. 16, 1-11).

8. THE AGES OF THE FULL TIME TENURE TRACK PROFESSORS IN THE BIOLOGY DEPT.

In his email of December 10, 2019, to Delta Colleges HR Dept. raising his concern of age discrimination, Bartoszek stated that to his knowledge in the last ten years no one over the age of 45 had been hired into the Biology Dept. as a full time Anatomy & Physiology Instructor. (Ex. 7). In response to Bartoszek’s Interrogatory #9 asking Delta College to provide the names and ages of the persons hired as full-time professors in the Biology Dept, since January 1, 2010, Delta College provided that information. All of those hires were substantially younger than Bartoszek at the time they applied with an average age of 38.8 (See Ex. 17). Bartoszek was 68 at the time he applied on 9/15/2019. (Ex. 1, Bartoszek Tr. p. 6, 16-17, p. 72, 17-25, p. 73, 1-3).

9. THE AGES OF THE PERSONS SELECTED FOR AN INTERVIEW

The six persons selected for an interview all submitted resumes which provided the Search Committee with a pretty good idea of their ages based on their graduation from high school or college:

- Rhonda Hughes-Seefeldt's resume shows she graduated from high school in 1981. (Ex. 18). If she graduated at the age of 18, she was approximately 56 at the time she applied.
- Rostern Tembo received his B.S. degree in 1990. If he graduated at the age of 22 he was approximately 51 at the time he applied. (Ex. 19).
- Joshua Osborn received his B.S. degree in 2001. If he graduated at the age of 22 he was approximately 40 at the time he applied. (Ex. 20).
- Trish Finerty received her B.S. degree in 1999. If she were 22 when she graduated, she would have been approximately 42. (Ex. 21). In addition, at the time she applied she had been working as an adjunct instructor in the Biology Dept. and Nitz and Drake would certainly and have a good idea as to her age. (Ex. 21).
- Miguel Chavez Jr. began College at the age of 18 and would have been approximately 43 at the time he applied. (Ex. 22).
- Timothy McGuire received his B.S. degree in 2002. If he was 22 at the time he received his degree, he would be approximately 39 at the time he applied. (Ex. 23, p. 1). In addition, McGuire had been working at Delta College as an adjunct instructor in the Biology Dept. since 2017 and Nitz and Drake would have certainly had a pretty good idea as to his age. (Ex. 22, p. 2). McGuire was actually 38 at the time he applied. (See Ex. 17).
- Ed. Bartoszek was 68 at the time he applied, and the members of the Search Committee would have a pretty good idea of his age from reviewing his resume and seeing he received his D.D.S. degree in 1975. (See Ex. 18, p. 12; Ex. 1 Bartoszek Tr. p. 6, 16-17; p. 72, 17-25; p. 73, 1-3).

10. BARTOSZEK WAS MORE QUALIFIED THAN MCGUIRE

Bartoszek admits McGuire who was hired for the position was qualified for it, but it is his position he was more qualified. (Ex. 1 Bartoszek Tr. p. 28, 11-15; p. 29, 1). Bartoszek was familiar with McGuire because McGuire taught just one class a semester across the hall from where Bartoszek taught. (Ex. 1 Bartoszek Tr. p. 27, 15-25; p. 1 – 5). Bartoszek has reviewed McGuire’s application for the position and believes he is more qualified than McGuire. (Ex. 1 Bartoszek Tr. p. 28, 11-25; P. 29). After the lawsuit began, he obtained the application of McGuire and the others selected for interviews and believes he is more qualified than all the persons selected for an interview. (Ex. 1 Bartoszek Tr. 29, 2-9).

Bartoszek taught at Delta College for ten years and McGuire only two. (Ex. 1 Bartoszek Tr. p. 73, 4-14). Bartoszek taught a number of different classes in the Biology Dept. while McGuire taught only one class. (Ex. 1 Bartoszek Tr. p. 73, 4-14). Bartoszek has actually treated patients and to his knowledge McGuire never has. (Ex. 1 Bartoszek Tr. p. 73, 4-14). Bartoszek performed the very job that was posted on a full-time basis in seven different semesters when the College asked him to. (Ex. 1 Bartoszek Tr. p. 29, 10-25; p. 30, 1-4; p. 77, 9-21). Apparently, Delta College thought Bartoszek was more qualified than McGuire because the College asked Bartoszek, not McGuire, to do the job on a full-time basis. In the fall of 2019 when the job was posted and the application and interview process was going on, Bartoszek was doing the identical job that was posted and for which he applied. (Ex.

1, Bartoszek Tr. p. 36, 16-25; p. 37, 1-3; p. 77, 4-21). Bartoszek had a doctorate degree while McGuire had a Master's. (See Ex. 4, pp. 2 and 12; Ex. 23, p. 1).

11. THE INAPPROPRIATE SELECTION PROCESS

The job was posted by at least 8/21/2019 as Bartoszek indicated in his application that he heard about this posting in a discipline meeting on that date. (See Ex. 4, p. 6, no. 2). On 8/23/2019 Cynthia Drake, Professor of Biology at Delta College and McGuire's self-described "mentor," wrote a letter of recommendation to the Hiring Committee strongly recommending McGuire for the teaching position in Anatomy and Physiology. (Ex. 24). Drake was on the Search Committee. (Ex. 10, Drake Tr. p. 5, 20-23). She refused to admit that she wanted McGuire to be hired for the position and claims she recused herself from all conversations related to McGuire's qualifications. (Ex. 10, Drake Tr. p. 23, 22-25; p. 24, 1-23). Drake did admit that she participated in the phone interviews with the applicants and the teaching demonstration observances in which McGuire was involved. (Ex. 10, Drake Tr. p. 24, 25, p. 25, 1-25, p. 26, 1-25; p. 27, 1-25; p. 28, 1-10).

Darrin Johnson ("Johnson"), Manager of Recruitment for Delta College, admitted that under Delta College's guidelines it is inappropriate for a member of a search committee to write a letter of recommendation on behalf of one of the applicants. (Ex. 25, Johnson Tr. p. 31, 20-25; p. 32, 1-6).

Nitz admits Drake should have perhaps recused herself from the Search Committee and doesn't recall if she ever recused herself from any part of the process. (Ex. 14, Nitz Tr. p. 33, 4-25; p. 34, 1-25; p. 35, 1-11). He admitted that Drake during the proceedings was giving McGuire an all-out endorsement. (Ex. 14, Nitz Tr. p. 35, 12-25; p. 36, 1-14).

C. STANDARD OF REVIEW

Bartoszek agrees with and adopts the Standard of Review set forth in Delta College's Brief in Support of Delta College's Motion for Summary Judgment. (ECF No. 24, Page 10, 133 and 134, pp. 21 and 22 of 31).

D. LAW AND ARGUMENT

Delta College does not dispute that Bartoszek has made out a prima facie case of age discrimination, but rather asserts that it has a legitimate reason for not granting him an interview, i.e., his allegedly incomplete application. Bartoszek contends he has substantial evidence that Delta College's proffered reason was actually a pretext to hide unlawful discrimination.

To establish a pretext, a plaintiff may show that the defendant's reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct. *Thompson v. Fresh Prods. LLC*, 985 F. 3d 509, 522 (6th Cir. 2021). Shifting justifications over time calls the credibility of those justifications into question. By showing that the defendant's justification for the adverse action changed over time the plaintiff shows a genuine issue of fact that the defendant's proffered reason was not only false, but that the

falsity was a pretext for discrimination. *Pierson v. Quad/Graphics Printing Corp.*, 949(?) F. 3d 530, 540 (6th Cir. 2002). And when the justification for an adverse employment action changes during litigation, that inconsistency raises an issue whether the proffered reason truly motivated the defendant's decision. *Cicero*, 280 F. 3d at 592.

1. Bartoszek's Evidence of Pretext

(a) Many of the Proffered Reasons Have No Basis in Fact.

Many of the proffered reasons asserted by Delta College for not selecting Bartoszek for an interview are indisputably false or, at a minimum, there is evidence from which a trier of fact could determine them to be false, non-motivational, or insufficient.

(1) On the Application for employment that Bartoszek completed, he represented that he had a Master of Science Degree in Biology. (See Ex. 9 pp. 3-4).

None of the members of the Search Committee stated this was a reason Bartoszek was not selected for an interview. (See Section 7(i) pp. 6-7).

(2) Bartoszek's application materials contained very little information related to his teaching experience.

Bartoszek's application materials contained very complete, accurate and precise information about his teaching experience. (See Section 7(h) pp. 7-8). A trier of fact reviewing Bartoszek's application could easily conclude this proffered reason by Delta College has no basis in fact.

- (3) Bartoszek's teaching experience was limited to working as an adjunct at Delta College in the Dental Hygiene Program since winter of 2010.**

This proffered reason of Delta College has no basis in fact as Bartoszek taught classes other than in the Dental Hygiene Program. (See Section 7(g) p. 8).

- (4) Bartoszek's primary employment experience had been as a Dentist.**

This statement is true, but did not actually motivate the defendant's challenged conduct. None of the Search committee members indicated this was a reason for not selecting Bartoszek for an interview. (See Section 7(g) pp. 8)

- (5) Bartoszek had no undergraduate degree at all since he was accepted into Dental School during his junior year.**

This statement is true, but did not actually motivate the defendant's conduct. All Search Committee members questioned about this admitted Bartoszek's lack of an undergraduate degree had no bearing on their decision making. (See Section 7(e) p. 9).

- (6) Bartoszek's Master of Science Degree was in Healthcare Administration**

This statement is true, but did not actually motivate Delta College's decision to not select Bartoszek for an interview. (See Section 7(d) pp. 9-10).

- (7) Bartoszek was not qualified for the Position because the Position requires a master's degree in Biology or a related field.**

This statement has no basis in fact, as all Search Committee members admitted Bartoszek met this qualification. (See Sections 7(c) and (d) pp. 10-11). Pp. 9-10 supra)

(8) The Search Committee determined that other candidates were better qualified than Bartoszek for the Position.

This statement has no basis. In fact, the Search Committee members questioned about this all admitted Bartoszek was qualified. (See Section 7(b) pp. 11-14).

(9) Bartoszek had chosen not to submit a complete application.

Bartoszek contends a trier of fact could determine that this proffered reason has no basis in fact, did not actually motivate Delta College's challenged conduct, or was insufficient to warrant the challenged conduct. (See Section 7(a) pp. 11-14).

All of Bartoszek's transcripts were on file in HR and it would not have taken HR very long to pull them from his file. (Ex. 25, Johnson Tr. p. 20, 1-5; p. 43, 19-24).

2. The Shifting Justifications Over Time

For the first approximately 16 months after Bartoszek's 12/10/19 email (Ex. 7) to HR expressing his age discrimination concerns, Delta College asserted no proffered reason. After Bartoszek filed his Charge of Discrimination (Ex. 8) on 9/21/20, Delta College for the first time on or about 4/19/2021, asserted its reasons why Bartoszek was not selected for an interview. (See Ex. 9).

In its Motion for Summary Judgment and Brief it appears that Delta College has now abandoned almost all of the previously asserted reasons and is now relying solely on Bartoszek's alleged failure to attach his transcripts to the application. And, not surprisingly, Delta College is now asserting new reasons, i.e., that Bartoszek's "cover letter and application were deficient and did not clearly address professional

development related to teaching Anatomy and Physiology.” (ECF No. 24, Page ID 138, 139, pp. 26-27 of 31). Not only is this a new reason, but Bartoszek submits it has no basis in fact as his cover letter and the application materials he submitted clearly showed all of the many courses he had taught at Delta College over his ten years as an adjunct Professor including the teaching of Anatomy and Physiology.

Another new reason asserted by Delta College in its Brief is that Bartoszek’s answer to the question on his Application to “briefly explain how you maintain currency in the field of Anatomy and Physiology” was deficient because he responded that “[s]tate license renewal requires 60 hours of continuing education during every three year licensing period.” (ECF No. 24, Page ID. 139-140, pp. 27-28 of 31). Not only is this a new reason asserted by Delta College, but Bartoszek submits that any reasonable person looking at the question asking for a “brief explanation” would conclude that Bartoszek gave just that, a brief explanation in the very limited amount of space on the application. (See Ex. 4, p. 5, no. 4). On the Screening Matrix (Ex. 16) there is no mention of this alleged deficiency, and it is not mentioned in the Position Statement (Ex. 9).

**THE CIRCUMSTANTIAL EVIDENCE SUPPORTS A FINDING OF
AGE DISCRIMINATION**

All of the persons selected for an interview were younger than Bartoszek, most substantially younger. Tim McGuire, the person hired, was 38 and Bartoszek was 68, and there is evidence to support the fact that the Search Committee members

were aware of that. Nitz and Drake clearly were aware of the disparity in age, as both Bartoszek and McGuire worked in the Biology Department in which Nitz was the Biology Department Coordinator and Drake was a full-time Professor and McGuire's mentor as set forth in the glowing letter (Ex. 24) she wrote for him after the job was posted, recommending that he be hired for the position, even though he had been working at Delta College for just two years as an adjunct and taught only one course, BIO 140, whereas Bartoszek had taught for ten years (7 semesters full time) and taught many different courses. Delta College's Response to Plaintiff's Interrogatory No. 9 (Ex. 17) shows the ages of all persons hired as full time Tenure Track Professors since January 1, 2010 – all were between the ages of 29 and 50 with the average age of 38. 8 at the time of application.

The estimated average age of the six interviewed for the position was 45.66 years of age, with Timothy McGuire, age 38 being the youngest and the person hired.

When McGuire was interviewed and hired in November 2017 for the Adjunct Professor Position, Delta College issued a Delta College – Human Resources Action Form regarding his hiring. (Ex. 26). That Form states, in part:

“Comments: This evening we interviewed Timothy (Tim) McGuire for a BIO adjunct position. We thought he was phenomenal and wish we could have hired him on the spot for full-time!” – (Ex. 26, highlighted).

Without having taught a single day at Delta College, the mindset of the Biology Department was they wished they could hire this young man (36 at the time) to a full-time position. That is exactly what happened. Let's forget about Ed Bartoszek, the old guy who had been teaching multiple classes in the BIO Dept. for 10 years and who had performed as a full time Professor in seven semesters. Let's forget that Ed Bartoszek was satisfactorily performing the identical full time Anatomy and Physiology teaching position at the time Delta College decided not to even so much as grant him an interview for that job.

Looking at Exhibit 16, the Screening Matrix and the "Committee Comments" next to McGuire's and Bartoszek's names, it looks like the Committee knew Bartoszek would object to their action and so they wrote next to McGuire's name these comments: "Strong candidate. Read the requirements and made sure to include all necessary information. Interview." And next to Bartoszek's name, these comments: "Need transcripts. No letters, Letter was not clearly defining job responsibilities. Hold Candidate."

The transcripts the College had, letters of recommendation were optional, not required (See. Ex. 4, p. 8) and his cover letter and the application materials he submitted clearly showed every course he had taught in his ten years at Delta College. (Ex. 4, p. 3 "Work Performed," p. 11 "Accomplishments" "Anesthesia students had 100% pass rate on the first attempt in 2017. First time ever for the Delta

College,” p. 12 “Classroom Responsibilities”, and p. 14. “Almost ten years of teaching experience at Delta College in the Biology, Nursing and Dental Hygiene departments”).

CONCLUSION

Bartoszek respectfully submits that there is sufficient evidence to support the reasonable inference of age discrimination.

Respectfully submitted,

/s/John C. Theisen

John C. Theisen (549-02)
Theisen & Associates, LLC
Attorneys for Plaintiff
810 South Calhoun St., Ste. 200
Fort Wayne, IN 46802
(260) 422-4255

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing has been filed and served upon the following as listed below this 9th day of March 2023, via the Michigan ECF system:

JOEL B. ASHTON (P 47039)
Cummings, McClorey,
Davis & Acho, PLC
Attorneys for Defendant
17436 College Parkway
Livonia, MI 48152
(734) 261-2400
jashton@cmda-law.com

ANGELLE M. ROTHIS (P 37661)
Rothis Law, PC
Attorneys for Plaintiff
356 Carver St.
Grosse Pointe Farms, MI 48236
(313) 882-3029
arothis@rothislaw.com

/s/ John C. Theisen_____