[Cite as *Warner v. Shawnee State Univ.*, 2024-Ohio-5472.]

IN THE COURT OF CLAIMS OF OHIO

CHARLES WARNER Plaintiff v. SHAWNEE STATE UNIVERSITY Defendant	Case No. 2023-00383JD Judge Lisa L. Sadler Magistrate Gary Peterson DECISION

{¶1} On May 9, 2024, Defendant filed a motion for summary judgment pursuant to Civ.R. 56(C). Pursuant to L.C.C.R. 4(D), the motion is now fully briefed and before the Court for a non-oral hearing. For the reasons stated below, the Court GRANTS Defendant's motion.

BACKGROUND

{¶2} Plaintiff, Charles "Chuck" Warner, brought this employment discrimination action after Defendant, Shawnee State University (SSU), terminated his employment during a budget crisis. In its motion, Defendant argues it is entitled to judgment as a matter of law on Plaintiff's state and federal law claims for age and disability discrimination because he can neither establish a prima facie case nor demonstrate that Defendant's proffered reasons for eliminating his position were pretext for discrimination. In support, Defendant submitted: (1) Dr. Jonica Burke's May 9, 2024 Affidavit, including exhibits referenced therein; (2) Malonda Johnson's May 8, 2024 Affidavit, including exhibits referenced therein; and (3) a copy of Charles Warner's April 3, 2024 deposition.

{¶3} In response, Plaintiff argues that a genuine dispute of material fact exists concerning whether his position was actually eliminated and, therefore, Defendant's proffered explanation for his termination was pretext for discrimination. In support, Plaintiff submitted: (1) Charles Warner's July 17, 2024 Affidavit; (2) February 24, 2023 Organizational Chart of SSU's IT Department with 16 regular employees; (3) May 29,

2023 Organizational Chart of SSU's IT Department with 14 regular employees; (4) February 27, 2023 "Project Request" Email from Jonica Burke to Chuck Warner; (5) SSU's Employment Actions & Policy/CBA Provisions; (6) February 24, 2023 Notice of Discontinuation of Position; and (7) January 17, 2023 "Budget Actions" Email from Jonica Burke to Jeff Bauer. While Plaintiff also references the deposition testimony of Jeffrey Bauer, Jonica Burke, and Vickie Crawford in support of his opposition, he did not file a copy of their depositions in accordance with Civ.R. 32 and 56.

{¶4} In reply, Defendant argues that Plaintiff fails to support his opposition with evidence and that he mischaracterizes witness' testimony to avoid summary judgment. In support, Defendant submitted: (1) a copy of Jonica Burke's April 17, 2024 deposition; (2) a copy of Jeffrey Bauer's April 24, 2024 deposition; and (3) a copy of Vickie Crawford's April 3, 2024 deposition.

STANDARD OF REVIEW

{¶5} Courts review motions for summary judgment 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.

"[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 (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.

{¶6} If the moving party meets its initial burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings," but has a reciprocal burden to file a response which "must set forth specific facts showing that there is a genuine issue

for trial." Civ.R. 56(E). It is well-established that courts should not render summary judgment unless,

> construing the evidence most strongly in favor of the nonmoving party: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party.

Robinette v. Orthopedics, Inc., 1999 Ohio App. LEXIS 2038, *7 (10th Dist. May 4, 1999). When considering whether summary judgment is appropriate, the court cannot weigh the evidence or determine the credibility of witnesses. *Grubach v. Univ. of Akron*, 2020-Ohio-3467, ¶ 40 (10th Dist.). Before awarding summary judgment, the court should take caution and "resolve any doubt in favor of the non-moving party." *Darden v. City of Columbus*, 2004-Ohio-2570, ¶ 10 (10th Dist.).

FACTS

{¶7} Plaintiff, a former employee of Defendant, was hired to lead SSU's Information Technology (IT) Department in 2000. In 2013, Plaintiff assumed the position of Chief Information Officer (CIO). Plaintiff does not dispute that he has never heard any comments, seen any actions, or interpreted any words or behaviors that he views as discrimination based on age or disability. Moreover, the parties agree that Plaintiff was a well-respected, qualified employee who had a good reputation, successful work performance, generally positive relationships with his co-workers, and no record of disciplinary action.

Financial Hardship Necessitating the RIF

{¶8} The parties agree that SSU's enrollment has been declining for many years and it has been operating in a financial deficit as a result. Warner Deposition, p. 98-101; Burke Affidavit, ¶ 3; *see also* Johnson Affidavit, ¶ 3. After enrollment in Fall 2022 fell below predicted targets, SSU's economic hardship became emergent and Dr. Jeffrey Bauer, Defendant's President, asked SSU's cabinet members to find areas for cost savings. Burke Affidavit, ¶ 3; *see also* Warner Depo., p. 105. To address this budget crisis, Dr. Jonica Burke—Defendant's Vice President of Finance & Administration—examined where eliminations could be made "to achieve maximum cost savings while

minimally impacting SSU's operations." Burke Affidavit, ¶ 1, 3-4; Exh. Burke A, SSU_000671 and SSU_000672; *see also* Plaintiff's Exh. January 17, 2023 "Budget Actions" Email, SSU_000670, SSU_000671, and SU_000672; *see also* Johnson Affidavit, ¶ 3. Ultimately, ten positions were slated for elimination as a part of a reduction in force (RIF) that Defendant implemented in 2023. Johnson Affidavit, ¶ 3, 6.

{¶9} With respect to SSU's IT Department, there were four leadership positions in February 2023: the CIO position and three Associate Director positions. Johnson Affidavit, ¶ 6; Burke Affidavit, ¶ 6. In her initial examination, Dr. Burke identified one of the Associate Director roles as a position that could be eliminated to find cost savings. Burke Affidavit, ¶ 4. Specifically, the Associate Director of Applications Computing & Operations position was identified for elimination because it was a "background role" that was "less directly involved in security and direct user support" where the IT Department could weather its elimination "by pulling together the skill sets of other IT employees." Burke Deposition, p. 50. However, Dr. Burke's initial examination "did not identify adequate costs savings to alleviate the budgetary gap" and she reevaluated her initial assessment of the positions within SSU's IT Department. Burke Affidavit, ¶ 4-5.

{¶10} Based on additional assessment, Dr. Burke determined that SSU's IT Department had been "relatively spared . . . compared to other units within the finance and administration division" when considering previous RIFs and it was "quite top heavy especially for such a small university" which led her to evaluate all four leadership positions "for potential reduction, with an aim to achieve as much cost savings as possible." *Id.* at ¶ 5; Burke Depo., p. 47. Ultimately, Dr. Burke "recommended that two positions in IT leadership be included in the reduction in force, the CIO position and the Associate Director of Applications Computing and Operations." Burke Affidavit, ¶ 6. The additional elimination of the CIO position provided the "badly needed cost savings to the university" without hindering IT operations because "the CIO position focused primarily on IT strategy and the execution of large initiatives, and that responsibility for setting the strategic direction for campus technology would be distributed to SSU's executive leadership." Burke Affidavit, ¶ 8.

{¶11} Dr. Burke concluded that it was necessary to "prioritize information security and user support" in order to achieve maximum cost savings while also "inflicting the least

amount of damage on the operation." *Id.* at ¶ 5. For this reason, the Associate Director of Network & Infrastructure position was retained "to focus on information security." *Id.* at ¶ 6. Additionally, the Associate Director of User Engagement and Support (ADUES) position was also retained and transitioned into a newly created Director of IT Operations (DITO) position. *Id.* The DITO position is a lower-level position than the CIO position that could handle the project leadership aspect of the CIO's responsibilities in addition to the ADUES's responsibilities. *Id.* at ¶ 8.

{¶12} Defendant's Associate Director of Network & Infrastructure, Mark Yarnell, was 61 years old at the time of the RIF, and Plaintiff acknowledged that he couldn't be sacrificed without hindering SSU's IT operations. Warner Depo., p. 102-103. Specifically, Yarnell is "the chief network security officer" and "there's no one else that can do that job in any way, shape, or form." *Id.* According to Plaintiff, Yarnell was the "next technical" and "most capable" individual in SSU's IT Department that had been there longer than him after the elimination of the CIO and Associate Director of Applications Computing and Operations positions. *Id.* at p. 84. Despite Plaintiff having knowledge that Yarnell is both older than him and similarly subjects SSU to high-cost medications, Plaintiff states that Yarnell was an "indispensable" employee. *Id.* at 103.

{¶13} Defendant's former ADUES and current DITO, Vickie Crawford, was 57 years old at the time of the RIF, had been employed with SSU longer than Plaintiff, and she directly oversaw institutional IT services, including student account password management, replacing lab computers, assisting in setup of classrooms and instruction, and other general university IT services. *See* Warner Depo., p. 75; *see also* Johnson Affidavit, ¶ 8. Specifically, Crawford's role was "very user facing and very responsive to user needs on a daily basis" and she had a "strong drive to deliver quality service and make things right for the user." Burke Depo., p. 63, 68.

{¶14} On February 24, 2023, Defendant notified Plaintiff that his position was going to be eliminated, effective May 25, 2023, for "efficiency of operations and/or reasons of economy" because of SSU's financial challenges. Plaintiff's Exh. February 24, 2023 Notice of Discontinuation of Position, SSU_001617 and SSU_001618; Johnson Affidavit, ¶ 4, Exh. Johnson A, SSU_000209 and SSU_000210. Defendant also provided Plaintiff with a rationale for its reduction in force in which it explains that SSU "must scale down

its operations to align with current enrollment levels; this includes the size of the administrative team in each department" and eliminating the CIO position would "provide cost savings to the university." Burke Affidavit, ¶ 8, Exh. Burke B, SSU_001670. Regarding the CIO responsibilities, the rationale also notified Plaintiff that SSU's "executive leadership will play an enhanced role in setting the strategic direction for campus technology" and the "[d]ay-to-day leadership will transition to a lower-level position (tentatively, Director of IT Operations) that focuses more on tactical matters." *Id.*

{¶15} Simply, the "CIO is a high-level leadership role that focuses primarily on IT strategy and execution of large initiatives" and Dr. Burke reasoned that its duties could be distributed elsewhere as a cost saving measure that would ultimately not damage the main objectives of SSU's IT Department. *Id.* Moreover, eliminating the CIO role would not have the most direct impact on the successful functioning of SSU's IT services because much of Plaintiff's responsibilities were not user-facing. Instead, much of his direct interaction was with SSU's leadership and his Associate Directors; "but in terms of the user base it was often his lieutenants that led those efforts." Burke Depo., p. 62-65.

{¶16} Defendant also informed him of his "recall rights to the vacated position for a period of two (2) years" in accordance with SSU's Policy 4.51[1] and his responsibility to maintain a current address with SSU's Human Resources (HR), as well as encouraged him to contact HR if he identified any job opportunities for which he wanted to apply. Plaintiff's Exh. February 24, 2023 Notice of Discontinuation of Position, SSU_001617 and SSU_001618; Johnson Affidavit, ¶ 4, Exh. Johnson A, SSU_000209 and SSU_000210. To ensure a smooth transition for the IT Department, Defendant soon thereafter requested Plaintiff provide a list of his primary responsibilities as CIO, consisting of (1) annual tasks and deadlines, (2) primary internal and external contacts, including details about the main purposes for which he would contact them; (3) regularly attended internal and external meetings; and (4) project leadership and monitoring duties. *See* Plaintiff's

[1] SSU's Policy 4.5, Section 9.5 states: "If an administrative employee is terminated due to a reduction in force, the employee will be eligible for reappointment to the last held position should it become available within a period of two (2) years from the date of the force reduction." Johnson Affidavit, ¶ 5, Exh. Johnson B, SSU_001253; Plaintiff's Exh. SSU's Employment Actions & Policy/CBA Provisions, SSU_00679.

Exh. February 27, 2023 "Project Request" Email, SSU_001512. As of May 2024, Defendant had not reinstated the CIO position within SSU's IT Department. Johnson Affidavit, ¶ 5.

Reorganization after the RIF

{¶17} Prior to eliminating two positions, SSU's IT Department staffed sixteen regular employees and was structured with Plaintiff, as CIO, overseeing four employees: Richard Hawk, as Associate Director of Applications Computing & Operations; Yarnell, as the Associate Director of Network & Infrastructure; Crawford, as ADUES; and Jaime Madden, as ITS Budget & Projects Operations Manager. *See* Plaintiff's Exh. February 23, 2023 Organizational Chart, SSU_001337. Positioned under those directly reporting to Plaintiff, the IT Department had eleven additional employees. *Id.*

{¶18} Specifically, Crawford directly oversaw two employees: (1) Alyssa Owens, a Blackboard Administrator, who did not have any directly-reporting employees positioned under her; and (2) Josh Teeters, a Service Desk Manager, who had one Lead Support Specialist—Darrell Jividen—and two Support Specialists—Doug Parsley and Zach Holsinger—directly reporting to him. *Id.* Additionally, Hawk oversaw four employees: Mark Russell, the Manager of Database & Applications; Dan White, a Software Engineer; Todd Hollback, a Senior Programmer/Analyst; and Terry Noel, a Data Integration Engineer. *Id.* Lastly, Mark Yarnell oversaw two employees: Rob Kline, Telecommunications/Engineer; and Tyler Richburg, Administrator of Computer Operations & Infrastructure. *Id.* Madden did not have any directly-reporting employees positioned under her. *Id.*

{¶19} Based on his personal knowledge, Plaintiff avers that "the individuals in the IT department at SSU were about the following ages:" (1) "Charles Warner, 61;" (2) "Rich Hawk, 67;" (3) "Mark Russell, mid-40s;" (4) "Dan White, mid-50s;" (5) Todd Hollback, late 50s;" (6) "Terry Noel, about 40;" (7) "Vickie Crawford, 57;" (8) "Alyssa Owens, mid-20s;" (9) "Josh Teeters, late 30s;" (10) "Darrel Jividen, mid-40s;" (11) "Doug Parsley, late 60s;" (12) "Zach Holsinger, late 20s;" (13) "Mark Yarnell, 61;" (14) "Rob Kline, mid-40s;" (15) "Tyler Richburg, mid-30s;" and (16) "Jamie Madden, mid-50s." Warner Affidavit, ¶ 14.

{¶20} Following Plaintiff's termination, Defendant reorganized SSU's IT Department. *See* Plaintiff's Exh. May 29, 2023 Organizational Chart, SSU_001338. With two positions eliminated, SSU's IT Department staffed fourteen regular positions and was structured with Crawford—newly positioned as Defendant's Interim DITO—directly overseeing five employees: Yarnell, Russell, Teeters, Madden, and Owens. *Id.* While Yarnell, Teeters, Madden, and Owens positions remained unchanged following the reduction in force, Russell was newly positioned as Defendant's Senior Engineer. *Id.*

{¶21} Positioned under those directly reporting to Crawford, the IT Department had eight additional employees. *Id.* Specifically, Yarnell continued to oversee Kline—whose position remained the same—and Richburg—who was newly positioned as Defendant's Network Engineer. Teeters continued to oversee Jividen, Parsley, and Holsinger—all whose positions remained unchanged. *Id*. Lastly, Russell was newly positioned to oversee White, Hollback, and Noel—all whose positions remained the same. *Id.* Madden and Owens continued to not have any directly-reporting employees positioned under them. *Id.*

{¶22} In July 2023, Crawford permanently transitioned into the DITO position. Burke Affidavit, ¶ 6-7; Johnson Affidavit, ¶ 8; Crawford Deposition, p. 21. As DITO, Crawford absorbed "the day-to-day responsibilities for the operations of the IT Department" from the former CIO position in addition to maintaining all the existing responsibilities she had as Defendant's former ADUES. Burke Affidavit, ¶ 7; Crawford Depo., p. 21. Meanwhile, "the strategic leadership component of the CIO position" was absorbed by Defendant's cabinet. Burke Affidavit, ¶ 7.

{¶23} With the elimination of the CIO position, Dr. Burke felt SSU's IT Department needed a DITO position held by "someone with direct understanding of [SSU's] user base as well as someone who could accomplish a variety of things very quickly and could lead a team through challenging times with a lean workforce." Burke Depo., p. 66-67. Dr. Burke felt Crawford demonstrated those qualities through "her leadership of the help desk and the support team" as well as her "very lengthy service in IT" at SSU which included an upward progression through multiple levels of responsibility. *Id.* at p. 67-68. While Dr. Burke also considered Yarnell for the DITO position, she did not want to distract him "from

a very critical technical role" and chose to rely on her "perceptions of those two remaining employees' strengths" given they were the only two in leadership at the time. *Id.* at 67.

Differences between CIO and DITO

{¶24} Before solidifying Crawford's transition, Defendant did not offer the DITO position to Plaintiff. Warner Affidavit, ¶ 12; *see also* Burke Depo., p. 65-66. At the time the CIO position was eliminated, Plaintiff's salary was just over $115,000 with a pay grade 50. Warner Depo., p. 90; Burke Depo., p. 72. Defendant created the DITO position at a pay grade 49. Burke Depo., p. 70-72. When Crawford assumed the DITO position on an interim basis, Defendant increased her salary to $98,430.02 to reflect the increase in additional duties she would be assuming. *Id.* at p. 70. Thereafter, Defendant increased Crawford's salary to just over $100,000 upon permanently installing her as DITO. Crawford Depo., p. 35. While Crawford received roughly a $20,000 raise because of this transition, she does not foresee any future raises. *Id.* at p. 13, 36.

{¶25} According to Plaintiff, "Crawford assumed most or all of [his] job duties" and that her job duties as DITO "are the same or substantially similar to the job duties" he had as CIO. Warner Affidavit, ¶ 10-11; *see also* Warner Depo., p. 77-100. According to a list of nearly thirty duties that Plaintiff provided to Dr. Burke regarding his responsibilities as CIO, however, Crawford only performs nine to eleven of those responsibilities with a varying degree of involvement or assistance from other SSU employees. Crawford Depo., p. 25-34.

{¶26} Specifically, Crawford is neither responsible for all IT business with final decision-making authority nor does she deliver IT policy and governance. *Id.* at p. 28-29, 31. Instead, Defendant's Chief Operating Officer (COO)—Malonda Johnson and Crawford's direct supervisor—handles those responsibilities. *Id.* Further, Plaintiff's technical networking or infrastructure responsibilities were reassigned to Yarnell. *See* Crawford Depo., p. 22, 30, 35. Regarding committee meetings that Plaintiff attended as CIO, Crawford deponed that she neither attends SSU's President's leadership meetings, any Jenzabar managers' meetings, nor does she regularly attend the Board of Trustees committee meetings unless asked for specific purposes. *Id.* at p. 34-35.

{¶27} Notwithstanding, Plaintiff believes that he should have been offered the DITO position instead of Crawford assuming any of his former leadership duties within the first two years following the abolishment of the CIO position in accordance with either his right to first recall or SSU's responsibility to reassign him to another position that he was qualified for amidst the RIF. *See* Warner Depo., p. 83 ("So that's what it meant to me, that the duties that I performed would not be performed for that period, and at the point that they would be performed, then I would have first right to recall to perform those duties."); *see also* Plaintiff's Exh. 3, SSU_00679 (Policy 4.51 provides, in part: "Attempts will be made to reassign employees to other open positions for which they are qualified.").

IP Addresses Sales Project

{¶28} It is undisputed that Plaintiff and Yarnell had started working on a project in late 2022 "to sell unneeded Internet Protocol version 4 (IPv4) addresses" (IP Addresses Sales Project) that would "potentially net a significant, one-time profit for SSU." Burke Affidavit, ¶ 11; Warner Depo., p. 79, 85, 97-100. As assets belonging to SSU, the sale of any IPv4 addresses "would benefit SSU as a whole" and "would not be dedicated to the IT department or to offsetting the salary costs of that department." Burke Affidavit, ¶ 11. Additionally, the IP Addresses Sales Project was "only expected to generate an isolated infusion of cash that would not be sufficient to counter a decade-long enrollment decline and multiple years of deficit spending." *Id.* While the potential profits "would reduce SSU's deficit spending in the short term," the IP Addresses Sales Project "would not resolve the overall structural imbalance issue in SSU's operating budget." *Id.*

{¶29} After Plaintiff's employment was terminated, Yarnell became responsible for the IP Address Sales Project having the network focus; however, Crawford joined the team and will update SSU's board on its progress. *See* Crawford Depo., p. 22, 27. According to Plaintiff, SSU could potentially profit up to $2.4 million from the IP Address Sales Project. *See* Warner Depo., 53, 85; *see also* Crawford Depo., p. 23. However, the first allocation was not executed until November 2023. Burke Affidavit, ¶ 11. As of April 2024, the IP Address Sales Project was halfway through the scheduled allocations, generating around $1 million in revenue. Crawford Depo., p. 22-23.

Plaintiff's Disability

{¶30} Regarding his disability, Plaintiff averred that he was diagnosed with Multiple Sclerosis (MS) in 2001, and his symptoms are "obvious and apparent." Warner Affidavit, ¶ 2-3. Plaintiff's symptoms include: (1) "[l]acking use in his right hand and right leg;" (2) "[d]ifficulty swallowing;" (3) "[t]rouble using a computer mouse;" (4) "[s]truggling to get up from a seated position;" (5) "[t]rouble standing and balancing;" (6) "[k]eeping my hand close to my chest;" (7) "[o]ccasionally using a cane;" and (8) "[d]ifficulty with fine motor skills." *Id.* at ¶ 4. Plaintiff's treatments include: (1) "[a]ttending doctor's visits;" (2) "[r]eceiving two infusions a year to treat all known symptoms of Relapse Remitting form of MS." *Id.* According to Plaintiff, he "exhibited most or all of these symptoms while employed at SSU." *Id.* at ¶ 5. Given "SSU is a small, close-knit university" where "word travels fast," Plaintiff averred that "many employees were aware of [his] MS diagnosis or symptoms." *Id.* at ¶ 9.

{¶31} Particularly, Plaintiff averred that "Dr. Burke witnessed many of the above referenced symptoms" because he "worked closely" with her at SSU. *Id.* at ¶ 5-8. Specifically, Plaintiff "interacted with Dr. Burke in-person on a weekly basis" and worked with her "for 2 years as her direct report." *Id.* at ¶ 6. During the thirteen years that they worked together, Plaintiff "worked with Dr. Burke on projects and other assignments, including attending conferences that included after-hour conference functions." *Id.* at ¶ 7.

{¶32} However, Plaintiff never specifically informed Dr. Burke that he had MS. Burke Affidavit, ¶ 9; Warner Depo., p. 18, 24-26. Additionally, she "had no knowledge that Charles Warner receives a costly treatment for his MS diagnosis." Burker Affidavit, ¶ 10; *see also* Warner Depo., p. 41, 46, 106. According to Dr. Burke, she "had no suspicion that Charles Warner was disabled" before learning of his disability discrimination lawsuit and "was surprised when [she] learned of his medical condition, since [she] had not seen any evidence of it, nor had he mentioned it to [her]." Burke Affidavit, ¶ 9. While Dr. Burke had "seen summary reports about high-cost health care claims" in her capacity as SSU's representative on the Higher Education Action Liaison Targeting Healthcare (HEALTH) Consortium, none of the summary reports she saw "revealed the identity of impacted employees or dependents." *Id.* at ¶ 10; *see also* Johnson Affidavit, ¶ 11.

{¶33} Moreover, Plaintiff never notified or otherwise made a documented record with HR while he was employed at SSU that he had MS or any other disability. Johnson Affidavit, ¶ 10; *see also* Warner Depo., p. 33-35. Further, Plaintiff never requested an accommodation for a disability or otherwise exercised any rights under the Family Medical Leave Act (FMLA). Warner Depo., p. 20, 44; Johnson Affidavit, ¶ 11. The only contact Plaintiff had with HR regarding his disability was verbal conversations regarding high-cost medication coverage. Warner Depo., p. 33-41.

LAW AND ANALYSIS

{¶34} Plaintiff's complaint seeks relief for age discrimination under 29 U.S.C. 621, et seq.—the Age Discrimination in Employment Act (ADEA)—and disability discrimination under 42 U.S.C. 12101, et seq.—the Americans with Disabilities Act (ADA). Plaintiff also seeks relief for employment discrimination based on age and disability under R.C. 4112.02.

{¶35} Under federal law, the ADEA states that it is unlawful for an employer "to discharge any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). Separately, the ADA states that it is unlawful for an employer to "discriminate against a qualified individual on the basis of a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a).

{¶36} Under Ohio state law, R.C. 4112.02 prohibits "any employer, because of the . . . disability, age, or ancestry of any person, to discharge without just cause, . . . or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." It is well settled that "Ohio courts may look to both federal law and state courts' statutory interpretations of both federal and state statutes when determining the rights of litigants under state discrimination laws." *Ray v. Ohio Dept. of Health*, 2018-Ohio-2163, ¶ 22 (10th Dist.).

{¶37} Moreover, "[t]he Supreme Court of Ohio has explained that discrimination actions under federal and state law each require the same analysis." *Id.* Notably, Plaintiff may meet his burden of proof using either direct or circumstantial evidence. *See Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 348-349 (6th Cir.1997) ("The direct evidence and circumstantial evidence paths are mutually exclusive; a plaintiff need only prove one or the other, not both."). At the outset, the Court notes that the parties agree Plaintiff submits no direct evidence of age or disability discrimination.

{¶38} Absent direct evidence of discrimination, "*McDonnell Douglas* set forth an analytical method to examine every intentional discrimination claim." *Barnes v. GenCorp. Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990); *Mauzy v. Kelly Servs.*, 75 Ohio St.3d 578, 583 (1996), citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-254 ("The function of the *McDonnell Douglas* prima facie test is to allow the plaintiff to raise an inference of discriminatory intent indirectly."). Thus, Plaintiff's claims for age and disability discrimination pursuant to the ADA, ADEA, and Ohio state law are all examined through the same burden-shifting framework. *See id.*; *see also Yarberry v. Gregg Appliances, Inc.* 625 Fed. Appx. 729, 735 (6th Cir. 2015); *see also Pettay v. DeVry Univ., Inc.*, 2021-Ohio-1380, ¶ 21.

{¶39} Generally, employment discrimination plaintiffs are required to establish a prima facie case of discrimination before the burden shifts to defendant to proffer a legitimate, nondiscriminatory reason for its adverse employment action. *See Mauzy* at 583 (1996), citing *Texas Dept. of Community Affairs* at 253-254 (The prima facie test "serves to eliminate the most common nondiscriminatory reasons for the employer's action . . . ."). While Defendant argues that Plaintiff cannot establish prima facie cases of discrimination, the Court finds that the issue of whether Plaintiff presented a prima facie case overlaps with the issue of pretext. Under the circumstances, the Court assumes without deciding that Plaintiff established his prima facie cases of age and disability discrimination for summary judgment purposes and proceeds to decide whether Plaintiff established pretext. *See, e.g., Kundtz v. AT&T Solutions, Inc.*, 2007-Ohio-1462, ¶ 30 (10th Dist.), citing *Eddings v. LeFevour,* 2000 U.S. Dist. LEXIS 14556, *32 (N.D.Ill, Sep. 29, 2000); *see also Morris v. Vanderburgh County Health Dept.*, 58 Fed.Appx. 654, 656 (7th Cir. 2003) ("Because the issue whether [plaintiff] presented a prima facie case

overlaps with the issue of pretext, we, like the district court, need not consider the issue of a prima facie case and will proceed to decide whether she established pretext.").

Legitimate, Nondiscriminatory Justification

{¶40} Before addressing the issue of pretext, the Court notes that Defendant satisfied its burden to set forth a legitimate, nondiscriminatory reason for terminating Plaintiff. *See Moody v. Ohio Dept. of Mental Health*, 2021-Ohio-4578, ¶ 18 (10th Dist.) (Articulating a legitimate, nondiscriminatory reason for an employment decision "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.'"'). The record contains evidence that longstanding economic hardship necessitated a RIF and reorganization of the leadership structure within SSU's IT Department. *See, e.g., Shah v. NXP Semiconductors USA, Inc.*, 507 Fed.Appx. 483, 492 (6th Cir. 2012), quoting *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 148 (2000) ("Evidence of an employer's business restructuring, which may include the elimination of jobs or termination of otherwise competent employees based on seniority, satisfies the employer's burden of producing a legitimate, non-discriminatory reason for a plaintiff's termination); *Housten v. Wilke Global, Inc.*, 2018-Ohio-3959, ¶ 34 (10th Dist.), quoting *Barnes* at 1465 (a RIF "occurs when business considerations cause an employer to eliminate one or more positions within the company."); *see Kundtz* at ¶ 28-31 (Ohio courts recognize that a RIF constitutes a legitimate, nondiscriminatory reason for an employee's discharge).

Pretext

{¶41} Once Defendant has satisfied its burden to articulate a nondiscriminatory justification for its employment action, Plaintiff must show that Defendant's explanation is pretext for unlawful discrimination. *See Texas Dept. of Comm. Affairs* at 255-256. Under a disparate-treatment theory, Plaintiff is ultimately required to show that his age or his disability or both was the 'but-for' cause of the Defendant adverse decision. *See Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175-177 (2009) ("the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the

'reason' that the employer decided to act"); *see Yarberry* at 736 ("plaintiff must show that his disability was the 'but-for' cause for his termination.").

{¶42} Absent direct evidence that a discriminatory intent motivated the employer's adverse action, "a plaintiff may establish pretext indirectly by showing that the employer's proffered explanation is unworthy of credence." (Cleaned up.) *DeBoer v. Musashi Auto Parts, Inc.*, 142 Fed.Appx. 387, 392 (6th Cir. 2005). Specifically, Plaintiff must demonstrate "'either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.'" *Id.,* quoting *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

{¶43} Plaintiff primarily argues that Defendant used its financial struggle as a cover to "replace" Plaintiff with Crawford instead of truly "eliminating" his position as a part of a RIF. *See Housten* at ¶ 34, quoting *Barnes* at 1465 ("An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge."). While Plaintiff broadly states that Defendant "was able to retain the other divisional employees", his brief and limited supporting evidence filed therewith solely challenges Defendant's retention of Crawford, her promotion to DITO, and its failure to consider him for the DITO position. Nevertheless, both undisputed and uncontroverted evidence in the record supports that Plaintiff was not "replaced" by Crawford.

{¶44} It is well settled that an employee is not "replaced" following a RIF "when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform the plaintiff's duties." *Id.* Here, Plaintiff does not dispute that SSU had been facing financial hardship for many years and that enrollment was down during Fall 2022. Additionally, Plaintiff agrees that two positions within SSU's IT Department were eliminated.

{¶45} While Plaintiff takes issue with duties from the CIO position being redistributed to the DITO position, he neither claims Crawford was reassigned to the CIO position specifically nor does he claim that another employee was hired into the CIO position. Though Plaintiff argues that Crawford "replaced" him based on his personal

belief that she is performing "most *or* all" of "the same *or* substantially similar" duties in her role as DITO as he did as CIO, he does not refute that a portion of his responsibilities were also redistributed among other existing employees. Instead, the evidence demonstrates that Crawford only assumed a portion of his former responsibilities as CIO and various other duties were also redistributed to Johnson, Yarnell, Madden, and among others in SSU's IT Department.

{¶46} Furthermore, Plaintiff fails to controvert that Crawford as DITO also maintained all the duties from her previous ADUES position. The evidence Plaintiff submitted depicts that Crawford maintained at least some of her former duties in addition to assuming further responsibilities when transitioning into the DITO position. Specifically, the organizational structure of SSU's IT Department before the RIF depicts that Plaintiff as CIO oversaw four direct reports, including Crawford. Comparatively, the organizational structure of SSU's IT Department structure following the RIF depicts that Crawford as Interim DITO oversaw five directly-reporting employees.

{¶47} For the Court to reasonably conclude that the DITO position "replaced" the CIO position, then the post-RIF organizational chart would only depict three—speculating that Crawford was "reassigned" to perform Plaintiff's former duties under a new title—or four—speculating that Crawford was "hired" into the DITO position and another employee would be hired to fill her former role as ADUES—directly-reporting employees under Crawford as DITO. Regardless, neither scenario is present in the record before the Court.

{¶48} Instead, the evidence demonstrates that Crawford as DITO assumed oversight responsibility of three employees who would have directly reported to the former CIO in addition to maintaining her direct oversight responsibilities of Teeters and Owens from her former role as the ADUES. In addition to the record containing evidence supporting that the CIO and DITO differed in the division of responsibilities in both quantity and kind, Plaintiff does not refute that Crawford's paygrade and salary as DITO are both lower than his was as CIO.

{¶49} In effect, the RIF and reorganization ultimately created one director-level leadership position within SSU's IT Department in lieu of retaining one chief-level and two associate director-level leadership positions. To ensure that SSU's IT operations were not negatively impacted, the uncontroverted evidence demonstrates that the newly

created director-level position transitioned the duties from one of the associate director-level positions as well as assuming a portion of the duties from the former chief-level position. Then, a portion of the remaining day-to-day duties of the former chief-level position were redistributed to the associate director-level or manager-level positions that were retained. A separate portion of the former chief-level position's responsibilities were redistributed outside of the IT Department to SSU's COO if they involved strategic decision-making regarding campus-wide technology concerns or planning initiatives.

{¶50} Although Plaintiff attempts to create an issue of fact by suggesting that the nuances between the title of "Director of IT" and "Chief Information Officer" offer a distinction without a difference, the Court is not persuaded. To the extent any arguable dispute does exist between the parties regarding any such distinction or lack thereof, the Court finds that the title itself does not specifically present a genuine issue in this case. While the Court acknowledges that an "employer cannot avoid liability by changing job titles or relying on minor differences in an attempt to argue that other employees did not have the 'same' job," Plaintiff nonetheless fails to negate the material differences between Plaintiff's former CIO position and Crawford's current DITO position. *See Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.38 414, 421 (6th Cir. 1999). The record is void of evidence upon which the Court could reasonably conclude that Crawford "replaced" Plaintiff following the RIF whether it be in title, division of responsibilities, paygrade, or salary. *See, e.g., Morton v. Greater Clev. Regl. Transit Auth.*, 2024 U.S. App. LEXIS 13062, *15 (6th Cir. May 30, 2024) ("adherence to its standard procedures for assigning [duties] is not evidence that it completely reassigned his role to another employee, and [plaintiff] presents no evidence that [defendant] hired a new operator to replace him.").

{¶51} Lastly, Plaintiff fails to refute that eliminating the CIO position provided SSU with the immediately necessary operational savings without negatively impacting the IT operations. The evidence establishes that it was necessary to retain Yarnell and Crawford in order to continue the user-facing operations of SSU's IT Department without incident during the RIF. Furthermore, the evidence demonstrates that the CIO position could be redistributed among other leadership positions with minimal direct impact on SSU's main institutional objectives because Plaintiff's day-to-day duties were not user-

facing. Consequently, the Court finds that Plaintiff's own evidence supports that he was terminated because the responsibilities of the CIO position could be more easily redistributed without damaging operations and the CIO position was not essential to SSU's crucial needs of the IT Department in light of its emergent economic downturn.

{¶52} Separately, Plaintiff appears to suggest that Defendant targeted older employees during the RIF evidenced by the CIO and the Associate Director of Applications Computing and Operations positions being held by two of the four oldest employees within SSU's IT Department. However, it is well settled that "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age. . . ." *Hazen Paper Co v. Biggins*, 507 U.S. 604, 611 (1993). For example, a younger employee "may have worked for a particular employer his entire career, while an older employer may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other." *See, e.g., id.*; *see also Allen v. Diebold, Inc.*, 33 F.3d 674, 677 (in order to state and support an age discrimination claim, plaintiff must show that defendant "discriminated against them because they were old, not because they were expensive.").

{¶53} Based on Plaintiff's own averments, only four of the fourteen remaining employees are under the age of 40 and, thus, over seventy percent of SSU's IT Department falls within the protected age class. *See generally Intl. Bhd. Of Teamsters v. United States,* 431 U.S. 324, 340 (1977) (the usefulness of statistical evidence in employment discrimination cases "depends on all of the surrounding facts and circumstances."). Further, Plaintiff acknowledged that Defendant retained the Associate Director of Network & Infrastructure position despite Yarnell being older than him. Moreover, Plaintiff's primary concern is that Crawford assumed his duties. To this end, Crawford also fell within the protected class, and she is less than six years younger than Plaintiff. *See Grosjean v. First Energy Corp.*, 349 F.3d 332, 340 (6th Cir.2003) ("we hold that, in the absence of direct evidence that the employer considered age to be significant, an age difference of six years or less between an employee and a replacement is not significant.").

{¶54} Additionally, Crawford was employed with SSU longer than Plaintiff, had worked upward through various levels of responsibility, and her position at the time of the RIF involved more of the IT Department's user-facing operations than Plaintiff's position. *See, e.g., Shah* at 492-495 (it is not pretext for unlawful discrimination when an employer uses its "business judgment to seize upon the opportunity" to improve its management structure during a RIF). Plaintiff does not provide contradicting evidence upon which this Court could doubt either Defendant's justification for selecting Crawford for the DITO position or Defendant's determination that eliminating the CIO and the Associate Director of Applications Computing and Operations positions would achieve the most cost savings without damaging SSU's user-facing operations.

{¶55} Plaintiff additionally argues that Defendant's failure to reassign him to the DITO position or offer it to him in advance of Crawford in accordance with its own RIF policies demonstrates that Defendant's articulated reasons are pretext. However, an employer has no legal obligation "to transfer an employee to another position or to displace workers with less seniority when the employee's position is eliminated as part of a work force reduction." *Barnes* at 1469. Moreover, Defendant informed Plaintiff that the DITO position was being created at the same time it provided its rationale for eliminating the CIO position during the RIF; however, the record is void of any suggestion that Plaintiff contacted HR with interest in filling the DITO position in accordance with the procedure outlined in his February 24, 2023 Notice of Discontinuation of Position and Defendant refused his efforts to exercise his rights under Defendant's policies.

{¶56} While "an employer's failure to follow a policy that is related to termination or demotion can constitute relevant evidence of pretext," the Court finds that Plaintiff failed to put forth evidence to support a finding that Defendant's decision to eliminate the CIO position was motivated by discriminatory intent despite making Crawford the DITO without first offering the role to Plaintiff. *See, e.g., DeBoer v. Musashi Auto Parts, Inc.* 124 Fed.Appx. 387, 392-395 (6th Cir. 2005) (the combination of evidence plaintiff presented created triable issues of fact sufficient to survive summary judgment—e.g., specifically the temporal proximity between plaintiff announcing her pregnancy and defendant's failure to counsel her in advance of demoting in accordance with its own policy, the suspicious timing of certain criticisms of plaintiff and defendant commenting that a

supervisor taking intermittent leave could be problematic). Stated another way, Defendant did not terminate Plaintiff "because of" his age. Consequently, the Court finds that Plaintiff failed to meet its burden under Civ.R. 56(E). Therefore, the Court finds that Defendant is entitled to judgment as a matter of law as to Plaintiff's employment discrimination claims based on age under both federal and state law.

{¶57} With respect to his disability discrimination claim, Defendant argues that Plaintiff offers no evidence to establish that Defendant's reasons for eliminating the CIO position were pretext for unlawful discrimination against Plaintiff because of his disability. Upon review, the Court agrees. Notably, Plaintiff fails to offer any argument in response to rebut Defendant's position. Although Plaintiff deponed that he made various employees at SSU aware of his disability since being diagnosed in 2001, logic suggests that Defendant would not have waited over two decades to terminate Plaintiff if it intended to do so *because of* his MS. *See, e.g., Brune v. BASF Corp.*, 2000 U.S. App. LEXIS 26772 (6th Cir. Oct. 17, 2000) ("While it is not clear whether a residual limp is a cognizable disability . . . 'common sense dictates that if BASF wanted to terminate Brune because of her disability it would not have waited five years to do so.'").

{¶58} Notwithstanding, Plaintiff acknowledges that he never specifically discussed his disability with those involved in the RIF decision-making process and there was never an occasion necessitating an official record of his disability with HR aside from inquiries regarding high-cost medication coverage. To this end, Plaintiff acknowledged that Defendant retained Yarnell despite his similar need for high-cost medication coverage. To the extent that the limited evidence Plaintiff presented about displaying symptoms of MS at SSU or his inquiries about high-cost medication coverage could be understood as challenging Defendant's proffered justification for eliminating the CIO position, such "[g]eneral knowledge or notice about an employee's medical treatment or condition, alone, is insufficient to overcome summary judgment . . . ." *See Wingfield v. Escallate, LLC*, 2014 U.S. Dist. LEXIS 139885, *16 (N.D.Ohio. Sept. 30, 2014).

{¶59} When viewing the evidence in a light most favorable to Plaintiff, the record is simply void of evidence upon which a reasonable factfinder could conclude that Plaintiff would not have been terminated "but for" his MS. Therefore, the Court finds that

Defendant is entitled to judgment as a matter of law as to Plaintiff's employment discrimination claims based on disability under both federal and state law.

CONCLUSION

{¶60} Following a non-oral hearing during which the Court reviewed all the evidence in a light most favorable to Plaintiff, the Court finds that Defendant is entitled to judgment as a matter of law.

{¶61} While Plaintiff represents that Defendant was able to "retain a younger, less disabled IT workforce" by terminating him, Plaintiff provides no evidence outside his personal beliefs to support that contention, much less evidence upon which a reasonable factfinder could conclude that genuine issues of material fact remain for trial. *See O'Day v. Webb*, 29 Ohio St.2d 215, 219 (1972) ("a review of the evidence is more often than not vital to the resolution of a question of law. But the fact that a question of law involves consideration of the facts or the evidence does not turn it into a question of fact. Nor does that consideration involve the court in weighing the evidence or passing upon its credibility."). Although the Court properly considers this uncorroborated subjective opinion as valid Civ.R. 56 evidence, Plaintiff must provide more than an unsubstantiated suspicion to survive summary judgment for intentional employment discrimination. *See, e.g., Rainieri v. Alliance Tubular Prods. LLC,* 2019 U.S. Dist. LEXIS 118241, 15 (N.D.Ohio. July 16, 2019), quoting *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 470 (6th Cir.2002) ("[M]ere conjecture that [the] employer's explanation is pretext for intentional discrimination is an insufficient basis for denial of summary judgement.").

{¶62} Ultimately, the Court finds that Plaintiff failed to present evidence upon which this Court could reasonably find a genuine issue of material fact that Defendant terminated him "because of" his age or "because of" his disability. *See O'Day* at 220 (when determining whether evidence exists to permit reasonable minds to reach different conclusions about an issue, "a court is repeatedly called upon to consider, review and assess the evidence in the record. But questions relating to the failure to discharge those duties properly are questions of law."). Thus, reasonable minds could come to but one conclusion that Plaintiff cannot prove that Defendant was motivated by discriminatory intent when it eliminated the CIO position. Consequently, the Court further finds that

Plaintiff failed to show that a genuine issue of material fact exists whether Defendant's articulated reasons for his termination were a pretext for unlawful discrimination. Therefore, Plaintiff failed to meet his reciprocal burden pursuant to Civ.R. 56(E).

{¶63} For the reasons stated above, the Court GRANTS Defendant's motion for summary judgment pursuant to Civ.R. 56.

LISA L. SADLER
Judge

[Cite as *Warner v. Shawnee State Univ.*, 2024-Ohio-5472.]

CHARLES WARNER Plaintiff v. SHAWNEE STATE UNIVERSITY Defendant	Case No. 2023-00383JD Judge Lisa L. Sadler Magistrate Gary Peterson JUDGMENT ENTRY

IN THE COURT OF CLAIMS OF OHIO

{¶64} For the reasons set forth in the decision filed concurrently herewith, the Court GRANTS Defendant's motion for summary judgment. Accordingly, 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.

LISA L. SADLER
Judge

Filed October 15, 2024
Sent to S.C. Reporter 11/21/24