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IN THE OHIO COURT OF CLAIMS

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WILLIAM RUSSELL, Plaintiff, vs. CLEVELAND STATE UNIVERSITY, Defendant.	))))))))	CASE NO.: 2013-00138 JUDGE PATRICK M. McGRATH MAGISTRATE HOLLY T. SHAVER
STEVEN LISS, Plaintiff, vs. CLEVELAND STATE UNIVERSITY, Defendant.	))))))))	CASE NO.: 2013-00139 JUDGE PATRICK M. McGRATH MAGISTRATE HOLLY T. SHAVER

PLAINTIFFS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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ON COMPUTER

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I. INTRODUCTION

The Court should deny Cleveland State University's ("CSU" or "Defendant") Motion for Summary Judgment. CSU fired Plaintiffs Steve Liss (age 50) and William Russell (age 66) because CSU wanted its Department of Student Life ("DSL") to get younger. CSU hired Willie Banks, a substantially younger dean, who referred to older employees as "elephants" and "old dogs."[1] Under the false claim of a "reorganization", CSU fired only older workers and hired only younger workers:

DSL Positions Eliminated	Hired Into New Open DSL Positions
Steve Liss (age 50)	Bob Bergman (age 32)
William Russell (age 66)	Jamie Johnston (age 29)
Mary Myers (age 50)[2]	

CSU admitted in deposition that a reasonable person could look at the "100% correlation" between age and terminations and conclude that age discrimination had occurred.[3]

CSU's falsity also precludes summary judgment.[4] Despite claiming CSU terminated Plaintiffs based on a June 2012 consulting report, Banks actually designed the new structure for DSL that eliminated Plaintiffs' jobs in April 2012.[5] Then he hired his "close friend," T.W. Cauthen, for $3,000 to issue a purportedly "independent" consulting report that copied Banks's predetermined structure and job descriptions.[6] James Drnek, Banks's supervisor, later rewrote the minimum qualifications for the new positions created by the purported "reorganization" to make sure that Plaintiffs were not eligible for rehire, then admittedly lied to his superior to justify Plaintiffs' terminations.[7] When Plaintiffs complained of discrimination, CSU retaliated by refusing to rehire them, even though CSU's rules obligated it to do so.[8] Finally, CSU knew that Russell

[1] Sections II(E) & III(C)1(d), *infra*.
[2] The ages provided in this chart are taken from Plaintiff's Consol. Dep. Ex. 327.
[3] Vartorella Dep. 161:12-19; Plaintiff's Consol. Dep. Ex. 327.
[4] *See, e.g., Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 2109 (2000).
[5] Plaintiff's Consol. Dep. Ex. 317, Banks Dep. 116:12-25.
[6] Banks Dep. 87:4-5.
[7] Section II(O), *infra*.
[8] Section III(I), *infra*.

needed FMLA leave (he had a heart attack at a CSU function), but Banks told Liss not to accommodate Russell's medical conditions.

Plaintiffs have overwhelming evidence preventing summary judgment including statistics of 100% correlation between age and termination, specific bigoted remarks, younger comparators who were given promotions without asking, and admitted false statements by decision-makers.[9] Summary judgment should be denied.

II. FACTS

A. CSU Fired Only Older Workers and Promoted Only Younger Workers.

In 2012, DSL physically separated the three older employees (Liss, age 50, Mary Myers, age 50, and Russell, age 66)[10] from the two younger employees (Bob Bergman, age 32, and Jamie Johnston, age 29)[11] who worked in a different hallway. In February 2012, CSU hired Willie Banks as Associate Dean of Student Life to supervise the Department. Banks took an office in the "younger worker" hallway,[12] and by April had decided on a new structure for the Department that eliminated the jobs of each of the older workers despite their superior skills and experience.[13] One hundred percent of the younger workers were promoted, while all the older workers lost their jobs.[14]

B. Liss, a Successful 19-Year Employee, Never Missed a Goal.

Liss served CSU's DSL for more than 19 years.[15] Liss ran CSU's Center for Leadership and Service, and later served as CSU's Director of Student Involvement for six years.[16] Liss consistently earned excellent performance reviews, such that "Liss met every goal for his prior

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[9] *See, e.g.*, Vartorella Dep. 158:20-24 & 159:14-20; Liss Dep. 22:16-20, 25:6-10, 25:19-24 & 230:16-18; Banks Dep. 178:18-179:20; Drnek Dep. 137:23-139:11, 140:19-141:15 & 151:12-15.
[10] Drnek Dep. 72:2-19; Plaintiff's Consol. Dep. Ex. 500.
[11] Drnek Dep. 72:2-19; Plaintiff's Consol. Dep. Ex. 500.
[12] Drnek Dep. 72:2-19; Plaintiff's Consol. Dep. Ex. 500.
[13] Vartorella Dep. 161:12-19; Plaintiff's Consol. Dep. Ex. 327.
[14] *See, e.g.*, Vartorella Dep. 158:20-24; Banks Dep. 178:18-179:20; Liss Dep. 8:16-9:6.
[15] Liss Dep. 32:20-23.
[16] *See, e.g.*, Liss Dep. 256:16-24.

year" and "every single evaluation criteria . . . was 'Met Expectations' or higher."[17] Banks testified that there were no goals that Banks developed that Liss had ever failed to meet.[18]

C. Russell, a 40-Year Employee, Increased Greek Life Ten-Fold and Won Numerous Awards.

Russell, a member of CSU's first entering class, is a dedicated alumnus who "bleeds green"—the colors of CSU. Russell earned his bachelor's and law degrees from CSU, and beginning in 1979, served as an Adjunct Law Professor at CSU.[19] In 2000, out of his loyalty to CSU, Russell left his law practice to take on the role of CSU's Greek Life Coordinator.[20] He consistently earned high performance reviews in this role.[21] In 2005, 2007 and 2012, he was nominated for CSU's "Distinguished Service Award,"[22] in 2006, he received Delta Sigma Phi's national "Lifetime Achievement Award,"[23] in 2008, he received Phi Delta Psi's national "Founder's Achievement Award,"[24] and in 2009, he received Greek Council's "Lifetime Service Award."[25] Russell grew the number of Greek students on campus from 28 to 289[26] without a single alcohol-violation[27] and initiated new Greek programming that did not exist previously.[28]

D. CSU Knew That Russell Had Plans To Take FMLA Leave.

Russell suffered a heart attack at a CSU function in October 2011.[29] In early 2012, Russell learned that he would need additional surgery and in the spring and summer of 2012, he underwent

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[17] Drnek Dep.28:14-20. *See also* Plaintiff's Consol. Dep. Exs. 131 & 132.
[18] Banks Dep. 37:2-6 & 68:20-23.
[19] *Affidavit of William Russell* ("Russell MSJ Aff."), attached to *Plaintiff William Russell's Motion for Partial Summary Judgment*, filed on September 29, 2014, at ¶¶2-3.
[20] Russell Dep. 4:10-13.
[21] Russell MSJ Aff. at Exhibit 1-1.
[22] Russell MSJ Aff. at Exhibit 1-2.
[23] Russell MSJ Aff. at ¶9.
[24] Russell MSJ Aff. at Exhibit 1-3.
[25] Russell MSJ Aff. at ¶11.
[26] Russell Dep. 44:24-45:8.
[27] Drnek Dep. 60:20-24.
[28] Russell Dep. 37:21-38:3 (Russell was responsible for starting Greek Week, Greek Fest, the Greek awards banquet, Greek Games, Greek Academic Challenge and Greek Rock). *See also* Liss Dep. 161:1-15 ("Bill brought everything to the table that we asked him to; enthusiasm, support. The size of the Greek community exploded under his leadership from 2000 to 2011. * * * I routinely had people from other offices compliment him; the athletic director, the head basketball coach, the folks in Admissions, Alumni Affairs, the President's office. And so when I look back on my time working with Bill, I'm amazed at all he was able to do as a part-time staff person.").
[29] Liss Dep. 76:17-20.

tests to ensure his heart was strong enough for the procedure.[30] Ultimately, the surgery was scheduled for September 2012.[31] Russell communicated his health conditions, including his need for FMLA leave related to the surgery to Drnek and to Banks.[32] Banks knew that Russell needed surgery in 2012 and admits that he had this knowledge prior to the decision to terminate Russell.[33] Banks also instructed Liss that Liss should not accommodate any of Russell's medical issues.[34] Banks even kicked Russell out of Banks's office and told Russell "[g]o back to your office and get healthy[.]"[35]

E. Banks Showed His Prejudice Against Older Workers by Making Specific Age-Related Remarks in Reference to Liss, Russell and Myers.

Banks regularly made age-related remarks,[36] including claiming that Russell and Myers were "old dogs" who could not "learn new tricks."[37] Banks even called Russell and Myers "elephants";[38] told Russell that he needed to "[g]et[] into the 21st Century" and "get rid of your old school methods";[39] criticized both Russell and Myers for not being "up to date[]" and for being "old fashioned";[40] and rejected Russell's ideas, claiming they were "old school."[41]

F. In April 2012, Banks Designed the Re-Organization and Drafted Job Descriptions That Eliminated Only the Jobs of the Older Workers.

On April 24, 2012, Banks designed the reorganization in a document titled "Org Chart AD."[42] Banks's new organizational chart put Banks—as the Associate Dean of Students—at the top with three direct reports: one for Student Organizations, one for Student Activities and one for

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[30] *See, e.g.*, Russell Dep. 161:17-21.
[31] Russell Dep. 161:17-21.
[32] Russell Dep. 191:5-12; *Affidavit of William Russell* ("Russell BIO Aff."), attached hereto.
[33] Banks Dep. 144:17-145:3.
[34] Liss Dep. 78:22-79:15; *Affidavit of Steven Liss* ("Liss BIO Aff."), attached hereto.
[35] Russell Dep. 191:5-192:9.
[36] Liss Dep. 74:20-75:11.
[37] Liss Dep. 230:16-18.
[38] Liss Dep. 22:16-20, 25:6-10 & 25:19-24.
[39] Russell Dep. 169:19-25; Banks Dep. 196:3-20 & 198:3-14.
[40] Liss Dep. 9:22-10:4 & 11:18-23.
[41] Russell Dep. 80:18-81:22.
[42] Banks Dep. 116:23-25; Plaintiff's Consol. Dep. Ex. 317.

Student Civic Engagement.[43] Each of the three vectors had a Manager, who reported to Banks and a Coordinator, who reported the respective Manager.[44] Banks also targeted his older workers in April by rewriting their job descriptions, but not those of the younger workers.[45]

G. In May, CSU Meets To Review How DSL Will Be Re-Organized and To Target The Job Descriptions for the Older Workers To Be Terminated.

On May 1, 2012, Drnek emailed Banks, Steve Vartorella (the HR representative assigned to DSL), Denise Mutti (a higher level HR representative) and Jean McCafferty (whose responsibilities included setting compensation) to meet on May 14 to discuss the "reorganization plan."[46] During the May 14 meeting, the new structure was announced and McCafferty was asked to work on job descriptions for the three new openings reporting directly to Banks.[47] Later that day, Banks emailed McCafferty the job descriptions he had already prepared for those positions.[48]

Despite the May 14 Reorganization Meeting, Banks falsely claimed under oath that he "never had any discussions about restructuring until after the [Cauthen] report."[49]

H. After Deciding the Re-Organized Structure and Job Descriptions, Banks Recommends That CSU Hire His Long-Time Close Friend—T.W. Cauthen—To Write a Report To Support the Decisions That Had Already Been Made.

Without issuing a "request for proposal,"[50] or considering anyone else,[51] Banks recommended that CSU pay his close friend, T. W. Cauthen, a mere $3,000 to issue a consulting report concerning DSL. Cauthen had never worked for either an urban or a commuter university,[52] did not have his own consulting practice,[53] and had not even received his diploma.[54] Banks had

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[43] Plaintiff's Consol. Dep. Ex. 317.
[44] Plaintiff's Consol. Dep. Ex. 317.
[45] Plaintiff's Consol. Dep. Exs. 318 & 321; Banks Dep. 123:1-22.
[46] Plaintiff's Consol. Dep. Ex. 238; McCafferty Dep. 42:25-45:2.
[47] McCafferty Dep. 50:22-52:22.
[48] Plaintiff's Consol. Dep. Ex. 218; McCafferty Dep. 43:25-44:11.
[49] Banks Dep. 91:13-16.
[50] Banks Dep. 88:12-15.
[51] Banks Dep. 90:25-91:2
[52] Banks Dep. 88:12-15 & 89:22-90:6; Liss Dep. 82:20-23.
[53] Banks Dep. 88:1-3.
[54] Cauthen Dep. 25:1-7.

known T.W. Cauthen for more than 10 years; Banks travelled to Atlanta with Cauthen for "New Year's or Christmas";[55] and Cauthen flew to Cleveland with Banks after Banks was hired to view an apartment with Banks.[56] When Cauthen came to Cleveland to conduct his investigation, Cauthen stayed in Banks's apartment.[57] Banks never disclosed his close relationship with Cauthen to CSU.[58]

I. Banks Told Cauthen What He Wanted Cauthen's Report To Recommend, Including That Banks Encouraged Cauthen To Scrutinize the Older Workers.

Banks told Cauthen in writing[59] that Cauthen should recommend a reorganization of DSL. Banks provided Cauthen with job descriptions for the Department's three oldest employees—Liss, Russell and Myers, but did not provide job descriptions for the other, younger employees.[60] Banks also provided Cauthen with confidential HR documents concerning Russell.[61] Cauthen only reviewed the documents given to him by Banks and only interviewed the employees suggested by Banks. Cauthen sought no independent information.[62] Banks edited Cauthen's drafts prior to submission of the final report.[63] Most telling of all, **the structure Cauthen recommended was functionally identical to Banks's "Org Chart AD" document, which he had created in April 2012**:[64]

> Q: So the final report from the leadership consultant is the same as Exhibit 317 with respect to the Associate Dean, the reporting authority, the reporting relationships of the three vectors and the existence of a coordinator for each of those three vectors, correct?
>
> A: Correct.[65]

Additionally, the consultant's report contains numerous false statements.[66] Notably, less than a year

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[55] Banks Dep. 80:8-16 & 83:4-13.
[56] Banks Dep. 81:6-20.
[57] Banks Dep. 82:22-83:3.
[58] Banks Dep. 110:1-19.
[59] Plaintiff's Consol. Dep. Exs. 16 & 35.
[60] Banks Dep. 160:8-161:15 & 162:23-163:9.
[61] Cauthen Depo. 156:16-158:2.
[62] Banks Dep. 162:17-163:12 & 205:17-22.
[63] Banks Dep. 160:2-7.
[64] Banks Dep. 222:22-223:1 (Banks "understood the Cauthen report to be consistent with the leadership and reporting structure that [he] created in Exhibit 317[.]").
[65] Banks Dep. 221:1-8. *See also* Liss Dep. 88:7-11.

after the Cauthen report, CSU spent $47,000 for a new consulting study of DSL.[67] Banks was not permitted to participate in, or even review, that report.[68]

J. Age Discrimination – CSU Subjects Plaintiffs To Unfair Scrutiny.

Banks and CSU only asked the older workers to complete questionnaires; only attempted to reprimand the older workers; only rewrote the job descriptions for the older workers; and only singled out the job descriptions for the older workers to Cauthen for his re-organization.[69] The younger workers were never even reviewed as part of Cauthen's study, but were simply hired into the new open jobs.

K. Liss Complained About Banks's Discriminatory Conduct.

Banks's discrimination against older workers included his bigoted comments and reprimands for the older—but not the younger—workers.[70] Liss complained about Banks's age discrimination to at least three CSU representatives including HR representative Steve Vartorella[71], Drnek.[72] and CSU's general counsel, Sonali Wilson.[73]

L. Banks and Drnek Seek To Create Five New Open Positions While Eliminating the Positions of the Older Workers.

The Cauthen Report was issued on June 15. On June 25, Drnek and Banks recommended

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[66] The report claimed that Russell spent most of his time with Greek alumni when in reality, Russell spent less than five percent of his time with Greek alumni and usually in evenings or on weekends. Russell Dep. 85:25-86:12. The report also claimed that Russell has no experience in Greek Life; this is not true—Russell was a national officer for at least eight or nine years. Russell Dep. 86:13-22. Finally, Cauthen falsely stated in the report that no educational workshops were being held for students in the student organizations area. Liss Dep. 86:4-13.

[67] Banks Dep. 30:17-31:1 (CSU's President has requested a second report regarding the Department of Student Life).

[68] Banks Dep. 33:7-13.

[69] Banks Dep. 163:3-23.

[70] Banks Dep. 153:16-24, 224:10-14 & 225:25-226:7.

[71] Liss Dep. 100:21-101:7. Liss met with Vartorella on or around June 4 to discuss two issues,71 one of which was "to tell him about the kind of treatment we were receiving[,]" including that Banks was "using language that [Liss] felt uncomfortable with[.]" Liss Dep. 40:21-41:4. The other issue addressed in this conversation was whether Liss was required to follow Banks's order to falsely reprimand Russell and Myers. Liss Dep. 40:21-25. Vartorella told Liss that he had no recourse and was required to do as Banks ordered. Liss Dep. 49:2-18. Within this conversation, Liss told Vartorella about the age-based comments Banks would make frequently. Liss Dep. 58:5-59:9. Vartorella's only response was to encourage Liss to discuss the issues with Banks's supervisor, Drnek.

[72] Liss Dep. 59:19-60:1. *See also* Liss Dep. 97:13-17 & 177:21-178:5 (complaints to Drnek about Banks's discriminatory order to falsely reprimand Russell and Myers).

[73] Liss Dep. 46:18-47:20 & 220:10-16. Liss scheduled a meeting with the Affirmative Action representative but was terminated prior to the meeting occurring. Liss Dep. 46:18-47:20.

restructuring DSL, including creating five new jobs and terminating Liss, Russell and Myers—the older workers. The structure created by Banks in April, copied by Cauthen, and adopted by Drnek on June 25 created: 1) a new Assistant Dean of Students for Student Activities position; 2) a new Assistant Dean of Students for Student Organizations position; 3) a new Assistant Dean of Students for Student Engagement position; 4) a new Coordinator of Student Activities position; and 5) a new Coordinator of Commuter Affairs & Student Center Programs position.[74]

M. CSU's Sole Purported Reason Was the Sham Cauthen Report.

CSU claims that the "sole reason" for Plaintiffs' termination was the reorganization of the Department based on the Cauthen Report.[75] The decision-makers with respect to Liss's and Russell's terminations have testified that Plaintiffs were not fired for performance reasons.[76]

N. CSU Considered the Ages of the Employees Terminated and the Ages of the Employees Promoted.

CSU specifically considered the ages of the employees affected by the reorganization when it created a chart highlighting the ages of each individual terminated and of each individual retained.[77] The HR representative assigned to DSL, Steve Vartorella, provided this age-chart to CSU's general counsel in connection with evaluating the reorganization and the terminations of Liss and Russell.[78] CSU does not deny that the chart constitutes an evaluation of the employees being terminated, including Liss and Russell, based on their ages.[79] CSU likewise admits that the chart confirms that every staff member terminated was 50 or older and that every person assuming most or all of those employees' duties was 35 or younger.[80]

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[74] *See generally* Plaintiff's Consol. Dep. Ex. 15; Banks Dep. 218:7-221:8. *See also* Banks Dep. 218:7-221:8 (Banks "understood the Cauthen report to be consistent with the leadership and reporting structure that [he] created in Exhibit 317[.]").
[75] Banks Dep. 39:22-25 & 143:24-144:6.
[76] *See, e.g.*, Banks Dep. 39:2-7; Vartorella Dep. 80:5-8; Drnek Dep. 248:17-249:3.
[77] Plaintiff's Consol. Dep. Ex. 327.
[78] Vartorella Dep. 144:2-5.
[79] Vartorella Dep. 144:9-12.
[80] Vartorella Dep. 158:20-159:2.

O. In Order To Terminate Liss and Russell, CSU Subsequently Changed the Minimum Qualifications of the New Positions and Misrepresented Plaintiffs' Qualifications.

On August 9, Drnek met with George Walker (then CSU's Interim Provost and VP for Academic Affairs)[81] for approval of Plaintiffs' terminations. By that time, Drnek had changed the job descriptions finalized in June 2012 and added new "minimum qualifications."[82] Drnek falsely told Walker that Liss did not meet the newly–added minimum requirements.[83] CSU now admits that every reason for not placing Liss in the open positions is false.[84]

P. Age Discrimination: CSU Created Five New Open Positions, Excluded Older Workers and Filled the New Positions With Younger Less-Qualified Workers.

After firing Liss and Russell, CSU did not consider them for the new open positions. In stark contrast to CSU's treatment of Liss and Russell, both Bergman and Johnston were promoted to Assistant Dean positions without responding to any posting, interviewing or even asking for the new positions:[85]

> Q: So while the younger employees who you supervised [Bergman and Johnston] were promoted and got pay raises without interviews or requests, you never interviewed or asked for any interest by any of your older employees for those same positions, correct?
>
> A: Correct.[86]

Q. In Violation of Its Own Policies, CSU Refused to Place Liss in Open Positions Within DSL for Which He Was Qualified.

CSU's policy manual requires that in the event it terminates professional staff like Liss as a result of a reorganization, CSU "**shall make a reasonable effort to secure alternative appointments within the University in open positions for which the affected individual is**

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[81] *See, e.g.*, Drnek Dep. 66:21-25.
[82] *See, e.g.*, Drnek Dep. 131:19-132:1 & 132:18-133:2; Plaintiff's Consol. Dep. Ex. 218.
[83] Plaintiff's Consol. Dep. Ex. 15; Drnek Dep. 151:12-15.
[84] Drnek Dep. 137:23-139:11 & 140:19-141:15
[85] Banks Dep. 59:22-60:4. *See also* Banks Dep. 59:10-21 (Banks did not consider any of the older employees within the Department for the positions to which Bergman and Johnston were promoted) & 178:18-179:20 (admitting differential treatment of Bergman in comparison to Liss because Bergman received a promotion without even asking and Banks did not even ask Liss if he was interested in the position to which Bergman was promoted).
[86] Banks Dep. 60:5-11.

qualified."[87] Other than telling Liss to apply like any other applicant, CSU made no effort to place Liss into any position.[88]

CSU simply refused to place Liss in open positions for which he was qualified.[89] Liss ultimately submitted applications for the three new positions—Assistant Dean for Student Engagement, Coordinator for Student Activities and Coordinator for Commuter Affairs & Student Center Programs.[90] Despite his superior qualifications, he was only granted an interview for the Coordinator of Commuter Affairs & Student Center Programs position.[91]

R. CSU Retaliated Against Liss For His Complaints of Discrimination.

During the application process related to positions Liss had applied for, Liss sought CSU's commitment that he would not be discriminated or retaliated against.[92] The search committee refused to provide such assurances.[93] In fact, because of this simple request, CSU refused to move Liss to the next round of the process:

> Q. So talking about that [the request for assurances against illegal conduct] was a negative factor?
>
> A. I believe that it didn't work in his favor because other candidates who were interested in the position truly talked about why they were interested in the position and it didn't involve, you know, talking about protection from harassment and that kind of stuff. So -- so, yeah, I think it did adversely affect Steve.[94]

Instead, CSU hired, into the positions Liss had applied for, three substantially younger and less-qualified individuals, including two individuals Jill Courson (the new Assistant Dean for Student Engagement) and Melissa Wheeler (the new Coordinator for Commuter Affairs & Student Center

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[87] Amended Complaint at Exhibit A (emphasis added).
[88] Drnek Dep. 150:8-151:11; Banks Dep. 175:8-20; Vartorella Dep. 98:14-22 & 211:5-8.
[89] Banks Dep. 204:25-203:3 (there is no question that Liss met the minimum qualifications for the Coordinator for Student Activities, the Coordinator for Commuter Affairs & Student Center Programs and the Assistant Dean for Student Engagement positions); Bergman Dep. 54:8-23 (Liss met minimum qualifications for Coordinator of Student Activities position).
[90] Liss Dep. 243:16-22.
[91] Liss Dep. 242:4-14.
[92] Liss Dep. 243:6-15.
[93] Liss Dep. 243:6-15.
[94] Drnek Dep. 176:11-19.

Programs) who had no previous experience at a commuting or urban universities.[95]

S. CSU Violated Its Contract With Russell.

Pursuant to Russell's contract with CSU,[96] in the event of a reorganization impacting Russell, CSU was required to transfer him into vacant posted bargaining unit positions for which he was qualified. CSU failed to do so, instead transferring all of Russell's duties to a substantially younger new hire (and long-time friend of Banks),[97] Jill Courson. Moreover, CSU had no specific discussions with Russell concerning any other job openings for which he was qualified.[98]

T. Liss and Russell Grieved Their Terminations.

Both Liss and Russell exhausted the grievance process CSU afforded them.[99]

U. CSU Recognizes That the Re-Organization of DSL Was A Sham.

Every administrator involved in the "reorganization" of DSL has left or is leaving CSU, or has been reassigned. Drnek has left CSU and now works in Bakersfield, California.[100] Banks was denied promotion into Drnek's position and is actively interviewing with other schools.[101] Banks no longer reports directly to Drnek's replacement. Vartorella was reassigned and no longer supports DSL. Most tellingly, less than a year after paying Cauthen $3,000 for his "report," CSU hired a new consultant for $49,000 to conduct a new study of DSL. CSU recognizes that the conduct of Drnek, Banks and Vartorella was wrongful, but without the action of this Court, CSU will not correct the damage it has caused Liss and Russell.

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[95] Banks Dep. 202:14-22.
[96] *See* Complaint at ¶¶51-52.
[97] Banks Dep. 173:10-19.
[98] Russell Dep. 204:21-24 (was never offered a position at CSU after his termination). *See also* Russell Dep. 202:23-203:5 (Russell was told during the termination meeting that there were no part-time positions open and therefore CSU could not place him in any open position); Banks Dep. 175:21-23 (Banks never made any efforts to help Russell find a job).
[99] Plaintiff's Consol. Dep. Exs. 330, 333, 335, 460 & 461.
[100] Drnek Dep. 161:20-24.
[101] Banks Dep. 27:12-20.

III. LAW & ARGUMENT

A. The Summary Judgment Standard Is Onerous.

Summary judgment is proper under Ohio Rule of Civil Procedure 56 only if a court determines that: "(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party."[102]

B. Summary Judgment Is Not Appropriate Where, As Here, the Question of Discriminatory Motive Is at Issue.

It is well-established that deciding cases on summary judgment is inappropriate for cases that turn on unlawful motive or intent.[103] Such claims depend on drawing an inference of the perpetrator's state of mind, and inferences must be drawn in favor of the party opposing summary judgment.[104] The Sixth Circuit particularly has indicated its dissatisfaction with entry of summary judgment in cases involving allegations of discrimination and issues of intent and motive.[105] In *Bloch v. Ribar*, the Court noted, "claims involving proof of a [defendant's] intent seldom lend themselves to summary disposition."[106] Thus, "summary judgment on the merits is ordinarily inappropriate once a *prima facie* case has been established."[107]

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[102] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267, 274 (1977) (discussing Civ. R. 56(C)).
[103] *See Lenz v. Erdmann Corp.*, 773 F.2d 62, 64 (6th Cir. 1983); *Proffitt v. Anacomp, Inc.*, 747 F. Supp. 421, 427 (S.D. Ohio 1990) ("[I]n general, summary judgment is an inappropriate tool for resolving claims of employment discrimination * * * [D]eterminations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder. * * * Thus, if any (material) facts are in dispute, summary judgment is generally inappropriate.") (quoting *Thornbrough v. Columbus and Greenville R.R. Co.*, 760 F.2d 633, 640-41 (5th Cir. 1985)).
[104] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St. 3d 482, 485, 696 N.E.2d 1044, 1046 (1998).
[105] *Lenz v. Erdmann Corp.*, 773 F.2d 62, 64 (6th Cir. 1985).
[106] *Bloch v. Ribar*, 156 F.3d 673, 681-82 (6th Cir. 1998) (citing *Curtis v. Story*, 863 F.2d 47, *3 (6th Cir. 1988)).
[107] *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 564 (6th Cir. 2004) (citing *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9th Cir. 1985)).

C. Plaintiffs May Prove Discrimination With Either Direct or Indirect Evidence.

R.C. 4112.02(A), as well as the ADEA, prohibits employers from discriminating based on age when making employment decisions.[108] There are two primary methods for proving discriminatory intent: the "direct" evidence method and the "indirect" evidence method.[109] A plaintiff may pursue his evidentiary burden under either method, or under both.[110] Under the direct evidence method, a plaintiff may offer "evidence of any nature"—direct, circumstantial, or statistical—to "directly" prove the ultimate issue of unlawful intent.[111] Here, Plaintiffs' direct evidence will include CSU's testimony that there is a "100 percent correlation" between the age of employee and termination. Importantly, "'direct evidence' refers to a **method** of proof, **not a type** of evidence."[112] This method differs from the indirect evidence method, which uses a multi-factor burden-shifting scheme to "indirectly" prove unlawful intent by eliminating common legitimate motives.[113]

1. Plaintiffs Have Direct Evidence of Age Discrimination.

Here, there is a direct and absolute correlation between age and termination. In other words, zero older workers were promoted, and zero younger workers were terminated. In "the employment setting, where the inexorable zero exists, the *prima facie* inference of discrimination becomes strong."[114] The Sixth Circuit has held that the inexorable zero is "virtually impossible to rebut."[115]

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[108] R.C. 4112.02(A). Courts have generally adopted the federal procedural framework for proving discrimination claims when analyzing Ohio's prohibition against employment discrimination. *See, e.g., Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Com.*, 66 Ohio St. 2d 192, 196, 421 N.E.2d 128, 131 (1981); *Ahern v. Ameritech Corp.*, 137 Ohio App.3d 754, 769, 739 N.E.2d 1184, 1194 (2000).

[109] *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 581-86, 664 N.E.2d 1272, 1276-79 (1996).

[110] *See Mauzy*, 75 Ohio St.3d at 581-86,

[111] *Mauzy*, 75 Ohio St.3d at Syllabus ¶1.

[112] *Id.* (emphasis added). The *Mauzy* court, in clarifying the meaning of "direct evidence" as it is used in reference to the "direct evidence method," emphasized that the term "is, in a sense, a misnomer." *Id.* at 586. It does not refer to "direct evidence" as the term is traditionally used relative to circumstantial evidence, *i.e.*, it does not refer to that type of evidence from which the factfinder need not draw any inference to establish the fact for which the evidence is offered. *Id.*

[113] *Id.* at 581-85.

[114] *Dussault v. RRE Coach Lantern Holdings, LLC*, 2014 ME 8, 2014 Me. LEXIS 9, ¶55 (quoting *Int'l Bhd. Of Teamsters v. U.S.* 431 U.S. 324, 342, n.23 (1977)). Unreported cases attached hereto as Exhibit [illegible].

a. Inexorable Zero: Only Older Workers Were Terminated.

Here, CSU's HR representative testified that 100% of the workers terminated were over the age of fifty:

> Q: So in looking at Exhibit 327 and comparing the workers to be laid off, first of all, every worker to be laid off is age 50 or older, correct?
>
> A: Correct.
>
> Q: And every person who is assuming most or all of their duties is aged 35 or younger, correct?
>
> A: Correct.[116]

b. Inexorable Zero: Only Younger Workers Were Promoted.

CSU's HR representative also testified that only younger workers were promoted:

> Q: So as between those two columns, it's true that there's 100 percent correlation between the age of the person being laid off being over the age of 50 and the age of the person assuming most of the duties as being aged 35 or younger correct?
>
> A: That is correct. [117]

c. Summary Judgment Not Available: CSU Admits That a Reasonable Person Could Conclude That Age Was a Factor in Plaintiffs' Terminations.

CSU's HR representative further testified that, based on the data he created in Exhibit 327, a reasonable person could conclude that age was a factor in the terminations:

> Q: And by that you mean someone reading the document, it would not be unreasonable to look at the face of it and conclude that age [was] a factor in leading to the layoffs, correct? That's a reasonable interpretation?
>
> A: Could be.
>
> Q: You wouldn't dispute it, correct?
>
> A: No. I would not dispute it.[118]

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[115] *EEOC v. Atlas Paper Box Co.*, 868 F.2d 1487, 1501 (6th Cir. 1989). The Supreme Court has noted that "fine tuning of the statistics" is not necessary in the face of "'the inexorable zero.'" *Teamsters*, 431 U.S. at 342 n.23. *See also United States v. Gregory*, 871 F.2d 1239, 1245 n.20 (4th Cir. 1989) (same). In cases, such as this one, the "inexorable zero speaks volumes" and establishes evidence of discrimination. *Barner v. City of Harvey*, 1998 U.S. Dist. LEXIS 14937, *160 (N.D. Ill.Sept. 16, 1998)

[116] Vartorella Dep. 158:20-59:2. Drnek Dep. 79 ("a hundred percent of the people who were negatively affected by the reorganization and reported to [Banks] were 50 or older.")

[117] Vartorella Dep. 159:14-20. Drnek Dep. 79:13-19.

CSU admits that it would "not dispute" the "reasonable interpretation" that "age was a factor" in terminating Plaintiffs. Thus, summary judgment is not available.

d. <u>Summary Judgment Not Available: Age-Related Comments Are Supplemental Direct Evidence of Discrimination.</u>

Defendant's conduct and comments reflecting age-based stereotypes constitute additional direct evidence of age discrimination.[119] Banks frequently used discriminatory language in the workplace. Banks used ageist language, saying, for instance, "you can't teach old dogs new tricks,"[120] describing the older employees "elephants"[121] and "old fashioned," and denigrating their programs as "out-dated."[122] Banks invoked ageist stereotypes in Liss's work evaluation.[123] These are not stray remarks because "under Ohio law, 'age related comments directed toward the employee may support an inference of age discrimination.'"[124] "If [the Defendant] actually made the statements allegedly reported by [the Plaintiff], a jury could take those statements alone as proof of the existence of a fact discriminatory motive without requiring any inferences."[125] Far from being "stray remarks," Banks's comments: 1) were made by the person who designed the reorganization; 2) were made in the workplace; 3) concerned specific employees; 4) related to their work performance; 5) reflected a bias against older workers and an adoption of discriminatory age-ist stereotypes; and 6) occurred contemporaneously with the decision to terminate the older workers and promote the younger workers. CSU's bigoted comments are just one additional source of direct evidence and by themselves, defeat summary judgment.

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[118] Vartorella Dep. 161:12-19.

[119] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 1791 (1989) (holding performance criticisms voiced while the plaintiff was being considered for a promotion that were based in common stereotypes permitted the inference that discrimination was the motivating factor behind the denial of the promotion, even if the criticisms were true).

[120] Liss Dep., p. 230.

[121] Liss Dep., pp. 24-25.

[122] *See, e.g.*, Russell Dep. 169:19-25 & 170:6-10.

[123] Plaintiff's Consol. Dep. Ex. 133 (Banks's comments included "Steve needs to be more creative and up to date in his work. He needs to embrace technology, and programs and services for the newer generation of students. * * * [Liss's] staff . . . has struggled with technology and has difficulty dealing with change.").

[124] *Coburn v. Rockwell Automation, Inc.*, 238 Fed. App'x 112, 117(6th Cir. 2007) (internal citations omitted).

[125] *Id.* at 119.

D. Plaintiffs Have Overwhelming Indirect Evidence of Discrimination.

Plaintiffs meet the non-demanding standard under Ohio law for a discriminatory termination: (1) Plaintiffs are 40 years old or older; (2) Plaintiffs were qualified for the positions they held; (3) Plaintiffs suffered an adverse employment action; and (4) (a) Plaintiffs were replaced by a substantially younger person, **or** (b) Plaintiffs were treated worse than a similarly-situated, substantially younger employee.[126] There is no dispute as to prong one: Liss was age 50, Russell was age 66.[127] As to prong two, CSU admits they were qualified for the positions they held and gave both Liss and Russell outstanding annual evaluations.[128] As to prong three, Liss and Russell suffered adverse employment actions when they were: 1) subjected to discriminatory scrutiny and review; 2) terminated from their jobs; and 3) denied rehire into other open positions. Liss and Russell satisfy the fourth prong as to each independent adverse employment action because they were treated differently than younger workers Bergman and Johnston:

1. **Discriminatory Scrutiny and Review.** Banks only reprimanded employees over the age of 50 and only targeted the job descriptions of employees over the age of 50, but not Bergman and Johnston. CSU only sent Cauthen the job descriptions of the older workers, but not Bergman or Johnston.[129] CSU only asked Cauthen to "reorganize" the jobs of the older workers but not Bergman or Johnston[130].

2. **Discriminatory Termination.** CSU only terminated workers over the age of 50, but promoted all of the workers under the age of 35, which CSU admits allows a reasonable inference of age discrimination.[131]

3. **Discriminatory Refusal To Rehire Into Open Positions.** CSU sought out and

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[126] *See, e.g., Mauzy*, 75 Ohio St.3d at 582; *Sherman v. American Cyanamid Co.*, 1999 U.S. App. LEXIS 21086, *5-6 (6th Cir. 1999) (internal citations omitted); *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 371 (6th Cir. 1999).
[127] Plaintiff's Consol. Dep. Ex. 327.
[128] Drnek Dep. 28:14-20; Banks Dep. 37:2-6 & 68:20-23; Plaintiff's Consol. Dep. Exs. 131 & 132.
[129] Banks Dep. 160:8-161:15 & 162:23-163:9.
[130] Banks Dep. 162:17-163:23.
[131] Vartorella Dep. 161:13-19; Plaintiff's Consol. Dep. Ex. 327.

promoted—without request and against policy—Bergman and Johnston into two new positions, but denied Plaintiffs even the chance to discuss those or other new, open positions for which they were qualified. Then CSU, after determining that Liss was qualified for three other positions, denied him rehire in favor of new employees under the age of 35, who had substantially less experience. Similarly, Russell was replaced by Jill Courson, under the age of 35, who did not meet the minimum required qualification of having prior experience at an urban and commuter institution. Thus, Plaintiffs have established a *prima facie* case on each of these three categories of discriminatory employment actions.

E. Defendant Did Not Ask for Summary Judgment – and Has Not Proffered Reasons – for CSU's Discriminatory Scrutiny and Failure To Rehire.

CSU's Motion addressed only the terminations of Plaintiffs. CSU did not address its discriminatory: 1) unfair scrutiny and 2) failure to rehire. Drnek conceded that he "did not hold Jamie Johnston and Bob Bergman to the same standards that [he] held Steve Liss and Bill Russell."[132] Because CSU has not sought summary judgment and has not produced non-discriminatory reasons for its discriminatory scrutiny and failure to rehire, it has failed to rebut Plaintiff's *prima facie* case.

F. Defendant's Purported Reasons for Terminating Plaintiffs Are Pretexts for Age Discrimination and Prevent Summary Judgment.

1. Plaintiffs Have Produced Overwhelming Evidence That Defendant's Stated Reason for Terminating Plaintiffs Is False and a Pretext for Age Discrimination.

Establishing the first three elements of the *prima facie* case and any version of the fourth raises a presumption of discrimination, which shifts to the employer the burden to set forth a legitimate, nondiscriminatory reason for the employment action.[133] If the employer satisfies this burden, a court must afford the plaintiff an opportunity to cast doubt on the employer's rationale.[134]

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[132] Drnek Dep. 244:14-17.
[133] *Mauzy*, 75 Ohio St.3d at 582.
[134] *Id.*

2. Defendant's False Reason Creates a Presumption of Discrimination.

Pretext may be established "either directly by persuading the [trier of fact] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[135] "[T]he factfinder's disbelief of the reasons put forward by the defendant" will allow it to infer intentional discrimination.[136] Where, as here, there is evidence that the given reason for termination is false, a jury reasonably may infer that unlawful discrimination was the true motivations behind Defendant's decision to terminate Plaintiffs.[137]

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, **the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.** Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a **party's dishonesty about a material fact as "affirmative evidence of guilt."**[138]

As Justice Ginsburg recognized, "evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation."[139]

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[135] *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095 (1981).

[136] *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)).

[137] *See, e.g., Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 2109 (2000) ("a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."); *Lilla v. Comau Pico, Inc.*, 2007 U.S. Dist. LEXIS 51807, *10-11 (E.D. Mich. 2007) ("These two types of rebuttals [that Defendant's 'legitimate' reasons had no basis in fact and the proffered reasons were insufficient to motivate discharge] are direct attacks on the credibility of the employer's proffered motivation for firing plaintiff and, if shown, provide an evidentiary basis for what the Supreme Court has termed 'a suspicion of mendacity.'") (internal quotations omitted).

[138] *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. at 147-48 (citing *Wright v. West*, 505 U.S. 277, 296, 112 S. Ct. 2482, 2950 (1992)) (emphasis added). *Cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2950 (1978) ("When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with some reason, based her decision on an impermissible consideration.").

[139] *Reeves, supra*, 530 U.S. at 154.

3. Evidence of Pretext: The Reorganization and Cauthen Report Were Shams.

CSU claims that the "sole reason" for the reorganization and Plaintiffs' terminations was the Cauthen report.[140] In fact, on April 24, 2012, a month before Cauthen's visit, Banks had already designed the new structure.[141] By May 14, two weeks before Cauthen's report, Banks had revised the job descriptions for the older workers and then held a meeting with Drnek, among others, to discuss the "Reorganization Plan"; then Banks lied about the meeting.[142] Only after the structure had already been designed and the job descriptions revised did Banks hire his close friend Cauthen to pretend that Cauthen had devised the plan himself. Cauthen asked for no documents, reviewed only the documents given to him by Banks, and only spoke with the people determined by Banks; then he recommended a reorganization that mirrored the plan designed by Banks in April.[143] The overwhelming evidence shows that the terminations of Liss and Russell were not based on the Cauthen Report, but were decided by Banks many weeks before Cauthen's Report. The report is sham and pretext to hide CSU's plan to fire the older workers.

4. Evidence of Pretext: Drnek Changed the Minimum Qualifications to Deprive Plaintiffs of Their Rights Under CSU's Policies to Placement in Other Positions.

On June 25, Drnek submitted the reorganization plan including new finalized job descriptions. However, weeks later, Drnek changed the job descriptions in advance of his August 10 meeting with Walker during which he sought approval of Plaintiffs' terminations. Drnek changed the minimum qualifications to add in new criteria which he used to recommend the firing of Plaintiffs without placing them in other available positions. Drnek admitted that he later added four out of the five minimum qualifications used to terminate Liss.[144]

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[140] Banks Dep. 39:22-25 & 143:24-144:6.
[141] Vartorella Dep. 161:12-19; Plaintiff's Consol. Dep. Ex. 327.
[142] Banks Dep. 91:13-16; Plaintiff's Consol. Dep. Ex. 238; McCafferty Dep. 42:25-45:2.
[143] Banks Dep. 222:22-223:1 (Banks "understood the Cauthen report to be consistent with the leadership and reporting structure that [he] created in Exhibit 317[.]").
[144] Drnek Dep. 131:19-134:1.

5. Evidence of Pretext: Drnek Lied About Every Reason for Liss's Termination.

On August 10, 2012, Drnek met with CSU Vice Provost George Walker seeking approval to fire Liss and Russell and to "reorganize" DSL. Drnek claimed that Liss and Russell should be terminated because they did not meet the qualification required for the newly created positions. Drnek specified five reasons why Liss should be fired. When confronted under oath, Drnek admitted that every reason he gave to terminate Liss was untrue:

Drnek's Lies To Fire Steve Liss	Drnek's Admissions At Deposition Under Oath
Lie To Fire Liss: Liss lacked "three years administrative experience maintaining/developing enterprise online student organization databases, e.g., OrgSync." Ex. 15, p. CSU 0040.	**Truth Under Oath:** For four years from 2008 to 2012, Liss "work[ed] with either Green Room [a web-based program similar to OrgSync] or OrgSync." Drnek Dep.26:22-27:10. "Green Room was an attempt by Cleveland State to create a web-based program similar to OrgSync." *Id.* 21:22-25. Drnek selected Liss to lead CSU's initiative to implement OrgSync. *Id.* 121:2-15.
Lie To Fire Liss: Liss lacked "significant knowledge and experience in developing and implementing leadership and service programs with focus on social justice, student leadership and service learning." Ex. 15, p. CSU 0040.	**Truth Under Oath:** Q. And, in fact, Steve used to run the Center for Leadership and Service; right? A. He -- he ran the Center for Student Involvement. Q. But before that he ran, and you talked about your conversations with him about his prior experience with the Center for Leadership and Service; right? A. Before I worked there, yes. Q. And -- and you were aware that he had knowledge and experience in developing these kinds of leadership and service programs; right? A. Right. **Q. Okay. So that's not correct either, is it?** **A. It appears that it wouldn't be.** Drnek Dep. 138:22-139:11 (emphasis added).
Lie to Fire Liss: Liss was not "technologically proficient and experienced with database, word, spreadsheet and presentation applications." Ex. 15, p. CSU 0040.	**Truth Under Oath:** "Steve Liss is proficient with database, Word, spreadsheet, [and] presentation applications." Drnek Dep. 136:10-12.
Lie to Fire Liss: Liss lacked "ability to travel with and supervise student groups." Ex. 15, p. CSU 0040.	**Truth Under Oath:** Q: [I]n fact, you know that Steve does travel and he does supervise student groups from time to time; correct?" A: Yes. Drnek Dep. 136: 21-24.
Lie to Fire Liss:	**Truth Under Oath:** Q. [CSU's] Greek Life program had increased and had not

Drnek's Lies To Fire Steve Liss	Drnek's Admissions At Deposition Under Oath
Liss lacked "ability to design and execute a comprehensive Greek Life program in an urban setting." Ex. 15, p. CSU 0040.	had a single alcohol warning and just one hazing incident; right? A. Right. Drnek Dep. 140:13-15. Q. You never criticized or reprimanded Steve Liss or Bill Russell for their ability to design or execute a comprehensive Greek Life program [at CSU]? A. No. Drnek, Dep. 47:13-16. Under Liss and Russell, every year CSU's Greek organizations won the most awards for student involvement. *See, e.g.*, Drnek Dep. 106:24-107:11.

On every "minimum qualification," Drnek lied in order to terminate Liss. Drnek's lies allow a fact-finder to conclude that the true reason CSU terminated and refused to re-hire Liss was discrimination and retaliation.

6. CSU's Dishonesty as to one Issue, Allows the Fact-Finder To Infer Dishonesty and Discrimination on Other Issues.

The impact of Defendant's multiple misrepresentations is that summary judgment is not permitted. CSU's inconsistency—and dishonesty—as to a single material issue "undermines its credibility generally" and allows the fact-finder to find that discrimination was the true reason.[145] As the U.S. Supreme Court has explained, such falsehoods "permit the trier of fact to conclude that the employer unlawfully discriminated" and make summary judgment impossible.[146] Moreover, "any inconsistencies in testimony are best left to a jury making a credibility determination."[147] Summary judgment must be denied.

7. Additional Evidence of Pretext: CSU's Failure To Investigate Complaints Prevents Summary Judgment.

A defendant's failure to investigate complaints of discrimination permits a jury to infer a

[145] *Coburn v. Rockwell Automation, Inc.*, 238 Fed. App'x 112, 122 (6th Cir. 2007)
[146] *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. at 147-48 (internal citations omitted).
[147] *Szymanski v. Rite-Way Lawn Maintenance Co.*, 231 F.3d 360, 366 (7th Cir. 2000).

discriminatory motive.[148] Here, CSU never investigated the complaints of either Liss or Russell that Banks was discriminating against them.[149] Thus, summary judgment is not available.

8. Additional Evidence of Pretext: Banks's Discriminatory Remarks and Conduct Are Attributable To CSU.

Under the "cat's paw" doctrine, the discriminatory comments of Banks are attributable to CSU because Banks was a supervisor, he participated in the decisions, and he provided untruthful and innaccurate statements that led to CSU's discriminatory scrutiny, terminations of Plaintiffs and refusals to rehire.[150]

9. Additional Evidence of Pretext: Statistics and the Inexorable Zero.

Finally, the fact-finder can doubt CSU's proffered reason at this stage by reconsidering the direct evidence of disparate impact of sham reorganization on older workers and considering the "inexorable zero"—*i.e.*, that zero younger workers were terminated and that only older workers were terminated.

G. Overwhelming Evidence Supports a Finding of Unlawful Retaliation.

To establish a *prima facie* case of retaliation under Chapter 4112, Plaintiffs must show that (1) they engaged in a protected activity; (2) the protected activity was known to CSU; (3) CSU took adverse action against Plaintiffs; and (4) a causal connection exists between the protected activity and adverse employment action.[151] "[T]emporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a *prima facie*

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[148] *Malik v. Carrier Corp.*, 202 F.3d 97, 105 (2d Cir. 2000) ("an employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer.") (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998)); *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1033 (9th Cir. 2006) ("The summary judgment record does not indicate affirmatively whether Electra's Board of Directors investigated or evaluated Cornwell's concern that Sharp's actions were racially motivated. A reasonable jury could view Electra's failure to investigate as an attempt to conceal Sharp's illegitimate motives."); *Collins v. Cohen Pontani Lieberman & Pavane*, 2008 U.S. Dist. LEXIS 58047, *35-36 (S.D.N.Y. July 30, 2008) ("A reasonable jury could find that Pavane's failure to investigate this complaint pursuant to CPLP's discrimination policy was evidence that he was covering up discriminatory treatment.").

[149] Vartorella Dep. 171:8-10.

[150] *Chattman v. Toho Tenax America, Inc*, 686 F.3d 339 (6th Cir. 2012).

[151] *Nguyen v. City of Cleveland*, 229 F.3d 559, 564 (6th Cir. 2000) (citing *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997)).

case of retaliation."[152] That CSU refused to investigate Plaintiffs' complaints is, in of itself, evidence from which the jury may determine that CSU intended to retaliate against Plaintiffs.[153]

Liss and Russell engaged in protected activity when they complained about Banks's discriminatory conduct, CSU was aware of the complaints, and within weeks of their complaints decided to exclude them from new jobs. Specifically, while seeking the new open positions, Liss complained about discrimination and "**as a result of that, unfortunately, you know, Steve -- his -- that -- that kind of ended his part in that – in that particular search**."[154] Thus, CSU admits that it retaliated against Liss by denying him Coordinator of Commuter Affairs & Student Center Programs position.

H. FMLA Interference & Retaliation.

The FMLA creates two claims: an "interference" claim and a "retaliation" claim.[155] An employer may not retaliate against an employee for invoking his right to FMLA leave.[156] A plaintiff prevails on an interference claim when he establishes that (1) he is an "eligible employee," (2) the defendant is an "employer," (3) the employee was entitled to leave under the Act, (4) the employee gave the employer notice of his intention to take leave, and (5) the employer denied the employee benefits to which he was entitled.[157] "Interference" includes any "discouragement" by the employer.[158] Unlike a claim for retaliation or discrimination, an employer's intent is not

[152] *Mickey v. Zeidler Tool & Die Co.,* 516 F.3d 516, 525 (6th Cir. 2007) (citing *Clark Cty. School Dist. v. Bredeen,* 532 U.S. 268, 273 (2001)). Adverse actions that fall within a three-month period of time between the protected activity and the adverse action is sufficient to create a causal connection for the purposes of establishing a *prima facie* case. *Goeller v. Ohio Dep't. of Rehab. & Corr.,* 285 F. App'x 250, 257 (6th Cir. 2008) (two months); *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 563 (6th Cir.2004) (three months).
[153] *See* n. 149, *supra.*
[154] Drnek Dep. 168:19-21 (emphasis added).
[155] *Daugherty v. Sajar Plastics, Inc.*, 2008 U.S. App. LEXIS 21574, *25-26 (6th Cir. 2008).
[156] *Bryson v. Regis Corp.*, 498 F.3d 561, 570 (6th Cir. 2007).
[157] *Arban v. West Publ'g Corp.,* 345 F.3d 390, 400-01 (6th Cir. 2003).
[158] *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446, 454 (6th Cir. 2005) (stating that "interfering with" an employee's rights under the Act includes "discouraging an employee from using leave.") (internal citations omitted); *Harcourt v. Cincinnati Bell Tel. Co.*, 383 F. Supp. 2d 944, 962 (S.D. Ohio 2005) ("an employer violates the FMLA by discouraging or chilling employees from exercising their FMLA rights.").

relevant to a claim for FMLA interference.[159]

Here, Russell is an eligible employee, CSU is covered by the FMLA, Russell was entitled to leave because he had worked for more than a year for CSU and needed surgery, and Russell gave notice to CSU that he needed to take leave. With regard to notice, Russell spoke to both Drnek and Banks about the scheduled surgery and his intention to take FMLA leave.[160] CSU "interfered" with Russell's rights by firing him before he could take leave and by instructing Liss not to accommodate Russell's medical needs.[161] CSU retaliated against Russell because within 90 days of learning of his intention to take FMLA leave, it terminated him and then refused to rehire him.[162]

I. CSU Breached Its Contracts With Liss and Russell.

A court has "general jurisdiction to consider a complaint that asserts a violation of rights independent of a collective bargaining agreement "or [R.C. 4117]."[163] The "dispositive test," in determining whether the court has jurisdiction over a claim by a party to a CBA, is whether the party's claims "arise from or depend on the collective bargaining rights" outlined by Chapter 4117.[164] Statutory rights to non-discrimination under R.C. Chapter 4112 are "distinct from any right conferred by the collective bargaining agreement" and they are, therefore, "independent of the arbitration process."[165]

Here, Liss is not a member of any union and is not subject to any collective bargaining agreement. Liss is "professional non-bargaining" staff and by contract, CSU was obligated to make affirmative "reasonable efforts to secure alternative appointments within the University in open

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[159] *Edgar v. JAC Prods.*, 443 F.3d 501, 507 (6th Cir. 2006).
[160] Russell Dep. 161:17-25 & 191:5-192:9; Russell BIO Aff.
[161] Liss Dep. 78:22-79:15; Russell Dep. 199:9-200:3.
[162] Russell Dep. 199:9-200:3, 202:23-203:5 & 204:21-24.
[163] *Brannen v. Bd. of Edn., Kings Loc. School Dist.*, 144 Ohio App.3d 620, 629, 761 N.E.2d 84, 91 (2001). In some cases, a party's statutory rights can differ from contractual rights he may have under a collective bargaining agreement. *See Haynes v. Ohio Turnpike Comm.*, 177 Ohio App.3d 1, 2008-Ohio-133, 893 N.E.2d 850, ¶18.
[164] *State ex rel. Cleveland v. Sutula*, 127 Ohio St.3d 131, 2010-Ohio-5039, 937 N.E.2d 88, ¶20,
[165] *Haynes*, 2008-Ohio-133, at ¶17 (internal quotations omitted).

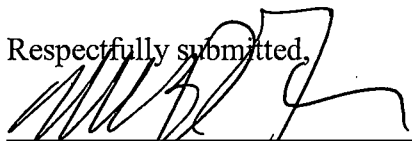
positions."[166] At the time of the reorganization, there were three open Assistant Dean positions for which Liss was qualified. Instead of placing Liss into any of these positions, CSU promoted two younger less qualified workers (Bergman and Johnston) and then left the third position open while it started a three-month search. CSU breached its contract by failing to make any effort to place Liss into these open positions for which he was qualified.[167]

Similarly, Russell's claims are not based on a collective bargaining agreement. Russell's rights to service credits and other compensation are not dependent on a collective bargaining agreement. CSU has not produced any admissible evidence to the contrary. It has failed to cite the provision of any CBA that might control this issue. In the absence of even a reference to any CBA section, CSU cannot prevail.

IV. CONCLUSION

The hard statistics, CSU's own admissions that these statistics imply discrimination, the bigoted age-ist statements of its decision-makers, and CSU's numerous false claims collectively and separately demonstrate that CSU fired Liss and Russell for discriminatory and retaliatory reasons. Summary judgment should be denied.

Respectfully submitted,



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[166] Plaintiff's Consol. Dep. Ex. 328, at §8.5.4.4.3(b), p. XV.
[167] *See, e.g.*, Drnek Dep. 150:8-151:11; Banks Dep. 175:21-23; Vartorella 96:22-97:4 & 98:14-22.

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served via electronic mail, on this 14th day of October 2014 to:

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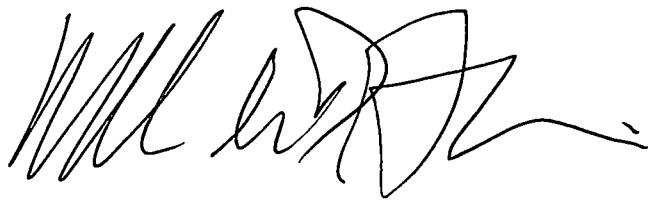

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