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COURT OF CLAIMS  
OF OHIO

IN THE OHIO COURT OF CLAIMS

2014 DEC 26 AM 10:26

WILLIAM RUSSELL,	)	CASE NO.: 2013-00138
	)	
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.	)	

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**PLAINTIFFS WILLIAM RUSSELL AND STEVEN LISS'S  
REPLY IN SUPPORT OF MOTION IN LIMINE TO PRECLUDE EVIDENCE OR  
ARGUMENT RELATED TO SPECIFIC INSTANCES OF ALLEGED CONCERNS OR  
PERFORMANCE**

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On grounds of relevance and prejudice, Plaintiffs moved to exclude testimony and argument concerning “specific instances of alleged concerns or performance”<sup>1</sup> because such testimony is irrelevant to, and contradicts, CSU’s repeated claim that Plaintiffs’ terminations were **not** based on performance. Now, CSU wants to contradict its own stated reason by introducing “reference[s] by Cleveland State to [Liss’s and Russell’s] skills and abilities.”<sup>2</sup>

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<sup>1</sup> Motion in Limine, at p.1.  
<sup>2</sup> Opposition, at p.1.

ON COMPUTER

Liss's and Russell's "skills and abilities" are beyond question in this lawsuit.<sup>3</sup> Moreover, CSU's claims of poor performance are irrelevant because CSU has continually sworn, in testimony and in writing, that performance did not play any role in the reorganization, the terminations of Plaintiffs or the failures to re-hire Plaintiffs

## LAW AND ARGUMENT

### I. Dr. Willie Banks Testified That Plaintiffs' Terminations Were Not Performance Based.

In addition to the testimony of Dr. James Drnek, previously cited in Plaintiffs' Motion in Limine, Dr. Willie Banks specifically testified in deposition:

Q. Mr. Liss was not terminated because of his performance, correct?

A. Correct.

Q. Mr. Russell was not terminated because of his performance, correct?

A. Correct.<sup>4</sup>

At trial, Dr. Banks testified again that the Plaintiffs' terminations were not based on performance. Thus, testimony and evidence regarding specific instances of performance or other concerns should be excluded because they are irrelevant.

### II. Steve Vartorella, CSU's Corporate Representative and HR Official, Also Testified That Plaintiffs' Terminations Were Not Performance Based.

Steve Vartorella has served as CSU's corporate representative at trial, observing every day of testimony. Vartorella was also the HR representative involved in the terminations. He emphatically testified:

- *"The reorg was not based on performance. The reorg was not based on performance."*<sup>5</sup>

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<sup>3</sup> Indeed, CSU's own documents indicate that Liss was qualified for positions that were available after his termination and CSU even interviewed him for these positions. *See, e.g.*, Trial Ex. 235 (CSU 01221-11222) (indicating Liss finalist for Assistant Dean of Student Engagement position), attached hereto as Exhibit 1.

<sup>4</sup> Banks Dep. 39:1-7.

- “It’s not driven by performance.”
- “[P]ositions were not eliminated due to employee performance.”<sup>6</sup>

CSU was very clear: performance was not a factor in the reorganization. Thus, evidence of specific instances should be excluded because they are irrelevant.

### III. CSU Put In Writing That Performance Was Not Relevant To Plaintiffs’ Terminations.

CSU confirmed that performance was not the basis for the terminations in writing:

- In the letter informing Liss of his termination, CSU wrote “Please note that **this decision is not based on performance**[]”;<sup>7</sup>
- Likewise, CSU stated in Russell’s termination letter that elimination of his position was “necessary for purposes of efficiency and effectiveness.”<sup>8</sup>

None of CSU’s identified decision-makers have contradicted what was put in writing and the CSU employees it claims led the re-organization effort that led to Plaintiffs’ terminations (Drnek and Banks)<sup>9</sup> testified that Plaintiffs’ performance was not the reason. As such, to the extent *Knepper*<sup>10</sup> stands for the proposition CSU claims,<sup>11</sup> it is simply inapposite.

### IV. CSU’s Constantly Changing Alibi Is Evidence of Discrimination.

CSU keeps searching for new pretexts to hide its discrimination. CSU’s shifting and changing claim that “Mr. Liss’s and Mr. Russell’s past job performance was one of the factors that led to the reorganization” is strong evidence of pretext. The Sixth Circuit has held that “[a]n employer’s changing rationale for making an adverse employment decision can be

<sup>5</sup> The repetition of Vartorella’s statement that “the reorg was not based on performance” twice is not an error—it is simply Vartorella’s testimony under oath.

<sup>6</sup> Vartorella Dep. at 80:5-23.

<sup>7</sup> Trial Ex. 98 (CSU\_002077) (emphasis added), attached hereto as Exhibit 2.

<sup>8</sup> Trial Ex. 100 (CSU\_002079), attached hereto as Exhibit 3.

<sup>9</sup> *Cleveland State University’s Motion for Summary Judgment*, at p. 5 (“Dr. Banks in turn [after Cauthen’s report] recommended restructuring to Dean Drnek, who approved it.”)

<sup>10</sup> The correct citation for *Knepper* is 2011-Ohio-6054.

<sup>11</sup> *Knepper* is, in fact, easily distinguished from the instant case for in *Knepper* the plaintiff had no testimony from the ultimate decision-maker as to why he was not hired and all persons testifying as to the reasons for termination agreed as to one reason. By contrast, all persons testifying as to the reasons for the adverse actions here explicitly testified that performance **was not** the reason for terminating and refusing to re-hire Plaintiffs.

evidence of pretext.”<sup>12</sup> See also *Moscato v. Ohio State Univ.*, Ct. Cl. No. 2011-06552, 2013-Ohio-3631, ¶40 (“Inconsistent reasons given by key decision-makers as to the reason for the firing can provide evidence of pretext.”) (citing *Tinker v. Sears, Roebuck & Co.*, 127 F.3d 519, 523 (6th Cir. 1997)).<sup>13</sup> Here, CSU keeps changing its rationale for firing Liss and Russell: first the rationale was the Cauthen Report; then it was Plaintiffs’ “relationship” with Banks; then it was performance, and now it appears to be “skill sets.” CSU compounds these falsehoods with others, the most recent being its claim that Mr. Russell refused a job offer, which he never did. CSU’s changing rationale is only relevant to the extent that it is proof of pretext.

### CONCLUSION

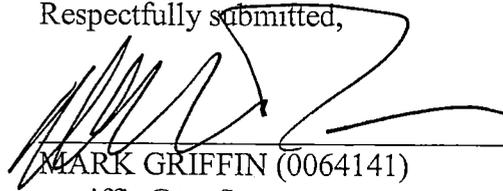
For all these reasons, as well as those set forth in the Motion in Limine, Plaintiffs respectfully move the Court for an Order *in limine* barring CSU from offering irrelevant, prejudicial, and trial-prolonging evidence and argument related to purported performance or conduct concerns being the basis for its decisions to terminate and not re-hire Plaintiffs.

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<sup>12</sup> *Thurman v. Yellow Freight Sys.*, 90 F.3d 1160, 1167 (6th Cir. 1996) (citing cases) (affirming judgment for plaintiff former employee).

<sup>13</sup> *Cf. Coburn v. Rockwell Automation, Inc.*, 238 Fed. App’x 112, 122 (6th Cir. 2007) (noting that an employer’s inconsistency or dishonesty on one issue “undermines its credibility generally.”).

Respectfully submitted,



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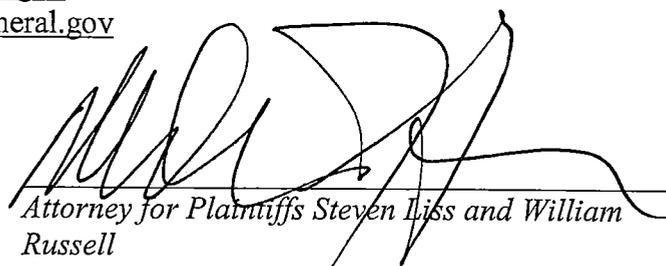
*Attorneys for Plaintiffs Steven Liss and William  
Russell*

**CERTIFICATE OF SERVICE**

A true and accurate copy of the foregoing was served via electronic mail, on this 24th day of December 2014 to:

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*Attorneys for Defendant*



*Attorney for Plaintiffs Steven Liss and William  
Russell*

# **Exhibit**

**1**

**Posting Information**

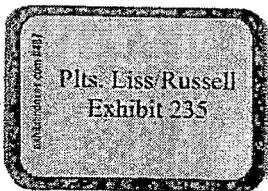
Title: Asst Dean, Student Engagement  
 Requisition Number: 0600955  
 Report Run Date: Nov 19 2012 9:59AM

**Finalist Stage Statistics**

		Race/Ethnicity								
		Hispanic/Latino	Non-Hispanic/Non-Latino						Not Disclosed	Total
			American Indian or Alaska Native	Asian	Black or African American	Native Hawaiian or Other Pacific Islander	White	Two or More		
Gender	Not Disclosed	0	0	0	0	0	0	0	0	0
	Female	0	0	0	0	0	1	0	1	2
	Male	0	0	0	2	0	1	0	0	3
	Total	0	0	0	2	0	2	0	1	5

**Finalist Stage**

Name	Hispanic / Latino	Race	Gender	Current Status	Is App a Finalist?	Ranking/Scoring
Campbell, Kristi				Not Selected for Interview-Not a Finalist	N	88
Clay, Robert				Selected for Interview-Finalist	Y	37
Coller, Isalah				Selected for Interview-Finalist	Y	34
Courson, Jill				Selected for Interview-Finalist	Y	38
Crawford, Andrew				Not Selected for Interview-Not a Finalist	N	20
D'Annunzio, Gina				Not Selected for Interview-Not a Finalist	N	30
Fox, Christopher				Not Selected for Interview-Not a Finalist	N	29
Liss, Steven				Selected for Interview-Finalist	Y	38
Rishe, Karl				Not Selected for Interview-Not a Finalist	N	23



Sabel, Elizabeth		Selected for Interview- Finalist	Y	37
Walkuski, Christina		Not Selected for Interview-Not a Finalist	N	29
Wallace, Tiffany		Not Selected for Interview-Not a Finalist	N	25

# **Exhibit**

**2**



Cleveland State University  
Office of the President

September 5, 2012

Via Certified and Regular Mail

Mr. Steven Liss  
4452 Donna Drive  
Richmond Heights, Ohio 44143

Dear Mr. Liss:

Dean Drnek has recommended that the University release you from your employment as the Director, Student Involvement in the Department of Student Life. Your layoff is part of an overall reorganization of the Department. After careful consideration and review of the commissioned consultant's report, I have accepted Dean Drnek's recommendation, and therefore, in accordance with Sections 8.5.8.4.2 and 8.5.8.4.3 of the Professional Staff Personnel Policies, you will be laid-off due to reorganization effective October 6, 2012.

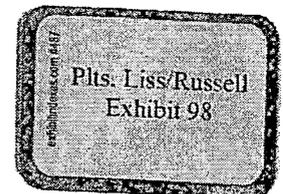
Please note that this decision is not based on performance. Thank you for your service to the University.

Sincerely,

Ronald M. Berkman  
President

cc: Jim Drnek, Dean of Students and Vice Provost for Student Affairs  
Steve Vancarella, Human Resources Generalist

Mailing Address: 2121 Euclid Avenue, AC 303 • Cleveland, Ohio 44115-2214  
Campus Location: Parker Hannifin Administration Center, Rm 302 • 3300 Euclid Avenue • Cleveland, Ohio  
Telephone (216) 687-3544 • Fax (216) 687-9333



CSU\_002077

# **Exhibit**

**3**



# Cleveland State University

Department of Human Resources Development and Labor Relations

September 5, 2012

William Russell  
627 Mariner Village  
Huron, Ohio 44839

Dear Mr. Russell:

It is with regret that I inform you that your part-time Coordinator, Greek Affairs position in Student Life is being eliminated. Accordingly, you are being laid off from this position effective October 5, 2012. In accordance with the SEIU bargaining agreement, if there exists a posted vacant bargaining unit position for which you are immediately qualified to perform, you will be offered the opportunity to transfer into it. Please be assured that Human Resources closely monitors new and existing job vacancies and will contact you should a transfer opportunity present itself. In the event of a transfer, please be advised that your layoff effective date may be sooner than October 5, 2012. This would be determined based on the staffing needs of the new department as well as the needs of your department.

This layoff is being carried out under the provisions of the collective bargaining agreement by and between Cleveland State University and SEIU, District 1199, including Article XXVII "Layoff, Bumping, and Recall." Under the provisions of the agreement, you as a laid off employee, will retain reinstatement rights to the job classification held prior to the initial layoff, transfer, bump, or reduction in hours, provided you immediately qualified to perform the required work, for a period of 18 months from the date of layoff. It is important that you keep the Department of Human Resources advised of your current home address. Please direct any such changes to the Department of Human Resources Development and Labor Relations, 2121 Euclid Avenue, AC 113, Cleveland, Ohio 44115. Failure to notify this department of your current address could result in non-delivery or untimely delivery of mail, which could result in forfeiture of your right to recall.

If you wish to schedule an appointment to answer any questions you may have, please contact Steve Vargarella, Human Resource Generalist. In addition, please be advised of outplacement services available through the Department of Human Resources. Please see the attached information regarding this service. It is our intent to be as responsive as possible to your concerns.

The University regrets having to take this measure, but finds it necessary for purposes of efficiency and effectiveness.

Sincerely,

Stephanie Y. McHenry  
Vice President for Business Affairs & Finance

cc: Jameé Dmek, Vice Provost Student Affairs/Dean of Students, Student Life  
Willie Banks, Associate Dean of Students, Student Life  
Rose Bagalla, SEIU/D 1199

Meeting Address: 2121 Euclid Avenue, AC 113, Cleveland, Ohio 44115-2214  
(216) 687-3636, Fax (216) 687-3334



CSU\_002079