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IN THE OHIO COURT OF CLAIMS

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

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PLAINTIFFS' POST TRIAL BRIEF

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I. INTRODUCTION

Cleveland State fired Plaintiffs Steve Liss (age 50) and William Russell (age 66) because Cleveland State wanted its Department of Student Life ("Student Life") to get younger. In February 2012, Cleveland State hired Willie Banks, a substantially younger dean, who referred to older employees as "elephants" and "old dogs."[1]

Within five months of his arrival, Banks decided to promote all of his younger subordinates,[2] terminate only his older subordinates,[3] and replace the older workers with younger workers.[4] Cleveland State promoted the younger workers into open positions, without their request or application,[5] while denying this same treatment to Liss and Russell.[6]

Cleveland State also fired Russell after it learned that he had applied for medical leave under the Family Medical Leave Act ("FMLA").[7] Russell was fired while his request was pending.[8]

Under a false claim of a "reorganization", Cleveland State fired only older workers and hired only younger workers:

Department of Student Life Positions Eliminated	**Hired Into New Open Department of Student Life Positions**
Steve Liss (age 50)	Bob Bergman (age 32)[9]
William Russell (age 66)	Jamie Johnston (age 29)[10]
Mary Myers (age 50)[11]	Jill Courson (age 34)[12]
	Melissa Wheeler (age 30)[13]
	Katie Lewis (age 24)[14]

[1] Liss, Tr. at 93-97 & 103-105; Russell, Tr. at 535-536.
[2] Drnek Dep., 81-82; Banks Tr. at 970-971.
[3] Banks, Tr. at 934-935.
[4] Vartorella, Tr. at 1331:17-20.
[5] Banks, Tr. at 970-971.
[6] Banks, Tr. at 970-971.
[7] Vartorella, Tr. at 1393
[8] Ex. 316.
[9] Ex. 109; Vartorella, Tr. at 1330.
[10] Ex. 106; Vartorella, Tr. at 1330.
[11] Ex. 6.
[12] Courson, Tr. at 1466:9-13.
[13] Ex. 108; Vartorella, Tr. at 1330.
[14] Ex. 105; Vartorella, Tr. at 1330.

In violation of Ohio Rev. Code § 4112, Cleveland State discriminated against Liss and Russell because of their age. Cleveland State discriminated against Liss and Russell because of their age when it: 1) subjected them to unfair scrutiny and discipline; 2) terminated them; and 3) refused to reassign, rehire, or promote them. In violation of 29 U.S.C. §2612 et seq., Cleveland State violated Russell's FMLA rights when it interfered with those rights by firing him and otherwise discouraging him from taking necessary medical leave.

Liss and Russell were outstanding, long-term employees who had never filed a complaint or grievance of any kind. Liss worked for Cleveland State for 19 years, earning excellent reviews and winning numerous awards, including Supervisor of the Year. [15] In his six years as Director of the Center for Student Involvement, Liss increased the number of student groups by more than 50%.[16] Russell was affiliated with Cleveland State for 47 years[17], was in Cleveland State's first freshman class, [18] taught tax law at Cleveland State, [19] and credits Cleveland State with "everything good" that has happened in his life. [20] Russell quit his job as a lawyer and took a 90% pay cut in order to serve as Coordinator for Greek Life to give back to the university. [21] Russell increased the number of students in Greek Life ten-fold, without a single fraternity cited for alcohol, discrimination or sexual misconduct violations. [22] Russell won numerous awards and was nominated for the Distinguished Service Award three times. [23] Russell was one of Cleveland State's most dedicated and loyal alumni until Banks fired him. Two days after receiving his notice of termination, Russell was told that he was again nominated for the Distinguished Service Award.

Plaintiffs' case that age was a factor in their terminations is proven by the direct evidence of

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[15] Liss, Tr. at 77:1-19.
[16] Liss, Tr. at 81:1-15; Ex. 8.
[17] Russell, Tr. at 470:12-15.
[18] Russell, Tr. at 385.
[19] Russell, Tr. at 385-386 & 388.
[20] Russell, Tr. at 391-392.
[21] Russell, Tr. at 391-392.
[22] Drnek Dep. 60:20-24.
[23] Ex. 309: Russell, Tr. at 456: 20-24.

Cleveland State's words and conduct. Banks made ageist comments and propounded ageist stereotypes "pervasively", and specifically in February, March, April and June while he was planning the sham "reorganization." [24] Beyond Banks' comments, the Court should look at what Cleveland State did: as Steve Vartorella testified, there is a 100% correlation between age and termination. [25]

Furthermore, disbelief of an employer's purported reason for termination, coupled with a plaintiff's *prima facie* case, is proof of discrimination. Here, Cleveland State claims that it terminated Plaintiffs based on a purportedly-independent June 2012 consulting report. This claim is false and is evidence of discrimination.[26] In April 2012, Banks had already actually designed the new structure for Department of Student Life that eliminated Plaintiffs' jobs.[27] Also in April, Banks rewrote the job descriptions to eliminate Liss and Russell. On May 14, Banks and his supervisor, James Drnek, held a meeting with Human Resources personnel to "meet to review reorg plan."[28]

Then Banks hired his "close friend," T.W. Cauthen, for $3,000 to issue a purportedly "independent" consulting report that copied Banks's predetermined structure and job descriptions.[29] Cauthen literally "cut and pasted" entire sections of his report from Banks' documents. Cauthen even "cut and pasted" Banks' opinions denigrating Liss and Russell and claimed they were his own opinions. Cauthen conceded that he only reviewed job descriptions for the older workers, excluded all positive comments about the older workers, and discounted older worker's successes because they were too impressive to be "realistic." Banks admitted at trial that the "reorganization" that Banks had created on April 24 and the reorganization presented later by Cauthen on June 15 are "functionally" identical. Banks and Cauthen falsely presented the recommendations for

[24] Liss, Tr. at 93-94.
[25] Vartorella, Tr. at 1331:21-1332:8.
[26] *See, e.g., Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 2109 (2000)
[27] Ex. 2, Banks, Tr. at 954 & 993-994.
[28] Ex. 1.
[29] Banks, Tr. at 995:11-12.

reorganization as though they were Cauthen's independent work.

The "reorganization" kept the same number of Banks' direct reports, but rearranged their duties and fired only the "older guy." The "reorganization" also promoted only Johnston and Bergman. These younger workers were given new jobs, new promotions, and pay raises, while the older workers were not similarly allowed reassignments or even demotions. Even though the "reorganization" cost Cleveland State more money, and created more additional positions, Cleveland State refused to retain the older experienced workers who were successfully performing their jobs.

James Drnek, Banks's supervisor, later added additional minimum qualifications for the new positions created by the purported "reorganization" to make sure that Plaintiffs were not eligible for rehire. On August 10, Drnek met with his supervisor, George Walker, to seek approval for the "reorganization" and Plaintiffs' terminations. Drnek made at least five false claims in writing about Liss' qualifications in order to justify the terminations.[30] In order to claim that Plaintiffs' terminations were based upon the report of an independent consultant, Drnek and Banks also falsely certified -- under oath -- interrogatories claiming that they had no discussions regarding the reorganization until after they received the Cauthen Report.[31]

An employer's changing reason for termination is also evidence of discrimination.[32] Each new reason proves the prior reason to be false. Here, Cleveland State claimed that "performance" was not the reason for Plaintiffs' termination, but then changed its reason.[33] Next, Cleveland State claimed that bad working "relationships" were central to its case.[34] That claim is also untrue.[35]

Cleveland State terminated Liss and Russell because of their age. Plaintiffs presented overwhelming evidence at trial of ageist remarks, statistics, pretext, changing rationale and

[30] Drnek Dep., 131-141.
[31] Exs. 11 & 14, Interrogatory No. 18.
[32] *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160 (6th Cir. 1996).
[33] Ex. 98; Banks, Tr. at 953; Walker, Tr. at 701-707.
[34] Tr. at 489.
[35] Banks, Tr. at 1058.

documents establishing that Cleveland State discriminated against Liss and Russel in violation of Ohio Rev. Code §4112.

Cleveland State also violated the Family Medical Leave Act, 29 U.S.C. §2612 et seq.. Under the FMLA, an "eligible" employee may take up to twelve weeks of unpaid leave in certain situations, including for a serious medical condition.[36] Any eligible employee is entitled "to be restored by the employer to the position of employment held by the employee when the leave commenced; or to be restored to an equivalent position[.]"[37] The FMLA creates separately and "interference claim" and a "retaliation

To assert an interference claim, "the employee only needs to show that (1) he was entitled to benefits under the FMLA and (2) that he was denied them."[38] "Under this theory, the employee need not show that he was treated differently than others [and] the employer cannot justify its actions by establishing a legitimate business purpose for its decision."[39] Here, it is undisputed that Russell applied for FMLA because he needed shoulder replacement surgery, he was deemed eligible by Cleveland State's FMLA administrator, and he was denied FMLA leave by Cleveland State.

Separately, Cleveland State retaliated against Russell in violation of 29 U.S.C. § 2615(a)(2) providing that "it shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter."[40] Cleveland State knew that Russell needed FMLA leave (he had a heart attack at a Cleveland State function), but Banks told Liss not to accommodate Russell's medical conditions. Furthermore, Banks and Drnek knew that Russell would need FMLA leave for his shoulder in late Summer or early Fall of 2012.[41] Despite months of prior discussion without action, Cleveland State fired Russell five days after it was confirmed that he was eligible for FMLA.

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[36] 29 U.S.C. § 2612(a)(1).
[37] *Id.* at § 2614(a)(1).
[38] *Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005) (citing 29 U.S.C. §§ 2612(a), 2614(a).
[39] *Id.* at 119-20.
[40] *See Arban v. West Pub. Co.*, 345 F.3d 390, 401 (6th Cir. 2003).
[41] Banks, Tr. at 1053-1056; Russell, Tr. at 413:12-19.

Cleveland State destroyed the careers of two outstanding employees. Plaintiffs are entitled to full compensation under Ohio Rev. Code §4112 and the FMLA. Plaintiffs are entitled to full economic and non-economic damages, attorneys fees and costs. However, because Cleveland State is a public entity, non-economic damages are capped at $250,000. Dr. John Burke, an expert economist, testified as to Plaintiffs' economic losses. Dr. Burke determined that Liss has suffered lost compensation up to $947,515. As calculated by Dr. Burke, Russell has lost wages and benefits of up to $482,291.

Plaintiffs have overwhelming evidence of discrimination, including statistics of 100% correlation between age and termination, specific bigoted remarks, younger comparators who were given promotions without asking, and admitted false statements by decision-makers.[42] Cleveland State's discrimination and dishonesty are appalling. The Court should enter judgment in favor of Plaintiffs to completely compensate them for their losses:

In violation of Ohio Rev. Code § 4112, Cleveland State discriminated against Liss on basis of his age. The Court should enter judgment in favor of Liss on his discrimination claims in the amount of $1,197,515, including $947,515 for his economic damages, $250,000 for his noneconomic damages, plus attorneys fees and costs.

In violation of Ohio Rev. Code § 4112, Cleveland State discriminated against Bill Russell on the basis of age. Russell has suffered injuries of $482,391 and is entitled to an award of damages in this amount. In violation of 29 U.S.C. §2617, Cleveland State interfered with Russell's FMLA rights, and retaliated against him for the exercise of those rights. The Court should render judgment against Cleveland State and in favor of Bill Russell in the amount of $574,525, plus attorneys fees and costs.

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[42] *See, e.g.*, Vartorella, Tr. at 1332:4-8 & 1331:21-1332:2; Banks, Tr. at 970-971 & 1113-1114; Liss, Tr. at 95-97 & 103-104; Drnek Dep. 137:23-139:11, 140:19-141:15 & 151:12-15.

II. FACTS

A. Cleveland State Fired Only Older Workers and Promoted Only Younger Workers.

In 2012, Department of Student Life physically separated the three older employees (Liss, age 50, Mary Myers, age 50, and Russell, age 66)[43] from the two younger employees (Bob Bergman, age 32, and Jamie Johnston, age 29)[44] who worked in a different hallway. In February 2012, Cleveland State hired Willie Banks as Associate Dean of Student Life to supervise the Department. Banks took an office in the "younger worker" hallway,[45] and by April had decided on a new structure for the Department that eliminated the jobs of each of the older workers despite their superior skills and experience.[46]

One hundred percent of the younger workers were promoted, while all the older workers lost their jobs.[47] As Drnek testified:

> Q: A hundred percent of the people who were negatively affected by the reorganization and who reported to Willie [Banks] were 50 or -- or older?
>
> A. Okay. Yes.
>
> Q. Okay. And it's true that a hundred percent of the people who were positively affected by the reorganization were -- reporting to Willie [Banks] were age 35 or younger?
>
> A. That's what it appears.
>
> Q. And that's true?
>
> A. Yes.[48]

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[43] Ex. 6 (as to ages); Ex. 352; Drnek Dep., 72:2-19; Ex. 346.
[44] Ex. 6 (as to ages); Ex. 352; Drnek Dep., 72:2-19; Ex. 346.
[45] Ex. 352; Drnek Dep. 72:2-19; Ex. 346.
[46] Banks, Tr. at 965:21-966:11; Ex.6.
[47] Drnek Dep., 81-82.
[48] Drnek Dep., 81-82:16-1.

This was not an accident or a coincidence. The termination of the Cleveland State's older experienced workers, and the promotion younger unqualified workers was part of Banks' and Drnek's goal to make Student Life younger. It is also illegal.

B. Parties

1. Liss Was an Outstanding 19-Year Employee.

Liss served Cleveland State's Department of Student Life for more than 19 years until he was abruptly terminated.[49] Liss ran Cleveland State's Center for Leadership and Service, and later served as Cleveland State's Director of the Center for Student Involvement for six years.[50] In the six years that Liss was the Director of CSI, he increased the number of student groups from 134 to 211 – an increase of more than 50%.[51] Liss consistently earned excellent performance reviews[52], such that "Liss met every goal for his prior year" and "every single evaluation criteria . . . was 'Met Expectations' or higher."[53] Liss was "a wonderful professional who excels at working closely with students. Steve is extremely well-organized and productive" and "has done really well taking on new projects."[54]

Liss was so effective that Cleveland State named him the point person to implement OrgSync, a new computer system and commended him for "work[ing] hard to move this initiative forward aggressively."[55] Throughout his 19-year career, Liss worked with numerous different supervisors "who were each unique individuals and the brought different kinds of strategies, different ideas, different approaches" with whom he always had good relations, received outstanding reviews, and achieved strong positive results.[56]

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[49] Liss, Tr. at 77.
[50] *See, e.g.*, Liss, Tr. at 78-79.
[51] Liss, Tr. at 81:1-15., Ex. 8.
[52] Exs. 57-63. Liss' Annual Performance Evaluations showing "Meets Expectations", "Exceeds Expectations" or "Outstanding" for every category in every year 2007-2011.
[53] Drnek Dep., 28:14-20. *See also* Exs. 57 & 59.
[54] Drnek Dep., 22:8-13.
[55] Drnek Dep., 23-24:22-7.
[56] Liss, Tr. at 77:1-19.

Liss received numerous awards. He was named the Supervisor of the Year, Faculty-Staff Mentor of the Year, and earned the Advising Excellence Commendation.[57]

2. **Russell, a 40-Year Employee, A Lawyer and Former Law Professor, Increased Greek Life Ten-Fold and Won Numerous Awards.**

Russell, a member of Cleveland State's first entering class, is a dedicated alumnus who "bleeds green"—the colors of Cleveland State. As young man, Russell had to support his disabled father while working and attending Cleveland State. Russell credits Cleveland State with turning his life around. Russell earned his bachelor's and law degrees from Cleveland State, and beginning in 1979, served as an Adjunct Law Professor at Cleveland State.[58] In 2000, out of his loyalty to Cleveland State, Russell left his law practice to take on the role of Cleveland State's Greek Life Coordinator.[59] Russell took a 90% pay cut from $97,800 to $6,600 in order to serve Cleveland State. Russell explained his personal commitment to Cleveland State that:

> You go through life, and sometimes good things happen to you and you **feel a commitment to give back to, in this case an institution that not only did wonders for me and built my career**, but especially to a facet of the institution that was Greek life.
>
> **And everything good, as I said, that happened in my life including meeting my wife and my career and all those things, personal development, occurred because of Greek life, so I was willing to give back.**[60]

Russell grew the number of Greek students on campus from 28 to 289.[61] Russell increased the number of service hours by Greek students from zero to 7,000 hours annually.[62] In Russell's twelve years as the Greek Coordinator, there was never a single alcohol-violation by a Greek

[57] Liss, Tr. at 173-74.
[58] Russell, Tr. at 385-86; Tr. at 388 (hired as Adjunct Law Professor in 1978).
[59] Russell, Tr. at 391-92.
[60] Russell, Tr. at 391-92 (emphasis added).
[61] Russell, Tr. at 393:1-21.
[62] Russell, Tr. at 393-94:22-3.

organization,[63] never an allegation of sexual misconduct,[64] and never an allegation of discrimination.[65] The one and only hazing violation occurred while Russell was on leave and involved nothing more serious than sorority pledges being required to carry beads, tampons, and other personal items.[66] The good conduct by Russell's fraternities was so impressive that Cauthen simply refused to believe it.[67] Further, Russell initiated new Greek programming that did not exist previously, including requiring every Greek organization to adopt a charity.[68]

Russell was outstanding and consistently earned high performance reviews in this role.[69] In 2005, 2007 and 2012, he was nominated for Cleveland State's "Distinguished Service Award,"[70] in 2006, he received Delta Sigma Phi's national "Lifetime Achievement Award,"[71] in 2008, he received Phi Delta Psi's national "Founder's Achievement Award," for bringing a national African-American fraternity to Cleveland State[72] and in 2009, Russell received the Greek Council's "Lifetime Service Award." Outrageously, two days after he was fired, Russell received notice that he had again been nominated for the Distinguished Service Award.[73]

3. Cleveland State Hired Banks, A Younger Supervisor With No Prior Experience With Urban Or Commuter Schools.

In February 2012, Cleveland State hired Willie Banks as the Associate Dean for Student Life. Banks came from the University of Georgia and had no prior experience working or even

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[63] Drnek Dep., 60:20-24. In contrast, while Drnek worked at the University of Arizona, among other things, a police officer was shot a fraternity, a pledge had to be hospitalized for hypothermia after being locked in freezer, and other serious crimes. Drnek Dep., 267-268.
[64] Russell, Tr. at 394:18-21.
[65] Russell, Tr. at 394-95:22-1.
[66] Drnek Dep., 42-43.
[67] Cauthen Dep., 109-110.
[68] Russell, Tr. at 394:4-13; See also Russell Tr. 394 & 399-400 and Liss, Tr. at 175,179-182 (Russell was responsible for starting Greek Week, Greek Fest, the Greek awards banquet, Greek Games, Greek Academic Challenge and Greek Rock.).
[69] Exs. 23 & 85-89.
[70] Russell, Tr. at 456.
[71] Russell, Tr. at 457.
[72] Russell, Tr. at 457.
[73] Ex. 309; See also Russell, Tr. at 456: 20-24.

studying at an urban university.[74] Banks had "never worked at a school that was a commuter school either."[75]

Banks immediately showed his preference for younger staff. On a fairly regular basis he lunched with Jamie Johnston and Bob Bergmann" but Banks "never lunched with Bill Russell or Mary Myers or Steve Liss."[76] When Liss asked Banks to lunch, Banks claimed that "my calendar never worked", even though it worked to have lunch with the younger employees.[77] Similarly, Banks spent almost all of his time in the younger office suite and almost never walked across the hall to visit the offices of his older subordinates.

C. February to June 2012- Age-Related Remarks: Banks Showed His Prejudice Against Older Workers by Making Specific Age-Related Remarks in Reference to Liss, Russell and Myers.

When Banks did leave his office, he regularly made age-related remarks.[78]

> [Banks'] use of terms like 'old-fashioned' and 'old school' and 'out-of-date' was pretty pervasive. You know, I was meeting with him for the most part every week starting in late February, early March, some weeks even more than once. And in, I would say a great majority of the meetings in some way or another he talked about our programs and our efforts being out-of-date and old fashioned.[79]

In February, March, April and June of 2012, Banks repeatedly and "pervasively" used ageist stereotypes and phrases.[80]

Banks claimed that Russell and Myers were "old dogs" who could not "learn new tricks."[81] Far from being an off-hand remark, Banks' disparaging of older employees was made in the

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[74] Banks, Tr. at 1131-32:16-7.
[75] Banks, Tr. at 1132:6-8.
[76] Banks, Tr. at 967:14-20.
[77] Banks, Tr. at 967:3-13.
[78] Liss, Tr. at 90, 91 & 94.
[79] Liss, Tr. at 90:8-16.
[80] Liss, Tr. at 93-94.
[81] Liss, Tr. at 95-97.

workplace, to the supervisor, and "in all cases, we were talking about the performance of my staff."[82]

At trial, Banks agreed that in talking with Liss about his staff that the disparaging comments about older workers were said "that 'old dogs can't learn new tricks' in an employment setting regarding Mr. Liss's employees."[83] Banks also admitted that "saying that older people can't learn indicates discriminatory or ageist attitude."[84]

Similarly, in April 2012, during a work meeting, Banks even called Russell and Myers "elephants."[85] And in fact, "they specifically referenced [Liss's] two older staff members, Bill Russell and Mary Myers, as being the elephant in the room."[86] Banks does not dispute that during the course of a work meeting that this phrase was used.[87]

Banks made age-related comments in reference to older workers within the Department of Student Life.[88] In a meeting with the younger staff, these comments included referring to Russell and Mary Myers as "old dogs" who could not "learn new tricks."[89]

Banks also said that older employees need to "get into the 21st Century," are "old fashioned" and need to get rid of their "old school methods."[90] Banks criticized both Russell and Myers for not being "up to date[]" and for being "old fashioned";[91] and rejected Russell's ideas, claiming they were "old school."[92]

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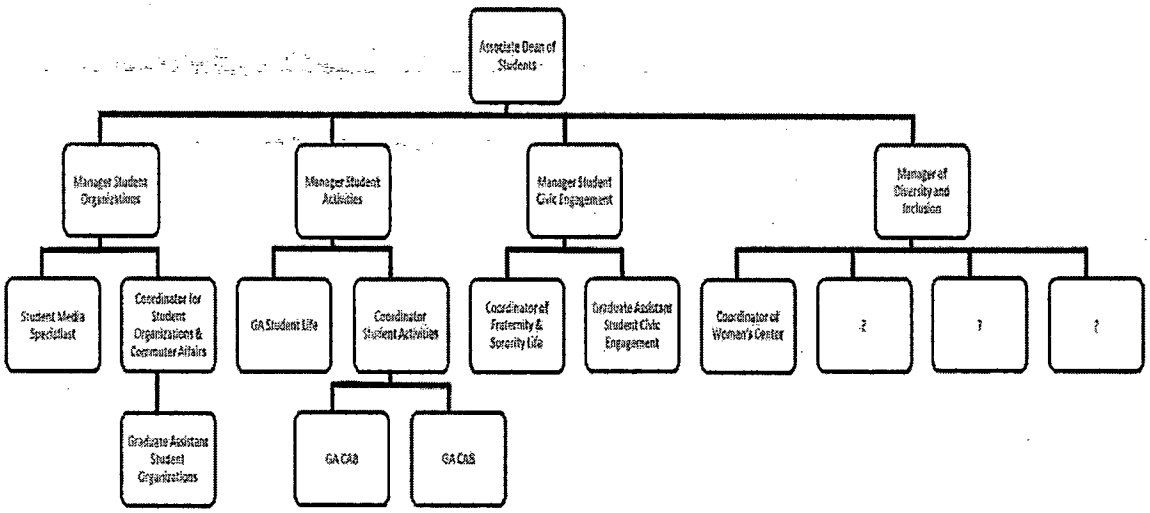
[82] Liss, Tr. at 97:5-19.
[83] Banks, Tr. at 1111:15-19.
[84] Banks, Tr. at 1112:18-24
[85] Liss, Tr. at 103-05; Russell, Tr. at 535.
[86] Liss, Tr. at 104:13-16.
[87] Banks, Tr. at 1112:3-5.
[88] Liss, Tr. at 103-105. *See, e.g.,* Liss, Tr. at 92-95, 99-101 & 103-105; Russell, Tr. at 398-402 & 404-405; Banks, Tr. at 928-929; Ex. 56 at Cleveland State_004574.
[89] *See, e.g.*, Liss, Tr. at 95-97.
[90] *See, e.g.*, Liss Tr. at 89-90 & 105; Banks, Tr. at 912-916.
[91] Liss, Tr. at 89-91, 93-94, 323 & 342.
[92] Liss, Tr. at 90 & 93; Russell, Tr. at 398, 401, 484 & 506.

D. Banks & Drnek Designed the "Reorganization", Identified Plaintiffs' Jobs for Elimination and Drafted Job Descriptions.

1. April 2012: Banks Designed The "Reorganization" Structure And Drafted New Job Descriptions.

In April 2012 – during the same time period that Banks made regular and pervasive ageist remarks – he set to the task of terminating his older employees through the pretense of a "reorganization." By April 9, 2012, Banks was planning to use taxpayer dollars to hire his close friend T.W. Cauthen as a purported "consultant" to "re-organize" the Department of Student Life.[93]

By April 24, 2012, Banks had already designed the re-organization of the Department of Student Life.[94] Banks' April 24 organizational chart is below:



The document Banks created reflecting his proposed re-organization is entitled "Org Chart AD." Banks's April 24 re-organization placed Banks—as the Associate Dean of Students—at the top with three vectors underneath him: one for Student Organizations, one for Student Activities and one for Student Civic Engagement; each vector had a Manager, reporting to Banks, and a

[93] Banks, Tr. at 1037; Ex. 345. *See also* Tr. at 938 (discussing re-organization as of April 18, 2012).
[94] Banks, Tr. at 951, 954-955, 993-994 & 1011; Ex. 2.

Coordinator, reporting to the respective Manager.[95] Banks' April 24 structure is later copied by Cauthen and falsely presented in June as though it is Cauthen's original work.[96]

Furthermore, in April 2012, Banks began the process of re-writing the job descriptions only for the Department's older workers, including Liss and Russell.[97]

2. May 2012: Cleveland State Meets To Review "Reorganization Plans", Including The Termination of Plaintiffs' Jobs.

On May 1, 2012, Drnek emailed Banks, Steve Vartorella (the HR representative assigned to Department of Student Life), Denise Mutti (a higher level HR representative) and Jean McCafferty (whose responsibilities included setting compensation) to meet on May 14 to discuss the "**reorg plan.**"[98] During the May 14 meeting:

- **Cleveland State Had Already Identified Plaintiffs' Position For Elimination:** Vartorella testified:

  Q: It's true that they identified those positions for elimination, correct?

  A: Correct.[99]

- **Cleveland State Had Already Identified The New Positions' Titles, Duties, And Reporting Structure:** Banks and Drnek told HR representative Jean McCafferty the titles they wanted to create and already concluded what they believed were the minimum qualifications for those new titles.[100]

- **Banks Had Already Drafted New Job Descriptions:** During the May 14 meeting, the new structure was announced and McCafferty was asked to change the job descriptions for the positions held by Liss and Russell.[101] Later that same day,

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[95] Banks, Tr. at 1012.; Ex. 2.
[96] Banks, Tr. at 1012-13. (presented as original work); Banks, Tr. at 1012-15 (identical structure).
[97] Exs. 3 & 4. McCafferty, Tr. at 791-794.
[98] McCafferty, Tr. at 787-789; Banks, Tr. at 944; Vartorella, Tr. at 1369; Ex. 1.
[99] Vartorella, Tr. at 1384: 1-4; *Id.* at 1384.
[100] McCafferty, Tr. at 818-819.
[101] McCafferty, Tr. at 791-792; Banks, Tr. at 949; Vartorella, Tr. at1302-1303.

Banks emailed job descriptions he had created for his proposed re-organization to HR representative Jean McCafferty.[102]

In short, by May 14, Banks and Drnek already knew they were going to terminate Liss, Russell and Myers (all over the age of 50), had designed the purported "reorganization" and written new job descriptions to eliminate the positions held by Liss, Russell and Myers.

E. Banks And Drnek Falsely Testified Under Oath That There Were No Meetings, Conferences Or Discussions Regarding the Sham Reorganization Until After The Cauthen Report Was Issued.

1. Under Oath, Banks And Drnek Certified False Interrogatories.

Until they were caught, Banks and Drnek falsely claimed that there were no meetings to discuss the "reorganization" until June 19, 2012. This falsehood was part of their effort to hide the firing of the older workers by claiming that it was based on the Cauthen Report that was delivered four days earlier on June 15, 2012. In sworn interrogatory answers, Cleveland State was required to identify "all events, including . . . .meetings, telephone calls . . .regarding the planning, strategy, discussions, determinations, implementation and execution of Defendant's September 5, 2012 Student Life Reorganization."[103] Cleveland State falsely claimed that no such events, meetings or discussions occurred before June 19, 2012.[104] In fact, Drnek and Banks had been meeting in April and May, had discussions with HR, and had already identified the three positions to eliminate. Both Drnek and Banks falsely swore under oath that these answers were "true and accurate."[105]

These answers are not merely incomplete – they are false, and were intended to hide Cleveland State's discrimination behind a pretext that they relied on the independent Cauthen Report.

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[102] McCafferty, Tr. at 790-793; Banks, Tr. at 1084-1088; Ex. 3
[103] Ex.11, Russell Interrogatory No. 18, pp.9-10; Ex.13, Liss Interrogatory No. 18, pp.9-10.
[104] Ex.11, Russell Interrogatory No. 18, pp.9-10; Ex.13, Liss Interrogatory No. 18, pp.9-10.
[105] Ex. 11, pp.15-16 (sworn signatures of Banks & Drnek); Ex. 13, pp.15-16 (sworn signatures of Banks & Drnek);

2. In Deposition, Banks Falsely Testified That No Discussions Had Occurred Until After the Cauthen Report.

Even though Banks had already designed the structure, re-written job descriptions and held meetings with HR to discuss the "reorg plan", Banks still testified that:

> Q. Prior to receiving Dr. Cauthen's report, you had not been involved in any discussions about restructuring?
>
> A. Not that I can remember or recall.
>
> Q. And you would remember those if they had occurred?
>
> A. I would hope so. I don't know.
>
> Q. It's a pretty dramatic change to your department, right?
>
> A. Yes.
>
> Q. And you remember dramatic changes or proposed dramatic changes to your department, right?
>
> A. I hope so.[106]

This testimony was untrue. After this testimony, Banks was confronted with the May 1 email[107] and his May 14 email[108] and was forced to admit that his plans and discussion started long before the Cauthen Report was issued on June 15.

3. At Trial, Banks Changed His Testimony At His Convenience.

Having already been confronted in deposition, and realizing he had been caught, Banks testified differently at trial:

> Q. Dr. Banks, you had meetings, discussions and plans about the restructuring before the Cauthen event, didn't you?
>
> A. Can you be more specific.
>
> Q. Well, you had discussions about reorganization before you received the Cauthen report on June 15th?

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[106] Banks Dep., 91:10-25-92: 1-13; *See also* Banks, Tr. 908-911.
[107] Ex.1.
[108] Exs. 3 & 4.

A. Correct. I believe so.

Q. Let me hand you what's been marked as your deposition. Let me direct you to page 91, lines 10 through 25. Dr. Banks, I asked you that question in the deposition. I asked you, Question: "When did you first have discussions with Dr. Drnek about the need to restructure? Answer: I think it was after the report. Question: So your testimony is that you never had any discussions about restructuring until after the report? Your answer was: Yes, until the report." I read that correctly, didn't I?

A. I believe so, yes.[109]

Banks was impeached at trial because he had answered dishonestly under oath during his deposition.

4. <u>Banks Claimed A Lack of Memory</u>.

Banks also dishonestly feigned a lack of memory:

Q. Well, in fact, you had discussions about the CSI portion of Student Life before the report, didn't you?

A. Possibly. I don't remember.[110]

Even though Banks had by May 2012 designed the new structure, written new job descriptions, attended the meeting on May 14th and sent McCafferty the revised job descriptions, [111] Banks purported to this Court:

Q. True or false, on May 14th you had a meeting to discuss the reorganization claim?

A. I do not remember.

Q. Okay. True or false, you had discussions on May 14th to discuss the reorganization plan?

A. I do not remember.

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[109] Banks, Tr. at 908:1-21.
[110] Banks, Tr. at 909:12-15.
[111] McCafferty, Tr. at 790-793 (Banks revised Plaintiffs' job descriptions before May 14); 908 (Banks had discussions before Cauthen Report); Vartorella, Tr. at 1372-1374 (At May 14th meeting, Banks and Drnek had already decided they wanted "new staffing in place."); Ex. 11 at pp. 9-10, 15 & 16; Ex. 14 at pp. 9-10, 15 & 16.

Q. In fact, long before the Cauthen report was issued on June 15th, you were discussing job descriptions, organization charts and plans to reorganize Student Life?

A. I do not remember.[112]

Banks' inability to tell the truth after he realizes that it hurts his case is shown in his testimony. On page 908, cited above, Banks concedes that he had discussions before receiving the Cauthen Report. Three pages later, on page 911, Banks testified under oath:

Q. Okay. And your truthful testimony in front of this Court is you have no recollection of discussions or meetings before the Cauthen report relating to the reorganization of Student Life?

A. If I had my calendar in front of me, I could probably say, okay, I remember this, but I don't remember.[113]

Banks' constantly-changing testimony and purported lack of memory is not clever. It is dishonest. Banks and Drnek testified falsely in their interrogatory answers and in front of this Court.

F. The Cauthen Report Is A Pretext For Age-Discrimination.

1. Banks Recommended That Cleveland State Hire His Long-Time Close Friend—T.W. Cauthen—To Write a Report To Support Banks' Decision To Fire The Older Workers Under The Guise of A "Reorganization.

Without issuing a "request for proposal," [114] or considering any other consultant,[115] Banks recommended that Cleveland State pay his close friend, T. W. Cauthen, a mere $3,000 to issue a consulting report concerning Department of Student Life. Cauthen is a close friend of Banks, who Banks has known for over ten years.[116] When Banks was hired, Cauthen flew with him from Georgia to Cleveland in the middle of a cold December to help pick out an apartment to live in.[117]

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[112] Banks, Tr. at 910:12-22.
[113] Banks, Tr. at 911:18-24.
[114] Banks, Tr. at 1003.
[115] Banks, Tr. at 1003.
[116] Banks, Tr. at 995-996.
[117] Cauthen Dep. at 46:23-25. Banks signs personal emails to Cauthen with "XOXO" hugs and kisses (See e.g. Ex. 345 also identified as Cauthen Dep. Ex. at p. TWC 91); have spent New Years Eve together (Cauthen Dep. At p. 167: 21-23) and looked for Banks' Cleveland apartment together (Cauthen Dep. at 46).

Other than being a close friend of Banks, Cauthen is utterly unqualified. Cauthen had never provided consulting services for or been employed by an urban university.[118] Cauthen had never provided consulting services for or been employed by a commuter university.[119] Cauthen stayed in Banks's apartment during his visit to Cleveland State related to the consulting report he was tasked with issuing.[120] Banks never revealed his personal relationship with Cauthen to Cleveland State.[121] Banks told his subordinates within the Department that the purpose of the consultant's report and interviews with staff attendant to the report was "to put [Cleveland State's] leadership & service area in the right direction[.]"[122] This was not the true purpose of the consultant's report.[123]

2. <u>Cauthen Had No Prior Experience At An Urban Or Commuter Institution</u>.

Banks hired Cauthen, his close friend, even though he had no prior experience at any similar university:

> Q. Well, when you hired or recommended the hiring of Dr. Cauthen, you understood that he had never previously done any consulting for an urban university, correct?
>
> A. Correct.
>
> Q. And you understood when you recommended hiring Dr. Cauthen that he had never done any previous consulting for a commuting university correct?
>
> A. Correct.
>
> Q. Okay. You didn't interview any consultants other than Dr. Cauthen, correct?
>
> A. Correct.
>
> Q. And, in fact, you didn't even interview Dr. Cauthen?
>
> A. Correct.[124]

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[118] Banks, Tr. at 1004.
[119] Banks, Tr. at 1004.
[120] Banks, Tr. at 1034.
[121] Banks, Tr. at 1029.
[122] Ex. 124. *See also* Liss, Tr. at 202-203.
[123] *See, e.g.*, Liss, Tr. at 203.
[124] Banks, Tr. at 1004-05.

Instead, Cauthen was hired because Banks knew that Cauthen would write the report that Banks instructed him to write.

3. Banks Told Cauthen That He Should Recommend A Restructuring.

Before Cauthen had even started his interviews, Banks told Cauthen in writing that Cauthen should conclude in favor of recommending a re-organization of the Department.[125] Banks testified:

> Q. Now, before you did – before Dr. Cauthen began any research, you told him you wanted recommendations on restructuring the Center for Student Involvement and that you had already reached the conclusion that the leadership in those areas were inadequate, correct?
>
> A. Correct.[126]

Banks provided Cauthen with materials and Cauthen did not solicit any additional materials.[127] Banks made sure that Cauthen could only recommend the elimination of the older staff's jobs by providing Cauthen with the job descriptions only for Russell, Liss and Myers.[128] Banks withheld the job descriptions for the younger Department employees—e.g. Bergmann and Johnston. Banks recommended that Cauthen interview certain Cleveland State stakeholders and employees and Cauthen interviewed only those people that Banks recommended. In order to further prejudice Cauthern's conclusions, Banks also provided Cauthen with confidential HR documents that Banks had created that reprimanded and criticized Russell.[129] Banks violated Russell's rights out of "frustration and animosity."[130] Banks even reviewed drafts of Cauthen's report.[131] Cauthen issued

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[125] Banks, Tr. at 1001-1002.
[126] Banks, Tr. at 1005.
[127] Banks, Tr. at 1010-1011.
[128] Banks, Tr. at 1024-1026.
[129] Cauthen Dep., 156:16-158:2.
[130] Banks, Tr. 1036:20-23.
[131] Banks, Tr. at 1061 & 1092-1093; Ex. 27.

his report on June 15, 2012.[132] The structure Cauthen recommended in his report was functionally identical to Banks's April 2014 structure.[133]

4. Cauthen Copied Banks' Personal Negative Opinions of Liss & Russell And Held Them Out As His Own.

Cauthen did not just rely on Banks' information, Cauthen actually copied and pasted Banks' opinions and held them out as his own:

> Q. And, in fact, in Dr. Cauthen's report on page 2 of his report he copies your opinions, correct?
>
> A. These are my words, correct.
>
> Q. Okay. And he copies your conclusion about the qualities of the leadership at the Center for Student Initiative, correct?
>
> A. Can you -- which -- where are you pointing to?
>
> Q. Sure. Well, let's start with, first of all, you agree that all of page 2 was written by you?
>
> A. Correct.
>
> Q. And there's no way from looking at this report that anyone would know that you were the author of it, right?
>
> A. Correct.

Cauthen's disparagement of Liss and Russell was, in fact, the opinion of Banks. Banks testified:

> Q. So, "Unfortunately, the leadership side has struggled to maintain focus and purpose." Do you see that?
>
> A. Yes.
>
> Q. That was your opinion, right?
>
> A. Yes.
>
> Q. Those were your words, right?
>
> A. Yes.[134]

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[132] Banks, Tr. at 1059; Ex. 10.
[133] McCafferty, Tr. at 838-839; Banks, Tr. at 972-973 & 1012-1015.

Until Banks was confronted with the documents, he "emphatically" denied that he had written the opinions regarding CSI's leadership.[135]

5. Cauthen Purports to Offer Conclusions "In My Opinion", When In Fact They Are The Opinions of Banks.

The deception of Banks and Cauthen extends to opinions regarding Liss' inclusive team approach to leadership. Until they were placed under oath, neither Banks nor Cauthen revealed that the opinions were really those of Banks:

> Q. Okay. And, in fact, there's no way for a reader to know that those are not the view of the consultant, correct?
>
> MS. SIMMONS: I'm just going to object from the standpoint that he said they're his views, but they may be the consultant's views as well. Speculation.
>
> The COURT: I think he's testified a couple times that the first two pages are your words, correct?
>
> A. Correct, yes, ma'am.
>
> THE COURT: But in this document somebody reading it might not know that because your name does not appear anywhere in this document?
>
> A. Correct.
>
> THE COURT: Okay.

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[134] Banks, Tr. at 1006-1007.

[135] Banks' testimony cannot be trusted in any respect because he changes it on a whim. In direct conflict with his testimony that he wrote those opinions, Banks also swore at trial that:

> Q. Okay. And you told T.W. Cauthen and in fact you wrote his conclusions regarding the leadership and skills of Steve Liss and Bill Russell, right?
> A. No.
> Q. No, okay. We'll get to that.
> A. An emphatic no.
> Q. An emphatic no?
> A. Yes.
> Q. So his statements regarding the leadership of the Center for Student Involvement, those are not yours?
> A. No.

Banks, Tr. at 1002. Given Banks' repeated contradictions and dissembling, the Court cannot give credence to any of Banks' testimony.

Q. In fact, it's more than that, right, because Dr. Cauthen affirmatively claims that these are his opinions, right?

A. I do not know.

Q. Well, let's read the next sentence: "In my opinion the team approach to leadership did not work and caused more confusion and frustration for all parties involved." Do you see that?

A. Yes.

Q. Okay. And the only author is Dr. Cauthen, right?

A. This is my -- these are my words.

Q. I understand that. But they're being held out as Dr. Cauthen's opinions, right?

MS. SIMMONS: Objection.

THE COURT: Overruled.

A. So what is your question?

Q. It's true that the sentence, "In my opinion" is being held out as Dr. Cauthen's opinion?

A. It could be read that way.[136]

Banks further testified that:

Q. So maybe you and I are in agreement, right, that these are your words and your opinions, but Dr. Cauthen is holding them out as his own?

A. I do not know. I don't know that that's the case.

Q. Well, you don't disagree with that statement, do you?

A. I don't know.

Q. And you don't disagree that the words "my opinion" are an affirmative claim by Dr. Cauthen that they're his opinions?

A. I don't know.

MS. SIMMONS: Objection.

[136] Banks, Tr. at 1007-1009.

THE COURT: Overruled.[137]

Under oath, Banks conceded that he had written - without disclosure or attribution - entire sections of Cauthen's report:

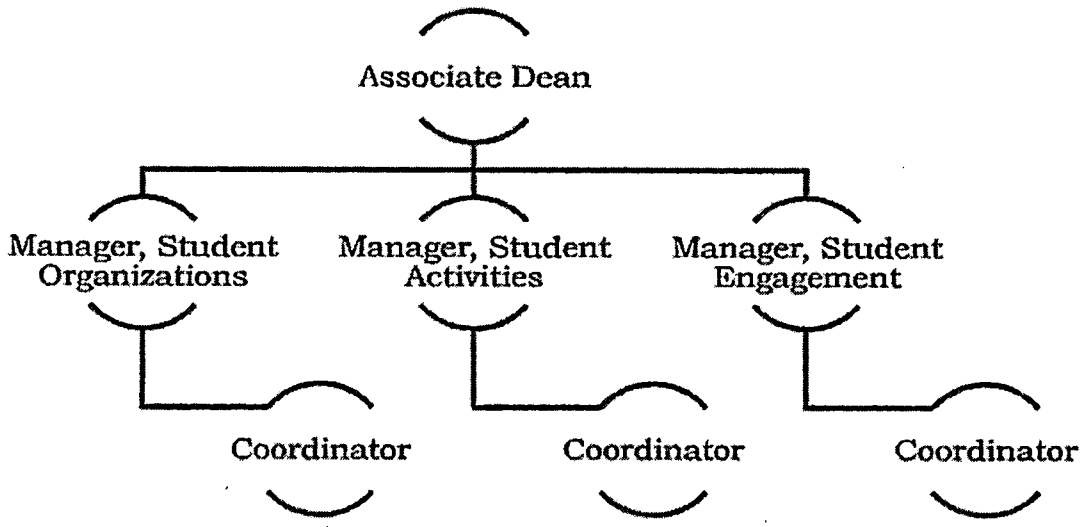
> Q. Let's go to the sentence after that: I also believe that our current approach to leadership is not relevant. The only "I" is Dr. Cauthen, who's listed on the report, right?
>
> A. Correct.
>
> Q. Okay. Now, in addition to writing all of page 2, you also wrote all of page 3, right?
>
> A. Correct.[138]

Banks and Cauthen worked together to write a deceptive report that purported to be independent but was in fact the work of Banks.

6. Banks Designed The Reorganization Structure And Allowed Cauthen To Falsely Hold It Out As Cauthen's Original Work.

Banks' hidden authorship extends beyond just the opinions regarding Liss' & Russell's leadership. Banks also designed the structure and responsibilities of the reorganization, and then told Cauthen to pretend that it was Cauthen's idea. Although Cauthen changed the title of "manager" to "assistant dean", everything else is functionally identical. On page 11, CSU_001019 of the Cauthen Report (identified as Trial Ex. 10), Cauthen proposed the following structure and job titles:

[137] Banks, Tr. at 1009.
[138] Banks, Tr. at 1010-1011.



In comparing Cauthen's purportedly original work submitted on June 15, with Ex. 2, created by Banks on April 24, Banks testified:

> Q. Okay. And on April 24th you decided that there would be a manager of student organizations, a manager of student activities, and a manager of student civic engagement, right?
>
> A. I think that was the consideration, yes.
>
> Q. Okay. And Dr. Cauthen presents as his own work a structure with an associate dean of students and with a manager of student organizations and a manager of student activities and a manager of student engagement also reporting to him, right?
>
> A. Uh-huh. Yes.[139]

Accordingly, Cauthen did not create and/or present his own work, but rather adopted Banks' proposal and falsely passed it off as his recommendation.

7. <u>Banks Decided The Job Titles And Allowed Cauthen to Falsely Hold Them Out As His Original Ideas.</u>

After designing the reorganization, Banks even decided the job titles that were copied by Cauthen. Banks testified:

> Q. And, in fact, Dr. Cauthen picked the exact same titles as you picked, right?

[139] Banks, Tr. at 1012-1013.

A. I'm not sure what he did.

Q. Okay. Well, you agree with me that the manager of student organizations in your structure created on April 24th is the same as the manager of student organizations on Dr. Cauthen's report presented June 15th as his own work?

A. I think looking at it structurally, sure.

Q. Okay. But it's also the exact same title and name, right, manager of student organizations, manager of student organizations?

A. Yes.

Q. Okay. And you would agree with me that the second vector, manager of student activities that you created on April 24th, is the exact same title that Dr. Cauthen presents as his own work on June 15th, 2012, right?

A. Correct.

Q. And you would agree with me that the manager of student civic engagement, although the word "civic" is out, is the same or close to the same as the manager of student engagement that Dr. Cauthen presented as his own work on June 15th, 2012?

A. Correct.[140]

Banks, and not Cauthen, selected and decided the job titles that would ultimately be incorporated into Cauthen's report.

8. <u>Even The Sequence of the Job Titles On The Diagrams Are Copied From Banks' Work</u>.

In comparing Banks' diagram[141] with the diagram that Cauthen claimed was his original work[142], the sequence of job titles in the purportedly "independently-created" org-charts are the same.

Q. Okay. And not only are the titles the same, but the sequence is exactly the same across here as well. So in your work you started with manager of student organizations, followed by manager of

[140] Banks, Tr. at 1013-1015.
[141] See Ex. 2.
[142] See Ex. 10, p.11.

student activities, followed by manager of student civic engagement, and Dr. Cauthen copied that exact same sequence in his work, manager of student organization, manager of student activities, manager of student engagement, correct?

A. I'm not sure. That's what it appears to be.

Q. Well, it is, right?

A. I don't know. I mean, that's what appears on paper.

Q. Well, do you disagree in looking at those two documents that Dr. Cauthen's report has the exact same sequence as the document that you created?

A. No.[143]

This is further damning evidence that Banks – in order to terminate the targeted older workers – designed the structure, wrote the critical parts of the Cauthen Report, and then falsely allowed Cauthen to hold it out as his own independent work.

9. <u>Banks Conceded That Cauthen's Purportedly-Independent Work Was In Fact "Functionally" Identical To Banks' April 24th Design</u>.

In comparing each new job and even the second layer of jobs, Banks was forced to admit under oath that Cauthen's June 15th report was functionally the same as Banks' work create on April 24th.

Q. Okay. Now, similarly it's also true that under each of those three vectors there is a coordinator in your document, right? So the manager of student organizations in yours has a coordinator, right?

A. Yes.

Q. And the manager of student organizations in Dr. Cauthen's has a coordinator?

A. Yes.

Q. And similarly the manager for student activities has a coordinator, right?

[143] Banks, Tr. at 1014-1015.

A. Yes.

Q. And the manager for student engagement also has a coordinator, correct?

A. Yes.

Q. So functionally what you created on April 24th is the same as what Dr. Cauthen proposed as his own work on June 15th, 2012, true?

A. By looking at the paper it appears that way.

Banks and Cauthen committed a horrible fraud. They jointly copied Banks's work and presented it falsely as the independent work and independent opinion of Cauthen.

10. <u>Banks Testified That He Never Communicated His Design Through Any Means to Cauthen</u>.

Banks repeatedly claimed that he never suggested the structure, title, or responsibilities in any way to Cauthen. Banks testified:

Q. You told him the structure of the reorganization and the titles that you wanted to see?

A. No.

Q. Okay. Did you have any conversations with Dr. Cauthen about the structure?

A. No.

Q. Did you have any conversations with Dr. Cauthen about the titles?

A. No.

Q. Did you have any conversations with Dr. Cauthen about the job descriptions?

A. I don't recall.

Q. Okay. Did you send him or receive any e-mails in which you discussed the structure or the titles before his final report?

A. I don't recall.

Q. You don't recall ever doing that?

A. I don't recall.[144]

Banks further testified that he did not send any emails or have any conversations.[145] Banks was unequivocal that he had no input into Cauthen's structure that was functionally identical to the structure drafted by Banks on April 24th:

Q. Okay. Now, Dr. Cauthen came to do his visits on May 29th and May 30th of 2012, right?

A. Yes.

Q. You picked him up at the airport, right?

A. Yes, I believe so.

Q. He stayed at your apartment?

A. I believe so, yes.

Q. And you took him back to the airport?

A. Yes.

Q. Okay. And despite him spending that time with you, you deny communicating with him about the structure you wanted to see, right?

A. Correct.

Q. And it's your testimony that you did not even see the structure until you received the final draft, right?

A. Correct.

Q. And you've claimed that you can't recall any communications with Dr. Cauthen about the type of restructuring you would like to see, right?

A. Correct.[146]

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[144] Banks, Tr. at 1016-1017.
[145] Banks, Tr. at 1018.
[146] Banks, Tr. at 1034.

According to Banks, he had no input on the structure or titles of the reorganization. Banks, committed himself deeper to this falsehood:

> Q. Okay. And it's true that he held out the structure that he proposed as his original work, right?
>
> A. I believe that is his work.
>
> Q. Do you believe it's his original work?
>
> A. Yes. I did not come up with that for him.
>
> Q. You had nothing to do with the structure he proposed on June 15th?
>
> A. No.
>
> Q. No, you did not, right?
>
> A. Correct.[147]

Banks' testimony is not believable: the two proposals are functionally identical, have the same titles, the same reporting structure, the same number of vectors – even the sequences of the job titles on the document are the same. Even though Banks testified that he did not communicate with Cauthen, the truth is that Banks' document at Ex. 2 is also nearly identical to a document produced by Cauthen in his deposition.[148] In short, Banks wants this Court to believe a falsehood. Banks' lie is neither credible nor believable. It is a fraud that extends even to this Court. And it is evidence of pretext and discrimination.

11. <u>The Cauthen Report Was Intentionally Biased Against Older Workers</u>.

The Cauthen Report excludes positive comments about older workers, excludes negative comments about younger workers, assesses only the skill sets of older workers, and disbelieves the successes of the older workers. Given the report's unfair treatment of older workers, the report is a pretext for discrimination.

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[147] Banks, Tr. at 1021.
[148] See Ex. 345 at TWC 55.

12. Cauthen Excluded Any Positive Comments About Older Workers, And Excluded Negative Comments About Younger Workers.

Cauthen prejudiced his report by excluding every **positive** comment regarding the older workers. In contrast, Cauthen excluded every **negative** comment about the younger workers. For example, Cauthen learned that Bergman "procrastinates. So much money, so little attendance" but recommended that Bergman be promoted to Assistant Dean. Cauthen consistently biased his report:

> Q. Okay. There -- there are no positive references or allusions to Steve Liss in your report, correct?
>
> A. That's correct.
>
> Q. Okay. And there are no positive references to Bill Russell in your report, correct?
>
> A. That's correct.
>
> Q. And in fact, there are no positive references to Mary Myers in your report, correct?
>
> A. That's correct.
>
> Q. None of the positive references about Mary Myers, Steve Liss or Bill Russell were included in your report, correct?
>
> A. That's correct.
>
> Q. And the negative comments about Jamie Johnston and Bob Bergmann were excluded from your report, correct?
>
> A. That's correct.[149]

Cauthen's bigoted process of refusing to praise the older workers, while refusing to criticize the younger workers is blatant discrimination. It is further proof that the Cauthen Report was intended to terminate the older workers. The Cauthen Report is evidence that the purported "reorganization" was a pretext for discrimination.

[149] Cauthen Dep., 136-137:22-14

13. Cauthen Only Assessed The Skill Sets of Older Workers, Not The Younger Workers.

Further, Cauthen's report is discriminatory and a pretext for discrimination because it is unduly critical of the skill sets of older workers, and contains no legitimate assessment of the younger workers.

> Q. Okay. And, in fact, he attempted to assess the skill set of the staff even though there were no objectives and no strategic plan for the department, right?
>
> A. Yes.
>
> Q. Okay. And, in fact, he did not assess the skill sets of either Bergmann or Johnston, right?
>
> A. Correct.
>
> Q. Okay. So your friend, Dr. Cauthen, only assessed the skill sets of Liss, Russell, Mary Myers, right?
>
> A. Correct.
>
> Q. And, in fact, one of the reasons that he didn't -- he assessed the older folks but not the younger folks is you only sent him the job descriptions for the older folks?
>
> MS. SIMMONS: Objection. Speculation.
>
> THE COURT: Overruled. You can answer if you know.
>
> A. I don't recall.[150]

Banks' purported lack of memory, however, conflicts with his testimony that:

> Q. And yet you didn't send the job descriptions including any of the objectives for either Bergmann or Johnston, did you?
>
> A. No.
>
> Q. So there really was no way for Dr. Cauthen to assess the skill sets of Bergmann and Johnston. The only people he could assess were your older staff?
>
> A. Yes.[151]

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[150] Banks, Tr. at 1023-1025.

Banks further purported that Cauthen's report was intended to review the entire Student Life department, not just part of it:

> Q. Okay. So your claim, though, is that Dr. Cauthen was reviewing all of Student Life right?
>
> A. Yes.
>
> Q. And yet you only sent the job descriptions for the older people, right?
>
> A. Yes.[152]

Based upon his testimony, Banks only sent information and job descriptions to Cauthen so that he would assess the older staff. As such, Banks' intentions are clear; he was targeting older workers for termination and using the Cauthen Report as justification for his unlawful designs.

14. <u>Cauthen Disbelieved Only The Older Workers' Successes</u>.

Drnek and Whyte both testified that there had been zero alcohol-incidents and only one hazing incident in the twelve years that Russell supervised Greek Life.[153] Cauthen simply refused to believe it:

> Q. Okay. And you understood that since Bill Russell has been at Cleveland State, there was only a single incident in 12 years?
>
> * * *
>
> A. That is something that he reported, yes.
>
> Q. Okay. And you have no reason to dispute that?
>
> A. It drew questions from me, yes.
>
> Q. Because it was so extraordinarily good, right, you couldn't believe it?
>
> A. It -- it was -- it felt unrealistic, yes.

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[151] Banks, Tr. at 1027.
[152] Banks, Tr. at 1025.
[153] Drnek, Dep., 53-54, 60; Whyte, Tr. at 1528-29 (only one hazing incident; never suspended, disciplined or reprimanded any Greek organization)

Q. Okay. And by "unrealistic," you mean you're not aware of any university which has gone 12 years without an alcohol-related incident, right?

A. I am unaware, that's correct.

Q. Okay. And in fact, it was the success that you found difficult to believe.

A. As self-reported, yes.

Q. Okay. And you did nothing to investigate whether that statement was true or false by Mr. Russell, did you?

A. No.[154]

Cauthen simply refused to believe that Russell could be that successful. In contrast to his disbelief of the older workers, Cauthen accepted unequivocally the claims of the younger staff members:

Q. So on two of the most critical issues, being hazing and alcohol, you believe that Bill Russell had an overinflated sense of himself because you could not believe how successful he claimed to be, correct?

A. Yes, yes.

Q. And you did nothing to verify whether he was accurate in his statements or not, correct?

A. Correct.

Q. And it's true that when it came to Bergmann and Johnston, you didn't discount their statements?

A. No.

Q. No, that's not true? You agree –

A. I did not -- I did not --

Q. Discount their statements.

A. -- discount their statements.[155]

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[154] Cauthen Dep., 109-110 (objection omitted).

[155] Cauthen Dep.,111

Cauthen disbelieved everything positive regarding the older workers, while he believed everything said by the younger workers. Cauthen's bias is revealed in the fact that he took one of Russell's great successes (the lack of violations) and turned it into a negative by claiming it was evidence that Russell had an "unrealistic" and "over-inflated view of himself." Cauthen, and his report, are biased and discriminatory against older workers.

G. Banks Targeted Older Workers With Questionnaires That He Then Sent to Cauthen To Justify Terminations.

Banks required Liss, Russell and Myers to fill-out questionnaires concerning their jobs.[156] Banks did not require Johnston or Bergmann to fill-out questionnaires concerning their jobs.[157] Banks prohibited Liss, Russell and Myers from participating in meetings in which they had traditionally participated.[158] In June 2012, after deciding the new organizational structure, Banks ordered Liss to reprimand Russell and to reprimand Myers.[159] Liss communicated to Banks that he did not agree with the reprimands to Russell and Myers.[160] Cleveland State ordered that the reprimands be retracted.[161] Banks only recommended performance improvement plans for employees over the age of 50.[162] Since becoming the Associate Dean for the Department of Student Life, Banks has never hired anyone over the age of 35.[163]

H. The Younger Workers Already Knew Of The "Reorganization" Before The Cauthen Report.

The Cauthen Report was a sham. Both Bergman and Johnston intimated that they knew the results before Cauthen had even left Cleveland. On the day that Cauthen interviewed staff, Daniel Lenhart expressed his surprise to Bergman that Cauthen's questions seemed to have nothing to do with the purported purpose of the study. Bergman did not express surprise. Instead he "kind of

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[156] Liss, Tr. at 85; Ex. 30.
[157] Liss, Tr. at 85.
[158] Liss, Tr. at 84-85.
[159] Banks, Tr. at 1047-1049; Liss, Tr. at 85 & 115-116; Exs. 40 & 345.
[160] *See, e.g.*, Vartorella, Tr. at 1426; Liss, Tr. 218 & 327-328.
[161] Banks, Tr. at 1063; Liss, Tr. at 119.
[162] Vartorella, Tr. at 1421.
[163] Vartorella, Tr. at 1423.

looked at me and sort of under his breath, he kind of shook his head a little bit, and he said, 'you just don't know . . . there's a shit storm coming.'"[164] Bergman testified that he had no reason to disbelieve Lenhart's testimony.[165] Only the younger staff knew that the terminations had already been decided. Similarly, Johnston also knew in advance. She told Cauthen that "some people don't need to be here for the change."[166] Like Bergman, she already knew that there would be changes and terminations. The Cauthen Report was a falsehood created to cover up a decision to make Student Life younger.

I. Age Discrimination – Cleveland State Subjected Plaintiffs To Unfair Scrutiny.

Banks and Cleveland State only asked the older workers to complete questionnaires; only attempted to reprimand the older workers; only rewrote the job descriptions for the older workers; and only singled out the job descriptions for the older workers to Cauthen for his re-organization.[167] The younger workers were never even reviewed as part of Cauthen's study; they were simply hired into the new open jobs. HR Vice-President Vartorella testified:

> Q. Okay. Now, it's true that Willie Banks only reprimanded older workers, right?
>
> MS. SIMMONS: Objection.
>
> THE COURT: Overruled. You can answer if you know.
>
> A. Correct.
>
> Q. And, in fact, to your knowledge there has never been a reprimand or a dispute over evaluations with Willie Banks except for employees who were over the age of 50, correct?
>
> A. Correct.
>
> Q. Okay. And it's also true that Willie Banks has never put anyone on a performance improvement plan or recommended a performance

[164] Lenhart, Tr. at 562:15-18.
[165] Bergman, Tr. at 1619.
[166] Cauthen Dep., 141:15-142:14.
[167] Cauthen Dep., 91:11-17.

improvement plan for anyone who was under the age of 40, correct?

A. Correct.

Q. The only employees that Willie Banks has ever recommended performance improvement plans for are those who are over the age of 50, correct?

A. Correct.[168]

Thus, Defendants unfairly and discriminatorily scrutinized older workers, including Liss and Russell, for the unlawful purpose of terminating their employment on account of their age.

J. Liss and Russell Complained Verbally And In Writing About Banks's Age Discrimination.

In "either very late April or early May", at the same time that Banks and Drnek were meeting to discuss the sham reorganization, Liss complained to HR representative Steve Vartorella "about the ageist language I was hearing from Dr. Banks"[169] Liss complained that Banks was singling out older staff for criticism and using terms like "elephants" to refer to them.[170] Liss also complained about this conduct to Drnek.[171] Liss also complained about discrimination to Cleveland State's general counsel, Sonali Wilson.[172] Liss complained to Cleveland State's HR representative Rick Horsfall.[173] Liss scheduled a meeting with Cleveland State's interim Affirmative Action Officer—Donna Whyte—to discuss Banks's conduct in singling out older workers but Liss was terminated before the meeting took place.[174]

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[168] Vartorella, Tr. 1421:2-22

[169] Liss, Tr. at 330:14-23; Liss, Tr. at 123-127, 328-330 & 332-334; Ex. 287. Liss, Tr. at 123-124 & 125. 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 they were receiving, including that Banks was using discriminatory language. Liss, Tr. at 125-127) The other issue addressed in this conversation was whether Liss was required to follow Banks's order to falsely reprimand Russell and Myers. Liss, Tr. at 125-126). Vartorella told Liss that he had no recourse and was required to do as Banks ordered. Within this conversation, Liss told Vartorella about the age-based comments Banks would make frequently. Liss, Tr. at 123-124. Vartorella's only response was to encourage Liss to discuss the issues with Banks's supervisor, Drnek.

[170] Liss, Tr. at 123:22-124:20.

[171] Liss, Tr. at 128-130, 331-332 & 334-343; Ex. 304.

[172] Liss, Tr. at 131-132; Whyte, Tr. at 1549-1550.

[173] Liss, Tr. at 130.

[174] Liss, Tr. at 132-133.

Similarly, Russell complained about age discrimination to Vartorella, Horsfall and Drnek.[175] Despite Liss and Russell's complaints of discrimination made to HR representatives, Cleveland State refused to protect Liss and Russell or even look into their reports.[176]

For someone who loved Cleveland State the way that Russell loved Cleveland State, this was a difficult step to take. In over 40 years of work, Russell had never previously filed any lawsuit, "complaint of any kind" or even an "internal complaint of any kind."[177]

K. Banks and Drnek Seek To Create Five New Open Positions While Eliminating the Positions of the Older Workers.

On June 15, 2012— the same day that Cauthen issued his report—Banks recommended to Drnek that Myers, Liss and Russell be terminated.[178] Drnek's "plan in mid-June was already to terminate Bill Russell and Steve Liss."[179] On June 25, 2012, Drnek and Banks recommended that the Department of Student Life be re-organized pursuant to the structure created by Banks in April and copied by Cauthen in his consulting report. Under the new structure, five new jobs were created.[180] Bergmann was placed in one of the new positions—Assistant Dean of Students for Student Organizations—without asking to be considered, filling-out an application or interviewing.[181] Banks was the final decision-maker with respect to placing Bergmann in the Assistant Dean of Students for Student Organizations position.[182] Johnston was placed in one of the new positions— Assistant Dean of Students for Student Activities and Events—without asking to

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[175] Russell, Tr. at 403-404 & 408-413; Vartorella, Tr. at 1422-1423.
[176] *See, e.g.*, Liss, Tr. at 127-128, 131, 133 & 344; Russell, Tr. at 410-412; Whyte, Tr. at 1582.
[177] Russell, Tr. at 607:1-14.
[178] Banks, Tr. at 1100-1103; Ex. 80. Although the memo is dated Monday June 18, Banks testified that he wrote it on June 15.
[179] Drnek Dep., 133:9-20. Drnek also testified:

> Q. Okay. And at least by June 25th of 2012 you anticipated the -- the termination of Steve Liss; correct?
> A. It hadn't been approved. It was the – it was the plan.
> Q. And similarly, if we go to 5749, by June 25th of 2012 you were proposing the termination of Bill Russell; correct?
> A. Yes. (Drnek Dep., 130:8-16)

[180] Liss, Tr. at 144-145.
[181] Banks, Tr. at 970-971 & 974-975; Vartorella, Tr. at 1327-1329.
[182] McCafferty, Tr. at 849 & 854.

be considered, filling-out an application or interviewing.[183] Banks was the final decision-maker with respect to placing Johnson in the Assistant Dean of Students for Activities and Events position.[184] The salaries for the positions into which Bergmann and Johnston were placed were funded through elimination of Liss's and Russell's positions.[185] Liss, Myers and Russell were not placed in any of the five new positions. At or after their terminations, Liss and Russell were not offered any positions with Cleveland State.[186]

After already deciding to terminate Liss, Russell and Myers, on June 28, Banks wrote a memo inventing reasons to justify the terminations of Liss, Russell & Myers.[187]

The Cauthen Report was issued on June 15. On June 25, Drnek and Banks recommended restructuring Department of Student Life, including creating five new jobs and terminating Liss, Russell and Myers—the older workers. The structure created by Banks in April, copied by Cauthen, and adopted by Drnek on June 25 created: 1) a new Assistant Dean of Students for Student Activities position; 2) a new Assistant Dean of Students for Student Organizations position; 3) a new Assistant Dean of Students for Student Engagement position; 4) a new Coordinator of Student Activities position; and 5) a new Coordinator of Commuter Affairs & Student Center Programs position.[188]

L. Cleveland State's Sole Purported Reason Was the Sham Cauthen Report.

Cleveland State claims that the "sole reason" for Plaintiffs' termination was the reorganization of the Department based on the Cauthen Report.[189] Indeed, ***"the only parts of the reorganization that occurred were the ones that were consistent with the Cauthen Report."***[190]

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[183] Banks, Tr. at 970-971 & 974-975; Vartorella, Tr. at 1327-1329.
[184] McCafferty, Tr. at 849 & 854.
[185] McCafferty, Tr. at 833-835; Ex. 155.
[186] Russell, Tr. at 467.
[187] Ex. 137.
[188] *See generally* Ex. 5, Banks, Tr. at 993-994).
[189] Banks, Tr. at 953.
[190] Banks, Tr. at 1051:18-21.

The decision-makers with respect to Liss's and Russell's terminations have testified that Plaintiffs were not fired for performance reasons.[191]

M. Cleveland State Considered the Ages of the Employees Terminated and the Ages of the Employees Promoted.

Cleveland State created a chart stating the ages of each individual affected by the termination—e.g. each individual to be retained or promoted and each individual to be terminated.[192] This age chart was provided to Cleveland State's general counsel in connection with her review of the proposed re-organization.[193]

Cleveland State specifically considered the ages of the employees affected by the reorganization when it created a chart highlighting the ages of each individual terminated and of each individual retained.[194] The HR representative assigned to Department of Student Life, Steve Vartorella, provided this age-chart to Cleveland State's general counsel in connection with evaluating the reorganization and the terminations of Liss and Russell.[195] Cleveland State does not deny that the chart constitutes an evaluation of the employees being terminated, including Liss and Russell, based on their ages.[196] Cleveland State 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.[197]

N. In Order To Terminate Liss and Russell, Cleveland State Subsequently Changed the Minimum Qualifications of the New Positions and Misrepresented Plaintiffs' Qualifications.

After the job descriptions for the five new positions created through the re-organization were finalized, Drnek made further changes to the job descriptions.[198] Making changes in this manner

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[191] *See, e.g.*, Banks, Tr. at 894-895; Vartorella, Tr. at 1307; Drnek Dep. 248:17-249:3.
[192] Vartorella, Tr. at 1321-1331; Ex. 6
[193] Vartorella, Tr. at 1324.
[194] Ex. 6.
[195] Vartorella, Tr. at 1324.
[196] Vartorella, Tr. at 1324.
[197] Vartorella, Tr. at 1331-1332.
[198] McCafferty, Tr. at 821-822.

violates Cleveland State policy.[199] In doing so, Drnek increased the minimum qualifications related to the Assistant Dean for Student Engagement position. He also increased the minimum qualifications related to the Coordinator for Student Activities position. He also increased the minimum qualifications related to the Coordinator for Commuter Affairs & Student Center Programs position.

O. Drnek and Banks Lied to Obtain Approval of Plaintiffs' Terminations.

On August 10, Drnek met with George Walker (then Cleveland State's Interim Provost and VP for Academic Affairs)[200] for approval of Plaintiffs' terminations. During the August 10 meeting, Drnek told Walker that the re-organization was based on T.W. Cauthen's consulting report. Drnek never revealed to Walker that Cauthen had no prior experience with urban or commuting universities.[201] Drnek never revealed to Walker that Cauthen and Banks were close, long-term friends. Drnek never revealed to Walker that Banks had designed the re-organization in April 2012, prior to even hiring Cauthen.

For purposes of that meeting, Drnek provided Walker with a document detailing the "[r]eorganization [r]ationale," which included reasons which Banks had previously provided in writing to Drnek. Drnek falsely told Walker that Liss did not meet the minimum qualifications for the positions of: Assistant Dean for Student Engagement, Coordinator for Student Activities, and Coordinator for Commuter Affairs & Student Center Programs.[202] Drnek told Walker that because Liss did not meet the minimum qualifications for these three positions, Cleveland State would have to conduct a search to find suitable candidates.

Liss, however, met the minimum qualifications for the positions of: Assistant Dean for Student Engagement, Coordinator for Student Activities, and Coordinator for Commuter Affairs &

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[199] McCafferty, Tr. at 823, 826 & 829-831; Exs. 39 & 154.
[200] Ex. 5, *See, e.g.*, Drnek Dep., 66:21-25.
[201] Walker, Tr. at 735-737.
[202] Walker, Tr. at 711-712; Ex. 5.

Student Center Programs.[203] Liss not only met the minimum qualifications for these three positions,[204] he also met the qualifications for each of the lower-level coordinator positions.[205]

Cleveland State now admits that every reason for not placing Liss in the open positions is false.[206] Cleveland State's pretexts are set forth clearly and specifically in Ex. 5, CSU0040. Each is false:

1. **Pretext 1: In Truth, Liss Had Three Years of Experience With Online Student Databases.**

Liss' 19-year career was destroyed because purportedly – and falsely – he did not have three years of online database experience. After June 25, Drnek added the new requirement of experience with an online student database[207] testifying that:

> Q. All right. Your first reason is "Experience must include three years administrative experience maintaining/developing enterprise, online student organization databases, e.g. OrgSync." Do you see that?
>
> A. Yes.
>
> Q. All right. First of all, that was not in your description, your job description, that you wrote on June 25th; right?
>
> A. Correct.[208]

But, in August, Drnek falsely claimed to Walker that Liss did not have "three years administrative experience maintaining/developing enterprise online student organization databases, e.g. OrgSync."[209] The truth is that Drnek knew that Liss had more than four years working with Green Room, Cleveland State's effort to develop its own "web-based program similar to OrgSync"[210] and with OrgSync itself. Because of Liss' expertise, Drnek had appointed Liss to spearhead the

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[203] *See, e.g.*, Liss, Tr. at 146-151 &155-164.
[204] *See, e.g.*, Banks, Tr. at 1067 & 1099-1100.
[205] Vartorella, Tr. at 1338, 1340 & 1349.
[206] Drnek Dep. 137:23-139:11 & 140:19-141:15.
[207] Drnek Dep., 131-32.
[208] Drnek Dep., 136:1-9.
[209] *See* Ex.5, CSU_00040.
[210] Drnek Dep., 24:20-21.

implementation of OrgSync and complimented Liss that Liss "had worked to move the [OrgSync] initiative forward aggressively."[211] Drnek knew that Liss met this minimum qualification because Liss "was reporting directly to him during the time period and we talked about it repeatedly."[212] Drnek testified:

> Q. And, in fact, you knew that Steve had been experienced with Green Room and had been involved in an online student organization database since at least 2008; right?
>
> A. Well, Green Room is different than OrgSync.
>
> Q. I appreciate that. It's an online student organization database; right?
>
> A. Yeah.[213]

Accordingly, Drnek knowingly misled Walker to justify Liss' termination.[214]

Drnek's lie is made more obvious by the fact that Jill Courson, who Cleveland State hired, admitted she lacked this qualification:

> Q. And you see that the minimum qualifications in Exhibit 202 ask for three years maintaining and developing enterprise online student organization databases, e.g. OrgSync, correct?
>
> A. Correct.
>
> Q. So you did not have that at the time you were hired, correct?
>
> A. No.
>
> Q. I've just got to make sure the record is clear. No, you did not have that?
>
> A. I did not have three years of experience with OrgSync at the time that I applied.

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[211] Drnek Dep., 24:10-11.
[212] Liss, Tr. at 154:22-24.
[213] Liss, Tr. at 135:10-18.
[214] Drnek Dep., 137:6-10. Once Drnek realized that that his testimony hurt Cleveland State he tried to change his testimony:

> Q. Okay. I thought we agreed earlier that Green Room was an online student organizational database. I thought that's what your testimony was. Do you want to change that testimony?
> A. Yes, I would.

Q. But you didn't have three years of experience with any type of enterprise online student organization database, correct?

A. Correct.[215]

Accordingly, Cleveland State disqualified Liss by falsely claiming he lacked 3 years of experience. For younger applicants, however, Cleveland State falsely claimed that they were qualified even though they admittedly lacked 3 years of experience.

2. <u>Pretext 2: In Truth, Liss Had Substantial Experience in Social Justice Leadership Programs</u>.

Drnek falsely claimed that Liss should be fired because he lacked the minimum qualifications because did not have "knowledge and experience in developing and implementing" leadership programs with a focus on "social justice."[216] Again, Drnek added this "minimum qualification" and then used it falsely to terminate Liss. First, there was no requirement that Liss have experience with social justice programs:

Q. Okay. And similarly, there's no requirement of experience with social justice programs in here right? Social just- -- the words "social justice" do not appear?

A. Right.[217]

In addition, Drnek added a new qualification and then he falsely claimed that Liss did not meet this qualification.

Q. Now, your second bullet is, "Knowledge and experience in developing and implementing leadership and service programs with focus on social justice" --

THE REPORTER: Can you slow down just a little bit.

BY MR. GRIFFIN:

Q. "Social justice, student leadership and service learning." Do you see that?

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[215] Courson, Tr. at 1476-1477.
[216] Ex.5, CSU-000040.
[217] Drnek Dep., 132:18-22.

A. Yes.

Q. Okay. It's true that that wasn't in your first job description dated June 25th either; right?

A. Right.

* * *

Q. And, in fact, Steve used to run the Center for Leadership and Service; right?

A. He -- he ran the Center for Student Involvement.

Q. But before that he ran, and you talked about your conversations with him about his prior experience with the Center for Leadership and Service; right?

A. Before I worked there, yes.

Q. Yeah. And -- and ***you were aware*** that he had knowledge and experience in developing these kinds of leadership and service programs; right?

A. Right.

Q. Okay. So that's not correct either, is it?

A. It appears that it wouldn't be.[218]

Accordingly, Defendant's purported reasons for not hiring Liss were false and a pretext for age discrimination.

3. <u>Pretext 3: In Truth, Liss Supervised A Hugely Successful Greek Life Program</u>.

Liss successfully supervised a Greek Life Program at Cleveland State; therefore, Defendant's decision to terminate his employment and refuse to hire him into the open position of Assistant Dean for Student Engagement is pretext for discrimination. Drnek testified that – after he had decided to terminate Liss and Russell, he added new minimum qualifications:

Q. You also agree there's no requirement of experience with NPC, IFC, or NPHC, or multicultural fraternities; correct?

A. That's not in here, but I think it came along later.

[218] Drnek Dep., 132:23-133:5.(emphasis added)

Q. That's right. Those were added afterwards; right?

A. Yeah.

Drnek testified:

> Q. All right. Your next [minimum qualification] is the ability to design and execute a comprehensive Greek Life program in an urban setting; significant experience and involvement with NPC, IPC, NPHC and Multicultural Greeks." Do you see that?
>
> A. Yes.
>
> * * *
>
> Q. Steve had supervised the Greek program; right?
>
> A. Well, he supervised, yes. It was -- it was under his area.
>
> Q. Under his area –
>
> A. Uh-huh.
>
> Q. -- the Greek Life program had increased and had not had a single alcohol warning and just one hazing incident; right?
>
> A. Right.

Accordingly, any suggestion that Liss lacked the qualifications or experience to design and execute a comprehensive Greek Life program is false.

4. <u>Pretext 4: In Truth, Liss Was Proficient With Database, Word & Spreadsheets</u>.

Liss possessed the computer and technological skills necessary for the positions for which he applied, including, but not limited to the position of Assistant Dean of Student Engagement. Drnek testified:

> Q. Okay. Now, "Technologically proficient and experiences with database Word spreadsheet and presentation applications." Right?
>
> A. Yes.
>
> Q. That also was not in your prior job description; right?
>
> A. Right.

Q. [Y]ou know that Steve Liss is proficient with database Word spreadsheet presentation applications; right?

A. Yes.[219]

Defendants admit that Liss possessed the technological and computer skills and should have been hired into the position of Assistant Dean of Student Engagement. As such, Cleveland State's stated reasons for not hiring or placing Liss into the position are false and a pretext for discrimination.

5. Pretext 5: In Truth, Liss Had The Ability to Travel With Student Groups.

Liss possessed the ability to travel and supervise groups; therefore, he was qualified for the position of Assistant Dean of Student Engagement. Drnek testified:

Q. All right. And finally the last one is the ability to travel with and supervise student groups. Do you see that?

A. Yes.

Q. Okay. That also was not in your prior job description, was it?

A. I don't believe so.

Q. Okay. And, in fact, you know that Steve does travel and he does supervise student groups from time to time; correct?

A. Yes.[220]

Liss, therefore, met every one of the qualifications for the position of Assistant Dean of Student Engagement.

P. Drnek Repeatedly Lied In Order To Terminate Plaintiffs.

There is no other way to state the facts: Drnek knowingly – and admittedly -- lied to Walker about Liss's qualifications in order to terminate Liss. Drnek is a serial liar. With regard to each of five separate "minimum criteria", Drnek knowingly misrepresented Liss's qualifications in order to force Liss' termination from Cleveland State. One misrepresentation might be a mistake. Five

[219] Drnek Dep., 140:19-141:4.
[220] Drnek Dep., 141:5-15.

separate misrepresentations show pure and deliberate malice. Drnek knowingly and intentionally lied to destroy the 19-year career of an outstanding public servant.

Drnek's malice is not limited to his lies regarding only the open position of Assistant Dean of Student Engagement. There were a total of five new positions, including two significantly more junior coordinator positions. Liss was qualified for each of these five positions. Drnek refused to consider Liss for any of these positions. Instead of keeping a 19-year expert, Cleveland State filled each of these jobs with young, unqualified or under-qualified staff.

Q. Age Discrimination: Cleveland State Created Five New Open Positions, Excluded Older Workers and Filled the New Positions With Younger Less-Qualified Workers.

After firing Liss and Russell, Cleveland State refused to consider them for any of the five new open positions. In stark contrast, both Bergman and Johnston were promoted to Assistant Dean positions without responding to any posting, interviewing, or even asking for the new positions:

> Q. Okay. And neither Johnston nor Bergmann had to go through an interview process to get those promotions, correct?
>
> A. Correct.
>
> Q. And neither Johnston nor Bergmann had to respond to any postings for those positions that they were promoted into, correct?
>
> A. Correct.
>
> Q. So while the younger employees who you supervised were promoted and got pay raises without interviews or requests, you never interviewed or asked for any interest by any of your older employees for those same positions, correct?
>
> A. Correct, but I believe -- I'll leave it at that.[221]

Defendant, therefore, admits that it treated younger employees differently and more favorably than it treated Liss and Russell with respect to hiring and promotion decisions.

In addition, Defendant's discriminatory conduct toward Liss is evident from the way Banks treated Liss as compared to similarly situated younger workers. Banks testified:

[221] Banks, Tr. at 970-71.

Q. Okay. So out of your three direct reports, the only one who had to put in a request was the old one, Steve Liss, right?

A. What do you mean a request?

Q. The only one who had to request a job in the reorganization was your oldest member, Steve Liss, true?

A. True.

Q. And the only one out of your three direct reports who had to put in an application was your oldest staff member, Steve Liss, right?

A. True.

***

Q. And, in fact, the only one who was fired out of your three direct reports was your oldest one, Steve Liss?

A. He was reorganized.

***

Q. He was separated involuntarily, right?

A. He was separated from the institution.

Q. But you understand that he was separated involuntarily?

A. Correct.[222]

Banks further admits that he treated both Liss and Russell differently than two younger employees, Bergman and Johnston, with respect to hiring/promotion:

Q. You gave Bergmann and Johnston jobs without a request or an application, and that's different than how you treated Liss and Russell?

MS. SIMMONS: Objection.

Q. True?

THE COURT: Overruled.

A. For the reorganization of the department, that is the way that Dr. Drnek and I decided was the best way to move forward with the department.

[222] Banks, Tr. 973-975.

Q. Okay. So that's true?

A. Yes.

Accordingly, Cleveland State treated younger employees more favorably with respect to hiring decisions and promotions; thereby, discriminated against Liss and Russell because of their age.

R. Cleveland State Refuses to Re-Hire Liss and Russell Despite Their Qualifications; Cleveland State Replaced Plaintiffs with Substantially-Younger Individuals.

Liss and Russell were qualified for all five of the positions within the Department of Student Life that were open at the time they were terminated.[223] Liss was ranked the same or higher in the interviewing process than the three substantially-younger individuals hired into the three open positions within the Department of Student Life.[224] Cleveland State treated Liss and Russell differently than it treated Bergmann and Johnston because it did not place Liss or Russell in the open positions for which they were qualified.[225]

Moreover, Cleveland State did not even encourage Liss to or suggest that he apply for the open positions for which he was qualified.[226] Instead, Cleveland State required Liss to go through the application and interview process related to the open positions. During the interview process Liss sought Cleveland State's assurances that he would not be discriminated or retaliated against.[227] Cleveland State failed to provide such assurances.[228]

Cleveland State viewed Liss's request for such assurances as a negative factor with respect to his applications for the three open positions. Cleveland State hired three substantially-younger individuals into the three open positions: Jill Courson (age 34), Catherine Lewis (age 24) and

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[223] *See, e.g.*, Tr. at 146-151 & 164-167; 1339. 1341
[224] Vartorella, Tr. at 1339-1341 & 1349-1350; Bergmann, Tr. at 1650.
[225] *See, e.g.*, Banks, Tr. at 977-978; Ex. G-1.
[226] Liss, Tr. at 302.
[227] Liss, Tr. at 165-166.
[228] Liss, Tr. at 166.

Melissa Wheeler (age 30).[229] Banks, in consultation with Drnek, "had discretion to hire anyone who was qualified for those positions."[230]

In every instance, Banks hired a younger, less qualified candidate. Courson, is a close friend from Georgia of both Banks and Cauthen and has known them for 12 years.[231] For younger applicants, qualifications were irrelevant: Courson did not even meet the minimum requirement of 3 years of experience with student online databases. Further, Courson "had no prior experience at a commuting or urban university before she was hired at Cleveland State."[232] And "Steve Liss had more years of experience than Jill Courson". In fact, Liss had successfully performed these duties at Cleveland State.

Similarly, Catherine Lewis (age 24) came straight out school and had almost no work experience.[233] Qualifications did not matter for younger workers:

> Q. Okay. And, in fact, the job was given to Catherine Lewis, right?
>
> A. I believe so.
>
> Q. And Catherine Lewis was ranked lower than Steve Liss?
>
> A. Yes.
>
> Q. Okay. It's true that Cleveland State hired a lower ranked younger individual rather than Steve Liss, true?
>
> MS. SIMMONS: Objection.
>
> THE COURT: Overruled.
>
> Q. That's true?
>
> A. That is true.[234]

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[229] All ages are as of December 1, 2012, by which time the hiring decisions had been made. Vartorella, Tr. at 1330-1331.
[230] Banks, Tr. at 1095:20-25.
[231] Courson, Tr. at 1469:6-22. In Georgia, Courson and Banks and Cauthen would "socialize" together; "go to the movies together"; have "dinner together." Courson, Tr. at 1470.
[232] Banks, Tr. at 1098-99.
[233] Ex. 243.
[234] Vartorella, Tr. at 1341:2-22.

Neither Lewis nor Wheeler had the years or level of experience that Liss and Russell possessed.[235] Russell successfully performed all of the duties for the new positions and also had a terminal degree. Similarly, Liss was qualified for all the new positions:

> Q. There were three positions left. There's no question that Steve Liss met the minimum qualifications for each of those three positions, correct?
>
> A. Correct.[236]

As such, Defendant cannot dispute Plaintiffs' qualifications for any of the positions that were ultimately offered to the substantially younger employees, including, but not limited to Courson, Lewis, and Wheeler.

Following Liss's termination, Bergmann assumed Liss's duties and responsibilities.[237] Russell was also qualified the positions within the Department of Student Life that were open at the time he was terminated.[238] Following Russell's termination, Courson assumed Russell's duties and responsibilities.[239]

S. **Cleveland State Discriminated Against Older Workers.**

1. Banks Only Reprimanded Older Workers.

Defendant's discrimination against older workers is further supported by the fact that Banks only reprimanded older workers:

> Q. Okay. Now, it's true that Willie Banks only reprimanded older workers, right?
>
> MS. SIMMONS: Objection.
>
> THE COURT: Overruled. You can answer if you know.
>
> A. Correct.[240]

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[235] Exs. 78, 230, 242, 244 & 247.
[236] Banks, Tr. at 1100.
[237] Banks, Tr. at 1117 & 1327.
[238] Russell, Tr. at 435 & 468.
[239] Russell, Tr. at 438-439.
[240] Vartorella, Tr. at 1421.

Such unfair treatment of older workers with respect to discipline and punishment is further evidence of discrimination, by Defendant, supporting Liss and Russell's claims of age discrimination.

2. Banks Only Put Older Workers On Performance Improvement Plans.

Banks discriminated against older workers by issuing performance improvement plans (PIPs) to only older workers. HR VP Vartorella testified that:

> Q. Okay. And it's also true that Willie Banks has never put anyone on a performance improvement plan or recommended a performance improvement plan for anyone who was under the age of 40, correct?
>
> A. Correct.
>
> Q. The only employees that Willie Banks has ever recommended performance improvement plans for are those who are over the age of 50, correct?
>
> A. Correct.[241]

Banks use of PIPs, which is a form of discipline, was administered discriminatorily against older workers, such as Liss and Russell, as means to justify the illegal termination of older employees.

3. Banks Only Demanded Older Workers Complete Questionnaires.

As part of his plan to create a false record to justify terminating the older workers, Banks sent out questionnaires only to the older workers, and then complained about how they were completed. In fact, Banks had already designed the reorganization.

> Q. Okay. And it's true that you had already designed a new structure before you ever sent out questionnaires to Steve and Bill and CSI, right?
>
> A. Correct[242]

Then, Banks on a discriminatory basis, sent the questionnaires only to the older staff.[243]

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[241] Vartorella, Tr. at 1421.
[242] Banks, Tr. at 994.
[243] Liss, Tr. at 85; Ex. 30.

4. Cleveland State Allowed Younger Staff To Hold Events In Bars, But Not Older Staff.

Cleveland State discriminated against older staff by prohibiting them from holding events at bars. Drnek testified:

> Q. Did there come a time when you asked Bill Russell not to have events at bars?
>
> A. Yes.[244]

In contrast, Jill Courson, Bill Russell's 35-year old replacement, testified:

> Q: You were never told by anyone that Greek organizations are not allowed to hold events at bars; is that correct?
>
> A: That is correct.[245]

Moreover, Bergman was also allowed to hold events in bars. But Russell was not:

> Q. -- okay. At line 22 I asked you, question: And Bergmann was never criticized for holding events in bars, correct? And you answered correct. Was that testimony truthful?
>
> A. Yes.
>
> Q. And then I asked: But you did criticize Bill Russell for holding events in bars, correct? And you answered, correct.
>
> A. Yes.[246]

Defendant treated younger employees differently than it treated older workers like Russell. In fact, Banks criticized and reprimanded Russell for the same conduct that was permitted for Bergman. Accordingly, Defendant treated younger staff differently than older staff.

T. The Purported "Reorganization" Was A Sham.

1. Banks Never Had A Plan For Student Life.

The claim that Banks wanted to move Student Life in a different direction is false. Banks had no direction or plan that required a reorganization:

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[244] Drnek Dep., 218-219.
[245] Courson, Tr. 1491: 8-11.
[246] Banks, Tr. at 1070.

Q. And, in fact, before you fired Bill and Steve, you never wrote a strategic plan for CSI?

A. That is correct.

Q. And before you fired Bill and Steve, you never laid out your vision and agenda for them to obtain, right?

A. That is correct.

The reorganization was not designed to implement any plan. The reorganization's only purpose was to fire the older workers so that Student Life could look younger.

2. Liss And Russell Never Failed To Meet Objectives.

In addition, Banks cannot claim that Liss or Russell could not meet his goals because he never articulated any:

Q. I just want you to answer my question. You never articulated a plan or a set of goals for Bill and Steve before you fired them?

A. Right.[247]

Similarly, Banks never set any objectives that Liss or Russell failed to meet:

Q. Yes. You never wrote down a plan, you never set a set of goals or objectives that Bill or Steve failed to achieve, right?

A. Correct.[248]

Banks had no basis for the actions he took against Liss and Russell, and his purported "plan" for the student life department was a sham.

3. Cleveland State Never Evaluated Whether Liss & Russell – Or Any Of Its Staff – Could Be Successful.

Banks cannot claim that Liss and Russell lacked any skills because Banks never even looked at their skills:

Q. You don't recall looking at whether Bill or Steve had the requisite skill sets to be successful, right?

[247] Banks, Tr. at 988.
[248] Banks, Tr. at 990.