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COURT OF CLAIMS
OF OHIO

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IN THE COURT OF CLAIMS OF OHIO

WILLIAM RUSSELL,	)	CASE NO.: 2013-00138
	)	
Plaintiff,	)	JUDGE PATRICK M. McGRATH
	)	
vs.	)	MAGISTRATE HOLLY T. SHAVER
	)	
CLEVELAND STATE UNIVERSITY,	)	
	)	**PLAINTIFF'S MOTION FOR LEAVE TO**
Defendant.	)	**FILE FIRST AMENDED COMPLAINT**
	)	

Pursuant to Rule 15 of the Ohio Rules of Civil Procedure, plaintiff William Russell respectfully requests leave to file the First Amended Complaint, attached hereto as Exhibit 1.

Rule 15 provides that amendments should be freely granted. Ohio R. Civ. P. 15(A). Here, permitting the requested amendment is appropriate. The only effect of the proposed amendment is to emphasize the existing claim for Defendant's failure to re-hire or re-assign Plaintiff and Defendant's failure to pay for all hours worked by adding a claim for breach of contract. Where, as here, litigation is in its early stages, including that the plaintiff's deposition has not yet been taken, courts grant leave to amend. *See, e.g., Jordan v. Cuyahoga Metro Housing Authority*, 161 Ohio App.3d 216, 223, 2005-Ohio-2443, 829 N.E.2d 1237 (8th Dist.) (holding trial court abused its discretion in denying leave to amend because there was no prejudice given that the motion was filed before the discovery cut-off).

Indeed, "[i]n order for an objecting party to prevent the amendment of a pleading under Civ. R. 15, the party must establish that he will be subject to serious disadvantage if the amendment were allowed." *City of Springfield v. Palco Inv. Co.*, 2013-Ohio-2348, 992 N.E.2d 1194, 1205, 2013 Ohio App. LEXIS 2279, ¶46 (2d Dist.) (internal quotations omitted). Here,

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Plaintiff is the only party to take depositions in this matter to-date, and has only taken four depositions. Defendant has not yet taken Plaintiff's deposition, and in any event, the additional topics raised in the First Amended Complaint are subsumed within Plaintiff's existing claim for termination, and failure to re-hire or re-assign. As such, no party will suffer prejudice from the granting of this Motion, the proposed amendment will not result in undue delay and this Motion is not brought in bad faith.

Accordingly, Plaintiff respectfully requests that the Court grant *Plaintiff's Motion for Leave to File First Amended Complaint* and grant Plaintiff leave to file the First Amended Complaint, attached hereto as Exhibit 1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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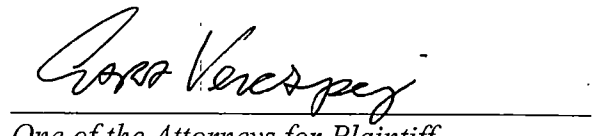


One of the Attorneys for Plaintiff

IN THE COURT OF CLAIMS OF OHIO

WILLIAM RUSSELL, 627 Mariner Village Huron, OH 44839	)	CASE NO.: 2013-00138
Plaintiff,	)	JUDGE PATRICK M. McGRATH
vs.	)	MAGISTRATE HOLLY T. SHAVER
CLEVELAND STATE UNIVERSITY, 2121 Euclid Avenue Cleveland, Ohio 44115,	)	**FIRST AMENDED COMPLAINT**
Defendant.	)	

JURISDICTION & VENUE

1. Plaintiff William Russell ("Russell") brings this action for damages against Defendant Cleveland State University ("CSU") for violations of Ohio Rev. Code § 4112.02 (Age and Disability Discrimination) and Ohio Rev. Code § 4112.02(I) (Retaliation).

2. This action also asserts claims against CSU for violations of 29 U.S.C. § 2611 *et seq.* (Family and Medical Leave Act), and 29 U.S.C. § 621 *et seq.* (Age Discrimination in Employment Act, as amended).

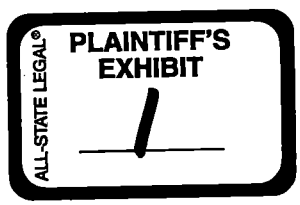
3. All administrative prerequisites have been met.

4. Russell is a citizen of the United States and a resident of Erie County, Ohio.

5. CSU is a state university located in Cuyahoga County, Ohio, and is an agent or instrumentality of the State of Ohio.

6. This Court has original jurisdiction of the claims asserted herein pursuant to Ohio Rev. Code § 2743.02.

7. This matter is timely filed, and jurisdiction and venue are proper.



PARTIES

8. Russell was employed by CSU, until his termination on or around September 5, 2012.

9. Russell is a "person," "individual" and "employee" within the meaning of Ohio Rev. Code Chapter 4112, 29 U.S.C. § 2611, *et seq.*, and 29 U.S.C. § 621, *et seq.*

10. CSU is a "person," an "individual" and an "employer" within the meaning of Ohio Rev. Code Chapter 4112, 29 U.S.C. § 2611, *et seq.*, and 29 U.S.C. § 621, *et seq.*

FIRST CAUSE OF ACTION
(Age Discrimination in Violation of O.R.C. Chapter 4112 and ADEA)

11. Russell incorporates by reference the previous paragraphs as if fully re-alleged herein.

12. Russell is an individual who is over the age of 40 and was so at all times relevant to the activities which are the subject of this First Amended Complaint.

13. Russell was qualified for the position(s) in which he was employed by CSU and the positions for which he applied, was considered, or was eligible.

14. Russell successfully performed the duties and responsibilities of the position(s) he held.

15. On or around September 5, 2012, CSU terminated Russell from his employment because of his age.

16. Because of Russell's age, CSU refused to promote, re-instate, re-hire, transfer or re-assign Russell for available positions for which he was qualified.

17. CSU did not terminate Russell's employment for any reasons related to his qualifications, work performance, behavior, or adherence to policy or procedure.

18. CSU replaced Russell with a substantially younger employee, and promoted and retained substantially younger employees in positions for which Russell was more qualified.

19. CSU has a pattern and practice of making employment decisions, such as hiring, promotion, transfer and termination decisions, on the basis of age.

20. CSU discriminated against Russell on the basis of age with respect to the terms, conditions and privileges of employment in violation of Ohio Rev. Code Chapter 4112 and the ADEA, including by: making age-related comments; subjecting him and older employees to unfair scrutiny, pay and discipline; terminating his employment; retaining, hiring, and promoting substantially younger employees; and refusing to re-hire, recall, transfer or re-assign Russell to his former position or to other open positions for which he was qualified.

21. As a direct and proximate result of CSU's unlawful conduct, Russell suffered and will continue to suffer economic and non-economic damages, including, but not limited to, pain and suffering, and the loss of salary and benefits and other privileges and conditions of employment.

22. CSU's discriminatory actions against Russell in violation of the ADEA and Ohio Rev. Code §§ 4112.02(A) and (N) were willful, in bad faith, conducted with malicious purpose, or conducted in a wanton or reckless manner. CSU is liable for past and future economic and non-economic compensatory pursuant to Ohio Rev. Code § 4112.99 and 29 U.S.C. § 626(b), liquidated damages,[1] attorneys' fees and costs,[2] and any other legal or equitable relief that this Court deems appropriate.

SECOND CAUSE OF ACTION
(Disability Discrimination in Violation of O.R.C. Chapter 4112)

23. Russell incorporates by reference the previous paragraphs as if fully re-alleged herein.

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[1] 29 U.S.C. § 626(b).

[2] 29 U.S.C. § 626(b), *incorporating* 29 U.S.C. § 216(b) ("The court in such action **shall**, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.") (emphasis added). Additionally, notwithstanding *Drain v. Kosydar*, Franklin App. 79AP-78, 1979 Ohio App. LEXIS 10929 (10th Dist., July 31, 1979), a defendant may be liable for the plaintiff's attorneys' fees and costs regardless of statutory authority upon a finding of bad-faith, malicious purpose, or wanton and reckless behavior. *See Sturm v. Sturm*, 63 Ohio St.3d 671, 675 (1992), *citing Sorin v. Board of Education*, 46 Ohio St.2d 177, 183 (1976).

24. At all times relevant to this complaint, Russell had a record of and suffered from physical impairments which substantially limited one or more life activities, including having a heart attack and having shoulder problems which required major surgery.

25. Russell is a qualified individual with a disability within the meaning of Chapter 4112 of the Ohio Revised Code.

26. CSU was aware that Russell had a record of and suffered from physical impairments which substantially limited one or more life activities, and that he required medical treatment.

27. On or around September 5, 2012, CSU refused to accommodate Russell and terminated him from his employment because he had or was regarded as having a disability.

28. CSU replaced Russell with an employee who did not have and was not regarded as having a disability, and promoted non-disabled employees into and retained non-disabled employees in positions for which Russell was more qualified.

29. CSU has a pattern and practice of making employment decisions, such as hiring, promotion, transfer and termination decisions, on the basis of disability.

30. CSU discriminated against Russell on the basis of disability with respect to the terms, conditions and privileges of employment in violation of Ohio Rev. Code Chapter 4112 including by: making disability-related comments; subjecting him to unfair scrutiny, pay and discipline; terminating his employment; retaining, hiring, and promoting non-disabled employees; and refusing to re-hire, recall, transfer or re-assign Russell to his former position or to other open positions for which he was qualified.

31. As a direct and proximate result of CSU's unlawful conduct, Russell suffered and will continue to suffer economic and non-economic damages, including, but not limited to,

pain and suffering, and the loss of salary and benefits and other privileges and conditions of employment.

32. CSU's discriminatory actions against Russell in violation of Ohio Rev. Code § 4112.02(A) were willful, in bad faith, conducted with malicious purpose, or conducted in a wanton or reckless manner. CSU is liable for past and future economic and non-economic compensatory pursuant to Ohio Rev. Code § 4112.99, as well as attorneys' fees,[3] costs and any other legal or equitable relief that this Court deems appropriate.

THIRD CAUSE OF ACTION
(Retaliation in Violation of O.R.C. Chapter 4112 and ADEA)

33. Russell incorporates by reference the previous paragraphs as if fully re-alleged herein.

34. Russell engaged in protected activity by complaining of discrimination and harassment on the basis of age and disability to CSU.

35. CSU failed to take prompt, remedial, and appropriate steps to address the unlawful discriminatory treatment of Russell and older workers.

36. CSU retaliated against Russell because he opposed discriminatory conduct in violation of Chapter 4112 of the Ohio Revised Code, including by: unfairly changing the terms, conditions and privileges of his employment; subjecting him to unfair scrutiny, pay and discipline; denying him promotional opportunities given to candidates who did not engage in protected activity; terminating his employment; retaining, hiring, and promoting employees who did not engage in protected activity; and refusing to re-hire, recall, transfer or re-assign Russell to his former position or to other open positions for which he was qualified.

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[3] *See* n.2, *supra; see also* 42 U.S.C. § 1981a.

37. As a direct and proximate result of CSU's unlawful conduct, Russell suffered and will continue to suffer economic and non-economic damages, including, but not limited to, pain and suffering, and the loss of salary and benefits and other privileges and conditions of employment.

38. CSU's discriminatory actions against Russell in violation of Ohio Rev. Code § 4112.02(I) and 29 U.S.C. § 623 were willful, in bad faith, conducted with malicious purpose, or conducted in a wanton or reckless manner. CSU is liable for past and future economic and non-economic compensatory pursuant to Ohio Rev. Code § 4112.99 and 29 U.S.C. § 626(b), liquidated damages,[4] attorneys' fees and costs,[5] and any other legal or equitable relief that this Court deems appropriate.

FOURTH CAUSE OF ACTION
(FMLA Interference and Retaliation)

39. Russell incorporates by reference the previous paragraphs as if fully re-alleged herein.

40. CSU was aware of Russell's serious health conditions and the medical necessity of Russell taking leave for treatment.

41. Russell was entitled to a period of leave under the FMLA, 29 U.S.C. §§ 2611, *et seq.*

42. Russell provided CSU with such notice of his need for leave as was practicable under the circumstances.

43. CSU terminated Russell's employment because he took or attempted to take a period of leave to which he was entitled under the FMLA, 29 U.S.C. §§ 2611, *et seq.*

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[4] 29 U.S.C. § 626(b).
[5] *See* n.2, *supra.*

44. CSU refused to consider Russell for re-instatement to his former position because he took or attempted to take a period of leave to which he was entitled under the FMLA, 29 U.S.C. §§ 2611, *et seq*.

45. CSU interfered with and retaliated against Russell because he sought to exercise or attempted to exercise his FMLA rights, in violation of 29 U.S.C. § 2695; including by: unfairly changing the terms, conditions and privileges of employment; subjecting him to unfair scrutiny, pay and discipline; terminating his employment; retaining, hiring, and promoting employees who did not engage in protected activity; and refusing to re-hire, recall, transfer or re-assign Russell to his former position or to other open positions for which he was qualified.

46. CSU failed to take prompt, remedial, and appropriate steps to address the unlawful discrimination, interference, and retaliation.

47. As a direct and proximate result of CSU's unlawful conduct, Russell suffered and will continue to suffer economic and non-economic damages, including, but not limited to, pain and suffering, and the loss of salary and benefits and other privileges and conditions of employment.

48. CSU's discriminatory actions against Russell in violation of FMLA, 29 U.S.C. § 2615 *et seq*., were willful, in bad faith, conducted with malicious purpose, or conducted in a wanton or reckless manner. CSU is liable under 29 U.S.C. § 2617 for interest on the amount of losses described in the preceding Paragraph, liquidated damages, all fees and costs, including, but not limited to, reasonable attorney's fees,[6] expert fees, and costs, and

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[6] 29 U.S.C. § 2617(a)(3) ("The court in such an action **shall**, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant.") (emphasis added).

any equitable relief that this Court deems appropriate, including, but not limited to, front pay, employment, reinstatement, and promotion.

FIFTH CAUSE OF ACTION
(Breach of Contract)

49. Russell incorporates by reference the previous paragraphs as if fully re-alleged herein.

50. CSU and Russell entered into an agreement with respect to Russell's employment.

51. The employment agreement includes the terms and conditions contained in a document entitled *Agreement Between Cleveland State University and Service Employees International Union, District 1199 WV/KY/OH, the Health Care and Social Service Union, CTW/CLC* (the "Employment Contract").

52. The Employment Contract is in the possession of CSU, and additionally can be made available if so required.

53. The Employment Contract was in effect at the time CSU terminated Russell.

54. CSU claims that Russell was laid off.

55. If Russell is laid off, under the Employment Contract CSU is required to, among other things, transfer Russell into a posted vacant bargaining unit position for which he is immediately qualified to perform the work. *See* Employment Contract at p.41.

56. CSU failed to transfer Russell into a posted vacant bargaining unit position for which he is immediately qualified to perform the work.

57. The Employment Contract requires CSU to give credit for and otherwise pay for all time worked by Russell.

58. CSU failed to give credit for or otherwise pay Russell for all time worked.

59. By engaging in the actions complained of herein, including, but not limited to, failing to re-hire or re-assign Russell, terminating Russell without taking the actions required under

the Employment Contract and failing to give credit for or otherwise pay Russell for all time worked, CSU has breached the Employment Contract.

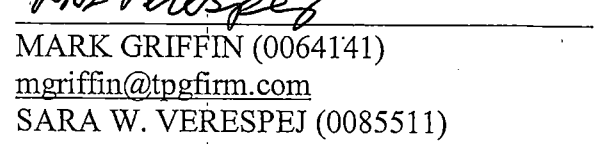
60. As a direct and proximate result of CSU's breach of contract, Russell suffered and will continue to suffer damages, including, but not limited to, the loss of salary, benefits, and other privileges and conditions of employment.

61. Russell is therefore entitled to all available remedies, including, but not limited to, compensatory damages, consequential damages, liquidated damages, and/or specific performance, and any other equitable remedies the Court deems appropriate.

CONCLUSION

Plaintiff William Russell seeks an amount in excess of $25,000 to fully, fairly and justly compensate him for injury, damage and loss, and respectfully prays that this Court enter judgment in his favor and award him past and future economic and non-economic compensatory damages, fringe benefits, consequential damages, incidental damages, liquidated damages, interest, attorneys' fees, all fees and costs, and any additional equitable relief that the Court deems appropriate, including, but not limited to, specific performance, back pay, front pay, employment, reinstatement and promotion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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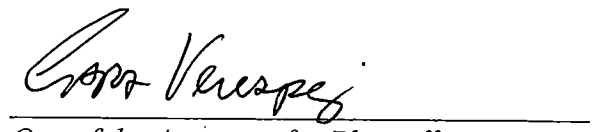

One of the Attorneys for Plaintiff