



Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
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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 True Shaver

DECISION

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On September 29, 2014, defendant filed motions for summary judgment pursuant to Civ.R 56(B), as to each plaintiff, and, plaintiff, William Russell, filed a motion for partial summary judgment pursuant to Civ.R. 56(A), as to his claim for breach of contract. On October 3, 2014, defendant filed a response to Russell's motion. On October 13, 2014, Russell filed a motion for leave to file a reply in support of his motion for partial summary judgment, which is GRANTED, instant. On October 15, 2014, with leave of court, plaintiffs filed a consolidated response to defendant's motions. On October 21, 2014, defendant filed a motion for leave to file a reply to plaintiffs' response. On October 23, 2014, plaintiffs filed a memorandum in opposition to defendants' October 21, 2014 motion, or, in the alternative, a motion for leave to file a sur-reply. Upon review, defendant's October 21, 2014 motions and plaintiffs' October 23, 2014 motion are DENIED. The motions for summary judgment are now before the court pursuant to L.C.C.R. 4(D).

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Civ.R. 56(C) states, in part, as follows:

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

Plaintiffs, Steven Liss, and William Russell, were both employed by defendant, Cleveland State University (CSU), in the Department of Student Life. Liss, who worked full-time as Director of the Center for Student Involvement, supervised both Mary Myers, Coordinator of Student Organizations, and Russell, who worked part-time as the Coordinator for Greek Affairs. Russell had worked for defendant in some capacity since the 1960s. Liss had worked for defendant for approximately 19 years.

In 2011, Liss' supervisor, Sandra Emerick, left defendant's employment. As a result of her departure, Dr. James Drnek, Dean of Students, became Liss' supervisor. A nationwide search was conducted to select Emerick's replacement, and in February 2012, Dr. Willie Banks was hired as Associate Dean of the Department of Student Life. Dr. Banks then became Liss' direct supervisor.

After Dr. Banks was hired, he determined that the Department of Student Life was not performing up to his standards. Dr. Banks instructed Liss to issue a written reprimand to both Myers and Russell regarding their failure to comply with certain of his requests for data. Liss disagreed with Banks' desire to issue written reprimands, and after consultation with Dean Drnek, the written reprimands were removed from Myers' and Russell's

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personnel files. During the spring semester of 2012, Dr. Banks and Dean Drnek determined that the Center for Student Involvement needed to be restructured. As part of the restructuring, Dr. Banks hired a consultant, T.W. Cauthen, who was a close friend of his. After Cauthen's report was submitted and meetings were held, defendant created three new positions: 1) Assistant Dean of Student Organizations, which encompassed most of Liss' former duties, and was filled by existing employee Robert Bergmann, age 32; 2) Assistant Dean of Student Activities and Events, which encompassed most of Mary Myers' former duties, and was filled by existing employee Jamie Johnston, age 29; and 3) Assistant Dean of Student Engagement, which assumed all of Russell's duties, and was eventually filled by Jill Courson, age 35, who was a personal friend of Dr. Banks. The former positions which were held by Liss, Myers, and Russell were abolished on September 5, 2012. At the time of the abolishment, both Liss and Myers were 50 years old, and Russell was 66 years old. Neither Bergmann nor Johnston were required to interview for the new positions; they were both promoted and received pay raises.

Russell was a member of a collective bargaining unit. When his position was abolished, he met with Steve Vartorella from defendant's human resources department who explained to Russell that he had "bumping rights," which meant that he could be placed into another comparable position based on his seniority. Although Vartorella identified one position for him, Russell declined it, stating that he did not have the skill set to perform the job, based on requirements of knowledge of Excel, Microsoft Word, and PowerPoint.

Liss was not a member of a collective bargaining agreement, and, consequently, was not eligible to "bump" into any existing position. Liss applied for all three newly created positions and was interviewed for two, but was not selected.

Both plaintiffs assert claims for age discrimination, violations of the Family and Medical Leave Act, retaliation, and breach of contract. Russell also asserts a claim of disability discrimination.

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AGE DISCRIMINATION

R.C. 4112.02 provides, in pertinent part, that: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the * * * age * * * of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." In Ohio, "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.*, 66 Ohio St.2d 192,196 (1981).

A plaintiff may establish a prima facie case of discrimination either by direct evidence or by the indirect method established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "Direct evidence of discrimination occurs when either the decision-maker or an employee who influenced the decision-maker made discriminatory comments related to the employment action in question." *Chitwood v. Dunbar Armored, Inc.*, 267 F. Supp.2d 751, 754 (S.D. Ohio 2003). Further, "direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003), quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999). "Consistent with this definition, direct evidence of discrimination does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." *Id.* citing *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000).

In order for a statement to be evidence of an unlawful employment decision, plaintiff must show a "nexus between the improper motive and the decision making process or personnel. Accordingly, courts consider (1) whether the comments were made by a decision maker; (2) whether the comments were related to the decision making process;

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(3) whether they were more than vague, isolated, or ambiguous; and (4) whether they were proximate in time to the act of alleged discrimination.” *Birch v. Cuyahoga Cty. Probate Court*, 173 Ohio App.3d 696, 705, 2007-Ohio-6189, ¶ 23 (8th Dist.). However, where allegedly discriminatory comments are merely “stray remarks,” unrelated to the decision-making process, such comments are not actionable. See *Bogdas v. Ohio Department of Rehabilitation and Correction*, 10th Dist. Franklin No. 09AP-466, 2009-Ohio-6327 citing *Brewer v. Cleveland Schools Bd. of Edn.*, 122 Ohio App.3d 378, 384 (8th Dist.1997); *Smith v. Firestone Tire and Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989).

Plaintiffs testified in their depositions that Dr. Banks made comments to them, including claiming that Russell and Myers were “old dogs who could not learn new tricks;” that Dr. Banks described Russell and Myers as “elephants in the room,” told Russell that he needed to get into the 21st century, get rid of his “old school” methods, and that Dr. Banks criticized both Russell and Myers for not being up to date and for being old fashioned. The alleged comments were made by a decision-maker, inasmuch as Dr. Banks worked with Dean Drnek to develop the reorganization plan; however, the court finds that issues of fact exist with regard to whether the comments were related to the decision making process. Although it is undisputed that Dr. Banks began his employment in February 2012, and plaintiffs were notified of the abolishment of their positions on September 5, 2012, issues of fact exist with regard to when Dr. Banks made the alleged derogatory comments, and thus, whether they were proximate in time to the act of alleged discrimination.

In order to state a prima facie case of age discrimination by indirect evidence, under *McDonnell Douglas*, plaintiff first has “the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant ‘to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.’ * * * Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true

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reasons, but were a pretext for discrimination.” *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981), quoting *McDonnell Douglas*, at 802, 804.

An inference of discriminatory intent may be drawn where plaintiff establishes that he: 1) was at least 40 years old at the time of the alleged discrimination; 2) was subjected to an adverse employment action; 3) was otherwise qualified for the position; and 4) that after plaintiff was rejected, a substantially younger applicant was selected. *Coryell v. Bank One Trust Co., N.A.*, 101 Ohio St 3d 175, 2004-Ohio-723, paragraph 1 of the syllabus.

After a review of the depositions filed in this case, both plaintiffs have established a prima facie case of age discrimination by indirect evidence. Liss was 50 years old and Russell was 66 years old at the time of the reorganization; both of their jobs were eliminated as a result of the reorganization; and they were both qualified for the positions that they previously held. As a result of the reorganization, all three of the newly created positions were filled by people who were substantially younger than plaintiffs.

Defendant presented both the affidavit and deposition of Dean Drnek to provide a legitimate, nondiscriminatory reason for the reorganization. Dean Drnek testified that he and his supervisors determined that the priority for Student Life was to provide as much programming on campus for the students as possible; that there was not enough student activity occurring on campus; and that there was no position to coordinate the new Student Center. (Drnek deposition, pages 92-93.) In addition, Dean Drnek averred, as follows: “During my tenure at CSU, I tried to create a greater sense of community on campus as it became a more residential University. To achieve that goal, I met with students, officials and consultants to determine what aspects of student life were lacking. In the Fall Semester of 2010, a new student center as well as a new residence hall with 1,100 dorm rooms opened. Thereafter, in the Fall Semester of 2012, the Department of Student Life was restructured. As a part of that restructuring, I made the decision to eliminate three positions within the Department of Student Life, which included the positions held by Steven Liss and William Russell.

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"Mr. Liss's and Mr. Russell's ages were not considered when I made the decisions related to the restructuring of the Department of Student Life. I did not discriminate against Mr. Liss or Mr. Russell because of their ages or any other protected characteristic. Additionally, I never considered Mr. Russell's health condition or need to take FMLA leave when making these decisions. In fact, I was unaware that he was going to be taking extended leave until his position had been eliminated." (Affidavit of Dean Drnek, paragraphs 3 and 4.)

"To establish pretext, a plaintiff must demonstrate that the proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct. Regardless of which option is chosen, the plaintiff must produce sufficient evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against him. 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." (Internal citations omitted.) *Knepper v. Ohio State Univ.*, 10th Dist. Franklin No. 10AP-1155, 2011-Ohio-6054, ¶ 12. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine, supra*, at 253.

Plaintiffs point to the fact that the only staff members who were affected by the reorganization were 50 years old or older; that the two existing employees who were promoted and were not required to interview for their positions were less than 40 years old; that the consultant who recommended reorganization was a close personal friend of Dr. Banks with no prior consulting experience; that Courson, who was hired to replace Russell was also a personal friend of Dr. Banks and was younger than 40 years old; and that Dr. Banks has not hired anyone over the age of 40 since he has been employed by defendant. Construing the evidence most strongly in favor of plaintiffs, issues of material fact exist with regard to pretext. Therefore, defendant's motions for summary judgment with regard to both plaintiffs' claims for age discrimination are DENIED.

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FMLA CLAIMS

The FMLA prohibits employers from discriminating against employees for exercising their rights under the Act. 29 U.S.C. Section 2615(a)(2). "Basing an adverse employment action on an employee's use of leave or retaliation for exercise of FMLA rights is therefore actionable. *Skrjanc v. Great Lakes Power Serv. Co.* (C.A.6, 2001), 272 F.3d 309. "An employee can prove FMLA retaliation circumstantially, using the method of proof established in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792 * * *. To establish a prima facie case of retaliation circumstantially, plaintiff must show that he exercised rights afforded by the FMLA, that he suffered an adverse employment action, and that there was a causal connection between his exercise of rights and the adverse employment action." (Internal citations omitted.) *Zechar v. Ohio Dept. of Edn.*, 121 Ohio Misc.2d 52, 2002-Ohio-6873, ¶ 9.

Liss asserts that the abolishment of his position was based in part on his informing his supervisors of Russell's need to take FMLA leave. Construing the evidence most strongly in favor of Liss, the only reasonable conclusion is that Liss has failed to state a claim for FMLA retaliation, inasmuch as Liss did not exercise his own right to use FMLA leave. Therefore, defendant is entitled to judgment as a matter of law on Liss' FMLA claim.

With regard to Russell's FMLA claim, Russell claims that defendant was aware of his need to take FMLA leave for his upcoming surgery prior to the decision regarding the abolishment of his position. Although Dean Drnek states that he was unaware that Russell was going to be taking FMLA leave, Russell states that Dean Drnek "knew about" the fact that he was undergoing cardiac tests to see if his heart was strong enough to undergo shoulder surgery in September. (Russell deposition, page 161.) In addition, Liss averred that he "spoke with Banks several times about Russell's need for FMLA leave related to surgery scheduled for September 2012." (Liss affidavit, paragraph 2.) Russell averred that in late May or early June 2012, he met with Dean Drnek to discuss his need to take FMLA leave for his upcoming shoulder surgery in September 2012, and that later in June 2012, he discussed his need for FMLA with both Drs. Banks and Drnek. (Russell affidavit,

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paragraphs 2-7). Thus, the court finds that issues of fact exist with regard to defendant's notice of the need for Russell to take FMLA leave. Accordingly, defendant is not entitled to summary judgment on Russell's claim for interference with his FMLA rights.

RETALIATION

In order to establish a prima facie case of retaliation, plaintiff is required to prove that: "(1) plaintiff engaged in a protected activity; (2) the employer knew of plaintiff's participation in the protected activity; (3) the employer engaged in retaliatory conduct; and (4) a causal link exists between the protected activity and the adverse action." *Motley v. Ohio Civ. Rights Comm.*, 10th Dist. Franklin No. 07AP-923, 2008-Ohio-2306, ¶ 11, quoting *Zacchaeus v. Mt. Carmel Health Sys.*, 10th Dist. Franklin No. 01AP-683, 2002-Ohio-444.

For purposes of a retaliation claim, opposition to "demeaning and harassing conduct," without complaining of illegal discrimination or taking an overt stand against such suspected illegal discriminatory action, does not constitute a protected activity. *Murray v. Sears*, N.D. Ohio No. 1:09 CV 702, 2010 U.S. Dist. LEXIS 34256 (April 7, 2010); see also *Fox v. Eagle Distributing Co.*, 510 F.3d 587, 591-592 (6th Cir. 2007). "[A] vague charge of discrimination in an internal letter or memorandum is insufficient to constitute opposition to an unlawful employment practice." *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989).

With regard to Liss' claim of retaliation, he asserts that Dr. Banks retaliated against him because he "stood up for" Myers and Russell when Dr. Banks questioned their job performance, and when he asked Dean Drnek to remove Dr. Banks' written reprimands from their personnel files. Liss also argues that he was retaliated against when he complained of discriminatory treatment during one of his interviews after his position was abolished, and that his reference to discrimination resulted in defendant's refusal to rehire him. Russell asserts that he was retaliated against because of his complaints of discriminatory treatment. Russell points to a letter that he drafted on June 19, 2012, in response to the written reprimand issued by Liss on behalf of Dr. Banks, wherein Russell

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states: "I will put this and any other claim of 'discriminatory issues' aside for the moment and respond to Associate Dean Willie Banks' charges relating to the written warning that he directed Steve Liss to write." (Exhibit VV to Russell's deposition). However, the rest of the letter responds to specific criticisms of Russell's work performance as noted in the reprimand, and does not specifically state what type of discriminatory issues Russell claims. Construing the evidence most strongly in favor of plaintiffs, the only reasonable conclusion is that neither Liss nor Russell engaged in a protected activity, and defendant is entitled to judgment as a matter of law on plaintiffs' claims of retaliation.

BREACH OF CONTRACT

With regard to Liss' breach of contract claim, he asserts that inasmuch as he was laid off due to a reorganization, defendant was required to make a reasonable effort to secure alternative appointments within CSU in open positions for which he was qualified pursuant to the Professional Staff Personnel Policies contract. (Exhibit A to Liss' amended complaint, Section 8.5.8.4.3(B)). Liss argues that defendant failed to make a reasonable effort to secure alternative appointments for him, and that it also failed to reappoint him to his position when it re-opened within 18 months.

Steve Vartorella testified in his deposition that he met with Liss after his job was abolished, that Vartorella gave Liss three or four CSU job postings, and made Liss aware of defendant's outplacement services department and career services department for help with his resume. (Vartorella deposition, pages 97-98.) In addition, documents attached to Vartorella's deposition show that Liss was selected as a candidate to interview for the Assistant Dean of Student Engagement. However, Liss testified in his deposition that he subsequently declined an interview for that position, based upon his inquiry to the chair of the hiring committee whether she could confirm that he would not be subjected to illegal discrimination. (Liss deposition, page 92). Construing the evidence most strongly in favor of Liss, the court finds that the only reasonable conclusion is that defendant made a reasonable effort to secure alternative appointments within CSU in open positions for which

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Liss was qualified. In addition, Liss has presented no evidence to show that his former position re-opened within 18 months of his job abolishment. Therefore, defendant is entitled to judgment as a matter of law with regard to Liss's claim of breach of contract.

Russell seeks summary judgment on his breach of contract claim. However, with regard to Russell's claim for breach of contract, defendant asserts that the court lacks subject matter jurisdiction because Russell's employment was subject to a collective bargaining agreement. Indeed, Russell asserts in his complaint that he was a member of the Service Employees International Union, District 1199. The Court of Claims lacks jurisdiction over an action alleging a violation of a collective bargaining agreement because R.C. 4117.09 grants exclusive jurisdiction over such actions to the courts of common pleas. *Moore v. Youngstown State Univ.*, 63 Ohio App.3d 238 (1989). Therefore, defendant is entitled to summary judgment as a matter of law on Russell's breach of contract claim.

DISABILITY DISCRIMINATION

Russell asserts a claim for disability discrimination, however, he does not identify his disability. In his deposition, he explains that he had suffered a heart attack and was undergoing tests to determine whether he would be eligible for shoulder surgery during the spring and summer of 2012, and that defendant was aware that he had shoulder surgery scheduled for September 2012, but that his employment was terminated despite the knowledge for his need for FMLA leave.

To establish a prima facie case of disability discrimination pursuant to R.C. 4112.02, plaintiff must demonstrate: "(1) that he or she was disabled; (2) that an adverse employment action was taken by an employer, at least in part, because the individual was disabled, and; (3) that the person, though disabled, can safely and substantially perform the essential functions of the job in question." *Yamamoto v. Midwest Screw Products*, Lake App. No. 2000-L-200, 2002-Ohio-3362, citing *Hazlett v. Martin Chevrolet, Inc.*, 25 Ohio St.3d 279, 281 (1986). The *McDonnell Douglas* burden shifting framework also applies for the analysis of plaintiff's claim of disability discrimination under

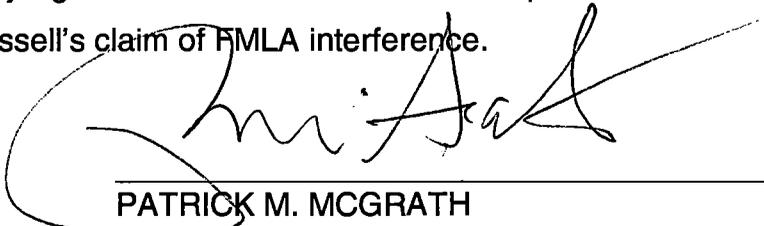
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R.C. Chapter 4112. *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St. 3d 175, 178 (2004); *Knepper v. Ohio State Univ.*, 10th Dist. No. 10AP-1155, 2011 Ohio 6054.

Ohio law defines "disability" to mean "a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment." R.C. 4112.01(A)(13). The court notes that "heart disease" is defined as an impairment under R.C. 4112.01(A)(16); however, such an impairment standing alone, does not necessarily constitute a disability. See *Rongers v. Univ. Hosps. of Cleveland, Inc.*, 8th Dist. No. 91669, 2009-Ohio-2137. Temporary impairments, with little or no long-term or permanent impact, are usually not disabilities. *Canady v. Rekau & Rekau, Inc.*, 10th Dist. Franklin No. 09AP-32, 2009-Ohio-4974, ¶ 33. Thus, Russell's heart attack, standing alone, does not constitute a disability. Although Russell testified that he needed shoulder surgery, he did not present evidence that the need for shoulder surgery substantially limited one or more major life activities. Construing the evidence most strongly in his favor, the only reasonable conclusion is that Russell was not disabled, and that defendant is entitled to judgment as a matter of law on Russell's disability discrimination claim.

For the foregoing reasons, defendant is entitled to summary judgment as a matter of law on Russell's claim of disability discrimination, on Russell and Liss' claims of breach of contract and retaliation, and on Liss's claim of violation of FMLA rights. However, defendant's motion for summary judgment shall be denied as to both plaintiffs' claims of age discrimination, and as to Russell's claim of FMLA interference.



PATRICK M. MCGRATH
Judge



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JUDGMENT ENTRY

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A non-oral hearing was conducted in this case upon defendant's motions for summary judgment, and plaintiff Russell's motion for partial summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is DENIED, in part, as to plaintiffs' claims of age discrimination and Russell's claim of FMLA interference. Defendant's motion for summary judgment is GRANTED, in part, as to plaintiffs' claims for retaliation, Liss' claim of violation of FMLA rights, Russell's claim of disability discrimination, and both plaintiffs' claims for breach of contract. Plaintiff Russell's motion for partial summary judgment is DENIED.

PATRICK M. MCGRATH
Judge

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