

IN THE OHIO COURT OF CLAIMS

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

ORIGINAL

PLAINTIFFS WILLIAM RUSSELL AND STEVEN LISS'S
FIRST AMENDED JOINT PRE-TRIAL STATEMENT

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ON COMPUTER

In order to be consistent with this Court's ruling on summary judgment, Plaintiffs Steve Liss and William Russell (together, "Plaintiffs") respectfully submit this amended joint pretrial statement in order to accurately reflect the claims to be tried.¹ This is an employment discrimination case set for trial beginning December 8, 2014. In short, defendant Cleveland State University ("CSU") used a sham reorganization to fire only older workers in its Department of Student Life—including Plaintiffs—and then to promote only younger workers. In violation of the Family Medical Leave act, CSU also violated Russell's rights under that statute. Plaintiffs respectfully reserve the right to amend this Statement, including adding witnesses and exhibits.

FACTUAL BACKGROUND

CSU fired Liss, age 50, and Russell, age 66, because CSU wanted its Department of Student Life ("DSL") to get younger. CSU hired Willie Banks to lead DSL in February 2012. Upon his hiring, Banks took an office in a hallway with younger DSL employees, separate from the three oldest DSL employees (Liss, Russell and Mary Myers), whose offices were located in a different hallway.² By April 2012, Banks had set to the task of justifying the termination of DSL's three oldest workers while promoting its younger workers, and denying Liss and Russell placement in open positions for which they were qualified. *CSU admitted in deposition that based on this "100% correlation" between age and terminations, a reasonable person could conclude that age discrimination had occurred.*³

¹ Plaintiffs submit this amended Pre-Trial Statement to assist the Court in the trial of this case. Notwithstanding the foregoing, Plaintiffs reserve all rights with respect to claims on which the Court granted summary judgment.

² Drnek Dep. 72:2-19; Plaintiff's Consol. Dep. Ex. 500.

³ Vartorella Dep. 161:12-19; Plaintiff's Consol. Dep. Ex. 327.

I. Plaintiffs Were Long-Term, Outstanding CSU Employees.

Plaintiffs have served CSU for a combined 55-plus years. Liss was employed by CSU for 19 years;⁴ Russell was employed by CSU for over 40 years.⁵ CSU recognized both Plaintiffs for their extraordinary contributions to CSU. Liss consistently earned excellent performance reviews, such that “Liss met every goal for his prior year” and “every single evaluation criteria . . . was ‘Met Expectations’ or higher.”⁶ Similarly, Russell’s outstanding work was recognized through various awards, including three nominations for CSU’s “Distinguished Service Award and national awards from the various fraternities and sororities he served in his role of Greek Life Coordinator.”⁷

II. Immediately Upon Hire, Banks Began Disparaging Older Workers on the Basis of Age.

Upon being hired in February 2012, Banks made his dislike for older workers apparent, including regularly making age-related remarks. For instance, Banks commented that Russell and Myers were “old dogs” who could not “learn new tricks.”⁸ Liss complained about Banks’s age discrimination to at least three CSU representatives: HR representative Steve Vartorella,⁹ Banks’s supervisor—James Drnek,¹⁰ and CSU’s general counsel—Sonali Wilson.¹¹ CSU never

⁴ Liss Dep. 32:20-23.

⁵ *Affidavit of William Russell* (“Russell MSJ Aff.”), attached to *Plaintiff William Russell’s Motion for Partial Summary Judgment*, filed on September 29, 2014.

⁶ Drnek Dep. 28:14-20. *See also* Plaintiff’s Consol. Dep. Exs. 131 & 132.

⁷ Russell MSJ Aff.

⁸ Liss Dep. 230:16-18.

⁹ Liss Dep. 100:21-101:7. Liss met with Vartorella on or around June 4 to discuss two issues, 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.

¹⁰ 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).

¹¹ 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.

investigated Liss's complaints.¹²

In a similar fashion, Banks mandated reprimands of Russell and Myers but issued no such orders with respect to DSL's younger employees.¹³ Specifically, Banks required Liss to issue a first warning to Russell and to issue a letter of concern to Myers.¹⁴ Liss repeatedly told Banks that he did not agree with Banks's assessment of Russell's and Myers's performance and that he did not agree that reprimand was appropriate in either case.¹⁵ While recognizing that he had no personal knowledge of the day-to-day performance of Russell,¹⁶ Banks nonetheless insisted on the reprimands. In the end, the reprimands were demonstrably false;¹⁷ so HR and Drnek—Banks's supervisor—ordered that the reprimands be retracted.¹⁸

III. Banks Decided To Restructure DSL To Make It Younger.

In April 2012, Banks drafted a new organizational structure for DSL that was consistent with his desire to make the Department younger.¹⁹ The new structure 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 Student Civic Engagement.²⁰ Each vector had a Manager (the Banks direct report) and a Coordinator, who reported to the respective Manager.²¹

¹² Vartorella Dep. 171:8-10.

¹³ Liss Dep. 40:4-8.

¹⁴ Liss Dep. 40:6-11.

¹⁵ Banks Dep. 216:9-15 & 217:2-11; Plaintiff's Consol. Dep. Ex. 31; Liss Dep. 169:3-6.

¹⁶ Banks Dep. 147:8-11.

¹⁷ The letter of concern to Myers was premised on her alleged failure to login to OrgSync for a certain period; Liss testified that he was training Myers on OrgSync throughout the period in question and moreover, Myers was not slotted to take over OrgSync responsibilities until July 1, well after the letter of concern was issued. Liss Dep. 137:1-14 & 166:13-23. Likewise, the first warning to Russell was based on his alleged failure to provide Greek rosters in the appropriate format; however, both Russell and Liss had communicated to Banks that due to the timing of the request (school was not in session at the time), they would need some additional time to provide the rosters as requested. Liss Dep. 137:1-14.

¹⁸ Banks Dep. 151:10-152:2; Liss Dep. 50:9-17.

¹⁹ Banks Dep. 116:23-25; Plaintiff's Consol. Dep. Ex. 317.

²⁰ Plaintiff's Consol. Dep. Ex. 317.

²¹ Plaintiff's Consol. Dep. Ex. 317.

Banks discussed this new structure with CSU HR representatives in May 2012 and provided job descriptions for the new positions even though drafting the descriptions was HR's responsibility.²² Banks also provided these job descriptions to Drnek.²³ Despite this meeting and the April 2012 document Banks created setting forth his desired organizational structure, Banks falsely claimed under oath that he "never had any discussions about restructuring until after the [Cauthen] report [in mid-June 2012]."²⁴

IV. Banks Recommended CSU Hire His Close, Personal Friend as a Consultant To Review the Department and Then Told His Friend To Recommend Restructuring.

After deciding to reorganize the Department, Banks recommended that CSU pay his close friend, T. W. Cauthen, a mere \$3,000 to issue a consulting report concerning DSL. CSU hired Cauthen without issuing a "request for proposal,"²⁵ or considering anyone else.²⁶ Cauthen did not have prior experience consulting on universities similar to CSU.²⁷ Banks did not reveal this or his close relationship with Cauthen to CSU.²⁸

Banks told Cauthen in writing that Cauthen should recommend a reorganization of DSL.²⁹ 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.³⁰ Banks also provided Cauthen with confidential HR documents concerning Russell.³¹ Cauthen only reviewed the documents given to him by Banks and only interviewed

²² Plaintiff's Consol. Dep. Exs. 218 & 238; McCafferty Dep. 42:25-45:2.

²³ Plaintiff's Consol. Dep. Ex. 43.

²⁴ Banks Dep. 91:13-16.

²⁵ Banks Dep. 88:12-15.

²⁶ Banks Dep. 90:25-91:2.

²⁷ Banks Dep. 88:12-15 & 89:22-90:6; Liss Dep. 82:20-23.

²⁸ Banks Dep. 110:1-19.

²⁹ Plaintiff's Consol. Dep. Exs. 16 & 35.

³⁰ Banks Dep. 160:8-161:15 & 162:23-163:9.

³¹ Cauthen Dep. 156:16-158:2.

the employees suggested by Banks. Cauthen sought no independent information.³² Banks edited Cauthen's drafts prior to submission of the final report.³³ 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.**³⁴

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.³⁵

V. **Drnek Recommended the Structure Banks Created, Which Banks Had Instructed the Consultant to Endorse.**

On June 25, Drnek and Banks recommended restructuring DSL consistent with the structure created by Banks in April 2012 and copied by Cauthen in his consultant's report.³⁶ The recommendation was that CSU create five new jobs, place younger employees in two of those jobs without any posting or interview process, and terminate Liss, Russell and Myers—the older workers. In connection with this recommendation, CSU created a chart highlighting the ages of each individual terminated and of each individual retained.³⁷ CSU does not deny that the chart constitutes an evaluation of the employees being terminated, including Liss and Russell, based on their ages.³⁸ 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.³⁹

³² Banks Dep. 162:17-163:12 & 205:17-22.

³³ Banks Dep. 160:2-7.

³⁴ 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[.]").

³⁵ Banks Dep. 221:1-8. *See also* Liss Dep. 88:7-11.

³⁶ *See generally* Plaintiff's Consol. Dep. Ex. 15; Banks Dep. 218:7-221:8.

³⁷ Plaintiff's Consol. Dep. Ex. 327.

³⁸ Vartorella Dep. 144:9-12.

³⁹ Vartorella Dep. 158:20-159:2.

VI. Drnek Lied About Liss's Qualifications in Order To Obtain Approval for Liss's Termination.

On August 9, Drnek met with his supervisor—George Walker, then CSU's Interim Provost and VP for Academic Affairs,⁴⁰ to seek approval for Plaintiffs' terminations. During that meeting, Drnek presented job descriptions for the new positions that were different than those Banks drafted earlier in the year; Drnek had added new "minimum qualifications"⁴¹ in an attempt to disqualify Plaintiffs from consideration. Despite this attempt, Liss remained qualified for the new positions. Drnek, however, falsely told Walker that Liss did not meet the newly-added minimum requirements.⁴² CSU now admits that every reason for not placing Liss in the open positions was false.⁴³

VII. CSU Refused To Place Plaintiffs in Open Positions for Which They Were Qualified.

In stark contrast to its treatment of Liss and Russell, CSU promoted substantially younger employees within the Department to two of the new Banks direct-report positions—titled Assistant Dean—even though the employees did not respond to any posting, interview for the positions or even ask to be placed in the positions.⁴⁴ CSU simply refused to make any effort to place Liss or Russell in positions for which they were qualified. This violates CSU policies.

⁴⁰ See, e.g., Drnek Dep. 66:21-25.

⁴¹ See, e.g., Drnek Dep. 131:19-132:1 & 132:18-133:2; Plaintiff's Consol. Dep. Ex. 218.

⁴² Plaintiff's Consol. Dep. Ex. 15; Drnek Dep. 151:12-15.

⁴³ Drnek Dep. 137:23-139:11 & 140:19-141:15

⁴⁴ Banks Dep. 59:22-60:11. 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).

Liss ultimately applied for the three open positions in DSL.⁴⁵ Despite his superior qualifications, he was only granted an interview for two positions.⁴⁶ Then CSU refused to consider him in retaliation for Liss seeking CSU's assurances that he would not be subject to discrimination or retaliation.⁴⁷ CSU ultimately 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 Programs), who had no previous experience at commuting or urban universities.⁴⁸

CSU's lack of effort to place Russell into vacant posted bargaining unit positions for which he was qualified is equally apparent. CSU transferred all of Russell's duties to a substantially younger new hire (and long-time friend of Banks),⁴⁹ Jill Courson, and had no discussions with Russell concerning any other job openings for which he was qualified.⁵⁰

VIII. Russell Requested FMLA Leave Prior to His Termination, Which He Was Unable To Take Due To His Termination.

CSU's termination of Russell resulted in him not being able to take FMLA leave to which he was entitled. CSU expressed its animosity towards Russell's leave requests in other ways as well, including instructing Liss not to accommodate Russell's health condition and refusing to rehire Russell.⁵¹

⁴⁵ Liss Dep. 243:16-22.

⁴⁶ Liss Dep. 242:4-14.

⁴⁷ Liss Dep. 243:6-15; Drnek Dep. 176:11-19.

⁴⁸ Banks Dep. 202:14-22.

⁴⁹ Banks Dep. 173:10-19.

⁵⁰ 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).

⁵¹ Russell Dep. 199:9-200:3, 202:23-203:5 & 204:21-24; Liss Dep. 78:22-79:15; Russell Dep. 199:9-200:3.

IX. CSU Recognizes That the Reorganization of DSL Was a Sham.

In the time since CSU fired only older workers and hired only younger workers, under the false claim of a reorganization, every administrator involved in the purported “reorganization” has left or is leaving CSU, or has been reassigned. Drnek has left CSU and now works in Bakersfield, California.⁵² Banks was denied promotion into Drnek’s position and is actively interviewing with other schools.⁵³ 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.⁵⁴

LEGAL ISSUES AND ARGUMENT

I. Summary of Legal Issues.

Plaintiffs incorporate by reference their brief in opposition to CSU’s motion for summary judgment, and further summarize the following legal issues:

1. Whether CSU discriminated on the basis of age against Liss and Russell when it terminated only Liss, Russell and other workers aged 50 or older;
2. Whether CSU discriminated on the basis of age against Liss and Russell when it refused to place them into open positions for which they were qualified, and instead filled those positions with substantially younger, less qualified persons;
3. Whether CSU interfered with Russell’s exercise of his FMLA rights and/or retaliated against him for exercising those rights;
4. The damages suffered by Liss and Russell; and
5. Any affirmative defense asserted by CSU.

These issues are set forth in more detail in the sections below.

⁵² Drnek Dep. 161:20-24.

⁵³ Banks Dep. 27:12-20.

⁵⁴ See, e.g., Banks Dep. 30:17-31:1.

II. Plaintiffs May Prove Discrimination with Either Direct or Indirect Evidence.

R.C. 4112.14 prohibits employers from discriminating based on age when making employment decisions.⁵⁵ Under Ohio law, there are two primary methods for proving discriminatory intent: the “direct” evidence method and the “indirect” evidence method.⁵⁶ A plaintiff may pursue his evidentiary burden under either method, or under both.⁵⁷

Under the direct evidence method, a plaintiff may offer “evidence of any type”—direct, circumstantial, or statistical—to “directly” prove the ultimate issue of unlawful intent.⁵⁸ Importantly, “direct evidence” refers to a **method** of proof, **not a type** of evidence.⁵⁹ This method differs from the indirect evidence method, under which a plaintiff uses the *McDonnell Douglas* burden-shifting framework to “indirectly” prove unlawful intent by eliminating common legitimate motives.⁶⁰

III. Plaintiffs Will Present Direct Evidence of Discrimination at Trial, Thereby Obviating the Need to Employ the McDonnell Douglas Framework.

In *Kohmescher v. Kroger Co.*, the Ohio Supreme Court held that the *McDonnell Douglas* test is unnecessary where the plaintiff presents direct evidence of discrimination.⁶¹

⁵⁵ R.C. 4112.14.

⁵⁶ *Mauzy v. Kelly Servs.*, 75 Ohio St. 3d 578, 581-87, 664 N.E.2d 1272, 1276-79 (1996). A copy of *Mauzy* is attached hereto as Exhibit 1. See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (articulating the indirect method for demonstrating discriminatory intent under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.).

⁵⁷ See *Mauzy*, 664 N.E.2d at 1276-79.

⁵⁸ *Mauzy*, 664 N.E.2d at paragraph one of the syllabus.

⁵⁹ *Id.* (explaining *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501 (1991)) (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 1279. 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 fact-finder need not draw any inference to establish the fact for which the evidence is offered. *Id.* (clarifying that “direct evidence of discrimination” refers to a method of proof, not a type of evidence).

⁶⁰ *Id.* at 1276-78.

⁶¹ *Kohmescher v. Kroger Co.*, 61 Ohio St. 3d 501, 504-505, 575 N.E.2d 439, 441 (1991); see also *id.* at Syllabus. See also *TWA v. Thurston*, 469 U.S. 111, 121, (1985) (“[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination.”) (citing *Teamsters v. United States*, 431 U.S. 324, 358, n. 44 (1977)); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 350 (6th Cir. 1998) (“[w]here the plaintiff fails to present direct evidence of discrimination, the courts analyze ADEA cases under the [] *McDonnell Douglas*

This is because the function of the *McDonnell Douglas* test is to allow the plaintiff to raise an inference of discriminatory intent “indirectly.”⁶² Thus, in *Kohmescher*, the Court held that only in the absence of “direct evidence of age discrimination,” does the *McDonnell Douglas* test need to be utilized to establish a *prima facie* case of age discrimination.⁶³

Direct evidence includes discriminatory statements or conduct that have a nexus with the alleged prohibited act of discrimination.⁶⁴ Similarly, examples of specific conduct of age discrimination, as opposed to bald assertions of such discrimination, are sufficient under the direct evidence test.⁶⁵ Here, direct evidence includes Banks stating, in reference to older employees, “you can’t teach old dogs new tricks,”⁶⁶ Banks’s description of the older employees as “old fashioned,” and his criticisms of their programs as “out-dated.”⁶⁷ Discriminatory comments “directed at or relating to the plaintiff are not deemed vague, ambiguous or isolated” and have been found to be sufficient, direct evidence in an age discrimination case.⁶⁸

Separately, it is undisputed that there is a direct and absolute correlation between age and termination. Indeed, CSU created a document tracking the ages of the affected staff. In

framework.”) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)) (emphasis added). A copy of *Ercegovich* is attached hereto as Exhibit 2.

⁶² *Mauzy*, 664 N.E.2d at 1277 (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-254 (1981)).

⁶³ *Kohmescher* at Syllabus.

⁶⁴ *Tessmer v. Nationwide Life Ins. Co.*, 10th Dist. Franklin No. 98AP-1278, 1999 Ohio App. LEXIS 4633, *17-18 (Sept. 30, 1999) (internal citations omitted).

⁶⁵ *Tessmer*, 1999 Ohio App. LEXIS 4633 at *20-21.

⁶⁶ Liss Dep., p. 230.

⁶⁷ See, e.g., Russell Dep. 169:19-25 & 170:6-10.

⁶⁸ *Tessmer*, 1999 Ohio App. LEXIS 4633 at *19 (holding that because an employer's age related comments were directed at the plaintiff, the comments could be used as direct evidence in plaintiff's discrimination case) (citing *Mauzy*, 664 N.E.2d at 1281). See also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (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).

other words, zero older workers were promoted, and zero younger workers were terminated. This constitutes additional direct evidence of discrimination.⁶⁹

IV. Plaintiffs Will Independently Prove Their Cases Through Indirect Evidence Under the McDonnell Douglas Test.

Employees may also use indirect evidence to show that they have been the victim of discrimination through the *McDonnell-Douglas* burden-shifting method of proof.⁷⁰ This method requires an employee to establish a *prima facie* case of discrimination.⁷¹ If the employee establishes a *prima facie* case, a mandatory presumption of discrimination arises.⁷² A defendant must then articulate a legitimate, non-discriminatory reason for the action it took against the plaintiff.⁷³ If the employer satisfies this burden, a court must afford the plaintiff an opportunity to demonstrate that the employer's rationale is actually pretext for unlawful discrimination.⁷⁴

A. Plaintiffs Will Easily Establish Their *Prima Facie* Cases.

Courts universally agree that the *prima facie* burden is not intended to be onerous.⁷⁵ Plaintiffs will easily meet their *prima facie* burden at trial. There is no dispute that both were over 40 at the time of their terminations. CSU admits that Plaintiffs were qualified for the positions they held and gave both Liss and Russell outstanding annual evaluations;⁷⁶ in the context of Plaintiffs' failure to re-hire claims, there is no higher burden—e.g. Plaintiffs need

⁶⁹ *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).

⁷⁰ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁷¹ See, e.g., *Wexler v. White's Fine Furniture*, 317 F.3d 564, 574 (6th Cir. Ohio 2003).

⁷² See *Coburn v. Rockwell Automation, Inc.*, 238 Fed. App'x 112, 119 (6th Cir. Ohio 2007); see also *Lulaj v. Wackenhut Corp.*, 512 F.3d 760, 765 (6th Cir. 2008).

⁷³ *Mauzy*, 664 N.E.2d at 1277.

⁷⁴ *Id.*

⁷⁵ *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 251 (1981).

⁷⁶ Drnek Dep. 28:14-20; Banks Dep. 37:2-6 & 68:20-23; Plaintiff's Consol. Dep. Exs. 131 & 132.

not show that they were more qualified than the younger employees hired (although there is substantial evidence showing that this is the case).⁷⁷ As to the third prong—adverse action—Plaintiffs were terminated and denied rehire. Finally, Plaintiffs were treated differently than substantially younger DSL employees Bob Bergmann and Jamie Johnston. Evidence of this differential treatment includes that Plaintiffs were subjected to scrutiny and review Bergmann and Johnston were not subject to (e.g. Banks ordered that Russell be reprimanded, and Banks only sent the job descriptions for Plaintiffs and another older employee—Mary Myers—to Cauthen); and Plaintiffs were terminated and not rehired even though there were open positions for which they were qualified while Bergmann and Johnston were promoted into positions for which they neither applied nor interviewed. Plaintiffs were also treated differently than CSU’s new younger hires Jill Courson, Catherine Lewis and Melissa Wheeler.

B. CSU’s Stated Reason for Terminating Plaintiffs Is Demonstrably False and Pretext for Unlawful 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.”⁷⁸ “[T]he factfinder’s disbelief of the reasons put forward by the defendant” will allow it to infer intentional discrimination.⁷⁹ If “disbelief is accompanied by a suspicion of mendacity,” the likelihood of intentional discrimination is increased, permitting the factfinder to infer discrimination more readily.⁸⁰

⁷⁷ *Patterson v. McLean Credit Union*, 491 U.S. 164, 168 (1989). See also *Plegue v. Clear Channel Broad., Inc.*, 2005 U.S. Dist. LEXIS 29250, *29-31 (E.D. Mich. Nov. 22, 2005). For purposes of the *prima facie* failure to hire/promote case, all that is required is a showing that the plaintiff met the requirements for the sought position.

⁷⁸ *Burdine, supra*, 450 U.S. at 256.

⁷⁹ *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (internal quotations omitted).

⁸⁰ *Id.*

CSU claims that the “sole reason” for Plaintiffs’ termination was the reorganization of the Department based on the Cauthen Report.⁸¹ CSU’s stated reason for the terminations is patently false and pretext for unlawful discrimination. The evidence will show that as of April 24, 2012, over a month before Cauthen’s report, Banks had already designed the reorganization.⁸² 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.”⁸³ Only after the structure had been designed and the job descriptions revised did Banks hire his close friend Cauthen to pretend that Cauthen had devised the plan himself. Cauthen did not ask for any 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.⁸⁴ 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.

Additional evidence of pretext is that Drnek changed the job descriptions drafted in May/June 2012 in an effort to disqualify Plaintiffs from the new positions.⁸⁵ Moreover, Drnek still had to lie about Liss’s lack of qualifications: Drnek now admits that the five reasons he gave his supervisor, George Walker, for why Liss should not be placed in any of the new

⁸¹ Banks Dep. 39:22-25 & 143:24-144:6.

⁸² Vartorella Dep. 161:12-19; Plaintiff’s Consol. Dep. Ex. 327.

⁸³ Plaintiff’s Consol. Dep. Ex. 238; McCafferty Dep. 42:25-45:2.

⁸⁴ 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[.]”).

⁸⁵ Drnek Dep. 131:19-134:1.

positions were untrue.⁸⁶ The impact of CSU's multiple misrepresentations is that they "permit the trier of fact to conclude that the employer unlawfully discriminated."⁸⁷

Finally, CSU's failure to investigate Plaintiffs' complaints of discrimination permits the jury to infer a discriminatory motive.⁸⁸ Liss complained to at least three CSU representatives. Nonetheless, CSU admits it never investigated the complaints about Banks's discrimination.⁸⁹

V. Plaintiffs' Ultimate Burden Is Only To Establish that Age Was a "Determining Factor."

Plaintiffs ultimate burden is to prove that "age made a difference in [CSU's] decisions[.]"⁹⁰ "There may be more than one reason for [the] decisions[;] Plaintiff[s] [are] not required to prove that [their] age was the only reason."⁹¹ Ohio courts refuse to endorse a standard requiring more than this.⁹²

VI. Plaintiffs Will Prove FMLA Interference and Retaliation.

There is no dispute that Russell was entitled to FMLA leave. At trial, Plaintiffs will offer evidence establishing that both Russell and Liss informed CSU of Russell's need to take

⁸⁶ See *Plaintiff's Consolidated Memorandum in Opposition to Defendant's Motion for Summary Judgment* at pp. 20-21.

⁸⁷ *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. at 148 (internal citations omitted).

⁸⁸ *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 (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.").

⁸⁹ *Vartorella Dep.* 171:8-10.

⁹⁰ *Thomas v. Columbia Sussex Corp.*, 10th Dist. Franklin No. 10AP-93, 2011-Ohio-17, ¶31. A copy of *Columbia Sussex* is attached hereto as Exhibit 3.

⁹¹ *Id.*

⁹² *Id.* (overruling assignment of error claiming that court was required to instruct the jury that it could only find for the plaintiff if "age was the 'but-for' cause for her termination i.e., that Defendants let Plaintiff go because of her age.").

FMLA leave.⁹³ CSU engaged in retaliation and interference prohibited under the FMLA by instructing Liss not to accommodate Russell's medical needs,⁹⁴ and by firing Russell before he could take leave and then refusing to rehire him.⁹⁵

EVIDENTIARY ISSUES

Concurrently herewith, Plaintiffs file a motion *in limine*. Plaintiffs reserve the right to make oral arguments regarding evidentiary issues during trial.

WITNESSES

Plaintiff anticipates calling the following witnesses:

1. Plaintiff William Russell;
2. Plaintiff Steven Liss;
3. Steve Vartorella;
4. Willie Banks;
5. Donna Whyte;
6. Jamie Johnston;
7. Jill Courson;
8. George Walker;
9. Sandra Emerick;
10. Jean McCafferty;
11. Bob Bergmann;
12. Daniel Lenhart;
13. Ronald Berkman;

⁹³ Russell Dep. 161:17-25 & 191:5-192:9; *Affidavit of William Russell* ("Russell BIO Aff."), attached to *Plaintiff's Consolidated Memorandum in Opposition to Defendant's Motion for Summary Judgment*, filed on October 15, 2014.

⁹⁴ Liss Dep. 78:22-79:15; Russell Dep. 199:9-200:3.

⁹⁵ Russell Dep. 199:9-200:3, 202:23-203:5 & 204:21-24.

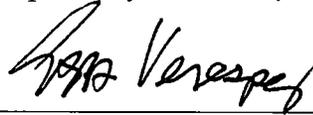
14. James Drnek (by videotaped deposition);
15. T.W. Cauthen (by videotaped deposition);
16. John Burke, Ph.D.;
17. Defendant's custodian of financial and business records; and
18. Rebuttal witnesses and Defendant's witnesses.

Counsel have taken the video-taped trial depositions of Mr. Drnek and Mr. Cauthen. Counsel have agreed that their testimony will be submitted by filing the depositions in their entirety, with parties reserving the right to move to strike portions thereof or to seek rulings on the objections contained in the transcripts.

EXHIBITS

Plaintiffs' Amended Exhibit List is attached hereto as Exhibit 4. Plaintiffs' Amended Exhibit List is intended to more closely reflect the claims in light of the Court's ruling on Summary Judgment. Plaintiffs reserve the right to use any exhibit identified by CSU. Plaintiffs may enlarge all and/or a portion of some exhibits for demonstrative purposes. Plaintiffs reserve the right to amend this exhibit list.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served via hand delivery, on this 8th day
of December 2014 to:

Randall W. Knutti, Esq.

Amy S. Brown, Esq.

Emily M. Simmons, Esq.

Attorneys for Defendant



*Attorney for Plaintiffs Steven Liss and William
Russell*