[Cite as *Morrison v. Kent State Univ.*, 2022-Ohio-2730.]

BENNETT MORRISON Plaintiff v. KENT STATE UNIVERSITY Defendant	Case No. 2020-00111JD Judge Patrick E. Sheeran Magistrate Scott Sheets DECISION

{¶1} On February 25, 2022, defendant filed a motion for summary judgment pursuant to Civ.R. 56. The motion has been fully briefed. Initially, the court GRANTS plaintiff's April 8, 2022 motion for leave to file a sur-reply, which plaintiff filed to address arguments raised in defendant's reply. Pursuant to L.C.C.R. 4(D), the motion is now before the court for a non-oral hearing. As evidence, the parties submitted the depositions of plaintiff and Angela Spalsbury (Dr. Spalsbury), who is the Dean of defendant's Geauga Campus. The parties also submitted affidavits from plaintiff and two affidavits from Dr. Spalsbury (Spalsbury Affidavit and Second Spalsbury Affidavit) as well as several documents as exhibits. For the reasons stated below, defendant's motion is GRANTED.

Standard of Review

{¶2} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C), which states, in part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the

> evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

"[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of material fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id.* at 292-293.

{¶3} If the moving party meets its initial burden, the nonmoving party bears a reciprocal burden outlined in Civ.R. 56(E), which states, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Plaintiff's complaint asserts claims for age, gender and disability employment discrimination as well as an intentional infliction of emotional distress (IIED) claim.

Facts

{¶4} Plaintiff is a male who has two permanent disabilities, moderate to profound hearing loss and bilateral vestibular hypofunction disorder. Plaintiff wears hearing aid(s) and wore them the entire time he was employed by defendant. His vestibular disorder affects his hearing and vision. Plaintiff's Deposition p. 5; 10; 19, 60-61; 63-65; Plaintiff's Affidavit ¶ 2. Further, plaintiff sought and received workplace accommodations for his

hearing loss. Plaintiff's Deposition p. 9; 12; 86. At the time of his termination, discussed more below, plaintiff was 45 years old. *Id.* at 46; Plaintiff's Affidavit ¶ 2.

{¶5} Plaintiff began employment with defendant in 2007 as a Coordinator of Academic Services at defendant's Geauga campus. In this role, plaintiff helped students with disabilities and acted as an advisor to students, among other duties. In 2014, he became the Assistant Director of Enrollment Management and Student Services (EMSS) at defendant's Geauga campus. As assistant director, plaintiff gained experience related to admissions, financial aid, and the bursar's office. He also undertook recruiting trips to local high schools. Plaintiff's Deposition p. 15; 64-65; 67; 87; Plaintiff's Affidavit ¶ 3-4; Spalsbury Depo. p. 30. Put another way, his duties included "disabilities services * * * student accessibility services, student services such as tutoring [and] other student services including advising, recruiting, [and] admitting." *Id.* at 31.

{¶6} Plaintiff's former duties also included accessibility services, tutoring, academic advising and testing. Plaintiff's Affidavit ¶ 22. Further, plaintiff's enrollment management experience included "recruiting students, admitting students, assisting with financial aid applications, new student orientation, [serving] as the Chair of Campus Retention, [assisting] with the transition of incoming transfer students, [evaluating] transcripts, [giving] recruiting presentations at high schools * * * and [registering students] for classes." *Id.* at ¶ 23.

{¶7} By his own estimation, plaintiff performed well at his job. Plaintiff's Deposition p. 35. Further, plaintiff was rated as excellent/good on all annual evaluations. Plaintiff's Affidavit ¶ 17. Nonetheless, defendant terminated plaintiff in June of 2018. *Id.* at ¶ 8-9; 13; Plaintiff's Deposition p. 28. During a meeting with his supervisor, Luann Coldwell and a Human Resources representative on June 18, 2018, plaintiff was terminated without cause and informed that his former position no longer existed. Plaintiff's Affidavit ¶ 9. At the time, Ms. Coldwell acted as plaintiff's immediate supervisor while Dr. Spalsbury supervised Ms. Coldwell. Spalsbury Depo. p. 9; 30. Dr. Spalsbury recommended that

plaintiff's position, Assistant Director of EMSS, be abolished which led to plaintiff's termination. *Id.* at 17-18; 51; Plaintiff's Deposition p. 69-70.

{¶8} The abolishment of plaintiff's position and plaintiff's resulting termination stemmed from a "restructuring of the EMSS department" which Dr. Spalsbury undertook after she became Dean. Dean Spalsbury wanted "to structure Geauga's [EMSS] to be more in line with what was happening at the other campuses, in particular at Ashtabula." Spalsbury Depo. p. 35. In fact, three other positions in the EMSS department were also eliminated in June of 2018 while different positions were added "throughout the campus." *Id.* at 43; 58; 64. The other positions eliminated in EMSS were an advisor position, and a secretary. Two of these positions were held by males and one by a female. *Id.* at 97-98. Later, two other advising positions in the EMSS department, both held by women, were also abolished and neither were offered another position. *Id.* at 125-126; 128.

{¶9} Dr. Spalsberry testified that she "restructured the department due to seriously failing enrollment." *Id.* at 61. With a "tiny campus" of around 300 students, Dr. Spalsbury indicated that three directors were not needed. *Id.* at 61-62. She felt that there were "too many employees for the few students that we served." She consulted with other Deans and visited all of defendant's campuses to undertake what she called a "major restructuring" of the Geauga campus. *Id.* at 63. Dr. Spalsbury testified:

> I came to a campus that had seriously failing enrollment and serious financial issues. Since that restructuring that we did, we've had increasing enrollment for seven semesters in a row and finally had budget performances over the last four years. So, you know, there were difficult decisions I had to make, these kinds of recommendations, there is no doubt about it, it's not easy, but the restructuring was necessary.
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> * * *
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> The problems weren't just people -- it wasn't the people who held the positions, it was the duties that they did, and those duties needed to be

> done differently and divided differently. We aligned our self more with what is the common practice among the other regionals. So it wasn't the people, the people who were in the positions. Yes, people make a difference, of course, they do. But the jobs you have them doing and the efficiencies that you create or don't have can make a big impact.

Id. at 123-124.

{¶10} Dr. Spalsbury recommended that the three positions in EMSS be abolished "to allow for the creation of an Operations and Special Projects Director, Regional Campus and two Security Officer positions." In particular, the Special Projects Director was needed because the Geauga campus had suffered from declining enrollment for four years. Spalsbury Affidavit ¶ 2-3.

{¶11} While defendant abolished plaintiff's position, it sought to fill other positions in the EMSS department. In fact, after plaintiff's termination, defendant posted the following jobs in the EMSS department: a Director 2 position, a Director 1 position, a Director/Special Assistant, Data Operations, EMSS, and Coordinator of Academic Services (Plaintiff's original position when hired in 2007). Plaintiff's Affidavit ¶15. At the time of plaintiff's termination, the Director 1 position was vacant. Spalsbury Depo. p. 99. Nonetheless, defendant kept the Director 1 position over plaintiff's position because the Director 1 position "supervised the advisors" and defendant needed someone in this position "to be full time with advising." *Id.* at 100.

{¶12} Plaintiff applied for the Director 1 position after his termination. He did not apply for any other position. Plaintiff's Affidavit ¶ 14; Spalsbury Depo. p. 113; 99-100; Spalsbury Aff. ¶ 4; Complaint ¶ 23. The search committee for the Director 1 position, which consisted of plaintiff's former colleagues and did not include Dr. Spalsbury, did not invite plaintiff to interview and did not recommend plaintiff for the job. Instead, the search committee invited the three top candidates for interviews after ranking all candidates using a scoring system. Initially, it recommended a different male applicant for the job

who declined the position. Spalsbury Aff. ¶ 4; Spalsbury Second Affidavit ¶ 4; Plaintiff's Affidavit ¶ 18; Spalsbury Depo. p. 71-72; 76; 78-79;116-118. Defendant thereafter invited additional applicants for interviews before it hired Danielle Weiser-Cline, a 41-year-old female, for the Director 1 position. Plaintiff's Affidavit ¶ 19; Spalsbury Depo. P. 71-72; 116-118. Dr. Spalsbury testified that the Director 1 position required enrollment management skills which plaintiff lacked. Spalsbury Aff. ¶ 4.

{¶13} Defendant followed the same search committee process before hiring a female, Brandie Blankenship, as the Coordinator of Academic Services. Spalsbury Depo. P. 82; Plaintiff's Affidavit ¶ 20. After a failed search, Dr. Spalsbury appointed an interim Director 2, a female named Megan Krippel. Spalsbury Depo. P. 68-69. Defendant eventually hired her permanently into the position. *Id.* at 67; 88-89.

{¶14} Though defendant, relying on Dr. Spalsbury's affidavit, asserts plaintiff's duties as Assistant Director of EMSS were identical to Ms. Blankenship's duties as Coordinator, Dr. Spalsbury testified in deposition that the duties overlap but are not identical in every way. Spalsbury Aff. ¶ 4; Spalsbury Depo. p. 107. Attached to plaintiff's affidavit are job descriptions, which do differ, for both of plaintiff's former positions with defendant, Assistant Director of EMSS and Coordinator of Academic Services. Plaintiff's Affidavit ¶ 24; Exhibits thereto. Nevertheless, after plaintiff's former position was abolished, plaintiff's former job duties were split among several other different positions, including those held by Krippel, Blankenship, and Weiser-Cline. Most were assumed by the Coordinator of Academic Services, Ms. Blankenship. *Id* at ¶ 22; Spalsbury Depo. p. 56-59.

{¶15} Despite Dr. Spalsbury's representation that she would meet with all faculty and staff after she became Dean, she never met with plaintiff and never spoke to him. Plaintiff's Deposition p. 33, 35; 82; Spalsbury Deposition p. 14; 37-38; Plaintiff's Affidavit ¶ 5-7; Spalsbury Aff. ¶ 5.

{¶16} At some point before Dr. Spalsbury became Dean, defendant hired a consultant who authored a report (the May report) that was critical of plaintiff and the EMSS department overall. Spalsbury Second Affidavit ¶ 2; Plaintiff's Deposition p. 90. As to plaintiff, the report stated that plaintiff had "very little information or data on the students that he was supporting in his role." Spalsbury Depo. p. 42. However, Dr. Spalsbury testified that plaintiff was not terminated due to his job performance. *Id.* at 43; 95-96. Rather, the May report "was part of a larger decision-making process of restructuring of [the EMSS] department." *Id.* at. 46.

Law and Analysis

{¶17} Plaintiff asserts claims of employment discrimination in violation of R.C. 4112 on the basis of age, gender and disability as well as a claim for intentional infliction of emotional distress. Plaintiff's discrimination claims and his IIED claim are based on his termination and defendant's failure to hire him for the Director 1 position, the only position for which he applied after his termination.

I. Discrimination

{¶18} R.C. 4112.02 provides, in pertinent part, that: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the * * * sex * * * disability, [or] age * * * of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any other matter directly or indirectly related to employment." In Ohio, "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S.Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Little Forest Med. Ctr. v. Ohio Civil Rights* Comm., 61 Ohio St.3d 607, 609-610, 575 N.E.2d 1164 (1991). "'To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent' and may establish such intent through either direct or indirect methods of proof." *Dautartas v. Abbott Labs.,* 10th

Dist. Franklin No. 11AP-706, 2012-Ohio-1709, ¶ 25, quoting *Ricker v. John Deere Ins.* Co., 133 Ohio App.3d 759, 766, 729 N.E.2d 1202 (10th Dist.1998).

{¶19} In opposing defendant's motion for summary judgment, plaintiff admits he has no direct evidence of discrimination. Thus, plaintiff seeks to establish discriminatory intent through the indirect method, which is subject to the burden shifting analysis established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Nist v. Nexeo Solutions, LLC,* 10th Dist. Franklin No. 14AP-854, 2015-Ohio-3363, ¶ 31. "Under McDonnell Douglas, a plaintiff must first present evidence from which a reasonable [trier of fact] could conclude that there exists a prima facie case of discrimination." *Turner v. Shahed Ents.,* 10th Dist. Franklin No. 10AP-892, 2011-Ohio-4654, ¶ 11-12. "In order to establish a prima facie case, a plaintiff must demonstrate that he or she: (1) was a member of the statutorily protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) was replaced by a person outside the protected class or that the employer treated a similarly situated, non-protected person more favorably." *Nelson v. Univ. of Cincinnati,* 10th Dist. Franklin No. 16AP-224, 2017-Ohio-514, ¶ 33. "If the plaintiff meets her initial burden, the burden then shifts to the defendant to offer 'evidence of a legitimate, nondiscriminatory reason for' the adverse action. * * * If the defendant meets its burden, the burden then shifts back to the plaintiff to demonstrate that the defendant's proffered reason was actually a pretext for unlawful discrimination." *Turner, supra,* at ¶ 14.

{¶20} "To establish pretext, a plaintiff must demonstrate that the proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct. *Dews v. A.B. Dick Co*., 231 F.3d 1016, 1021 (6th Cir.2000). Regardless of which option is chosen, the plaintiff must produce sufficient evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against [her]. *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir.2003). A reason cannot be

proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515 (1993)." *Knepper v. Ohio State Univ.,* 10th Dist. Franklin No. 10AP-1155, 2011-Ohio-6054, ¶ 12. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Comm. Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

{¶21} Finally, though the standard for establishing a disability discrimination claim is slightly different, a plaintiff must still prove discriminatory intent. *Anderson v. Bright Horizons Children's Ctrs., LLC*, 10th Dist. No. 20AP-291, 2022 Ohio 1031, ¶ 20. As with age and gender claims, a plaintiff must prove "that discriminatory intent motivated defendants to take the alleged adverse employment action * * * A plaintiff may prove discriminatory intent by either direct or indirect evidence." *Id.* at 44. When proceeding with the indirect evidence approach, the *McDonnell Douglas* burden-shifting framework applies. *Id.*

{¶22} The court first discusses defendant's termination of plaintiff's employment in June of 2018. Initially, as to plaintiff's termination, the court notes that defendant does not assert that plaintiff cannot establish a prima facie case. Plaintiff is a male with two disabilities and was 45 years old at the time of his termination in June of 2018. With some accommodation, he was able to perform the essential functions of his job despite his disability. Thus, the court finds that plaintiff was both a member of several statutorily protected classes based on his age, gender and disability and that he suffered an adverse employment action. As to plaintiff's qualifications, plaintiff received annual positive performance reviews and had been in defendant's employ since 2007. Defendant promoted him to the Assistant Director position during this time. Further, Dr. Spalsbury testified that plaintiff's termination and the abolishment of his position was not performance-based. Therefore, the court also finds that plaintiff was qualified for the job from which he was terminated. As to the last element, though the evidence indicates that

plaintiff's job duties were delegated to several different employees and the evidence is limited regarding the demographics of the employees to whom defendant assigned plaintiff's job duties, it does establish that they were female and, in at least two cases less than 40 years old. It also establishes that the bulk of plaintiff's former job responsibilities were assigned to the new Coordinator of Academic Services position, a 32-year-old female hired into the position after plaintiff's termination. Plaintiff's Affidavit ¶ 21. There is no evidence and defendant does not assert that any of these employees are or were disabled. Thus, when viewed a light most favorable to plaintiff and for the purpose of summary judgment, the court finds that the evidence is sufficient to "conclude that there exists a prima facie case of discrimination" on the grounds of sex, disability, and/or age with regard to plaintiff's June 2018 termination. *Turner, supra.*

{¶23} As such, the burden shifts to defendant to articulate a legitimate, non-discriminatory reason for plaintiff's termination. As stated in *Drummond v. Ohio Dep't of Rehab. and Corr.* 10th Dist. No. 21AP-327, 2022-Ohio-1096, ¶ 15:

> [t]his is a burden of production, not persuasion, and is satisfied if the employer "'introduce[s] evidence which *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action.'" (Emphasis sic.) *Id.*, quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). "If the employer articulates a legitimate, nondiscriminatory reason, 'the presumption created by the prima facie case drops from the case because the employer's evidence has rebutted the presumption of discrimination.'" *Id.*, quoting *Williams* at ¶ 12.

Here, defendant asserts that it abolished plaintiff's position, Assistant Director of EMSS, along with other positions within the EMSS department to "allow for the creation of an Operations and Special Projects Director, Regional Campus and two Security Officer positions" and to combat declining enrollment. (Spalsbury Aff. ¶ 2-3). Thereafter, the

duties of plaintiff's former position were split among several different positions with most being assumed by the Coordinator of Academic Services position. *Id.* at ¶ 4; Plaintiff's Affidavit ¶ 22. In her deposition, Dr. Spalsbury made clear that "difficult decisions," such as plaintiff's termination, had to be made due to the Geauga campus' low enrollment and that she undertook a major restructuring to align the operations of the Geauga campus with defendant's other regional campuses. The court, therefore, finds that defendant has articulated a legitimate, non-discriminatory reason for plaintiff's termination.

{¶24} The burden thus shifts to plaintiff to demonstrate that defendant's proffered reason is a pretext for discrimination. Plaintiff initially takes issue with defendant's characterization of his former position and the Coordinator of Academic Services position as identical or near identical. However, as noted, the evidence establishes that most of his former duties were, in fact, assumed by the Coordinator of Academic Services, Ms. Blankenship, while others were split among several other employees. The court finds that the differences, if any, between the two positions is not probative of age, gender, or disability bias and does not create an issue of material fact as to pretext.

{¶25} Moreover, plaintiff does not address defendant's restructuring of the Geauga campus. In addition to plaintiff's position, defendant also abolished 2 other positions within the EMSS department as part of the restructuring of the Geauga campus. Shortly after plaintiff's termination, two more advisor positions were also eliminated. Dr. Spalsbury, in both her affidavit and deposition, indicated that the Geauga campus' low enrollment required "difficult decisions," including the abolishment of plaintiff's position, to allow the "urgent" need for a Special Projects Director to be met. Dr. Spalsbury also testified that the Geauga campus had no full-time security and that the abolishment of plaintiff's position also allowed defendant to hire two security officers. Plaintiff has pointed to no probative evidence that this reason for plaintiff's termination has no basis in fact, did not actually motivate his termination, or was insufficient to warrant his termination.

{¶26} Plaintiff testified to his belief that defendant and specifically Dr. Spalsbury discriminated against him when defendant terminated him in June of 2018. Plaintiff pointed to Dr. Spalsbury's failure to meet with him and the fact that she knew plaintiff had a disability in support of this belief. Plaintiff's Deposition p. 33; 35; 37. Plaintiff also pointed to the fact that he is an older man who was replaced by younger females. *Id.* at 46-48; 72; 74. However, as in *Drummond,* plaintiff relies on his "general feelings" and does not point to any probative evidence of age, gender, or disability bias. *Drummond* at ¶ 29.

{¶27} Thus, when construing the evidence most strongly in plaintiff's favor as to his termination, the court finds that plaintiff has established a *prima facie* case. However, defendant has proffered a legitimate, non-discriminatory reason for plaintiff's termination and plaintiff has failed to demonstrate the existence of a genuine issue of material fact as to pretext. Defendant is, therefore, entitled to summary judgment on plaintiff's age, gender and disability discrimination claims related to his June 2018 termination.

{¶28} The court next examines defendant's failure to hire plaintiff for the Director 1 position, the analysis of which also involves the *McDonnell Douglass* framework, though slightly modified as the claim is based on a failure to hire. Thus, as stated in *Drummond*, plaintiff must demonstrate that he is a member of the protected class, was qualified and applied for the position, was not hired for the position despite his qualifications, and the position remained open or was filled by someone outside of the protected class. *Drummond* at ¶ 18.

{¶29} Defendant initially argues that plaintiff cannot establish a *prima facie* case because he lacked enrollment management skills which were needed for the position. Defendant makes no argument that plaintiff cannot establish any other aspect of his *prima facie* case. As it relates to plaintiff's age, gender and disability claims and for the purpose of summary judgment, the court finds that plaintiff is a member of the respective protected classes and was not hired for the Director 1 position. Moreover, though plaintiff's own

affidavit indicates Ms. Weiser-Cline's age as 41 years old, it is unclear if this was Ms. Weiser-Cline's age at the time of her hiring or her current age. At any rate, defendant does not challenge plaintiff on any element of his *prima facie* case beyond asserting that he was not qualified for the Director 1 position. Therefore, for the purpose of summary judgment, the court also finds that the position was filled by an individual. Ms. Weiser-Cline, outside of the protected classes.

{¶30} Further, for the purpose of establishing his *prima facie* case only, the court finds that there is an issue of fact as to whether plaintiff was qualified for the Director 1 position. Neither of the parties provide a description of the requisite qualifications, if any, for the position. Though defendant asserts that plaintiff lacked enrollment management skills, plaintiff's affidavit states that he has enrollment management experience from his job time as Assistant Director of Enrollment Management and Student Services and lists several examples of his experience. Plaintiff's Affidavit ¶ 23. Therefore, for the purpose of summary judgment, the court finds plaintiff can establish a *prima facie* case.

{¶31} The burden, therefore, shifts to defendant to articulate a legitimate, non-discriminatory reason for not hiring plaintiff. Again, the court would note that this is a burden of production, not persuasion, which defendant can meet through admissible evidence "which *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action." *Drummond* at ¶ 15. Defendant again points to plaintiff's lack of enrollment management skills as a legitimate, non-discriminatory reason for not hiring him. (Reply p. 1-2). Further, as Dr. Spalsbury testified, the search committee in charge of recommending a candidate for the Director 1 position, which consisted of plaintiff's former colleagues, did not rank plaintiff as a top three candidate, let alone a finalist, and did not recommend him to be interviewed. This is true despite the fact that none of the first three finalists filled the Director 1 position. Spalsbury Depo. p. 116-118; Spalsbury Aff. ¶ 4. Thus, the court finds that the presence

of superior candidates, as determined by the search committee, constitutes a legitimate, non-discriminatory reason for not hiring plaintiff for the Director 1 position.

{¶32} It, therefore, falls on plaintiff to produce evidence that this reason is pretextual. Plaintiff himself testified that he did not believe the search committee discriminated against him. Moreover, plaintiff admitted in deposition that he did not know whether enrollment at the Geauga campus changed, positively or negatively, during his time as Assistant Director from 2014 to 2018. In addition, defendant points out that the May report, which was submitted as evidence, was very critical of the EMSS department, including plaintiff, and specifically critical regarding failures related to enrollment data. While Dr. Spalsbury testified that this report did not lead to plaintiff's termination, she also testified that it did play a part in the overall restructuring of the EMSS department.

{¶33} Further, when attempting to prove pretext in the absence of probative evidence of discrimination, plaintiff must demonstrate an issue of fact as to whether he "was a plainly superior candidate" and evidence that plaintiff was as qualified or marginally more qualified is insufficient to raise a genuine issue of material fact. *Drummond* at ¶ 33. While plaintiff asserts his own belief that he was qualified for the Director 1 position and outlines some of his previous experience with enrollment management, he points to no evidence upon which the court could conclude that he was a plainly superior candidate or that the presence of and defendant's preference for a superior candidate has no basis in fact, did not actually motivate the decision not to hire him, or was insufficient to warrant the decision not to hire him.

{¶34} Thus, when construing the evidence most strongly in plaintiff's favor as to defendant's failure to hire him for the Director 1 position, the court finds that plaintiff has established a *prima facie* case. However, defendant has proffered a legitimate, non-discriminatory reason and plaintiff has failed to demonstrate the existence of a genuine issue of material fact as to pretext. Defendant is, therefore, entitled to summary judgment

on plaintiff's age, gender and disability discrimination claims related to defendant's failure to hire him for the Director 1 position.

II. IIED

{¶35} Turning to plaintiff's IIED claim, as stated in *Kanu v. Univ. of Cincinnati*, 10th Dist. No. 18AP-517, 2018-Ohio-4969, ¶ 13:

> To recover for a claim of intentional infliction of emotional distress under Ohio law, "it is not enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort." Rather, "[l]iability is found only where the conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." In general, "it must be conduct that would lead an average member of the community to exclaim, 'Outrageous!'" (internal cites omitted).

{¶36} As the court has found that defendant terminated plaintiff and did not hire him for the Director 1 position based on legitimate, non-discriminatory reasons, the court also finds that defendant did not engage in outrageous conduct which would support an IIED claim. Though plaintiff points to the case of *Hampel v. Food Control Specialties*, 89 Ohio St.3d 169 (2000) in support of this claim, the court finds that the facts of *Hampel,* which involved graphic, sexual remarks including requests for sexual favors by a supervisor to a subordinate, are not at all analogous to the facts of this case. The court finds that there are no genuine issues of material fact regarding defendant's lack of outrageous conduct and that defendant is entitled to summary judgment on plaintiff's IIED claim.

Conclusion

{¶37} For the reasons stated herein, the court finds there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment is GRANTED.

PATRICK E. SHEERAN
Judge

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{¶38} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK E. SHEERAN
Judge

Filed June 30, 2022
Sent to S.C. Reporter 8/8/22