

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

IN THE OHIO COURT OF CLAIMS

2014 OCT 31 PM 2:59

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
PRETRIAL STATEMENT

I. OVERVIEW OF THE CLAIMS

Steven Liss and William Russell filed a combined nine different claims against Cleveland State. They each say that Willie Banks discriminated against them because of their age and, for good measure, they each say that he—and others whom they think he controlled—retaliated against them for standing up for the rights of older employees. They each say that the Family Medical Leave Act required Cleveland State to delay Mr. Russell's termination in order for him to have surgery. And they each say that Cleveland State breached their contracts. Mr. Russell's contract was a public collective bargaining agreement, which means that this Court lacks jurisdiction even to hear it; and Mr. Liss's contract centers on a provision that obligates the university's Human Resources department to "make a reasonable effort" to place laid-off professionals in suitable new positions, which he interprets as an obligation to place him into positions for which he refused to interview. Finally, Mr. Russell says that Cleveland State discriminated against him because he has a "disability,"

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but he appears to have abandoned that claim after recognizing that a heart attack and shoulder problems are not “disabilities.”

II. THE LEGAL ISSUES REGARDING DISCRIMINATION CLAIMS

Mr. Liss’s and Mr. Russell’s contract and FMLA claims raise no legal issues at all. The phrase “make a reasonable effort” means what it says, and Cleveland State made much more than a reasonable effort to place Mr. Liss into positions that he expressed little or no interest in obtaining. Collective bargaining agreements like Mr. Russell’s are resolved through grievances and arbitrations, not in the Court of Claims. And the FMLA has never required employers to delay terminations that are already in progress. Mr. Liss’s and Mr. Russell’s discrimination—and retaliation—claims are classic disparate-treatment claims for which they have not a shred of direct evidence. Those claims must, therefore, be resolved under the standard *McDormell Douglas* burden-shifting analysis in which private plaintiffs must demonstrate that their employers’ stated reasons for its decisions were both *pretextual* and *rooted in an attempt to discriminate against them*. The few stray remarks that they say Dr. Banks made could never demonstrate either pretext or a discriminatory intent on Cleveland State’s part, particularly given the fact that he was not responsible for their terminations. And Mr. Liss and Mr. Russell cannot assert pattern-and-practice claims or rely on theories like the “inexorable zero” theory here.

III. WITNESSES AND EXHIBITS

Cleveland State has taken Mr. Liss’s and Mr. Russell’s depositions and filed the transcripts along with the exhibits it identified in those depositions. Mr. Liss and Mr. Russell have taken the depositions of everyone who appears to know anything about the subject matter of their claims; and those transcripts and exhibits have likewise been filed. Cleveland State may call one or more of the following witnesses, or it may rely on their deposition transcripts: **William Russell**, as on cross-examination; **Plaintiff Steven Liss**, as on cross-examination; **Dr. James Drnek**, former Dean of

Students & Vice Provost for Student Affairs; **Dr. Willie Banks**, Associate Dean of the Department of Student Life; **Sandra Emerick**, former Associate Dean of Students; **Steve Vartorella**, Human Resources Consultant formerly assigned to the Department of Student Life; **Jean McCafferty**, Director of Compensation; **Donna Whyte**, former Director of the Office of Diversity and Multicultural Affairs; **George Walker**, former Interim Provost & Senior Vice President for Academic Affairs; **Jill Courson**, Assistant Dean of Student Engagement; **Robert Bergmann**, Assistant Dean of Students and Student Organizations; **Jamie Johnston**, Assistant Dean of Students and Student Activities. If needed, Cleveland State may also call a records custodian, any other witness who has been deposed in this matter, and any witness called or identified by Mr. Liss and Mr. Russell. Cleveland State may also introduce any exhibit that was used in any witness's deposition; and it may introduce the so-called Keeling report, about which much has been said, most of it wrong.

Respectfully submitted,

MICHAEL DE WINE
Ohio Attorney General

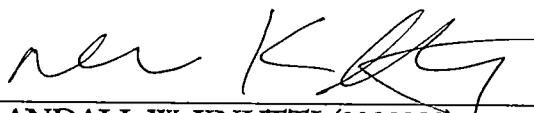


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CERTIFICATE OF SERVICE

On October 31, 2014, I sent a copy of this document via electronic mail to Plaintiffs' Counsel: Mark Griffin (mgriffin@tpgfirm.com) and Sara Verespej (SVerespej@tpgfirm.com).



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