

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

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' OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE OF COURT TO
REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR
LEAVE TO FILE SUR-REPLY**

Reply briefs are appropriate where an opposition raises new arguments or presents new evidence. Such briefs are not appropriate where, as here, they merely reiterate arguments previously made, or which could have been made, and cite evidence that was available at the time the motion was filed. For this reason, as set forth more fully below, *Defendants' Motion for Leave of Court to Reply to Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment* ("Motion for Leave") should be denied. Alternatively, because the reply brief attached to the Motion for Leave actually does raise new arguments, Plaintiffs seek leave to file a sur-reply in support of their brief in opposition to Defendant's motion for summary judgment.

- *Defendant's Motion Should Be Denied Because Its Reply Brief Alleges No New Evidence And Attempts To Newly Argue Claims That Have Been Waived.*

A movant may not make new arguments in a reply brief. A "discussion of new arguments in

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a reply brief is improper. In such a case, [the responding party] is denied the opportunity to address and attempt to refute such arguments, as no additional briefs may be filed without seeking leave of court.”¹ All of the evidence cited in and arguments made in Defendant’s reply brief were available to Defendant at the time it filed its motion for summary judgment. As such, there is no “necessity” for a reply brief as required under Loc. R. 4(C). Defendant’s failure to cite all available evidence in its original pleading does not create such a “necessity.”

In fact, failing to raise issues in a motion and instead holding back the issues for a reply brief waives those issues.² The most egregious example of Defendant’s failure to make arguments and cite evidence is that in its motion for summary judgment, Defendant does not address Plaintiffs’ FMLA claims at all. The motion was Defendant’s opportunity to seek summary judgment on Plaintiffs’ FMLA claims and it cannot save its failure to do so by now submitting over three pages of argument on the issue.

- ***Defendant’s Motion Should Be Denied Because Its Reply Brief Merely Confirms The Existence of Factual Disputes.***

Defendant’s Motion for Leave merely highlights the material facts that are in dispute in this matter. Such factual disputes include whether Banks instructed Cauthen as to how he wanted the Department re-organized,³ whether Russell was offered another position with Defendant,⁴ and whether Drnek was aware of Russell’s need for FMLA leave.⁵ Finally, Defendant still, even if its reply brief is considered, has not responded to critical arguments that make summary judgment here

¹ *Crosby v. Crosby*, 4th Dist. App. No. 91-CA-32, 1992 Ohio App. LEXIS 4090, *13 (July 28, 1992).

² See *Abraitis v. United States*, 2012 U.S. Dist. LEXIS 97350 (N.D. Ohio July 13, 2012) (even where the applicable rules provide for a reply brief “any new arguments and new evidence contained in that brief have been waived, and the court shall not consider them.”).

³ Compare Plaintiffs’ Consolidated Memorandum in Opposition to Defendant’s Motion for Summary Judgment (“Opposition”) at p. 6 (“[T]he structure Cauthen recommended was functionally identical to Banks’s “Org Chart AD” document, which he had created in April 2012[.]”) with Cleveland State University’s Reply in Support of Its Motion for Summary Judgment (“Reply”) at p. 4 (“[Drnek] eventually instituted another reorganization along the lines suggested by T.W. Cauthen, III in his report.”).

⁴ Compare Opposition at p. 11 (“CSU had no specific discussions with Russell concerning any other job openings for which he was qualified.”) with Reply at p. 6 (“Steve Vartorella offered Mr. Russell the opportunity to ‘bump into’ another position after the reorganization.”)

⁵ Compare Opposition at p. 24 with Reply at p. 12.

inappropriate. Defendant does not claim—nor could it—that Plaintiffs cannot meet their *prima facie* cases. Likewise, Defendant makes no attempt to rebut Plaintiffs’ evidence of pretext, which includes that the stated reason for termination is false;⁶ that Defendant changed job descriptions for new positions to deprive Plaintiffs of placement in those positions;⁷ that Drnek lied about Liss’s qualifications in order to gain approval for Liss’s termination;⁸ and that Defendant refused to investigate Plaintiffs’ complaints of age discrimination.⁹

• ***In The Alternative, Plaintiffs Should Be Granted Leave To File A Sur-Reply.***

To the extent that Defendant is permitted to remedy its failure to cite all evidence and make all arguments at the time it filed its motion for summary judgment, Plaintiffs respectfully request leave to file a sur-reply responding to the evidence and arguments that were not included in Defendant’s original pleading.¹⁰ Respectfully, where a defendant presents new arguments in reply, it is reversible error to consider these new arguments without also allowing the plaintiff an opportunity to respond.¹¹

Defendant should have raised the arguments and evidence included in its reply brief in its motion for summary judgment and has offered no excuse for the failure to do so. For this reason, Plaintiffs respectfully request that the Court deny the Motion for Leave.

⁶ Opposition at pp. 17-19.

⁷ Opposition at p. 19.

⁸ Opposition at pp. 20-21.

⁹ Opposition at pp. 21-22.

¹⁰ See, e.g., *Zindroski v. Parma City Sch. Dist. Bd. of Educ.*, 8th Dist. Cuyahoga No. 93583, 2010-Ohio-3188, 2010 Ohio App. LEXIS 2659, ¶10 (noting court previously granted leave for a sur-reply for purposes of “responding to the Board’s new arguments [in its reply brief.]”); *Eng’g & Mfg. Servs., LLC v. Ashton*, 387 Fed. App’x 575, 583 (6th Cir. 2010) (holding trial court abused its discretion in denying motion for leave to file sur-reply where reply brief presented new arguments).

¹¹ *Ashton*, 387 Fed. App’x at 583 (“Defendants’ presentation of new arguments and new evidence in their reply brief violated [Plaintiff’s] right under Fed. R. Civ. P. 56(c) to notice and a reasonable opportunity to respond to defendants’ summary judgment motion and supporting evidence and necessitated that [Plaintiff] be permitted to respond.”); *Seay v. Tennessee Valley Auth.*, 339 F.3d 454, 481-82 (6th Cir. 2003) (“this court concluded that the district court abused its discretion in failing to allow the non-moving party an opportunity to file a sur-reply brief” where defendant had made new arguments in reply brief.).

Respectfully submitted,



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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served via U.S. Mail, on this 22nd day of
October 2014 to:

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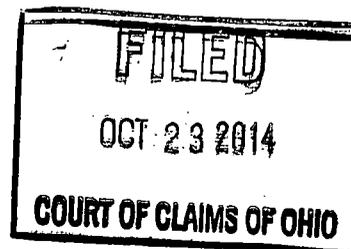
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THORMAN PETROV GRIFFIN

October 22, 2014

Via UPS Overnight Mail

The Ohio Judicial Center
Court of Claims of Ohio
65 South Front Street
Third Floor
Columbus, OH 43215



Re: *Liss v. Cleveland State University-Case No.: 2013-00139*
Russell v. Cleveland State University-Case No.: 2013-00138

Dear Sir/Madam:

I have enclosed an original and one copy of *Plaintiffs' Opposition to Defendant's Motion for Leave of Court to Reply to Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment or, in the Alternative, Motion for Leave to File Sur-Reply* for the cases referenced above. The original is for filing with the Clerk and the one other copy we would like to have time-stamped. Please return the time-stamped copy to me in the enclosed self-addressed postage-prepaid envelope. / *EBB* 1 copy was returned.

Thank you for your attention to this matter. Please do not hesitate to call me should you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Lesa Liston".

Lesa Liston
Paralegal
lleston@tpgfirm.com

Enclosures

Cc: Randall W. Knutti, Esq.
Amy S. Brown, Esq.
Emily M. Simmons, Esq.