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IN THE OHIO COURT OF CLAIMS

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WILLIAM RUSSELL
Plaintiff

v.

CLEVELAND STATE UNIVERSITY
Defendant

and

STEVEN LISS
Plaintiff

v.

CLEVELAND STATE UNIVERSITY
Defendant

Case Nos. 2013-00138 and
2013-00139

Judge Patrick M. McGrath
Magistrate Holly T. Shaver

CLEVELAND STATE UNIVERSITY'S
REPLY IN SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT

I. OVERVIEW

Steven Liss and William Russell say they were victims of age discrimination because Willie Banks used some common terms that contain the word "old," like "old fashioned" and "old school." They also fault him for using terms that suggest modernity, like "21st century," "up to date" and "technology." And they ascribe to him a saying that actually came straight from Mr. Liss, something about "old dogs" and "new tricks." Now they have added another term to the mix, "the elephant in the room," thus making them the only two people in the English-speaking world who think that phrase is about the elephant's age rather than its size. The trouble with all of this, apart from its triviality, is that Dr. Banks did not authorize the reorganization that resulted in their layoffs. That reorganization came courtesy of James Drnek, the Dean of Student Life with whom they had worked for four years before Dr. Banks ever set foot on campus. Try as they might, they cannot point to a single age-related comment that Dr. Drnek ever uttered, so they have settled on calling

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him a “liar” instead. Needless to say, that is not the kind of argument on which people who have felt the all-too-real sting of actual discrimination stake their cases.

Their memorandum opposing summary judgment runs twenty-five pages long, and it traffics largely in snippets of testimony and bits of case law that stand for the opposite of what they argue, some phony “statistics,” and a beachhead built on the sands of the “inexorable zero.” That is a theory courts sometimes mention when they discuss employers whose workforces contain zero or nearly zero members of protected groups. How it could ever apply in an age-discrimination case against Cleveland State, *whose average employee is fifty years old*,¹ is a topic Mr. Liss and Mr. Russell do not address. But this Court need not search for meaning in their incantations of the term “inexorable zero” because that inference applies only in pattern-and-practice cases, which individual plaintiffs like them have no standing to assert:

[B]efore we begin our analysis of appellant’s disparate impact claim, we note that appellant specifically argues that he is relieved of his burden to produce meaningful statistical analysis under the inexorable zero theory. *However, this exception is granted only in pattern and practice cases, which this case clearly is not, and is not available to individual plaintiffs. Bacon v. Honda of Am Mfg, Inc.* (C.A.6, 2004), 370 F.3d 565. To the extent that appellant is asking this court to extend the inexorable zero theory to cases involving individual claims of discrimination, we decline.

Brown v Worthington Steel, Inc., 2005-Ohio-4571 (10th Dist.) at ¶7 (McGrath, J.) (emphasis added)(footnote omitted). Mr. Liss and Mr. Russell are just two plaintiffs, and their claims rise or fall on their own merits, not on the merits of hypothetical discrimination claims that no other Cleveland State employees have seen fit to file.

¹ Vartorella Dep. at 87.

II. DR. DRNEK FIRST THOUGHT ABOUT REORGANIZING THE DEPARTMENT OF STUDENT LIFE WHEN HE INTERVIEWED AT CLEVELAND STATE IN 2007. AS TIME WENT ON, THE NEED FOR A MAKEOVER BECAME INCREASINGLY OBVIOUS.

Dr. Drnek was the Associate Dean of Students at the University of Arizona, an institution that knows a thing or two about Greek life. When he interviewed for the Dean of Student Life position at Cleveland State in November of 2007, it was already clear to him “that Student Life needed to ramp up the level of activity to engage students.” (Drnek Dep. at 193). He started in his new position in February of 2008, and he soon went on a “listening tour” in which he met with “a wide variety of administrators and students about their expectations for Student Life” and about “what they saw as [the] weaknesses and strengths of Student Life.” *Id.* at 193-94. Sandra Emerick was his Associate Dean at that time, and he kept her in that position for some three years, while he did his best to “form [his] own opinions about what was happening.” *Id.* at 194. The new Student Center opened in 2010, which meant that “all of the staff and Student Life” were in one place where he had an “opportunity to . . . observe[]” and take “mental notes” about their interactions and his developing thoughts about what kind of changes “might work well and how [he] might change things.” *Id.* at 195.

One of the first things that struck him was that staff members who were doing similar work were walled off into different groups with no central reporting structure. That ended in 2011, when “all of the Student Affairs-related functions, the Counseling Center, Disability Services, the Women’s Center, Veterans, Residence Life Programming [and] Recreation Center Programming” all began reporting to him. *Id.* at 196. That was the first part of reorganizing the Department of Student Life, but it did not resolve all of the problems with the distribution of work in the department. *Id.* Later, when Dr. Emerick left her Associate Dean position at Cleveland State— “right before school started in 2011” at the “busiest time of the year for a Student Affairs professional”— to become the

Chief Student Affairs Officer at the Northeast Ohio Medical University, Dr. Drnek pressed Mr. Liss to assume some of her duties. *Id.* at 197-98. Their conversation did not go well:

I went to Steve right away and I said, "Please, would you . . . take on these additional responsibilities?" And he . . . was very upset. He said, "No, no." And I said, "Really, do you want to think about it? You know I'm asking you. I need your help." So then finally he said, "I've done all of this before [and] I don't want to do it again." I was "really taken aback because whenever a supervisor has come to me and said, "Would you take on additional responsibility?" I always [said] yes.

[A] day or two later Steve came back and he said, "Well, I'll do this and this but not that, that, that and that." So then I had to distribute widely across Student Life the leadership and service activities. And as a result they weren't effective.

Id. That is when Dr. Drnek "wrote a job description for an Associate Dean of Students and put in some things about crisis response" and other duties that had not been in Dr. Emerick's job description. He conducted a national search, which brought Dr. Banks to campus in January 2012, and he eventually instituted another reorganization along the lines suggested by T.W. Cauthen, III in his report. *Id.* at 198-200. Dr. Cauthen's report was no surprise to Dr. Drnek. In fact, it confirmed his own view that the lack of collaboration in the department was "myopic." *Id.* at 200. Based on the report itself and on his own "experience of two years observing staff" and observing "how people worked with each other and with students," Dr. Drnek recommended the reorganization that led to Mr. Liss's and Mr. Russell's layoffs. *Id.* at 269.

III. THE TASK OF PLACING PEOPLE INTO THE NEW POSITIONS CREATED THROUGH THE REORGANIZATION FELL TO A SEARCH COMMITTEE. MR. LISS HAD TELEPHONE INTERVIEWS FOR TWO POSITIONS BUT DELINED TO INTERVIEW FOR THE THIRD UNLESS THE COMMITTEE FIRST "CORRECTED" WHAT HE BY THEN HAD TAKEN TO CALLING "HARASSMENT."

Dr. Drnek prepared descriptions for the newly opened positions, and Mr. Liss met some but not all of the qualifications for those positions. He did not, for example, have sufficient experience for the Assistant Dean position, which he now argues he should have gotten. The "Assistant Dean

position was an amalgamation of different pieces and parts of leadership and service and Greek Life, which hadn't been together before. So Steve hadn't done those things before. . . ." *Id* at 140. Whether Mr. Liss did or did not meet those qualifications—a question that forms the basis of his allegation that Dr. Drnek is a "liar"—was of little consequence, though, either to the search committee or to Dr. Drnek. The search committee attempted to interview him anyway. But, as Bob Bergmann—who chaired that committee—explained to Dr. Drnek, Mr. Liss would answer no questions, not even the first one: "Why are you interested in the position?" *Id* at 172. Instead, he demanded that the committee address his concerns about "harassment." *Id*. Dr. Drnek advised Mr. Bergmann to "carry on with the interview and just let Steve know that [consideration of his yet-to-be-filed discrimination claims was not] under the purview of the search committee." *Id*. But Mr. Liss persisted, which put him in stark contrast to other candidates who actually "talked about why they were interested in the position" for which they were interviewing. *Id* at 176.

Had the decision been Dr. Drnek's to make, position descriptions would have played no role in it. By then, Mr. Liss had already demonstrated that he was uninterested in doing the hard work of managing his staff. He would not, for example, intervene when Mary Myers—one of his direct reports—fell for an internet scam and began soliciting hundreds of dollars from staff and students for money she thought she needed in order to receive the "winnings" from a "lottery in Africa." *Id* at 202-03. Mr. Liss told Dr. Drnek that he was "afraid of her" and he refused to "hold her accountable." *Id* at 204. So Dr. Drnek had to issue the reprimand himself. *Id*. And he behaved similarly in the matter of Mr. Russell's reprimand, which he supported "until he got pushback" from Mr. Russell. *Id* at 86. Moreover, Dr. Drnek had already seen Mr. Liss refuse to take on additional responsibilities after Dr. Emerick's departure. *Id* at 150. Nevertheless, Dr. Drnek did not attempt to dissuade Mr. Liss from interviewing for any new positions. *Id*.

IV. MR. RUSSELL WAS OFFERED THE OPPORTUNITY TO “BUMP” INTO ANOTHER POSITION, BUT HE REFUSED.

Steve Vartorella offered Mr. Russell the opportunity to “bump into” another position after the reorganization. (Vartorella Dep. at 96) But that position required knowledge of Microsoft Word, Excel and PowerPoint. *Id.* Mr. Russell declined the job, telling Mr. Vartorella this: “I don’t have the skill set to do that.” *Id.* In addition, Mr. Russell indicated that he was “going to be retiring very soon” and that he did not “want to bump somebody out of a job if [he would be] leaving in November.” *Id.* Mr. Russell cannot dispute any of that:

Q [Mr. Knutti]: Do you understand that as a member of a collective bargaining [unit] you had bumping rights to become employed in various positions?

A [Mr. Russell]: Actually, I never looked at the union contract until quite a bit later. So, no, I didn’t understand that.

Q: Do you remember talking with Mr. Vartorella about bumping rights?

A: Well, again, Steve and I had talked about a lot of things including baseball, sports, his history where he lived, which was out by me. *I think you’re probably going to refer to something I might have said like, “I think too much of Cleveland State to bump somebody else when I’m this close to retirement.” Is that what you’re referring to?*

Q: I wasn’t. But did you say that?

A: *I don’t remember. . . .*

(Russell Dep. at 205) If Mr. Russell had accepted the position Mr. Vartorella offered him, he would of course not have been terminated.

V. ARGUMENT

As evidence of age discrimination, Mr. Liss and Mr. Russell first rely on the “inexorable zero” theory, which applies only in pattern and practice cases and which individual plaintiffs are not permitted to assert. Next they rely on “statistics”—the kind used in disparate-impact cases, though

they have asserted no disparate-impact claim— but their only “statistic” is a numerator representing employees older than forty who were terminated in one part of the Department of Student Life. They then turn to the argument that this Court *cannot award Cleveland State summary judgment because they have stated a prima facie case*, though their own cases discredit—and openly mock—that same argument. After that, they claim that the stray and ambiguous remarks they ascribe to Dr. Banks prove that the department’s reorganization was not just a pretext for their terminations *but was a “sham” too*. And their final argument is, apparently, Mr. Russell’s, a wide-ranging conspiracy at every level of Cleveland State and beyond all designed to justify their terminations. All of those arguments are baseless as a matter of law, as are their remaining claims.

A. THE “INEXORABLE ZERO” THEORY APPLIES ONLY IN PATTERN AND PRACTICE CASES.

If there ever was doubt as to the ability of individual plaintiffs to press pattern-and-practice claims, the Sixth Circuit Court of Appeals laid it to rest in *Bacon v Honda of America Mfg, Inc.*, 370 F.3d 565 (6th Cir. 2004):

We therefore hold that the pattern-or-practice method of proving discrimination is not available to individual plaintiffs. We subscribe to the rationale that a pattern-or-practice claim is focused on establishing a policy of discrimination; because it does not address individual hiring decisions, it is inappropriate as a vehicle for proving discrimination in an individual case. *Lowery*, 158 F.3d at 761 (observing that “[t]he Supreme Court has never applied the *Teamsters* method of proof in a private, non-class suit charging employment discrimination. Rather, the Court has noted that there is a ‘manifest’ and ‘crucial’ difference between an individual’s claim of discrimination and a class action alleging a general pattern or practice of discrimination.”)

Id. at 575 (emphasis added). *See also Brown v Worthington Steel, Inc.*, 2005-Ohio-4571 (10th Dist.) at ¶7 (acknowledging *Bacon* and refusing to extend patter-and-practice claims to individual plaintiffs like Mr. Liss and Mr. Russell.) They cannot, therefore, defeat summary judgment by pointing to other Cleveland State employees who lost their jobs.

B. THIS IS NOT A DISPARATE IMPACT CASE, AND, EVEN IF IT WERE, THE COURT WOULD BE REQUIRED TO CONSIDER UNIVERSITY-WIDE STATISTICS.

The use of statistical evidence is common in disparate-impact cases, which involve “employment practices that are facially neutral in their treatment of different groups, but fall more harshly on one group.” *Warden v Ohio Dept. of Natural Resources*, 2014-Ohio-35 at ¶19 (10th Dist.) (citations omitted). But this is not a disparate-impact case, and, even if it were, the Court would be required to consider university-wide statistics, not just the number of older employees who were laid off in one department at one time. In other words, disparate-impact plaintiffs must prove that the effect of an otherwise neutral policy is significant, and a policy that causes an “adverse effect on a single employee, or even a few employees, is not sufficient to establish disparate impact.” *Massarskey v General Motors Corp.*, 706 F.2D 111, 121 (3d Cir. 1983). Dean Drnek was responsible for some “400 employees.” (Drnek Dep. at 189) The fact that two of those employees lost their jobs could never be legally significant. Mr. Liss’s and Mr. Russell’s “statistics” amount to nothing more than a numerator in search of a denominator.

C. COURTS CAN AND FREQUENTLY DO RESOLVE DISPARATE-TREATMENT CLAIMS ON SUMMARY JUDGMENT.

Courts can and frequently do resolve disparate-treatment claims like Mr. Liss’s and Mr. Russell’s on summary judgment. Their notion to the contrary rests on long-discredited quotations that trace their way back to just two cases— *Thornborough v Columbus and Greenville R.R. Co*, 760 F.2d 633, 640-41 (5th Cir. 1985) and *Lowe v City of Morrovia*, 775 F.2d 998, 1009 (9th Cir. 1985). See Liss/Russell Memorandum at notes 103 and 107 (citing both cases). The position those decisions took— that a finding of pretext alone is sufficient in discrimination cases— is so at odds with the law that a U.S. Supreme Court majority openly mocked it in *St. Mary’s Honor Center v Hides*, 509 U.S. 502, 513, 516 (noting that “a reason cannot be proved to be ‘a pretext for discrimination’ unless it is shown *both* that the reason was false, *and* that discrimination was the real reason” and explicitly

rejecting the contrary *Thornborough* approach) (emphasis in original). As for *Lowe*, the Ninth Circuit was forced to amend the decision Mr. Liss and Mr. Russell cite in order to add this sentence to the end of the very quote they cite: “The principles described above do not prevent the summary disposition of meritless suits but simply ensure that when a genuine issue of material fact exists a civil rights litigant will not be denied a trial on the merits.” *Lowe v City of Morrovia*, 784 F.2d 1407, 1407 (9th Cir. 1986).

D. STRAY AND AMBIGUOUS REMARKS CANNOT DEFEAT SUMMARY JUDGMENT.

Mr. Liss and Mr. Russell ask this Court to hold as a matter of law that terms like “old fashioned,” “old school,” and “out-dated” are so plainly “ageist” that they constitute “direct evidence” of discrimination, meaning that supervisors who use those words are on that ground alone deemed to be “more likely than not” to be “motivated by discriminatory animus.” *Byrnes v LCI Communication Holdings Co.*, 77 Ohio St.3d, 125, 128-29 (1996). Suffice it to say, though, that the list of words as to which courts have afforded that treatment is remarkably short. The “common use of the n-word by both staff and management”—a word that is “perhaps the most offensive word in the English language”—justifies special treatment. *Smith v Superior Prod., L.L.C.*, 2014-Ohio-1961 at ¶25. But none of the terms Mr. Liss and Mr. Russell think Dr. Banks said are that word’s equal.

E. WHEN STRIPPED TO THEIR ESSENCE, MR. LISS’S AND MR. RUSSELL’S DISCRIMINATION CLAIMS ARE NOTHING MORE THAN UNSUPPORTED CONSPIRACY THEORIES.

Mr. Russell is the leader and spokesperson in these two cases. And his views are nothing short of tin-foil-hat conspiracy theories. Dr. Banks, it seems, had a “plot from day one to bring in a younger associate of his to replace [him].” (Russell Dep. at 74) The “plot” involved—though it is unclear how—Dr. Banks’s decision to scrap Mr. Russell’s physical-yearbook project. *Id.* at 80. Or maybe instead the “plot” was less about age and more about “eliminat[ing] something that Greek Life wanted to do that would have been a fun thing.” *Id.* at 82. Dr. Banks may have “come up with

that plot before he ever met” Mr. Russell. *Id.* at 83. And all of this concerned Mr. Russell because he thinks that Dr. Banks was the type of man who “was ready to go postal” and was “capable of rage” like the “rage” that occurred on one infamous day at Virginia Tech. *Id.* at 78. T.W. Cauthen was “in on” Dr. Banks’s plot. *Id.* at 85. Though Mr. Russell scarcely knows who he is, he concludes that Dr. Cauthen “was directed to slant his report a certain way.” *Id.* at 87. Mr. Russell was, in his words, also “sabotaged” by Dr. Drnek. *Id.* at 72. But Mr. Liss was not involved in any “sabotage” because he “just passed on whatever [Dr. Banks] told him to do.” *Id.* at 74. Older people (a reference to the most senior member of Cleveland State’s trial team) apparently are not easily intimidated, but younger people (a reference both to Mr. Liss and to the two less senior members of Cleveland State’s trial team) apparently are easily intimidated:

A [Mr. Russell]: I guarantee you if Mike DeWine said to any of you, “Put this in writing or it’s going to cost you your job because I’ll view it as insubordination,” you probably would have [written] what he told you to write.

Q [Mr. Knutti]: You’ve got that wrong [about] me.

A: Well, you’re a little different. I don’t want this to sound ageist, but a younger person would do that.

Id. at 73. Discrimination claims require proof— real proof— just like any other claims. Mr. Liss and Mr. Russell, though, have no proof at all. They were laid off as a result of a reorganization that Dr. Drnek had envisioned for years, and they were not rehired because they refused to accept any other positions. **Cleveland State moved for summary judgment on all of their discrimination claims, and they cannot win any of those claims.**

F. MR. LISS AND MR. RUSSELL CANNOT WIN THEIR CONTRACT CLAIMS.

Mr. Russell now says his contract claim is not a contract claim at all, but one look at his Amended Complaint proves that it is as straightforward a contract claim as can be. It appears as his Fifth Cause of Action, ¶¶50-53, 55, 57, 59 and 60 explicitly refer to his employment contract, and

not a single word even hints at any non-contract remedy. Mr. Russell cannot win claim because he was a member of a collective bargaining unit, and he was required to grieve those claims. *See* Affidavit of Sonali Wilson (directing the Court to his full collective bargaining agreement online.)

G. MR. RUSSELL'S FMLA INTERFERENCE AND RETALIATION CLAIMS ARE BASELESS AS A MATTER OF LAW, AS ARE MR. LISS'S RETALIATION CLAIMS THAT DERIVE FROM THEM.

The facts of this case could never support an FMLA interference claim because Cleveland State granted every single one of Mr. Russell's FMLA leave before his position was eliminated. In fact, even his most recent request for leave had been approved; his removal simply went into effect before he needed to take the leave. (Liss Dep. at 77) Nor can Mr. Liss and Mr. Russell prevail on a claim under the "retaliation" or "discrimination" theory arising from 29 U.S.C. 2615(a)(2), which states that employers cannot "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." Their inability to establish a causal connection between their termination and Mr. Russell's request to take leave is fatal to their claim.

Plaintiffs can demonstrate that they suffered unlawful FMLA retaliation in either of two ways: "by introducing direct evidence of discrimination, or by proving circumstantial evidence which would support an inference of discrimination." *Johnson v Univ of Cincinnati*, 215 F.3d 561, 572 (6th Cir.), *cert. denied*, 531 U.S. 1052 (2000). Direct evidence is that which, if believed, proves the existence of improper discriminatory animus without inference or presumption. *Joostberns v UPS, Inc.*, 166 Fed. Appx. 783, 791-92 (6th Cir. 2006). Mr. Russell and Mr. Liss lack any direct evidence that Dr. Drnek, the decision-maker, had an improper animus regarding Mr Russell's or others' need to take FMLA leave. Quite the contrary, after Mr. Russell learned of his termination, he sent an email to Dr. Drnek stating,

I have always looked at you as a compassionate person that I have enjoyed having many non-work related conversations, and certainly appreciate your concern regarding my daughter's terminal cancer, mother-in-law's dementia (which seems

parallel to your father's), and my own health issues (helping me carry things to my car, etc.).

(Russell Dep. at Ex. XX) Additionally, others in the department (e.g. Dan Lenhart) had also taken extended FMLA leave and their positions were not eliminated through the reorganization. *Liss* depo. p. 77.

Dr. Drnek was unaware of Mr. Russell's need to take FMLA leave in September for a shoulder surgery at the time he made the decision to reorganize. In an email sent 9/8/12 to Dr. Drnek, Mr. Russell informed him of his upcoming surgery and of who was previously aware of his need to take leave:

As Steve Vartorella knows, I had contacted Care Works in August, our FMLA provider, and after trying all summer (4 separate cardiology procedures) to get Cardiac clearance, I finally received clearance and will be having surgery. **Both my direct supervisor (Dr. Myers) and the next level up supervisor (Steve Liss) have been aware for months.**

(Russell Dep. at Ex. XX) Contrary to the testimony included in his own affidavit, nowhere in Mr. Russell's email does he reference previous conversations where he had also informed Dr. Drnek of this upcoming surgery. "Generally, a party's unsupported and self-serving assertions, offered by way of affidavit, standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to demonstrate material issues of fact." *McDade v CSU*, Court of Claims Case No. 2013-00025, citing *Wolf v Big Lots Stores, Inc.* 10t Dist. No. 07AP-511, 2008-Ohio-1837 at ¶ 12.

Absent direct evidence, FMLA retaliation cases are analyzed under the familiar *McDormell Douglas Corp. v Green*, 411 U.S. 792 (1973) burden shifting framework. *Ressler v OAG*, Ct Claims No. 2013-00005 (J. McGrath), citing *Robinson v Franklin Cty. Bd. of Commrs.* (Jan. 28, 2002), S.D. Ohio No. 99-CV-162, 2002 WL 193576; *Soletro v Natl. Fedn. of Indep. Business* (N.D. Ohio 2001), 130 F.Supp.2d 906; *Darby v Bratch* (C.A.8, 2002), 287 F.3d 673, 679." *Zechar v Ohio Dept. of Edn.*, 121 Ohio Misc.2d 52, 2002-Ohio-6873, ¶ 9. In order to establish a prima facie case of FMLA retaliation, a plaintiff must

show: (1) he availed himself of a protected right under the FMLA; (2) he was adversely affected by an employment decision; and, (3) there was a causal connection between the exercise of a FMLA right and the adverse action. *Skryjan v Great Lakes Power Serv Co* (C.A. 6, 2001), 272 F.3d 309. The plaintiff bears the burden of demonstrating the causal connection. *Killian v Yorozu Auto Term, Inc*, 454 F.3d 549, 556 (6th Cir. 2006).

Here, Mr. Russell and Mr. Liss simply cannot establish any causal connection between the abolishment of their positions and Mr. Russell's FMLA leave request. "If an employee's discharge would have occurred regardless of her request for FMLA leave, then that employee may be discharged even if discharge prevents her exercise of any possible right to FMLA leave." *Ressler*, Ct Claims No. 2013-0005 p. 6, citations omitted.

The court may look to the temporal proximity between the adverse action and the protected activity to determine whether there is a causal connection. "The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close. However, the Sixth Circuit Court of Appeals has held that **closeness in time is only one indicator of a causal connection and that temporal proximity, standing alone, is not enough to establish a causal connection for a retaliation claim.**

Ressler, Ct. of Claims No. 2013-0005 (J. McGrath) at p. 5 (internal citations omitted). In the current action, Dr. Drnek had been considering a reorganization of the department since he arrived at CSU in 2007, long before Mr. Russell completed FMLA paperwork for a shoulder surgery in August of 2012. And, his decision was based on his own personal observations— Dr. Cauthen's report merely confirmed what, and who, he already believed were the problem areas.

If an adverse action was considered before plaintiff engaged in protected activity, there is no inference of causation. See *Prebilich-Holland v Gaylord Entertainment Co.*, 297 F.3d 438, 443-444 (6th Cir. 2002) (finding that close proximity creates no inference of causation when the termination procedure was instituted several days before knowledge of protected status or activity). "Evidence that the

employer had been concerned about a problem before the employee engaged in the protected activity undercuts the significance of the temporal proximity." *Sosby v Miller Brewing Co.*, 415 F. Supp. 2d 809, 822 (S.D. Ohio 2005), citing *Smith v Alien Health Sys., Inc.*, 302 F.3d 827, 834 (8th Cir. 2002).

Ressler, supra at p. 6. Dr. Drnek was considering the departmental reorganization well before Mr. Russell requested in August of 2012 to take FMLA leave for his shoulder surgery. Thus, there can be no inference of causation.

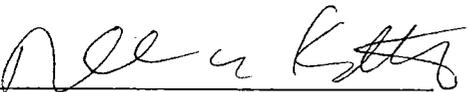
To the extent Mr. Russell and Mr. Liss argue that the Court should apply a "cat's paw" theory of causation based on their assertion that Dr. Drnek's actions were the result of "transferred" discriminatory animus from Dr. Banks, that argument is also baseless. Dr. Drnek's testimony shows that he was considering a reorganizaiton and having issues with Mr. Liss and Mr. Russell long before Dr. Banks was even hired by CSU.

VI. CONCLUSION

Because Mr. Liss and Mr. Russell cannot prevail on any of their claims as a matter of law, Cleveland State urges the Court to grant this motion and enter judgment in its favor on all of their claims.

Respectfully submitted,

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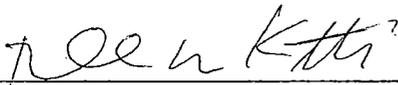
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CERTIFICATE OF SERVICE

On October 21, 2014, I sent a copy of this document via electronic mail to Plaintiff's Counsel: Mark Griffin (mgriffin@tpgfirm.com) and Sara Verespej (SVerespej@tpgfirm.com).


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