

A. Correct.

Q. And you don't recall ever reviewing the academic credentials of any of your employees, right?

A. Correct.²⁴⁹

Liss and Russell had the skills to succeed in a reorganization done in good-faith. Cleveland State's purported reorganization, however, never looked at whether Plaintiffs' skills matched the reorganization. The purpose of the reorganization was to terminate or transfer the older workers – regardless of their skills.

U. Cleveland State Has Changed Its Purported Reasons for Terminating and Refusing to Re-hire Plaintiffs.

Cleveland State initially communicated to Plaintiffs that the terminations and refusals to re-hire were not based on performance.²⁵⁰ Cleveland State confirmed in testimony at trial that the terminations were not performance-based.²⁵¹ Cleveland State initially communicated to Plaintiffs that the sole reason for the terminations and refusals to re-hire was the re-organization based on the Cauthen report.²⁵² At trial, Cleveland State attempted to claim for the first time that “Mr. Liss’s and Mr. Russell’s past job performance was one of the factors that led to the reorganization[.]”²⁵³

V. All of Cleveland State’s Stated Reasons Are False.

Cleveland State now tries to claim that Liss and Russell were terminated and denied rehire because of performance reasons or because of poor relationships. Cleveland State itself concluded that these claims are false.

²⁴⁹ Banks, Tr. at 994-995.

²⁵⁰ See, e.g., Liss Tr. at 313-322 & 326; Russell, Tr. at 434 & 447-448; Lenhart, Tr. at 528-529; Walker, Tr. at 701-702; Vartorella, Tr. at 1306-1307; Ex. I-I.

²⁵¹ Banks, Tr. at 953.

²⁵² See, e.g., Banks, Tr. at 925-926.

²⁵³ *Cleveland State University’s Memorandum in Opposition to Motion in Limine*, at p.2.

1. The Terminations of Liss and Russel Were Not Based On Performance.

Dr. Berkman in his termination letter to Liss stated that “this decision is not based on performance.”²⁵⁴ Similarly, Drnek testified that none of his “concerns impact[ed] CSU's decision not to rehire or to find new jobs for Steve and Bill.”²⁵⁵ Banks testified:

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

A. Correct.

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

A. Correct.²⁵⁶

Cleveland State considers “performance” to include “interpersonal relations and team interactions,” “trust openness and good relations among the University community”, the “ability to work cooperatively with supervisors to accomplish tasks”, “productivity, initiative and creativity” and “whether an individual is current on recent developments and new information in his/her department or field including new technology, equipment, programs and services.”²⁵⁷ Liss and Russell received outstanding evaluations based on this performance criteria.²⁵⁸ After discussing these criteria, Vartorella testified that the terminations of Liss and Russell were not based on performance.²⁵⁹

2. Cleveland State's Own Investigation Revealed No Problems With Performance or Relationships.

Acting on behalf of Cleveland State, Dr. George Walker investigated Liss' grievance regarding his termination, as well as his requests for “reinstatement or rehiring to a similar position at Cleveland State.”²⁶⁰ Walker concluded that the termination and failure to rehire “was not for performance reasons”, was “not for any issue with relationships”, and that “anyone claiming that it

²⁵⁴ Ex. 98.

²⁵⁵ Drnek Dep., 249.

²⁵⁶ Banks, Tr. at 953:16-21

²⁵⁷ Vartorella, Tr. at 1304-06. See also Ex. 57.

²⁵⁸ Liss Performance Evaluations-Exs. 56-63; Russell Performance Evaluations- Exs.85-89.

²⁵⁹ Vartorella, Tr. at 1305:7-15.

²⁶⁰ Walker, Tr. at 701:2-9.

was because of performance reasons or relationship reasons, that would be contrary to the conclusions in [his] findings.”²⁶¹ In fact, until this lawsuit was filed, no one at Cleveland State maintained that Liss or Russell were terminated and/or not rehired because of performance or relationship reasons.²⁶²

3. Banks Testified He Had No Relationship Issues With Liss Or Russell – Thus, “Gutting” Cleveland State’s Case.

Cleveland State kept changing their reasons and searching for yet another new story to tell to justify the terminations. Cleveland State waited until trial to make the new claim that Liss and Russell were fired and not rehired because of their work relationships with Banks:

Mr. Knutti: Central to this entire case is Mr. Russell’s relationship with Dr. Banks. This is about that relationship and one of what are admittedly very few direct contacts that Mr. Russell had with Dr. Banks.

Mr. Griffin: Dr. Banks’ relationship is not at issue in this case.

Mr. Knutti: Dr. Banks’ relationship is – has everything to do with this case. . . And I guess what I will say is if that’s not coming in, then our case has been gutted.

And I will proffer all of this at the appropriate time so that Judge McGrath and the court of appeals should have access to it if necessary.²⁶³

Thus, in looking for a new pretext, Cleveland State claimed at trial that Banks and Russell had relationship problems and these problems were “central to the entire case.” It is also – again – simply false: Banks “guttled” the “entire case” when he testified:

Q: Did you have any problems with Mr. Russell?

A: No.

Q: So, when I say ‘you didn’t like Mr. Russell’ and you said “no”, does that mean you disliked Mr. Russell.

²⁶¹ Walker, Tr. at 701:17-702:3.

²⁶² Walker, Tr. at 707:10-708:3.

²⁶³ Tr. 489:7-24 (emphasis added).

A: No.

Q: Do you have any feelings towards him one way or the other?

A: No.²⁶⁴

Banks further clarified:

Q: Okay. You disliked Bill?

A: No.

Q: You had a bad relationship with Bill?

A: No.²⁶⁵

Cleveland State's claim that Banks and Russell had a bad relationship is untrue. Their entire case is meritless.

With regard to Liss, the only reason given by Cleveland State for not retaining Liss was the falsehood that Liss did not meet the minimum qualifications for any of the new positions.²⁶⁶ In fact, Liss was qualified for each of the positions that were given to the younger Bergman and Johnston without request, application or interview. Liss was also qualified for the remaining positions.²⁶⁷ Cleveland State's new excuses are pretexts for discrimination. Liss and Russell were not retained and not rehired because they were old. Banks wanted Student Life to get younger to match the student body.

²⁶⁴ Banks, Tr. 955-56:13-1.

²⁶⁵ Banks, Tr. at 1058:19-22.

²⁶⁶ Walker, Tr. at 711:7-15.

Q. Okay. It indicates that Mr. Liss would not be retained or transferred into that position because he does not meet a majority of the minimums. Do you see that?

A. I do see that.

Q. And those are the only reasons you recall Dr. Drnek telling you why Steve Liss should not be retained?

A. Insofar as I recall, that's correct.

²⁶⁷ Banks, Tr. at 1100.

W. Cleveland State Knew That Russell Had Plans To Take FMLA Leave.

1. Russell's Health Conditions Were Well Known Because Russell Had Suffered A Heart Attack While At a Cleveland State Function.

Russell suffered a heart attack at a Cleveland State function in October 2011.²⁶⁸ He took 10 weeks of FMLA leave in connection with his October 2011 heart attack. In 2012, Russell learned that he would need shoulder surgery. He underwent cardiac testing in advance of the surgery.

2. Banks Knew Of Russell's Need For FMLA Leave Before He Recommended Termination Because He Discussed It With Liss.

Banks was aware that Russell needed surgery in 2012 and that he would require FMLA leave for the surgery.²⁶⁹ Banks was aware of Russell's need for FMLA leave prior to making the decision to terminate Russell.²⁷⁰ In "March or April", Liss told Banks that Russell needed shoulder replacement surgery and "that the goal would be to have shoulder surgery probably late summer or early fall. And we – we talked about that on numerous occasions just in terms of, is it – will Bill be away for an extended period and that kind of thing."²⁷¹

3. Banks Testified That He Already Knew Russell Needed FMLA Before He Recommended Russell's Termination.

Banks knew about Russell's need for FMLA leave before terminating his employment.

Banks testified:

Q. Okay. And you understood before the decision was made to terminate him that he was going to go out on FMLA because he needed time for medical care, correct?

A. I don't recall.

Q. Okay. But you answered a little bit differently at the deposition, right? I asked you, question -- this is page 144, line 24, question: And you understood before the decision was made to terminate him that he was going to need to go out on FMLA leave because

²⁶⁸ Russell, Tr. at 419.

²⁶⁹ Liss, Tr. at 133-137; Russell, Tr. at 412-413 & 416-419; Banks, Tr. at 1052-1055.

²⁷⁰ Liss, Tr. at 133-137; Russell, Tr. at 412-413.

²⁷¹ Liss, Tr. 135:18-24.

he needed time for medical care, correct? And your answer was I believe so, yes. Right?

A. I believe so.

Q. I read that correctly?

A. Yes.

Q. That was your testimony?

A. Right.²⁷²

Banks further testified:

THE COURT: Okay. So your testimony today is that you believe you knew that he had to have shoulder surgery?

A. Possibly, yes.

The COURT: Okay. Well, we'll let that answer stand. Overruled.

Q. Okay. Thank you. And let me continue just so that we're clear about this. You agreed that there was some point in time that because of the shoulder and the need for surgery, that Mr. Russell was going to need to be out on FMLA?

A. Yes.²⁷³

Thus, Banks knew that Russell would need FMLA leave and, rather than accommodate this request, elected to terminate Russell's employment.

4. Banks Discouraged, Disparaged And Interfered With Russell's Need For Medical Leave.

In May 2012, Russell submitted his application for FMLA leave and was waiting for approval.²⁷⁴ Drnek was aware that Russell needed surgery in 2012 and that he would require FMLA leave for the surgery.²⁷⁵ On June 27, Russell met with Drnek:

And I went in and I said, Jim, you know what I'm going through, you know my FMLA is coming up, you know I've got these health issues .

²⁷² Banks, Tr. 1053-54:12-5.

²⁷³ Banks, Tr. at 1055-1056.

²⁷⁴ Russell, Tr. at 421:2-10; Ex. 316.

²⁷⁵ Russell, Tr. at 412.

. . . You know this isn't right, you know this is discriminatory, you know he's affecting – trying to affect me because he wants me to retire.²⁷⁶

Drnek and Russell then met with Banks. Instead of supporting his need for FMLA leave, Banks discouraged, disparaged and interfered with Russell's FMLA rights:

The dean explained why I was there, that I wanted to get rid of the – that I had complaints about being discriminated against, that I had health concerns, and he emphasized the health concern. Willie looked at me, leaned forward, leaned at me and said, "I think Bill should go back to his office and get healthy." And that's a quote.²⁷⁷

Russell needed surgery. But rather than support his need, Banks' hostility toward leave was evident in his comment that "Bill should go back to his office and get healthy." Banks' hostility is also shown by his instructions to Liss to not accommodate any of Russell's medical conditions.²⁷⁸

5. Drnek Knew Of Russell's Need For FMLA Before Terminating Russell.

Drnek was aware of Russell's need for FMLA leave prior to terminating Russell.²⁷⁹ Vartorella was also aware that Russell needed surgery in 2012 and that he would require FMLA leave for the surgery.²⁸⁰ Vartorella was aware of Russell need for FMLA leave prior to Drnek and Banks making the decision to terminate Russell.²⁸¹

6. Cleveland State Fired Russell Five Days After His FMLA Leave Was Approved.

Russell was medically approved for the surgery by July 2012.²⁸² Russell scheduled the surgery for September 2012. On August 31, 2012, CareWorks approved Russell's FMLA leave.²⁸³ CareWorks sent Vartorella an email notifying him of Russell's "new claim", approving Russell's FMLA leave and indicating that "he has at least 280 hours of available time."²⁸⁴ Despite months of

²⁷⁶ Russell, Tr. at 412:12-20.

²⁷⁷ Russell, Tr. at 413:12-19.

²⁷⁸ Liss, Tr. at 137; Banks, Tr. at 1056.

²⁷⁹ Russell, Tr. at 412 & 416-419.

²⁸⁰ Vartorella, Tr. at 1391:14-20; Russell, Tr. 422:19-23 ("I told him.")

²⁸¹ Vartorella, Tr. at 1393:14-22.

²⁸² Russell, Tr. at 599.

²⁸³ Ex. 316.

²⁸⁴ Vartorella, Tr. at 1392; Ex. 361.

prior reorganization discussions without action, five days after Russell's FMLA was approved, Cleveland State fired Russell.²⁸⁵

7. Cleveland State Refused To Grant Russell FMLA Leave Unless Russell Waived All of His Rights.

Vartorella never inquired as to whether Russell's FMLA rights were being violated.²⁸⁶

Cleveland State University offered Russell the time for his surgery and the right to FMLA leave if he waived his claims to age discrimination and other employment issues.²⁸⁷

Q. Okay. And Cleveland State said that they would allow him enough time to have the surgery and take the medical leave if he agreed to waive his claims for age discrimination and other issues, correct?

A. Correct.

Q. And if he did not agree to waive his claims, Cleveland State would not enlarge any period of time to allow him to take medical leave, correct?

A. Correct.²⁸⁸

As such, Cleveland State violated Russell's rights under the FMLA by conditioning approval of his medical leave on Russell waiving his claims for age discrimination.

X. Cleveland State Recognizes That the Re-Organization of Department of Student Life Was A Sham.

Every administrator involved in the purported "reorganization" of the Department of Student Life has left or is leaving Cleveland State, or has been reassigned. Drnek has left Cleveland State and now works in Bakersfield, California.²⁸⁹ Banks was denied promotion into Drnek's position and is actively interviewing with other schools.²⁹⁰ Vartorella was reassigned and no longer supports

²⁸⁵ Vartorella, Tr. at 1393;

²⁸⁶ Vartorella, Tr. at 1415.

²⁸⁷ Vartorella, Tr. at 1419.

²⁸⁸ Vartorella, Tr. at 1419:6-16.

²⁸⁹ Drnek Dep. 161:20-24.

²⁹⁰ Banks Tr. at 1132.

Department of Student Life.²⁹¹ Less than a year after hiring Cauthen to provide a \$3,000 report “reorganizing” the Department, Cleveland State hired a different third-party consultant to conduct a new study of the Department; Cleveland State paid this consultant \$49,000.²⁹² Cleveland State recognizes that the conduct of Drnek, Banks and Vartorella was wrongful, but without the action of this Court, Cleveland State will not correct the damage it has caused Liss and Russell.

III. LAW & ARGUMENT

A. Burden of Proof: Preponderance of the Evidence.

At trial, Plaintiffs must prove their case by “the greater weight of the evidence.”²⁹³ In discrimination cases, plaintiffs do not have to prove that age was the only reason for the adverse employment action.²⁹⁴ Plaintiffs only need to show that age “made a difference” in Cleveland State’s treatment of Plaintiffs.²⁹⁵ There may be more than one reason for the Defendant’s decisions.²⁹⁶ Plaintiffs need not prove that their age was the only reason.²⁹⁷ Because there is overwhelming evidence that age repeatedly “made a difference,” the Court should find in favor of Plaintiffs on their age discrimination claim, and should then determine the amount of Plaintiffs’ damages.

B. Plaintiffs May Prove Discrimination With Either Direct or Indirect Evidence.

R.C. 4112 prohibits employers from discriminating based on age when making employment decisions.²⁹⁸ There are two primary methods for proving discriminatory intent: the “direct”

²⁹¹ Vartorella, Tr. at 1297-1298.

²⁹² Walker, Tr. at 752 & Banks, Tr. at 1060.

²⁹³ Ohio Jury Instructions, § CV 533.03. See also § CV 533.05 (2012).

²⁹⁴ Ohio Jury Instructions, § CV 533.03.

²⁹⁵ Ohio Jury Instructions, § CV 533.03.

²⁹⁶ Ohio Jury Instructions §§ CV 533.03, CV 533.05 (2012); Ohio Rev. Code § 4112.02(A); *Cleveland Civil Service Comm. v. Ohio Civil Rights Comm.*, 57 Ohio St.3d 62, 66 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-41 (1989); *Gross v. FBL Financial Services, Inc.* 129 S.Ct. 2343 (2009); see also *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *In re Lewis*, 845 F.2d 624 (6th Cir. 1988).

²⁹⁷ Ohio Jury Instructions, § CV 533.03.

²⁹⁸ R.C. 4112.02(A). Courts have generally adopted the federal procedural framework for proving discrimination claims when analyzing Ohio’s prohibition against employment discrimination. See, e.g., *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Com.*, 66 Ohio St. 2d 192, 196, 421 N.E.2d 128, 131 (1981); *Ahern v. Ameritech Corp.*, 137 Ohio App.3d 754, 769, 739 N.E.2d 1184, 1194 (2000).

evidence method and the “indirect” evidence method.²⁹⁹ A plaintiff may pursue his evidentiary burden under either method, or under both.³⁰⁰

Furthermore, in employment discrimination cases, a party may prove discrimination by a preponderance of the evidence any number of ways, including through both direct and circumstantial evidence. “Circumstantial evidence is not only sufficient, but may also be more certain and persuasive than direct evidence...” Indeed, “juries are routinely instructed that ‘the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence.’”³⁰¹

Under the direct evidence method, a plaintiff may offer “evidence of any nature”—direct, circumstantial, or statistical—to “directly” prove the ultimate issue of unlawful intent.³⁰² Here, Plaintiffs’ direct evidence will include Cleveland State’s testimony that there is a “100 percent correlation” between the age of employee and termination. Importantly, “‘direct evidence’ refers to a **method** of proof, **not a type** of evidence.”³⁰³ This method differs from the indirect evidence method, which uses a multi-factor burden-shifting scheme to “indirectly” prove unlawful intent by eliminating common legitimate motives.³⁰⁴

C. Cleveland State Repeatedly And Consistently Preferred Younger Workers And Discriminated Against Older Workers.

Cleveland State made at least six separate discriminatory decisions including:

1. **The Sham “Reorganization”**: Implementing a reorganization that terminated only older workers, Liss and Russell and promoted only younger workers (Johnston and Bergman);

²⁹⁹ *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 581-86, 664 N.E.2d 1272, 1276-79 (1996).

³⁰⁰ *See Mauzy*, 75 Ohio St.3d at 581-86,

³⁰¹ Ohio Jury Instructions § CV 305.01 (2012); Federal Jury Practice and Instructions (O’Malley, Grenig & Lee, 5th ed. Vol. 3, 2000); *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148, 2154 (2003).

³⁰² *Mauzy*, 75 Ohio St.3d at Syllabus ¶1.

³⁰³ *Id.* (emphasis added). The *Mauzy* court, in clarifying the meaning of “direct evidence” as it is used in reference to the “direct evidence method,” emphasized that the term “is, in a sense, a misnomer.” *Id.* at 586. It does not refer to “direct evidence” as the term is traditionally used relative to circumstantial evidence, *i.e.*, it does not refer to that type of evidence from which the factfinder need not draw any inference to establish the fact for which the evidence is offered.

Id.

³⁰⁴ *Id.* at 581-585.

2. **Assistant Dean for Student Organizations:** Promoting the younger Johnston without request and without considering or allowing the older Liss or Russell to apply;
3. **Assistant Dean for Student Activities:** Promoting the younger Bergman without request and without allowing the older Liss or Russell to apply;
4. **Assistant Dean for Student Engagement:** Hiring the younger Courson (who did not satisfy the minimum requirements) while declining to promote or reassign Liss or Russell (the way that the younger Johnston and Bergman were treated).
5. **Coordinator for Student Activities:** Hiring the younger less qualified Wheeler while declining to promote or reassign Liss or Russell (the way that the younger Johnston and Bergman were treated).
6. **Coordinator for Commuter Affairs/Greek Life:** Hiring the younger less-qualified Lewis while declining to promote or reassign Liss or Russell (the way that the younger Johnston and Bergman were treated).

This is not a case about a single decision. It is about many decisions – every one of which revealed Cleveland State’s preference for younger workers. In every one of these discrete decisions, Cleveland State preferred younger workers and discriminated against older, more experienced staff. As Cleveland State’s HR Vice-President Vartorella testified, there is a 100% correlation between the age of the employee and the replacement by a younger worker.³⁰⁵ At every discrete step, Cleveland State intended to “get younger” by eliminating older workers and replacing them with younger workers. The pattern of separate discriminatory decisions cannot be explained except, as shown below, by Cleveland State’s age discrimination.

D. Plaintiffs Have Direct Evidence of Age Discrimination.

1. Cleveland State Illegally Considered Age As A Factor.

Here, there is direct evidence of discrimination. Steve Vartorella, Cleveland State’s HR Representative for the Department of Student Life, testified that age was a factor that Cleveland State considered:

Q. Yes. It’s true that Cleveland State looked at the age of the people to be hired and the people to be promoted as factors that they

³⁰⁵ Vartorella, Tr. at 1331:21-1332:8. Drnek Dep., 79:13-19.

considered in the review process for the terminations and the reorganization, correct?

A. Correct, with the exception of "hired," that was not determined at that point in time.

Q. Okay. "Promotion" would be a better word?

A. Correct.³⁰⁶

Thus, Cleveland State admits that it considered age as factor in the reorganization.³⁰⁷ As shown below, in every case the consideration of age was a negative factor.

2. Evidence of Discrimination: Only Older Workers Were Terminated.

Here, Cleveland State's HR representative testified that 100% of the workers terminated were over the age of fifty:

Q: So, in looking at Exhibit 6 and comparing the workers to be laid off, first of all, every worker to be laid off is age 50 or older, correct?

A: Correct.³⁰⁸

Thus, the "reorganization" fired only older workers.

3. Evidence of Discrimination: In Every Case, the Older Workers Were Replaced By Younger Workers.

However, Cleveland State did not replace Plaintiffs with other older workers. Instead, Cleveland State, which was aware of the ages of the replacements, only replaced them with younger workers.

³⁰⁶ Vartorella, Tr. at 1382:2-11.

³⁰⁷ Specifically, Cleveland State was aware of the ages of Liss, Russell and their replacements:

Q. Well, it's true that Cleveland State was aware of the ages of Mr. Liss and Mr. Russell at the time it decided to terminate them, right?

A. Correct.

Q. And it's true that Cleveland State was aware of the individuals who were going to replace Mr. Liss and Mr. Russell at the time of the termination, correct?

A. Correct.

Q. And Cleveland State knew that the individuals being terminated were substantially older than the individuals who were going to replace them, correct?

MS. SIMMONS: Objection.

A. Correct.

THE COURT: Overruled.

Vartorella, Tr. at 1335:24-1336:15.

³⁰⁸ Vartorella, Tr. at 1331:12-16.

Q: And every person who is assuming most or all of their duties is aged 35 or younger, correct?

A: Assuming those duties, correct.³⁰⁹

Thus, in 100% of the job changes made by the “reorganization”, older workers were replaced by younger workers.

4. Evidence of Discrimination: 100% Correlation Between Age And Replacement By A Younger Worker.

Cleveland State’s HR representative also testified that only younger workers were promoted:

Q: And as between those two columns, it’s true that there’s 100 percent correlation between the age of the person being laid off being over the age of 50 and the age of the person assuming most of the duties as being aged 35 or younger correct?

A: That is correct.

Q: Okay. And just on the face of Exhibit 6, it’s true that anyone who was over the age of 50 is being replaced for most of their duties by someone under the age of 35, correct?

A: Correct.³¹⁰

Furthermore, “in each instance, the employees who were being laid off were evaluated with respect to their age.”³¹¹ Thus, Cleveland State achieved its illegal goal of making the Department of Student Life become substantially younger.

5. Evidence of Discrimination: Banks Consistently Discriminated Against Older Workers.

The “reorganization” reflected Banks’ consistent preference for younger workers, and his bias against older workers. There is not a single instance in which Banks hired or promoted an older worker. Instead:

1. Banks never hired anyone over the age of 35;³¹²
2. Banks never promoted anyone over the age of 35;³¹³

³⁰⁹ Vartorella, Tr. at 1331:17-20.

³¹⁰ Vartorella, Tr. at 1331:21-1332:8; Drnek Dep., 79:13-19.

³¹¹ Vartorella, Tr. at 1326:16-19.

³¹² Banks, Tr. at 934:13-935:4.

3. Banks never fired anyone younger than age 35;³¹⁴
4. Banks never reprimanded anyone under the age of 35.³¹⁵
5. Banks never put anyone on a Performance Improvement Plan who was younger than 35.³¹⁶

In 100% of his employment decisions, Banks showed his discriminatory animus. These statistics are evidence of discrimination.

6. Evidence of Discrimination: Cleveland State's Sham Reorganization Rearranged the Same Duties and "Fired The Older Guy."

There was no change in the number of Banks' direct reports or their duties – only their ages:

- Q. All right. So as a result of the reorganization, you went from three direct reports to three direct reports, right?
- A. Correct.
- Q. And the result was you rearranged the duties, but fired the older guy, right?
- A. I don't know that I would characterize it that way.
- Q. I understand you wouldn't characterize it, but that was the effect?
- A. Yes.³¹⁷

The outcome of Cleveland State's sham reorganization was simply to rearrange the same duties and fire the older employees.

7. Age-Related Comments Are Supplemental Direct Evidence of Discrimination.

Cleveland State's conduct and comments reflecting age-based stereotypes constitute additional direct evidence of age discrimination.³¹⁸ Direct evidence includes employer remarks that

³¹³ Drnek Dep., 81; Banks, Tr. at 934-935 & 937:3-6. In contrast to HR VP Vartorella's testimony that Banks made the decisions to promote Johnston and Bergman, Banks claims that he has no such power, Banks, Tr. at 935.

³¹⁴ Banks, Tr. at 936: 18-20.

³¹⁵ Vartorella, Tr. at 1421.

³¹⁶ Vartorella, Tr. at 1421.

³¹⁷ Banks, Tr. at 1117-1118.

³¹⁸ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 1791 (1989) (holding performance criticisms voiced while the plaintiff was being considered for a promotion that were based in common stereotypes permitted the inference that discrimination was the motivating factor behind the denial of the promotion, even if the criticisms were true).

“reflect a discriminatory attitude” or that demonstrate a “discriminatory animus in the decisional process.”³¹⁹

a. **Banks Participated In the Decisions To “Reorganize”, Fire Liss and Russell, Promote Younger Workers and Hire New Younger Workers.**

Banks was a decision-maker at virtually every step. In April, Banks designed the sham reorganization.³²⁰ In early May: Banks found Cauthen; Banks recommended that Cleveland State hire Cauthen; Banks told Cauthen who to interview and what documents to review; Banks wrote entire sections of the Cauthen Report including the opinions and the structure; and Banks allowed Cauthen to falsely represent Banks’ opinion as though they were Cauthen’s own. In June, the same day he received the Cauthen Report, Banks recommended Cleveland State adopt Cauthen’s purportedly independent report without revealing that Banks had actually written portions of it or disclosing his personal relationship. Thus, Banks was a decision-maker who initiated, designed and recommended the reorganization.

With regard to excluding older workers and promoting younger workers into the five new positions, Banks also was the decision-maker. As to the three senior assistant dean positions, Vartorella testified:

Q. And the hiring manager makes the final decision on who to hire or not, right?

A. Yes, they do.

Q. And who do you believe -- who was the hiring manager for the assistant dean for student organizations?

A. The Associate Dean, Willie Banks.

Q. Okay. And he made the final decision, right?

A. Yes.

³¹⁹ *Kneibert v. Thomson Newspapers*, 129 F.3d 444 (8th Cir. Mo.1997) quoting *Beshears*, 930 F.2d at 1354.

³²⁰ Ex. 2. See also Banks’ testimony supra.

Q. Okay. And who was the hiring manager for the assistant dean of student activities?

A. Again, it would be Dr. Banks. However those two other positions were filled through a job audit.

Q. The hiring manager has the right to decide who fills those positions, right?

A. Correct.

Q. Okay. And Dr. Banks made the decision as to who to audit into that position, right?

A. Correct.

Q. Okay. And the last one is the assistant dean for student engagement, correct?

A. Correct.

Q. And who do you believe made the decision to fill that position?

A. Associate Dean Willie Banks.³²¹

Thus, in addition to designing the reorganization, Banks also made the decision to promote Bergman and Johnston without request or interviews, rather than fill the positions with Liss and Russell. Banks also decided not to promote or hire either Liss or Russell into the position of Assistant Dean for Student Organizations which Banks filled with his substantially younger friend Jill Courson (age 34) despite the fact that she did not meet all of the minimum qualifications.

Banks' remarks demonstrate an unabashed preference for a younger workforce. Discriminatory statements made by individuals who are meaningfully involved in an employment decision are highly probative of discriminatory intent.³²² Discriminatory remarks are also relevant to managerial attitudes over time and "reflect a cumulative managerial attitude among the defendant-employer's managers."³²³ The Sixth Circuit has held that:

³²¹ Vartorella, Tr. at 1318-19.

³²² *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 355 (6th Cir. 1998) (following *Wells v. New Cherokee Corp.*, 58 F.3d 233, 238 (6th Cir. 1995)).

³²³ *Id.*

evidence of a corporate state-of-mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the . . . timeframe involved in the specific events that generated a claim of discriminatory treatment. This is especially true when the discriminatory statement is “not an off-hand comment by a low-level supervisor” but a remark by a *senior official* evidencing managerial policy.³²⁴

b. Banks Used Ageist Language In Workplace, Regarding Older Workers’ Skills, While He Was Planning to Reorganize And Fire Older Workers.

Banks, the Associate Dean of Students and the architect of the sham reorganization, frequently used discriminatory language in the workplace during the very same months he planned to fire Liss and Russell. Banks used ageist language, saying, for instance, “you can’t teach old dogs new tricks,”³²⁵ describing the older employees “elephants”³²⁶ and “old fashioned,” and denigrating their programs as “out-dated.”³²⁷ Banks made these comments regarding older staff “pervasively” and specifically in March, April and June 2012.³²⁸ Banks also invoked ageist stereotypes in Liss’s work evaluation.³²⁹ These are not stray remarks because “under Ohio law, ‘age related comments directed toward the employee may support an inference of age discrimination.’”³³⁰

“If [the Defendant] actually made the statements allegedly reported by [the Plaintiff], a jury could take those statements alone as proof of the existence of a discriminatory motive without requiring any inferences.”³³¹ Far from being “stray remarks,” Banks’s comments: 1) were made by the person who designed the reorganization; 2) were made in the workplace; 3) concerned specific employees; 4) related to their work performance; 5) reflected a bias against older workers and an adoption of discriminatory ageist stereotypes; and 6) occurred contemporaneously with the decision

³²⁴ *Id.* (emphasis added) (internal citations and quotations omitted).

³²⁵ Liss, Tr. at 95-97.

³²⁶ Liss, Tr. at 103-105; Russell, Tr. at 535-536

³²⁷ *See, e.g.*, Liss, Tr. at 323 & 342.

³²⁸ Liss, Tr. at 90-93; Russell, Tr. at 401-404.

³²⁹ Ex. 56 (Banks’s comments included “Steve needs to be more creative and up to date in his work. He needs to embrace technology, and programs and services for the newer generation of students. * * * [Liss’s] staff . . . has struggled with technology and has difficulty dealing with change.”).

³³⁰ *Coburn v. Rockwell Automation, Inc.*, 238 Fed. App’x 112, 117(6th Cir. 2007) (internal citations omitted).

³³¹ *Id.* at 119.

to terminate the older workers and promote the younger workers. Banks made these ageist comments “pervasively”, including during February, March, April and June.³³²

8. Evidence of Discrimination: Banks Held Negative Stereotypes of Older Workers.

Banks went beyond his disparaging words of “old dogs,” “elephants,” “old school,” “outdated” and others. Banks engaged in the negative stereotyping of older workers. Banks wanted younger staff in Student Life because he held the bigoted view that the older generation could not communicate with the younger generation. Although Banks tried to deny his unhelpful deposition testimony, the record shows that Banks believed that the older generation in general, and Liss in particular – could not communicate with students because he was from an older generation:

Q. On line 15 I asked you: And your concern was that because there was a difference in generation, they may not understand each other, correct? And you answered, correct. Is that your testimony?

A. Sure.

Q. I need a verbal answer.

A. Yes.

Q. Okay. And, in fact, you believed that because there was a difference in generations, due to Steve’s generation, he may not be able to understand the younger generation, correct?

A. Possibly.

Q. Well, that’s what you’re saying, right?

A. Yes. There was concern, correct.

Q. And, in fact, that was part of how you evaluated his productivity, initiative and creativity, correct?

A. Correct.³³³

³³² Liss, Tr. at 90, 93-94.

³³³ Banks, Tr. at 929.

Thus, Banks' bigoted view that generations communicate differently was – in his view – a problem that affected work productivity. Banks' stereotypes are also offensive:

Q. In your view, though, part of the problem is that the newer generation communicates one way and the older generation communicates in a different way, correct?

A. Yes, possibly.³³⁴

Banks, agreed that his ageist comments were offensive:

Q. A generalization like that of an entire generation of older people would be inappropriate?

A. Absolutely, yes.³³⁵

When Banks realized that he had revealed his bigoted ageist stereotypes in deposition, he tried to recant:

Q. Yes. In your view the way the older generation communicates impacts their productivity, initiative and creativity?

A. I can't make that -- I can't answer that question for older generation.

Q. Okay. So I asked you on line 6, page 185, question: And that in your view impacts their productivity, initiative and creativity. And your answer is, could be, right?

MS. SIMMONS: Excuse me, on 185?

MR. GRIFFIN: 186.

Q. That was your testimony, right?

A. Could be.

Q. Well, no, it was your testimony, wasn't it?

A. Right. Could be is my answer, yes.

MS. SIMMONS: Objection. Move to strike, form.

THE COURT: Overruled.³³⁶

³³⁴ Banks, Tr. at 931.

³³⁵ Banks, Tr. at 932.

³³⁶ Banks, Tr. at 933-934.

Banks wanted Student Life to get younger because he preferred younger co-workers and held discriminatory ageist stereotypes regarding how the older generation communicates, their purported difficulties communicating with younger generations and their purported lack of productivity, initiative and creativity. As a decision-maker, Banks' discriminatory ageist stereotypes are evidence of discriminatory animus.

9. Banks Used Discriminatory Stereotypes In Adverse Employment Evaluations for Liss.

Banks' unlawfully used these same ageist stereotypes in evaluating his subordinates. Even though Steve Liss received high marks for spearheading the implementation of OrgSync, Banks "told Steve that he needed to be more creative and up-to-date in his work, he needs to embrace technology and programs and services for the newer generation of students" and that he "was not connecting with the newer generation of students." These are the very stereotypes regarding generations and communications to which Banks testified, and they are contradicted by the actual fact that Liss had led technological innovation at Cleveland State. In contrast, Banks "never criticized either Jamie Johnston or Bob Bergmann for failing to embrace technology or understand the newer generation of students," although those younger employees had less of a track record than Liss in these areas. Banks' use of ageist stereotypes is direct evidence of discriminatory animus.

10. Banks and Drnek Fired Everyone Involved in Programs They Disparaged As "Old School."

Banks' comments and stereotypes were not innocuous: he fired everyone associated with "old school" programs. Banks repeatedly disparaged the Greek Life program as "old school."³³⁷ Even though Greek Life had grown ten-fold without a single alcohol or sexual misconduct charge, and provided 7,000 service hours of service, Banks regarded it as "old school." He fired everyone associated with it:

³³⁷ Banks, Tr. at 916:10-21. *See also* Banks, Tr. at 912-15. (describing "Greek Life under Bill Russell as old school.")

Q. Okay. It's true that everyone who supervised the "old school" programs, Ms. Myers, Mr. Russell and Mr. Liss, had their positions eliminated as part of the restructuring?

A. They did.³³⁸

All of these staff were over the age of 50. Banks acted on his prejudice: he fired everyone associated with "old school" programs.

E. Plaintiffs Have Overwhelming Indirect Evidence of Discrimination.

In addition to direct evidence of discrimination, Plaintiffs also have indirect evidence of discrimination.

1. Plaintiffs Proved Their Prima Facie Case.

The Franklin County Court of Appeals has held that a plaintiff establishes a prima facie case of discrimination by showing (1) the employee is within the statutorily-protected class, (2) the employee was qualified for the position, (3) the employee was discharged, and (4) additional direct, circumstantial or statistical evidence tending to indicate discrimination.³³⁹ A plaintiff satisfies the fourth prong by demonstrating that a comparable, non-protected person was treated better.³⁴⁰ "Establishing a prima facie case 'creates a presumption that the employer unlawfully discriminated against the employee.'"³⁴¹

There is no dispute as to prong one: Liss was age 50, Russell was age 66.³⁴² As to prong two, Cleveland State admits Liss and Russell were qualified for the positions, and in fact gave both Liss and Russell outstanding annual evaluations.³⁴³ Cleveland State consistently gave Liss and

³³⁸ Banks, Tr. at 923:12-16.

³³⁹ *Lennox Indus. v. State Civ. Rights Comm'n*, 1999 Ohio App. LEXIS 6491, 15-16 (Ohio Ct. App., Franklin County Dec. 28, 1999) citing *Ercegovich v. Goodyear Tire & Rubber Company* (1998), 154 F.3d 344, 350.

³⁴⁰ *Lennox Indus. v. State Civ. Rights Comm'n*, 1999 Ohio App. LEXIS 6491, 15-16 (Ohio Ct. App., Franklin County Dec. 28, 1999) citing *Ercegovich v. Goodyear Tire & Rubber Company* (1998), 154 F.3d 344, 350, see also *Bowditch v. Mettler Toledo Int'l, Inc.*, 2013-Ohio-4206, P15 (Ohio Ct. App., Franklin County Sept. 26, 2013) quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir.1992); *Clark v. Dublin*, 10th Dist. No. 01AP-458, 2002-Ohio-1440.

³⁴¹ *Bowditch v. Mettler Toledo Int'l, Inc.*, 2013-Ohio-4206, P15 (Ohio Ct. App., Franklin County Sept. 26, 2013) quoting *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, ¶ 11, 837 N.E.2d 1169, quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

³⁴² Ex. 6.

³⁴³ Drnek Dep. 28:14-20; Ex. 57 & 59.

Russell excellent performance evaluations. Liss was also qualified for all five new positions.³⁴⁴ Russell was also qualified for the new job taken by his replacement and to be the new Coordinator of Commuter Affairs and Greek Life – duties that he had performed successfully previously.³⁴⁵ There is also no dispute as to prong three: Liss and Russell were both discharged. They were also subjected to discriminatory scrutiny and review, and were treated differently from younger employees when they were not considered for reassignment or rehire into any of the five newly created positions.

Liss and Russell satisfy the fourth prong as to each independent adverse employment action because they were treated differently than younger comparable workers Bergman and Johnston:

a. Discriminatory Scrutiny and Review Of Older Workers.

Banks only reprimanded employees over the age of 50. Banks only targeted the job descriptions of employees over the age of 50, but not Bergman and Johnston. Cleveland State only sent Cauthen the job descriptions of the older workers, but not Bergman or Johnston.³⁴⁶ Banks only demanded that older workers complete questionnaires.³⁴⁷

b. Discriminatory Termination Of Older Workers.

The “reorganization” was intended to, and did, terminate only the jobs of the older workers. Cleveland State only terminated workers over the age of 50, but promoted all of the workers under the age of 35. Cleveland State’s termination of Liss and Russell, but not Bergman and Johnston satisfies the fourth prong by showing that younger comparators outside the protected group were treated better – much better, they kept their jobs and were promoted without application – than were Plaintiffs.

³⁴⁴ Liss, Tr. at 163-167.

³⁴⁵ Russell, Tr. at 438-440 & 468.

³⁴⁶ Banks Tr. at 1024-1025; Cauthen Dep., 91.

³⁴⁷ Courson, Tr. at 1485.

c. **Discriminatory Refusal To Reassign or Rehire Older Workers Into Open Positions.**

i. **Discriminatory Refusal To Reassign.**

Cleveland State sought out and promoted—without request and against policy—Bergman and Johnston into two new positions, but denied Plaintiffs even the chance to discuss those or other new, open positions for which they were qualified. Liss was qualified for all five positions but was not even considered. Instead, unlike Bergman and Johnston, he was not given any job – even the lower coordinator positions – without application, interview or request. Russell was also denied the opportunity to be reassigned without request into: 1) his replacement’s job, or 2) the lower coordinator position for commuter affairs and Greek Life. By not even considering the older workers for reassignment, Drnek conceded that he “did not hold Jamie Johnston and Bob Bergman to the same standards that [he] held Steve Liss and Bill Russell.”³⁴⁸

ii. **Discriminatory Refusal to Rehire.**

After eliminating their jobs and refusing to reassign them like the younger staff, Cleveland State engaged in a separate additional set of discriminatory employment actions. Cleveland State hired younger unqualified and less qualified workers to fill the positions of 1) Assistant Dean of Student Engagement; 2) Coordinator of Student Activities; and 3) Coordinator of Commuter Affairs and Greek Life. Cleveland State, after determining that Liss was qualified for each of these three other positions did not treat him like Bergman and Johnston but instead denied him rehire in favor of new employees under the age of 35, who had substantially less experience. Similarly, Russell was replaced by Jill Courson, under the age of 35, who did not meet the minimum required qualification of having prior experience at an urban and commuter institution. Thus, Plaintiffs have established a *prima facie* case on each of these three categories of discriminatory employment actions.

³⁴⁸ Drnek Dep., 244:14-17.

2. Presumption of Discriminatory Intent: Plaintiffs' Prima Facie Case Establishes A Presumption of Discrimination Which Cleveland State Must Rebut.

A prima facie case creates a presumption of intentional discrimination “because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.”³⁴⁹ Plaintiffs may also, as here, create a presumption of discriminatory intents where there is “*direct, circumstantial, or statistical evidence of discrimination.*”³⁵⁰ Here, Liss and Russell have proven intentional age discrimination through their *prima facie* case as well as with an avalanche of “direct, circumstantial and statistical evidence of discrimination.”

3. Defendant's Purported Reasons for Terminating Plaintiffs Are Pretexts for Age Discrimination.

a. Plaintiffs Have Produced Overwhelming Evidence That Defendant's Stated Reason for Terminating Plaintiffs Is False and a Pretext for Age Discrimination.

Establishing the first three elements of the *prima facie* case and any version of the fourth raises a presumption of discrimination, which shifts to the employer the burden to set forth a legitimate, nondiscriminatory reason for the employment action.³⁵¹ If the employer satisfies this burden, a court must afford the plaintiff an opportunity to cast doubt on the employer's rationale.³⁵²

b. Defendant's False Reason Creates a Presumption of Discrimination.

Pretext may be established “either directly by persuading the [trier of fact] that a discriminatory reason more likely motivated the employer or indirectly by showing that the

³⁴⁹ *Mauzy v. Kelly Servs.*, 75 Ohio St. 3d 578, 584 (Ohio 1996), citing *Teamsters v. United States*, 97 S. Ct. at 1866, 52 L. Ed. 2d at 429 n. 44

³⁵⁰ *Mauzy v. Kelly Servs.*, 75 Ohio St. 3d 578, 584 (Ohio 1996), citing *McDonnell-Douglas* and *Kohmescher*, *supra*, 61 Ohio St. 3d at 505, 575 N.E.2d at 442-43.

³⁵¹ *Mauzy*, 75 Ohio St.3d at 582.

³⁵² *Id.*

employer's proffered explanation is unworthy of credence."³⁵³ If the purported reason is unworthy of credence or likely to be false, this falsity satisfies the need to show that the reason is both pretext and is covering up discrimination.³⁵⁴

Thus, "the factfinder's disbelief of the reasons put forward by the defendant" will allow it to infer intentional discrimination.³⁵⁵ Where, as here, there is evidence that the given reason for termination is false, a factfinder reasonably may infer that unlawful discrimination was the true motivations behind Defendant's decision to terminate Plaintiffs.³⁵⁶

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, **the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.** Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as **"affirmative evidence of guilt."**³⁵⁷

As Justice Ginsburg recognized, **"evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation."**³⁵⁸

³⁵³ *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095 (1981).

³⁵⁴ *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. at 147-48 (citing *Wright v. West*, 505 U.S. 277, 296, 112 S. Ct. 2482, 2950 (1992)) (emphasis added). Cf. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2950 (1978) ("When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with some reason, based her decision on an impermissible consideration.").

³⁵⁵ *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)).

³⁵⁶ See, e.g., *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 2109 (2000) ("a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination); *Lilla v. Comau Pico, Inc.*, 2007 U.S. Dist. LEXIS 51807, *10-11 (E.D. Mich. 2007) ("These two types of rebuttals [that Defendant's 'legitimate' reasons had no basis in fact and the proffered reasons were insufficient to motivate discharge] are direct attacks on the credibility of the employer's proffered motivation for firing plaintiff and, if shown, provide an evidentiary basis for what the Supreme Court has termed 'a suspicion of mendacity.'" (internal quotations omitted)).

³⁵⁷ *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. at 147-48 (citing *Wright v. West*, 505 U.S. 277, 296, 112 S. Ct. 2482, 2950 (1992)) (emphasis added). Cf. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2950 (1978) ("When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with some reason, based her decision on an impermissible consideration.").

³⁵⁸ *Reeves, supra*, 530 U.S. at 154.

Similarly, the Franklin County Court of Appeals has held that when the employer's purported reason is pretextual, the fact finder may "draw the inference of intentional discrimination without any further evidence of discrimination."³⁵⁹ "[T]he trier of fact can reasonably infer from the falsity of the employer's explanation that the employer is dissembling to cover up a discriminatory purpose. As such, a complainant does not always need to introduce independent evidence of discrimination to meet his or her burden of showing pretext when the trier of fact finds sufficient evidence to reject the employer's explanation."³⁶⁰ Proof of a *prima facie* case, plus evidence of pretext is sufficient to prove intentional discrimination.

Similarly, in *HLS Bonding*, the Franklin County Court of Appeals held that "the ALJ's disbelief of the reasons put forward by HLS, together with the evidence submitted to show the elements of the prima facie case of retaliation, is reliable, probative, and substantial evidence that shows intentional discrimination. Consequently, we find that the trial court did not abuse its discretion and we overrule HLS's second assignment of error."³⁶¹

Here, the Plaintiffs have much more additional statistical, documentary and testimonial evidence of discrimination to add on top of the issue of pretext. However, even standing alone, as discussed below, the evidence of pretext is overwhelming proof of discrimination.

4. Evidence of Pretext: The "Reorganization" and the Cauthen Report Were Shams.

Cleveland State has repeatedly claimed that the only reason for the termination of Liss and Russell was the "reorganization" and its structure based on the Cauthen Report.³⁶² However, in fact, on April 24, 2012, a month before Cauthen's visit, Banks had already designed the new

³⁵⁹ *Smith v. Superior Prod., LLC*, 2014-Ohio-1961, P41 (Ohio Ct. App., Franklin County 2014)(reversing trial court and finding, inter alia, that proof that employer's stated reason was not credible was sufficient to prove ultimate question of discrimination); citing *Brock v. Gen. Elec. Co.*, 125 Ohio App.3d 403, 408, 708 N.E.2d 777 (1st Dist.1998); *Jelinek v. Abbott Labs.*, 138 Ohio St. 3d 1499 (2014).

³⁶⁰ *HLS Bonding v. Ohio Civ. Rights Comm'n*, 2008-Ohio-4107 (Ohio Ct. App., Franklin County Aug. 14, 2008)(internal citations omitted) quoting *Reeves v. Sanderson Plumbing Prods., Inc.* (2000), 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105; *Peters v. Lincoln Elec. Co.*, 285 F.3d 456 (6th Cir. 2002).

³⁶¹ *HLS Bonding v. Ohio Civ. Rights Comm'n*, 2008-Ohio-4107 (Ohio Ct. App., Franklin County Aug. 14, 2008)

³⁶² Banks, Tr. 953, 1051:18-21.

structure.³⁶³ By May 14, a month before Cauthen's report, Banks had revised the job descriptions for the older workers and then held a meeting with Drnek, among others, to discuss the "Reorganization Plan." Then Banks lied about the meeting.³⁶⁴ Only after the structure had already been designed and the job descriptions revised did Banks hire his close friend Cauthen to pretend that Cauthen had devised the plan himself. Cauthen asked for no documents, reviewed only the documents given to him by Banks, and only spoke with the people determined by Banks; then he recommended a reorganization that mirrored the plan designed by Banks in April.³⁶⁵

Banks and Cauthen falsely held out the report as Cauthen's original work, when in fact:

1. Banks designed the functionally-identical structure in April;³⁶⁶
2. Banks had already identified the three job terminations in April;³⁶⁷
3. Banks wrote the new job titles used by Cauthen;³⁶⁸
4. Banks wrote opinions and conclusions regarding Liss and Russell that Cauthen held out as his own;³⁶⁹
5. Banks wrote entire pages of the Cauthen Report;³⁷⁰
6. Banks told Cauthen who to interview;³⁷¹
7. Banks gave Cauthen the only written documents he reviewed;³⁷²
8. Bergman and Johnston already knew of the "shit storm" restructuring and terminations.³⁷³

Cauthen's report was itself ageist and discriminatory because:

1. Cauthen only reviewed the job descriptions of older workers;³⁷⁴
2. Cauthen excluded all positive comments about older workers;³⁷⁵
3. Cauthen excluded all negative comments about younger workers;³⁷⁶
4. Cauthen discounted the successes of older workers, but not younger workers;³⁷⁷
5. Banks prejudiced the report by sending Cauthen confidential HR documents about the reprimand to Russell (that he was eventually required to rescind).³⁷⁸

³⁶³ Ex. 2.

³⁶⁴ Banks Dep., 91:10-25-92: 1-13; *See also* Banks, Tr. 908-911.

³⁶⁵ *See* discussion *supra*; Compare Cauthen Report, Ex. 10, p.11 and Banks' Organizational Chart, Ex. 2.

³⁶⁶ Banks, Tr. at 1012-1015.

³⁶⁷ Vartorella, Tr. at 384:1-4.

³⁶⁸ Banks, Tr. at 1013-1015.

³⁶⁹ Banks, Tr. at 1006-1007.

³⁷⁰ Banks, Tr. at 1007-1009.

³⁷¹ Cauthen Dep., 68-69.

³⁷² Cauthen Dep., 68-69; Lenhart, Tr. at 562:15-18.

³⁷³ Cauthen Dep., 141

³⁷⁴ Cauthen Dep., 91:11-17.

³⁷⁵ Cauthen Dep., 137:7-14.

³⁷⁶ Cauthen Dep., 137:7-14.

³⁷⁷ Cauthen Dep., 112:7-14

The overwhelming evidence shows that the terminations of Liss and Russell were not based on the Cauthen Report, but were decided by Banks many weeks before Cauthen's Report. The report is sham and pretext to hide Cleveland State's plan to fire the older workers.

5. Evidence of Pretext: Drnek Changed the Minimum Qualifications to Terminate Plaintiffs.

On June 25, Drnek submitted the "reorganization" plan including new purportedly-finalized job descriptions. However, weeks later, Drnek changed the job descriptions in advance of his August 10 meeting with Walker during which he sought approval of Plaintiffs' terminations. Drnek changed the minimum qualifications to add in new criteria which he used to recommend the firing of Plaintiffs without placing them in other available positions. Drnek admitted that he later added four out of the five minimum qualifications used to terminate Liss.³⁷⁹

6. Evidence of Pretext: Drnek Lied About Every Reason for Liss's Termination.

On August 10, 2012, Drnek met with Cleveland State Vice Provost George Walker seeking his approval to fire Liss and Russell and to "reorganize" Department of Student Life. Drnek claimed that Liss and Russell should be terminated because they did not meet the qualifications required for the newly created positions. Drnek specified five reasons why Liss should be fired. When confronted under oath, Drnek admitted that every reason he gave to terminate Liss was untrue:

<u>Drnek's Lies To Fire Steve Liss</u>	<u>Drnek's Admissions At Deposition Under Oath</u>
<p>Lie To Fire Liss:</p> <p>Liss lacked "three years administrative experience maintaining/developing enterprise online student organization databases, e.g., OrgSync." Ex. 5, p. Cleveland State 0040.</p>	<p>Truth Under Oath:</p> <p>For four years from 2008 to 2012, Liss "work[ed] with either Green Room [a web-based program similar to OrgSync] or OrgSync." Drnek Dep.26:22-27:10.</p> <p>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?</p> <p>A. Well, Green Room is different than OrgSync.</p>

³⁷⁸ Cauthen Dep., 165:2-12.

³⁷⁹ Drnek Dep. 131:19-134:1.

<u>Drnek's Lies To Fire Steve Liss</u>	<u>Drnek's Admissions At Deposition Under Oath</u>
	<p>Q. I appreciate that. It's an online student organization database; right?</p> <p>A. Yeah.³⁸⁰</p> <p>Drnek even selected Liss to lead Cleveland State's initiative to implement OrgSync. Id. 121:2-15.</p>
<p>Lie To Fire Liss:</p> <p>Liss lacked "significant knowledge and experience in developing and implementing leadership and service programs with focus on social justice, student leadership and service learning." Ex. 5, p. Cleveland State 0040.</p>	<p>Truth Under Oath:</p> <p>Q. And, in fact, Steve used to run the Center for Leadership and Service; right?</p> <p>A. He -- he ran the Center for Student Involvement.</p> <p>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?</p> <p>A. Before I worked there, yes.</p> <p>Q. And -- and you were aware that he had knowledge and experience in developing these kinds of leadership and service programs; right?</p> <p>A. Right.</p> <p>Q. Okay. So that's not correct either, is it?</p> <p>A. It appears that it wouldn't be.</p> <p>Drnek Dep. 138:22-139:11 (emphasis added).</p>
<p>Lie to Fire Liss:</p> <p>Liss was not "technologically proficient and experienced with database, word, spreadsheet and presentation applications." Ex. 5, p. Cleveland State 0040.</p>	<p>Truth Under Oath:</p> <p>"Steve Liss is proficient with database, Word, spreadsheet, [and] presentation applications." Drnek Dep. 136:10-12.</p>
<p>Lie to Fire Liss:</p> <p>Liss lacked "ability to travel with and supervise student groups." Ex. 5, p. Cleveland State 0040.</p>	<p>Truth Under Oath:</p> <p>Q: [I]n fact, you know that Steve does travel and he does supervise student groups from time to time; correct?"</p> <p>A: Yes.</p> <p>Drnek Dep. 136: 21-24.</p>
<p>Lie to Fire Liss:</p> <p>Liss lacked "ability to design and execute a comprehensive Greek Life program in an urban setting." Ex. 5, p. Cleveland State 0040.</p>	<p>Truth Under Oath:</p> <p>In every evaluation, Drnek rated Liss "meets expectations" or better for his area leadership which included Greek Life.³⁸¹</p> <p>Q. [Cleveland State's] Greek Life program had increased and had not had a single alcohol warning and just one hazing incident; right?</p> <p>A. Right.</p> <p>Drnek Dep. 140:13-15.</p>

³⁸⁰ Liss, Tr. 135:10-18.

³⁸¹ Drnek Dep., 28:14-20; Exs. 57 & 59.

<u>Drnek's Lies To Fire Steve Liss</u>	<u>Drnek's Admissions At Deposition Under Oath</u>
	<p>Q. You never criticized or reprimanded Steve Liss or Bill Russell for their ability to design or execute a comprehensive Greek Life program [at Cleveland State]?</p> <p>A. No. Drnek, Dep. 47:13-16.</p> <p>Under Liss and Russell, every year Cleveland State's Greek organizations won the most awards for student involvement. See, e.g., Drnek Dep. 106:24-107:11.</p>

On every "minimum qualification," Drnek lied in order to terminate Liss. Drnek's lies allow a fact-finder to conclude that the true reason Cleveland State terminated and refused to re-hire Liss was discrimination. Furthermore, Drnek's falsehoods regarding Liss establish that none of Drnek's other testimony can be given any credence.

Interim-Provost Walker testified that if Liss "had met all of the requirements or the minimum qualifications like Bob Bergmann and Jamie Johnston, he would have been retained."³⁸² Moreover, Walker "would never approve a reorganization if the qualification of Steve Liss had been intentionally misstated."³⁸³ Thus, Drnek's misrepresentations were material: without them, Liss would not have been terminated, and the "reorganization" would have been halted.

7. Additional Evidence of Pretext: Changing Rationale.

a. Cleveland State Claimed Performance Was Not At Issue – Until It Changed Its Pretext.

"Sixth Circuit case law is clear that an employer's changing rationale for making an adverse employment decision can be evidence of pretext." *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996); see also *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695 (6th Cir. 2007).

³⁸² Walker, Tr. at 716-17.

³⁸³ Walker, Tr. 721:9-13.

An employer's changing rationale for making an adverse employment decision is evidence of pretext.³⁸⁴

Here, at first, Cleveland State was emphatically clear that performance had nothing to do with the Cleveland State's termination or failure to rehire of either Liss or Russell. On September 5, 2012, in his letter terminating Steve Liss, Cleveland State President Berkman declared that Liss' termination was not based on performance.³⁸⁵ Next, Cleveland State conducted its own investigation which concluded that:

Q. Okay. And you concluded that Mr. Liss's termination and failure to rehire was part of a reorganization, correct?

A. Yes.

Q. Okay. It was not for performance reasons.

A. No.

Q. Okay. It was not for any issue with relationships, correct?

A. Not to my knowledge.

Q. Okay. And certainly anyone claiming that it was because of performance reasons or relationship reasons, that would be contrary to the conclusions in your findings, correct?

A. That's right.³⁸⁶

Then, Drnek also testified that:

A. Yes.

Q. Now, you talked about a variety of concerns relating to Steve and Bill today. And we've talked about a whole bunch of different issues which

³⁸⁴ *Gaglioti v. Levin Group, Inc.*, 508 Fed. Appx. 476, 481 (6th Cir. Ohio 2012), *Lynch v. ITT Educ. Servs.*, 571 Fed. Appx. 440, 449 (6th Cir. Ohio 2014); *See Cicero v. Borg-Warner Auto., Inc.*, 280 F.3d 579, 592 (6th Cir. 2002) ("Shifting justifications over time calls the credibility of those justifications into question. By showing that the defendants' justification for firing him changed over time, [the plaintiff] shows a genuine issue of fact that the defendants' proffered reason was not only false, but that the falsity was a pretext for discrimination."); *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996) ("An employer's changing rationale for making an adverse employment decision can be evidence of pretext.").

³⁸⁵ Ex. 337.

³⁸⁶ Walker, Tr. at 701-702.

you believe are -- are negative instances. Did any of those impact your decision to terminate Steve Liss or Bill Russell?

A. No.

Q. Did any of those concerns impact CSU's decision not to rehire or to find new jobs for Steve Liss or Bill Russell?

A. No.³⁸⁷

However, Cleveland State decided to change its story. Cleveland State now claims that it was wrong and that performance was purportedly an issue.³⁸⁸ After a week of trial testimony, and a month to reconsider its strategy, Vartorella changed Cleveland State's proffered reason:

Q. Okay. So I want you to look at page 81, lines 2 through 5. And I asked you: To your knowledge, the decisions to fill certain positions was not based on any performance criteria. And your answer was: Not that I'm aware of.³⁸⁹

Vartorella then changed his answer:

Q. Okay. You want to change your answer that you gave in the deposition?

A. Yes, I do.

Q. You believe that the deposition that you gave under oath was not accurate?

A. Yes, I do.³⁹⁰

Cleveland State's changing rationale is simply evidence of pretext, particularly, where the answer is only changed after the witness has heard a week of testimony:

Q. I just want you to answer my question. It's true that you didn't change your answer until after you had an opportunity to hear a week of testimony?

MS. SIMMONS: Objection.

THE COURT: Overruled.

³⁸⁷ Drnek Dep., 248:16-249:3.

³⁸⁸ *Cleveland State University's Memorandum in Opposition to Motion in Limine*, at p.2.

³⁸⁹ Vartorella, Tr. at 1309-1311.

³⁹⁰ Vartorella, Tr. at 1309-1311.

A. Yes, it's true.³⁹¹

Thus, Cleveland State's latest attempt to claim that it considered performance contradicts the letter of President Berkman, Walker's own investigation, and the testimony of Drnek. Cleveland State's changing rationale is evidence of pretext.

Each new reason proves the prior reasons to be false and unworthy of credence. Cleveland State has failed to meet its burden of articulating a legitimate nondiscriminatory reason. Judgment for Plaintiffs is required.

b. Cleveland State Claimed Russell's Relationship With Banks Was "Central to This Case" – Until It Changed Its Pretext.

In search of a new reason, Cleveland State waited until trial to claim that Liss and Russell were fired and not rehired because they did not have a good working relationship with Banks. Cleveland State claimed that "central to this entire case is Mr. Russell's relationship with Dr. Banks" and that "if that's not coming in, then our case has been gutted."³⁹² Cleveland State even threatened that they would "proffer all of this at the appropriate time so that Judge McGrath and the court of appeals should have access to it if necessary."³⁹³

However, Banks testified that he did not "have any problems with Mr. Russell" and that he did not "have any feelings towards him one way or the other."³⁹⁴ Banks denied that he "disliked Bill" and denied that he "had a bad relationship with Bill."³⁹⁵ Furthermore, Dr. Walker's investigation – on behalf of Cleveland State - concluded that the Cleveland States termination and failure to rehire Liss and Russell "was not for performance reasons", was "not for any issue with

³⁹¹ Vartorella, Tr. at 1311.

³⁹² Tr. 489:7-24.

³⁹³ Tr. 489:7-24 (emphasis added).

³⁹⁴ Banks, Tr. at 955:13-956:1.

³⁹⁵ Banks, Tr. at 1058:19-22.

relationships”, and that “anyone claiming that it was because of performance reasons or relationship reasons, that would be contrary to the conclusions in [his] findings.”³⁹⁶

Cleveland State’s claim that Banks and Russell had a bad relationship is untrue. Furthermore, every new reason asserted by Cleveland State proves the falsity of the prior reasons – and proves discrimination. It is true, though, that their case has been gutted. Their entire case is meritless.

8. Additional Evidence of Pretext: Rationale Fully Articulated Only After Litigation.

An employer’s attempt to explain its rationale only at trial is further evidence of pretext. *See Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 813 (10th Cir.2000) (“We are disquieted. . . by an employer who ‘fully’ articulates its reasons for the first time months after the decision was made.”); *see also EEOC v. Sears Roebuck & Co.*, 243 F.3d 846 (4th Cir. 2001) (finding pretext where the non-discriminatory reason for not hiring the plaintiff emerged only after the beginning of litigation). Here, Cleveland State’s later efforts at trial to explain its story in a way that means “performance did not really mean performance” is evidence of discrimination.

9. Additional Evidence of Pretext: Lack of Documentary Evidence Supporting Cleveland State’s Purported Rationale.

An employer’s stated reason must have some documentary support. Cleveland State has none. Inconsistencies between the Cleveland State documents and personnel records, and their stated reasons for terminating Plaintiffs, or refusing to retain, transfer, or hire them, are evidence of discriminatory motive or pretext.³⁹⁷ For example, in *Gaglioti*, the Sixth Circuit reversed the trial court and held that the lack of documents supporting the employer’s purported rationale of was evidence of pretext and discrimination.³⁹⁸ Here, there are no documents that show poor performance

³⁹⁶ Walker, Tr. at 701:17-702:3.

³⁹⁷ *See Seay v. TVA*, 339 F.3d 454, 468 (6th Cir. 2003) (inconsistencies between written documents and stated reasons for refusing to hire plaintiff is evidence of pretext).

³⁹⁸ *Gaglioti v. Levin Group, Inc.*, 508 Fed. Appx. 476, 482 (6th Cir. Ohio 2012) (“Moreover, it is undisputed that there is no documentary evidence, such as a personal [sic] record or evaluation, that substantiates that Gaglioti’s performance was deficient. This buttresses the possibility that poor performance was a *post hoc* creation by Levin Group.”)

or any other legitimate reason for terminating Liss and Russell. Cleveland State does not have documents to support its proffered reason. This is evidence of pretext.

10. Additional Evidence of Pretext: Different Reasons Given By Different Decision-Makers.

Further proof of Cleveland State's discrimination is the fact that different decision-makers have given different reasons. In a similar case, the Sixth Circuit has held that inconsistent claims regarding whether "performance" was a reason for termination constitutes evidence of discrimination.³⁹⁹ In *Gaglioti*, one supervisor claimed that performance was a factor while another supervisor "however, states that work performance 'didn't have anything to do with why he was fired,' relying instead on the lack-of-work justifications. **Inconsistent reasons given by key decision-makers as to the reason for the firing can provide evidence of pretext.** Any one of these issues, or all of them in combination, provide a jury with a basis to conclude that poor performance was a pretextual justification for Gaglioti's firing." Here, as in *Gaglioti*, the fact that Cleveland State has inconsistent positions regarding the reasons for Plaintiffs' termination is evidence that its proffered reasons are pretexts for discrimination. Cleveland State fired Liss and Russell because they were too old.

11. Cleveland State's Dishonesty as to One Issue, Allows the Fact-Finder To Infer Dishonesty and Discrimination on Other Issues.

Cleveland State's inconsistency—and dishonesty—as to a single material issue "undermines its credibility generally" and allows the fact-finder to find that discrimination was the true reason.⁴⁰⁰ As the U.S. Supreme Court has explained, such falsehoods "permit the trier of fact to conclude that the employer unlawfully discriminated."⁴⁰¹ Even a single falsehood permits a trier of fact to find discrimination. Here, there are many, many, instances of falsehoods.

³⁹⁹ *Gaglioti v. Levin Group, Inc.*, 508 Fed. Appx. 476, 483 (6th Cir. Ohio 2012)(internal citation omitted).

⁴⁰⁰ *Coburn v. Rockwell Automation, Inc.*, 238 Fed. App'x 112, 122 (6th Cir. 2007)

⁴⁰¹ *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. at 147-48 (internal citations omitted).

The Court cannot give credence to anything said by Banks or Drnek. Drnek admittedly lied on five separate occasions in order to justify the termination of Liss. Drnek also lied under oath when he twice signed interrogatory answers which falsely claimed that there had been no reorganization meetings until after the Cauthen report.

Banks' false statements are too numerous to catalogue. Among other things, Banks also falsely certified interrogatories, changed his testimony in court, participated with Cauthen in falsely holding out a sham report as an independent piece of work, falsely testified under oath in this court that he had nothing to do with Cauthen's functionally-identical structure, and numerous other falsehoods.

The dishonesty of Cleveland State's decision-makers is evidence of pretext and discrimination.

12. Additional Evidence of Pretext: Cleveland State's Failure To Investigate Complaints Is Evidence of Discrimination.

A defendant's failure to investigate complaints of discrimination permits a factfinder to infer a discriminatory motive.⁴⁰² An institution that is non-discriminatory, investigates complaints of age discrimination – they are required to.⁴⁰³ Cleveland State did not. Here, before his termination, Liss “complained to five different administrators at the University six times in total.”⁴⁰⁴ Cleveland State never investigated the complaints of either Liss or Russell that Banks was discriminating against

⁴⁰² *Malik v. Carrier Corp.*, 202 F.3d 97, 105 (2d Cir. 2000) (“an employer’s investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer’s failure to investigate may allow a jury to impose liability on the employer.”) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998); *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1033 (9th Cir. 2006) (“The summary judgment record does not indicate affirmatively whether Electra’s Board of Directors investigated or evaluated Cornwell’s concern that Sharp’s actions were racially motivated. A reasonable jury could view Electra’s failure to investigate as an attempt to conceal Sharp’s illegitimate motives.”); *Collins v. Cohen Pontani Lieberman & Pavane*, 2008 U.S. Dist. LEXIS 58047, *35-36 (S.D.N.Y. July 30, 2008) (“A reasonable jury could find that Pavane’s failure to investigate this complaint pursuant to CPLP’s discrimination policy was evidence that he was covering up discriminatory treatment.”).

⁴⁰³ *Id.*

⁴⁰⁴ Liss, Tr. at 1924:7-17.

them.⁴⁰⁵ Thus, in addition to ageist comments, statistics, and disparate treatment, Cleveland State's failure to investigate Plaintiffs' complaints is further evidence of discriminatory animus.

13. Additional Evidence of Pretext: Statistics of Hiring, Firing & Promotions.

At this stage, in evaluating whether to disbelieve Cleveland State's proffered reason, the factfinder also considers the direct evidence cited previously. Here, the facts and statistics show that the sham "reorganization" is just a pretext to getting rid of the older Student Life workers:

1. 100% of the terminated workers were over age 50;
2. 100% of the promoted workers were under age 35;
3. There is a 100% correlation between age and termination;
4. In 100% of the cases, older workers were replaced by younger workers;
5. Banks never hired anyone over the age of 35;⁴⁰⁶
6. Banks never promoted anyone over the age of 35;⁴⁰⁷
7. Banks never fired anyone younger than age 35;⁴⁰⁸
8. Banks never reprimanded any younger employees.⁴⁰⁹
9. Banks never put anyone on a Performance Improvement Plan who was younger than 35.⁴¹⁰
10. Cleveland State fired everyone involved in programs that Banks considered "old school."
11. The effect of the "reorganization" was to keep the same duties, but fire the "older guy."

Cleveland State's claim that the "reorganization" was a neutral management decision is destroyed by the facts. It is a pretext for terminating the older workers and making Student Life younger.

⁴⁰⁵ Vartorella, Tr. at 1423:11-13.

⁴⁰⁶ Banks, Tr. at 934:13-935:4.

⁴⁰⁷ Drnek Dep., 81; Banks, Tr. at 934-935 & 937:3-6. In contrast to HR VP Vartorella's testimony that Banks made the decisions to promote Johnston and Bergman, Banks claims that he has no such power, Tr. 935.

⁴⁰⁸ Banks, Tr. at 936:18-20.

⁴⁰⁹ Vartorella, Tr. at 1421.

⁴¹⁰ Vartorella, Tr. at 1421.

14. Additional Evidence of Pretext: Banks's Discriminatory Remarks and Conduct Are Attributable To Cleveland State.

a. Drnek Adopted Every Single Employment Recommendation Made By Banks.

Drnek's discriminatory animus is demonstrated by: 1) what he did; and 2) what he said. As noted above, Drnek participated in decisions to fire only the older workers, to promote without application the younger workers, and to approve the reorganization. Moreover, Drnek also made numerous false statements regarding Liss' qualifications in order to fire him – dishonest conduct that is evidence of discrimination. Thus, there is independent evidence of Drnek's illegal motives.

However, in addition to this independent evidence regarding Drnek, Cleveland State is liable for Banks' discriminatory animus. Under the "cat's paw" doctrine, the discriminatory comments of Banks are attributable to Cleveland State because Banks was a supervisor, he participated in the decisions, and he provided untruthful and inaccurate statements that led to Cleveland State's discriminatory scrutiny, terminations of Plaintiffs and refusals to rehire.⁴¹¹

Banks participated in and influenced the discriminatory decisions in this case. First, Banks decided to hire Cauthen:

Q. And you recommended the hiring of Dr. Cauthen to Dr. Drnek, correct?

A. Yes, sir.

Q. And he accepted that recommendation, correct?

A. Yes, sir.⁴¹²

On each and every employment decision, Drnek adopted Banks' recommendations:

Q. Okay. But so in every case of hiring and firing, your recommendation was adopted by Dr. Drnek, right?

A. Apparently so, yes.

⁴¹¹ *Chattman v. Toho Tenax America, Inc.*, 686 F.3d 339 (6th Cir. 2012).

⁴¹² Banks, Tr. at 1003.

Q. Okay. There was never an instance in which Dr. Drnek disagreed with your recommendations about hiring and firing, right?

A. Correct.

Q. Okay. I just need an answer to my question. In every instance of hiring and firing, Dr. Drnek did what you recommended that he do?

A. Those are my recommendations, correct.

Q. And he did what you recommended him to do?

A. Correct.⁴¹³

Thus, there is no question that Banks' ageist and bigoted attitudes are evidence of discrimination.

15. Banks Made Ageist Remarks and Held Ageist Stereotypes.

Similarly, in determining whether to believe Cleveland State's proffered reason that Plaintiffs' were terminated for neutral reasons, the Court also considers again direct evidence of the ageist remarks and stereotypes held by the decision-makers. Cleveland State's claim is unworthy of credence because Banks:

1. Disparaged older workers as old dogs who can't learn new tricks;⁴¹⁴
2. Disparaged older workers as elephants;⁴¹⁵
3. Regularly used terms like "old school" and "out-dated";⁴¹⁶
4. Disparaged older generations as being unable to communicate with younger generations;⁴¹⁷ and
5. Disparaged Greek Life as "old school" and fired everyone involved in old school programs.⁴¹⁸

Banks' repeated and "pervasive" age-related comments are evidence that Cleveland State's claim is pure pretext.

⁴¹³ Banks, Tr. at 984-985.

⁴¹⁴ Liss, Tr. at 93-94 & 95-97.

⁴¹⁵ Liss, Tr. at 103-105; Russell, Tr. at 535-536.

⁴¹⁶ Banks, Tr. at 912-916; Liss, Tr. at 89-90 & 323-342.

⁴¹⁷ Banks, Tr. at 929.

⁴¹⁸ Banks, Tr. at 923:12-16.

16. The *Byrnes* Test: Proof Of Discriminatory Intent Is Shown By Cleveland State's Use of Salaries From Older Employees To Retain And Hire Younger Employees.

Cleveland State took the money from Liss' and Russell's salaries and used Plaintiffs' salary money to retain and hire younger workers. Under the *Byrnes* test, additional evidence of discrimination is where "his discharge permitted the retention of, a person not belonging to the protected class."⁴¹⁹ The purpose of the *Byrnes* showing is to demonstrate that the employer was motivated by the discriminatory purpose that R.C. 4112.14(A) prohibits.

On Ex. 18, Cleveland State set forth its purported rationale for firing Plaintiffs:

Q. Let me ask you to look at the first page of Exhibit 18.

A. I have it.

Q. That is a purported rationale for reduction in force for Steve Liss, correct?

A. Correct.⁴²⁰

Cleveland State literally took the money from Liss' salary and used his salary to retain and hire younger workers (including using Plaintiffs' salaries to give raises and promotions to Johnston and Bergman):

Q. Okay. And, then, it's also true that 52,500 in funds from this position would be needed to support the salary of the assistant dean of students for student activities and events; do you see that?

A. Yes, I do.

Q. Okay. It's true, isn't it, that they took Steve Liss's salary and used it to fund the position of assistant dean of students for student activities and events?

A. Part of it, yes.

Q. Okay. And, in fact, Steve's salary was used to fund the hiring or the promotion of a substantially younger person, correct?

⁴¹⁹ *Byrnes v. LCI Communication Holdings Co.* (1996), 77 Ohio St.3d 125, 1996 Ohio 307, 672 N.E.2d 145 (restating elements of prima facie case).

⁴²⁰ *Vartorella*, Tr. at 1823.

A. Correct.

Q. And below it says the remaining \$9,671 would be used to support positions created in Student Life as a result of the reorganization. Do you see that?

A. I do.

Q. And it's true that those positions also went to people under the age of 35, correct?

A. More than likely, yes.

Q. And it's true that the rest of Steve's salary was also used to hire and to support positions for younger workers, right?

A. Correct.⁴²¹

Similarly, Cleveland State took Russell's salary and used it to hire his replacement, Jill Courson

(34) a substantially younger person:

Q. And that's also the rationale supposedly for the termination of Bill Russell, right?

A. Correct.

Q. Okay. And if you look at the second page, it says the 27,878 part-time salary from this position will be used to fund a portion of a full-time assistant dean of student engagement position at 52,500; do you see that?

A. I do.

Q. Okay. It's true that Bill Russell's salary was also used to fund the hiring of a substantially younger person, correct?

A. Correct.⁴²²

Cleveland State used the salaries of Liss and Russell to retain and promote Johnston and Bergman, and to hire substantially younger new workers (Courson, Wheeler and Lewis). Taking money from

⁴²¹ Vartorella, Tr. at 1824-1825.

⁴²² Vartorella, Tr. at 1826-1827.

older workers to pay for younger workers is further proof that Cleveland State discriminated on the basis of age.

F. Dr. Berkman's Failure To Testify Requires Judgment For Plaintiffs.

Liss and Russell have provided overwhelming proof that Cleveland State discriminated against them because of their age. However, separate and apart from Plaintiffs' independent evidence of discrimination, Cleveland State cannot prove a neutral non-discriminatory reason because it refused to call Cleveland State President Berkman to testify. Pres. Berkman was the highest decision-maker involved in the termination of Liss & Russell and Cleveland State's refusal to reassign or reinstated them. Pres. Berkman approved the reorganization that terminated Liss and Russell.⁴²³ As one of the final decision makers, "President Berkman could have vetoed [the reorganization] as well."⁴²⁴ Furthermore, Pres. Berkman signed Liss' termination letter.⁴²⁵ Pres. Berkman represented that "this decision is not based on performance."⁴²⁶ Liss' termination was not terminated for performance reason. Pres. Berkman was the final person to reject Liss' grievance.⁴²⁷

Drnek testified that although he made recommendations, his recommendations were passed up the chain of command for decisions to be made by others:

Q. Now, you said that you decided to make terminations. In fact, the termination decision for Steve Liss was signed by President Bergman; right?

A. Yes.

Q. Okay. And you passed recommendations up the chain, but you don't know what the decision makers decided or not decide to do; right?

A. Correct.

Q. Okay. You don't know what factors they considered or didn't consider?

⁴²³ Ex. 98; *See also*, Walker, Tr. at 703:17-19.

⁴²⁴ Walker, Tr. at 703:17-19.

⁴²⁵ Ex. 98.

⁴²⁶ Ex. 98.

⁴²⁷ Ex. 337.

A. Correct.⁴²⁸

Drnek also testified that Drnek did not know the reasons for Pres. Berkman's employment actions regarding Liss and Russell, and further, that Pres. Berkman was the final decision maker with respect to Liss:

Q. You never had any conversations with President Berkman about why he took any of the actions he did with respect to Mr. Liss or Mr. Russell; correct?

A. No, I did not.

Q. Okay. You never had any communications with President Berkman about why he took the actions he did with respect to Mr. Liss or Mr. Russell; correct?

A. Correct.

Q. Okay. And the final decision maker with respect to Mr. Liss was the president of the University; right?

MS. SIMMONS: Objection.

MR. GRIFFIN: Go ahead.

MS. SIMMONS: Foundation.

THE WITNESS: Yes.⁴²⁹

Similarly, CSU claims that Dr. Berkman made the final decision to deny Russell's request to reinstate or rehire him.⁴³⁰

Despite the overwhelming evidence of decisions made Banks & Drnek, CSU now claims that, Pres. Berkman was the final decider, acting on the recommendations of Banks & Drnek. If, this were true, however, Cleveland State has failed to meet its burden of establishing a legitimate non-discriminatory reason because there is no testimony from Pres. Berkman. Without Pres. Berkman's testimony, there is no evidence supporting Cleveland State's case. Because Cleveland

⁴²⁸ Drnek Dep., 268.

⁴²⁹ Drnek Depo., Page 105-106

⁴³⁰ Ex. 335.

State failed to call Pres. Berkman, Cleveland State as a matter of law cannot rebut Plaintiffs' case. Judgment must be rendered for the Plaintiffs.

G. FMLA: Cleveland State Violated Russell's Rights Under The FMLA By Interfering With His Right To Medical Leave And By Retaliating Against Him.

Separately, Russell has a claim for the violation of his FMLA rights. Under the FMLA, an "eligible" employee may take up to twelve weeks of unpaid leave in certain situations, including for a serious medical condition.⁴³¹ Accordingly, "any eligible employee who takes [FMLA] leave . . . shall be entitled, on return from such leave—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[.]"⁴³² The FMLA creates two distinct types of claims: "interference" claims and "retaliation" claims.⁴³³ Employers may not "interfere with, restrain or deny the exercise of or attempt to exercise, any [FMLA] right provided."⁴³⁴ Similarly, an employer may not retaliate against an employee for invoking his right to FMLA leave.⁴³⁵

1. FMLA Interference: Cleveland State Interfered With Russell's FMLA Rights By Firing Him After Receiving Notice of His Need For FMLA, Refusing to Honor His Rights Under The FMLA Unless He Waived His Claims, And Telling Him To "Get Healthy" in His Office.

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."⁴³⁶ "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."⁴³⁷ "An interference action is not about discrimination, it is only about whether the employer provided the employee with the

⁴³¹ 29 U.S.C. § 2612(a)(1).

⁴³² *Id.* at § 2614(a)(1).

⁴³³ *Daugherty v. Sajar Plastics, Inc.*, 2008 U.S. App. LEXIS 21574, *25-26 (6th Cir. Oct. 16, 2008).

⁴³⁴ 29 U.S.C. § 2615(a)(1)

⁴³⁵ *Id.* at § 2615(a)(2); *Bryson v. Regis Corp.*, 498 F.3d 561, 570 (6th Cir. 2007).

⁴³⁶ *Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005) (citing 29 U.S.C. §§ 2612(a), 2614(a)).

⁴³⁷ *Id.* at 119-20.

entitlements guaranteed by the FMLA.”⁴³⁸ Because an FMLA interference claim is not about discrimination, a *McDonnell-Douglas* burden-shifting analysis is not required.⁴³⁹

Moreover, Judge Nugent of the Northern District of Ohio held that “in order for [the employee] to recover for interference with his FMLA rights Once an employer is on notice that an employee will need FMLA leave, the employer cannot escape liability for interference or retaliation claims by terminating an employee before they can formalize a specific FMLA request or schedule the needed procedures.”⁴⁴⁰

A plaintiff prevails on an FMLA interference claim when he establishes the following: (1) he is an “eligible employee,” (2) the defendant is an “employer,” (3) the employee had a serious health issue for which he was entitled to leave under the Act, (4) the employee gave the employer notice of his intention to take leave, and (5) the employer denied the employee benefits or interfered with FMLA rights to which he was entitled.⁴⁴¹ “Interference” includes any discouragement by the employer. Unlike a claim for retaliation or discrimination, an employer’s intent is not relevant to a claim for FMLA interference.⁴⁴²

In this case, Russell established all five prongs of his FMLA interference claim at trial. Russell was an FMLA-eligible employee because he worked full time from 2008 to 2011.⁴⁴³ Cleveland State is covered by the FMLA.⁴⁴⁴ As such, the first two prongs of Russell’s FMLA interference claim are established. Russell further informed Defendant in May 2012 that he required

⁴³⁸ *Id.* at 120.

⁴³⁹ See *Parker v. Hahnemann Univ. Hosp.*, 234 F. Supp. 2d 478, 485 (D.N.J. 2002) (citing *Hodgens v. Gen’l Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998); Similarly, in *Bachelder v. American West Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001), the Ninth Circuit found that 29 C.F.R. 825.220(c) is the controlling authority for an FMLA interference claim.⁴³⁹ The Ninth Circuit, therefore, found its analysis “fairly uncomplicated” and refused to apply the traditional anti-discrimination burden-shifting frameworks. *Id.*

⁴⁴⁰ *Brown v. Travel Centers of America, LLC*, Case No. 12-CV-1496, Slip. Op., p.4 (Nov. 27, 2013).

⁴⁴¹ See *Arban v. West Publ’g Corp.*, 345 F.3d 390, 400 (6th Cir. 2003); *Hoge v. Honda of Am. Mfg., Inc.* 384 F.3d 238, 244 (6th Cir., 2004).

⁴⁴² *Edgar v. JAC Prods.*, 443 F.3d 501, 507 (6th Cir. 2006).

⁴⁴³ See Ex. 361 (approving Russell’s FMLA leave and indicating that he had at least 280 hours of available leave).

⁴⁴⁴ See Ex. 361. See also Vartorella, Tr. at 1385:18-20 (Cleveland State is subject to FMLA).

FMLA leave for his serious health condition.⁴⁴⁵ Russell gave notice to Cleveland State that he needed to take leave to have shoulder surgery.⁴⁴⁶ Russell further spoke to both Drnek and Banks about the scheduled surgery and his intention to take FMLA leave.⁴⁴⁷

In addition, Banks admitted at trial that he knew about Russell's need for shoulder replacement surgery and that Russell would need FMLA leave.⁴⁴⁸ Finally, Vartorella, Cleveland State's HR representative, testified that he was aware of Russell's need for FMLA leave prior to Banks and Drnek making the decision to terminate Russell.⁴⁴⁹ Accordingly, the third and fourth prongs of Russell's FMLA interference claim are established. Under the FMLA, Russell had a right to remain as a Cleveland State employee with medical coverage until his surgery was completed or his FMLA leave time expired. However, Cleveland State told Russell that he could not do so because he would no longer be employed. As a matter of law, Cleveland State denied Russell his right to take FMLA leave.

Additionally, Cleveland State "interfered" with Russell's FMLA rights by doing the following: (1) firing him before he could take leave; (2) asking him to waive his age discrimination claims in exchange for being granted FMLA leave; (3) ordering Russell to go back to his office and "get healthy" and (4) instructing Russell's supervisor Liss not to accommodate Russell's medical needs.⁴⁵⁰ There is no dispute that Cleveland State terminated Russell instead of providing him FMLA benefits to which he was entitled. In fact, Cleveland State fired Russell just five days after he was deemed eligible for FMLA leave by CareWorks, Cleveland State's third-party FMLA administrator.⁴⁵¹ Termination following a request for FMLA leave, standing alone, would discourage a reasonable employee from asserting rights under the FMLA. As such, Cleveland State

⁴⁴⁵ See Russell, Tr. at 421:2-10; Ex. 316.

⁴⁴⁶ See Ex. 316 & 361.

⁴⁴⁷ Russell, Tr. at 412-413.

⁴⁴⁸ See Banks, Tr. at 1055-1056.

⁴⁴⁹ See Vartorella, Tr. at 1393:14-22.

⁴⁵⁰ Russell, Tr. at 413; Liss, Tr. at 137.

⁴⁵¹ See Vartorella, Tr. at 1392; Ex. 361.

interfered with Russell's rights under the FMLA. Cleveland State also demanded that Russell waive his age-discrimination claim if he wanted to exercise his statutory FMLA rights. For these reasons, Russell is entitled to a judgment as to his FMLA interference claims against Cleveland State.

2. FMLA Retaliation.

Cleveland State retaliated against Russell for exercising his rights under the FMLA. The "retaliation" theory of recovery under the FMLA arises from 29 U.S.C. § 2615(a)(2). It provides 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."⁴⁵² With respect to FMLA retaliation claims, the Sixth Circuit applies the burden-shifting test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to retaliation claims under the FMLA.⁴⁵³

Russell must first establish a *prima facie* case of discrimination by showing that: (1) he engaged in protected activity; (2) the defendant knew of the protected activity; (3) he was subject to an adverse action; and (4) there was a causal connection between the two.⁴⁵⁴ The burden of producing a non-discriminatory reason for the adverse action then shifts to the defendant.⁴⁵⁵ To show a causal connection, a plaintiff is required to "proffer evidence 'sufficient to raise the inference that his protected activity was the likely reason for the adverse action.'"⁴⁵⁶ This burden is "minimal" and requires "merely that the plaintiff establish that the protected activity and the adverse action were not wholly unrelated."⁴⁵⁷ Russell's protected activity – his two requests for and, one use of, FMLA leave – are linked to his termination for compelling reasons.

⁴⁵² See *Arban v. West Pub. Co.*, 345 F.3d 390, 401 (6th Cir. 2003).

⁴⁵³ *Edgar*, 443 F.3d at 508, citing *Skrajanc v. Great Lakes Power Service Co.*, 272 F.3d 309, 315 (6th Cir. 2001)).

⁴⁵⁴ *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir.1997); see also *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006).

⁴⁵⁵ *DiCarlo v. Potter*, 358 F.3d 408 at 420 (6th Cir. 2004); *Williams v. Nashville Network*, 132 F.3d 1123, 1131 (6th Cir. 1997).

⁴⁵⁶ *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 862 (6th Cir. 1997); citing *Zanders v. Nat'l R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990).

⁴⁵⁷ *Avery Dennison* at 862; *Simmons v. Camden Cty. Bd. of Ed.*, 757 F.2d 1187, 1189 (11th Cir. 1985).

Cleveland State retaliated against Russell because within 90 days of learning of his intention to take FMLA leave, it terminated him and then refused to rehire him.⁴⁵⁸ On June 27th, Russell told Drnek and Banks that he needed time for surgery, and Banks told Russell to go back to his office and “get healthy.”⁴⁵⁹ The next day, June 28th, Banks emailed Drnek with reasons to terminate Russell.⁴⁶⁰ FMLA retaliation claims are analyzed under the framework of *McDonnell Douglas*.⁴⁶¹ A plaintiff establishes an inference of retaliation by showing: (1) he engaged in protected activity; (2) the defendant knew of the protected activity; (3) he was subject to an adverse action; and (4) there was a causal connection between the two.⁴⁶²

3. Russell Engaged In Protected Activity By Requesting Fmla Leave, And Cleveland State Was Aware Of Russell’s Protected Activity.

Russell engaged in protected conduct by exercising his rights under the FMLA. Russell took medical leave in 2011 as a result of suffering a heart attack. In May 2012, Russell requested leave again for shoulder replacement surgery. Cleveland State was further aware of Russell’s request for medical leave. Cleveland State’s HR representative testified that he was aware of Russell’s requests for medical leave.⁴⁶³ Moreover, Banks and Drnek were aware of Russell’s protected conduct under the FMLA.⁴⁶⁴ As such, Russell established the first two element of his prima facie case of FMLA retaliation.

4. Cleveland Subjected Russell To An Adverse Action By Terminating His Employment.

Cleveland State terminated Russell’s employment after Russell received approval to take FMLA leave to have shoulder replacement surgery. Therefore, Russell is able to establish that he suffered an adverse employment action.

⁴⁵⁸ Russell, Tr. at 412-13.

⁴⁵⁹ Russell, Tr. at 412-13.

⁴⁶⁰ Ex. 137.

⁴⁶¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *see also Clark v. Walgreen Co.*, 424 F. App’x. 467, 472-473 (6th Cir. 2011).

⁴⁶² *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir. 1997); *see also Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) (in the context of retaliation, a material adverse action is that which “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”)(internal citations omitted).

⁴⁶³ *See Vartorella*, Tr. at 1393:14-22.

⁴⁶⁴ *See Banks*, Tr. at 1055-1056; *Russell*, Tr. at 412-13.

5. There Is A Causal Connection Between Russell's Protected Conduct Under The Fmla And The Adverse Action.

The close timing between Russell's protected activity and Defendants' adverse actions is evidence of causation. "[T]emporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation."⁴⁶⁵ The Sixth Circuit has held that adverse actions that fall within a three-month period of time between the protected activity and the adverse action is sufficient to create a causal connection for the purposes of establishing a *prima facie* case.⁴⁶⁶

In the instant case, on June 27th, Russell told Drnek and Banks that he needed time for surgery, and Banks told Russell to go back to his office and "get healthy."⁴⁶⁷ The next day, June 28th, Banks emailed Drnek with reasons to terminate Russell.⁴⁶⁸ Moreover, Cleveland State terminated Russell's employment just five days after being approved to take medical leave. On August 31, 2012, CareWorks approved Russell's FMLA leave⁴⁶⁹ and sent Cleveland State's HR representative, Vartorella, an email notifying him that Russell's FMLA leave was approved.⁴⁷⁰ Five days after receipt of this notification, Cleveland State terminated Russell's employment. As such, the proximity in time establishes the "causal connection" element of Russell's FMLA retaliation claim.

6. Banks Was Openly Hostile To Russell's Need for Medical Care.

There is additional evidence - separately and cumulatively - of CSU's open hostility towards FMLA and evidence that CSU retaliated against Russell. Banks told Russell that instead of taking

⁴⁶⁵ *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 525 (6th Cir. 2007); citing *Clark Cty. School Dist. v. Bredeen*, 532 U.S. 268, 273 (2001).

⁴⁶⁶ *See Id.*; *Goeller v. Ohio Dep't. of Rehab. & Corr.*, 285 F. App'x. 250, 257 (6th Cir. 2008) (two months); *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 563 (6th Cir.2004) (three months).

⁴⁶⁷ Russell, Tr. at 412-13.

⁴⁶⁸ Ex. 137.

⁴⁶⁹ *See* Ex. 316.

⁴⁷⁰ *See* Vartorella, Tr. at 1392; Ex. 361.

medical leave, he should “go back to his office and get healthy.”⁴⁷¹ Banks further instructed Liss not to accommodate Russell’s medical condition.⁴⁷² Such actions demonstrate open hostility toward the exercise of federally guaranteed rights under law. Thus, in addition to temporal proximity, there is overwhelming additional evidence that CSU retaliated against Russell because he invoked his FMLA rights.

7. **Defendants’ Stated Reasons for Terminating Russell’s Employment Are Pretextual.**

There is overwhelming evidence that the Defendants’ stated reason for terminating his employment is pretextual. As addressed above, all the stated reasons for terminating Russell were false and a pretext for retaliation. Accordingly, Plaintiff has established his FMLA retaliation claim.

IV. DAMAGES

A. **Damages For Violating RC 4112.**

RC 4112.99 provides that “whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.”⁴⁷³ “When a party is injured by a violation of R.C. Chapter 4112, they are entitled to ‘make whole’ relief.”⁴⁷⁴ A plaintiff is made whole by being returned to the position the plaintiff would have occupied had the discrimination not occurred.⁴⁷⁵

Cleveland State violated R.C. 4112.99, and injured Plaintiffs, when: 1) Cleveland State fired Plaintiffs because of their age, based upon a sham reorganization; 2) Cleveland State refused to reassign Plaintiffs into any of the five new open positions, as it did for Johnston and Bergman; and 3) Cleveland State refused to rehire Liss for the three posted positions. Thus, Plaintiffs damages are caused by separate violations. Plaintiffs are entitled to damages as measured by their lost salaries,

⁴⁷¹ See Russell, Tr. at 413:12-19.

⁴⁷² See Liss, Tr. at 137.

⁴⁷³ R.C. 4112.99

⁴⁷⁴ *Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.*, 69 Ohio St.3d 89, 93, 1994 Ohio 515, 630 N.E.2d 669 (1994).

⁴⁷⁵ *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111 (7th Cir.1986).

economic and non-economic injuries attributable to: 1) the loss of their original jobs and related compensation; 2) the failure to reassign them into the senior or junior positions and related compensation; and 3) the failure to rehire Liss into the senior or junior positions and related compensation. Plaintiffs are entitled to the following categories of damages:

1. Plaintiffs Are Entitled to Damages For Lost Back Pay.

Plaintiffs are entitled to “back pay” including “lost wages and benefits, including any increases in wages or benefits lost because of [the discrimination].”⁴⁷⁶ “The amount of wages and benefits due is determined by calculating the amount that would have been earned from the date of the [discrimination] to the present.”⁴⁷⁷ Damages for back pay “include all forms of compensation that the employee proved he/she would have earned, but for [the discrimination], including salary, bonuses, vacation pay, pension, health insurance and other benefits.”⁴⁷⁸

2. Plaintiffs Are Entitled to Damages For Lost Front Pay.

Plaintiffs are also entitled to front pay. “Front pay includes the amount the employee would have earned from the date of the verdict until the date you find the Employee’s loss of future pay and benefits will cease.”⁴⁷⁹ Front Pay includes calculations for the employee’s age, salary and benefits, expenses associated with finding new employment, and the replacement value of fringe benefits.⁴⁸⁰

3. Plaintiffs Are Entitled to Non-Economic Damages.

Plaintiffs are also entitled to non-economic damages for, among other things, suffering, inconvenience, mental anguish and annoyance. Plaintiffs are entitled to an additional amount “that will reasonably compensate the employee for the actual (injury)(damage) proximately caused by the

⁴⁷⁶ Ohio Jury Instructions, §533.25 (1).

⁴⁷⁷ Ohio Jury Instructions, §533.25 (1).

⁴⁷⁸ Ohio Jury Instructions, §533.25 (1).

⁴⁷⁹ Ohio Jury Instructions, §533.25 (2).

⁴⁸⁰ Ohio Jury Instructions, §533.25 (2).

conduct of the employer.”⁴⁸¹ In deciding this additional amount, the factfinder should “consider the nature, character, seriousness and duration of any (emotional pain) (suffering) (inconvenience) (mental anguish) (loss of enjoyment of life) the employee may have experienced.”⁴⁸² “Non-economic damages” means harm other than the economic loss that results from Plaintiffs’ termination or denial of rehire, including, but not limited to, pain and suffering, loss of society, companionship, care, assistance, attention, guidance, counsel, instruction, training, or education; mental anguish, and any other intangible loss.⁴⁸³

Cleveland State destroyed the careers of two outstanding servants. However, because Cleveland State is a public university, under R.C. 3345.40, the amount of non-economic damages “shall not exceed two hundred fifty thousand dollars in favor of any one person.”⁴⁸⁴

This Court serves as the factfinder regarding the non-economic damages of Liss and Russell. Plaintiffs’ non-economic damages far exceed the \$250,000 statutory caps. In similar discrimination cases, factfinders have awarded significant damages for non-economic injuries.⁴⁸⁵ Indeed, the Sixth Circuit has upheld significant compensatory verdicts.⁴⁸⁶ In *Miller v. Alldata Corp*, the plaintiff brought a gender discrimination claim under Michigan law. At trial, the jury awarded plaintiff

⁴⁸¹ Ohio Jury Instructions, §533.25 (3). *Kishmarton v. William Bailey Constr., Inc.*, 93 Ohio St. 3d 226 (Ohio 2001)(“Section 16, Article I of the Ohio Constitution states that “every person, for an injury done him * * * shall have remedy by due course of law.” Emotional distress injuries are injuries for which our Constitution guarantees a right to a remedy. . . . To continue to disallow emotional distress damages unfairly exposes innocent persons to harm that a wrongdoer has no incentive to avoid or mitigate.”)

⁴⁸² Ohio Jury Instructions, §533.25 (3).

⁴⁸³ Non-economic damages have included “damages for inconvenience, aggravation, frustration, and humiliation for misrepresentations;” *Whitaker v. M.T. Automotive, Inc.*(2006), 111 Ohio St.3d 177, 2006 Ohio 5481, at P29, 855 N.E.2d 825 (“*Whitaker II*), citing *Damask v. Modern Communications, Ltd.* (Sep. 13, 2000), Lucas C.P. No. CI-99-3859; “embarrassment;” *Whitaker II* at P20, citing *Becker v. Montgomery Lynch*, 2003 U.S. Dist. LEXIS 24992 (Feb. 26, 2003); and “mental stress.” *Whitaker II* at P20, citing *Lamb v. M & M Assoc., Inc.*, 1998 U.S. Dist. LEXIS 13773 (Sept. 1, 1998). The Supreme Court also found in *Whitaker II* that courts have found non-economic damages, including for humiliation, mental distress, and anguish, to be properly included as actual damages. *Whitaker II* at P21 (internal citations omitted). The Supreme Court of Ohio has suggested that an award of non-economic damages might be proper even where the evidence does not support an award of economic damages. *Whitaker II* at P24.

⁴⁸⁴ R.C. 3345.40.

⁴⁸⁵ See, *Ellis v. HBE Corp.*, 2000 U.S. App. LEXIS 28293, 1, 229 F.3d 1151 (6th Cir. Tenn. 2000)(verdict of \$400,000 for compensatory damages and \$55,500 in back pay upheld in sexual harassment case)(attached); *Miller v. Alldata Corp.*, 14 Fed. Appx. 457 (6th Cir. 2001)(verdict of \$16,000 in economic damages and \$300,000 for emotional distress damages upheld).

⁴⁸⁶*U-Haul Co. of Cleveland v. Kunkle*, 1998 WL 681253 (6th Cir. 1998)(verdict of \$950,000 on ADA and Section 4112.02 claims upheld)(attached).

\$16,000 in lost pay and \$300,000 for emotional distress based solely on her testimony. Defendant's argument that "[Plaintiff] called no witness to testify, and conceded that she received no medical treatment and had no documentation, to establish that she suffered emotional distress as a result of her termination," did not convince the Circuit, which upheld the award of "garden variety" non-economic damages.⁴⁸⁷

Factfinders commonly award victims of discrimination significant damages for the emotional distress caused in the employment context under state law. In *Kluss v. Alcan Aluminum Corp.*,⁴⁸⁸ the plaintiff claimed defamation arising out of his termination from employment. The court refused to disturb a \$400,000 award of damages for non-economic damages, explaining:

His Alcan career was destroyed and his business reputation was seriously damaged in the trade. The extent of that injury and the amount of damages that would reasonably compensate him was for the jury to determine.⁴⁸⁹

Compensatory damages in excess of \$ 1 million are common in discrimination cases.⁴⁹⁰ Here, Cleveland State has destroyed the careers of Liss and Russell. The Court should award the maximum available non-economic damages as capped at \$250,000.

4. Any Ambiguity Is Resolved In Favor Of Plaintiffs And Against Cleveland State.

The "employee is not required to prove with unrealistic precision the amount of lost earnings, in any, due him/her."⁴⁹¹ Moreover, any "uncertainties in the amount the employee could have earned should be resolved against the employer."⁴⁹²

⁴⁸⁷ See also, *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996)(plaintiff can prove emotional injury by testimony without medical support; plaintiff's own testimony along with the circumstances of a particular case, can suffice to sustain the plaintiff's burden on emotional distress).

⁴⁸⁸ *Kluss v. Alcan Aluminum Corp.*, 106 Ohio App. 3d 528 (Cuyahoga App. 1995).

⁴⁸⁹ *Kluss*, at 540. The court further noted, "given the jury's unique role in determining damages for personal anguish, humiliation and emotional distress, in such circumstances, we cannot say that the substantial award was excessive or shocks the conscience," citing *Cooper v. Grace Baptist Church*, 81 Ohio App. 3d 728, 736 (1992).

⁴⁹⁰ See also *Sadowski v. Philips Medical Systems*, No. 477154 (Cuyahoga Cty. March 7, 2003)(verdict of \$1.365 million in non-economic upheld where plaintiff's expert testified to \$815,000 in economic losses.); *Srail v. RJF Internatl. Corp.*, 126 Ohio App.3d 689 (Cuyahoga App. 1998)(Eighth District upheld the jury's verdict of \$1,066,000 in compensatory damages); *Ahern v. Ameritech Corp.*, 137 Ohio App.3d 734 (Cuyahoga App. 2000)(Eighth District upheld a compensatory award of \$578,000); *Zifcak v. National City Bank*, Case No. 1:93 CV 2025 (N.D. Ohio 1996)(jury verdict in an age discrimination case of \$1,115,000); *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169 (2000)(Ohio Supreme Court upheld a jury's award of \$1.65 million in an employment tort claim); *Watkins v. Cleveland Clinic Found.*, 130 Ohio App.3d 262 (Cuyahoga App. 1998)(upholding award of compensatory damages in fraud and battery case of \$9,660,000.).

B. R.C. 4112 Damages Suffered By Liss.

1. Liss Has Suffered Economic Injuries Of Between \$947,515 and \$486,271.

Cleveland State discriminated against Liss when it fired him, refused to reassign him as it did for younger employees, and refused to rehire him. In his job as Director of CSI, Liss earned approximately \$63,377 per year, plus benefits. Dr. Burke testified that within a reasonable degree of economic certainty that Liss will suffer \$947,515 in lost wages as a result of being terminated as the Director of the Center for Student Involvement.⁴⁹³ The three Assistant Dean positions each paid \$52,500 per year plus benefits. Liss' damages for Cleveland State's repeated refusal to rehire him as any one of three Assistant Deans is \$743,000. The two coordinator positions each paid \$39,068 in annual salary plus benefits. Liss' damages for Cleveland State's refusal to rehire him as into either of the two open coordinator positions is \$486,271.⁴⁹⁴

The table below shows the economic damages that Liss has suffered with respect to Cleveland State's termination of his original job, refusal to reassign or rehire him as an Assistant Dean, and refusal to reassign or rehire him as even a Coordinator.

Steve Liss
Economic Damages (Lost Wages & Benefits)

Position	Damages from Lost Wages & Benefits
Director of CSI	\$947,515
Assistant Dean	\$743,000
Coordinator	\$486,271

Thus, Liss has suffered, and is entitled to economic damages ranging from \$947,515 to \$486,271.

⁴⁹¹ Ohio Jury Instructions § CV 533.25 (Comment) citing *Worrell v. Multipress, Inc.*, 45 Ohio St. 3d 241, 246 (1989).

⁴⁹² Ohio Jury Instructions § CV 533.25 (Comment) citing *Worrell v. Multipress, Inc.*, 45 Ohio St. 3d 241, 246 (1989).

"Any ambiguity in what the claimant would have received but for discrimination should be resolved against the discriminating employer." *Rasimas v. Mich. Dept. of Mental Health*, 714 F.2d 614, 628 (6th Cir.1983). In awarding back pay to an entitled discrimination victim, any ambiguities should be resolved against the discriminating employer. *Ohio Civil Rights Comm'n v. David Richard Ingram, D.C., Inc.*, 69 Ohio St. 3d 89, 94, 1994 Ohio 515, 630 N.E.2d 669.

⁴⁹³ Burke, Tr. at 646:7-13.

⁴⁹⁴ Burke, Tr. at 650:8-652:6.

2. Liss Has Suffered Non-Economic Damages In Excess of The Statutory Cap Of \$250,000.

Cleveland State destroyed Steve Liss' career. Banks and Cauthen fabricated a report to fire the older staff members. Drnek lied about Liss's skills at least five times to justify Liss' termination. Then, Cleveland State repeatedly made false statements about the reorganization, and lied to this Court. Cleveland State's level of dishonesty and malice is shocking. Punitive damages are not available against Cleveland State, as they would be against a private university. Only capped amount for non-economic damages are available.

Non-economic damages are awarded to compensate for "emotional pain", "inconvenience" or "mental anguish."⁴⁹⁵ However, Cleveland State's conduct, and the pain that its actions and words have caused, is compensable up to \$250,000. After 19 years of service, Cleveland State humiliated Liss. Liss' career has "been destroyed."⁴⁹⁶ He has had to work two low-level jobs. Liss has been deprived of rewarding work. Liss has been lied to, lied about, and forced to endure continuing embarrassment that is far beyond the mere "emotional pain", "inconvenience" or "mental anguish" for which non-economic damages are intended to compensate. The capped amount will not come close to compensating Liss for Cleveland State's dishonest and discriminatory conduct, but it is a start. In addition to the economic damages discussed above, the Court should also award the full amount of \$250,000 permitted under the caps for non-economic damages.

The Court should enter judgment in favor of Liss on his discrimination claims in the amount of \$250,000 for his noneconomic damages plus \$947,515 for his economic damages, for a total award of \$1,197,515.

⁴⁹⁵ Ohio Jury Instructions, §533.25 (3).

⁴⁹⁶ Liss, Tr., at 197:1-3.

C. R.C. 4112 Damages Suffered By Russell.

1. Russell Has Suffered Economic Injuries Of Between \$482,391 and \$300,643.

Cleveland State discriminated against Russell when it fired him and refused to reassign him as it did for younger employees. When Russell quit his job as a lawyer to work for Cleveland State, he took a 90% pay cut. In 2012, in his job as Coordinator of Greek Life, Russel earned approximately \$26,228 per year, plus benefits. Dr. Burke testified that within a reasonable degree of economic certainty that Russell will suffer \$300,643 in lost wages as a result of his termination as Coordinator of Greek Life.⁴⁹⁷ Moreover, Cleveland State refused to treat Russell in the manner it treated the younger Bergman and Johnston by promoting them into jobs without requests, applications or interviews. Dr. Burke testified that Russell had been injured in the amount of \$482,391 if he had been promoted into the similar Assistant Dean position that assumed his responsibilities in Greek Life.⁴⁹⁸ If Russell had been treated like Bergman and Johnston, and reassigned even to the lower level Coordinator's position, at the coordinator's salary of \$39,068, Russell's losses are \$362,897.⁴⁹⁹

The table below shows the economic damages that Russell has suffered with respect to Cleveland State's termination of his original job, refusal to reassign him as an Assistant Dean, and refusal to reassign him as even a Coordinator.

Bill Russell
Economic Damages (Lost Wages & Benefits)

Position	Damages from Lost Wages & Benefits
Coordinator of Greek Life	\$300,643
Assistant Dean	\$482,391
Coordinator	\$362,897

Thus, Russell has suffered, and is entitled to, economic damages ranging from \$482,391 to \$300,643.

⁴⁹⁷ Burke, Tr. at 646:7-13. This includes back pay in the amount of \$92,134. Burke, Tr. at 645:8-13.

⁴⁹⁸ Burke, Tr. at 692:2-19.

⁴⁹⁹ Burke, Tr. at 693:1:19.

2. **Russell Has Suffered Non-Economic Damages In Excess of The Statutory Cap Of \$250,000.**

For 47 years, Russell devoted himself to Cleveland State. Russell quit his law job in order to give back to Cleveland State because “everything good that happened to him” in his life was because of Cleveland State. From meeting his wife to becoming a successful lawyer, Russell has been thankful to Cleveland State. Russell devoted the last 12 years to “giving back” to Cleveland States. He gave of his time and of his life to increase Greek Life ten-fold – all without an alcohol complaint, a sexual conduct complaint or a discrimination complaint. Outrageously, Russell’s success was so impressive that Cauthen rejected it out of hand as not credible. Russell’s loyalty, commitment and love for Cleveland State are unparalleled.

That is why when Banks and Drnek fired Russell to replace him with younger staff, Russell was devastated. Two days after they fired him, Cleveland State told Russell that he had again been nominated for the Distinguished Service Award. Russell has been through hard times. He has had a heart attack. He has watched his daughter fight cancer. “But the betrayal that I felt, the unbelievable cutting off at the knees after a 47-year affiliation, my whole adult life at Cleveland State, has been tough to take.”⁵⁰⁰ Compared to watching his “daughter in her stage-4 breast cancer and my son-in-law in his cancer In my own way it has been devastating.”⁵⁰¹

The conduct of Cleveland State, the conduct of Banks, and the conduct of Drnek have been disgusting and dishonest. Their actions and their falsehoods on campus, and in this Court, ruined a 47-year commitment, a lifetime of loyal service, and caused Russell immeasurable distress, humiliation and pain. In addition to damages for lost wages, the Court should also award Russell the full capped amount of \$250,000 in non-economic damages.

⁵⁰⁰ Russell, Tr. at 470:12-15.

⁵⁰¹ Russell, Tr. at 470:8-10.

The Court should enter judgment in favor of Russell on his discrimination claims in the amount of \$250,000 for his noneconomic damages plus \$482,391 for his economic damages, for a total award of \$732,391.

D. Russell's Damages For Cleveland State's Violations Of The FMLA.

1. FMLA Damages Include Compensatory Damages, Interest, Liquidated Damages, Attorneys Fees and Costs.

The remedies available to Russell for Cleveland State's violation of his FMLA rights include compensatory damages, interest, liquidated damages, attorneys fees and costs, as well as equitable relief. 29 U.S.C. § 2617. The remedies are set forth in 29 U.S.C. § 2617 and are described as follows:

First, the aggrieved employee may recover "any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation." 29 U.S.C. § 2617(a)(1)(A)(i)(I).

In the alternative, if the employee has not lost any wages, salary, or employment benefits, the employee may recover any other monetary losses actually sustained as the result of the employer's violation. 29 U.S.C. § 2617(a)(1)(A)(i)(II).

Second, the employee is entitled to recover the interest on any compensatory damages that he is awarded. 29 U.S.C. § 2617(a)(1)(A)(ii).

Third, the employee may recover liquidated damages equal to the amount of compensatory damages for which the employer is liable. 29 U.S.C. § 2617(a)(1)(A)(iii).

Fourth, the court must award reasonable attorney's fees, reasonable expert witness fees, and other costs, in addition to any judgment awarded to an aggrieved employee. 29 U.S.C. § 2617(a)(3).

Finally, the statute provides that the court may award an aggrieved employee appropriate equitable relief, including employment, reinstatement, and promotion. 29 U.S.C. § 2617(a)(1)(B).⁵⁰²

Other kinds of damages, including punitive damages and damages for emotional distress, are not recoverable under the FMLA.⁵⁰³

⁵⁰² *Johnson v. Honda of America Mfg., Inc.*, 221 F.Supp.2d 853, 858 (S.D. Ohio 2002) citing 29 U.S.C. §2617 *et seq.*

2. **Russell Is Entitled To Damages Between \$574,525 to \$392,777, Plus Attorneys Fees and Costs.**

As indicated above, and as calculated by Dr. Burke, Russell has lost wages and benefits of between \$482,291 and \$300,643. Under the FMLA, Russell is also entitled to liquidated damages equal to the amount of back pay.⁵⁰⁴ Liquidated damages are only calculated on the amount of back pay. Dr. Burke calculated the amount of Russell's lost back pay as \$92, 134.⁵⁰⁵ The table below shows Russell's economic damages, liquidated damages and the sum of those two amounts.

Bill Russell
Economic Damages (Lost Wages & Benefits+ FMLA Liquidated Damages)

Position	Damages from Lost Wages & Benefits	FMLA Damages for Back Pay	Liquidated Damages for Back Pay	FMLA Damages: Lost Wages, Benefits plus Liquidated Damages
Coordinator of Greek Life	\$300,643	\$92,134		\$392,777
Assistant Dean	\$482,391	\$92,134		\$574,525
Coordinator	\$362,897	\$92,134		\$455,031

Thus, Russell is entitled to damages for lost wages and liquidated damages on back pay ranging from \$574,525 to \$392,777.

Russell is also entitled to attorneys, costs and expenses. Attorneys fees and costs (including expert fees) are awarded in post-trial briefing only after a finding of violation of the FMLA.⁵⁰⁶ In this case and others, the amount of attorneys fees is not known until the briefing is completed and judgment is entered.⁵⁰⁷ Thus, Russell requests that upon a finding that Cleveland State violated

⁵⁰³ *Rosania v. Taco Bell of America, Inc.*, 303 F.Supp.2d 878 (N.D. Ohio 2004); *Johnson*, 221 F.Supp.2d at 858.

⁵⁰⁴ 29 U.S.C. § 2617(a)(1)(A)(iii).

⁵⁰⁵ Burke, Tr. at 643:6-8.

⁵⁰⁶ See e.g. *Hoge v. Honda of Am. Mfg.*, 2003 U.S. Dist. LEXIS 4068, 2 (S.D. Ohio Feb. 28, 2003)(awarding attorneys fees and costs following previously-entered verdict).

⁵⁰⁷ See e.g. *Robinson v. Hilton Hospitality, Inc.*, 2008 U.S. Dist. LEXIS 124665, 2 (S.D. Ohio Sept. 30, 2008)(“Following the entry of judgment, plaintiff filed a motion for attorneys fees and costs . . . On August 23, 2007, Plaintiff filed a motion for supplemental attorney fees, seeking compensation of \$5270.00 for services rendered subsequent to her original fee application.”)

Russell's FMLA rights that he be permitted to submit a petition for attorneys fees, costs and expenses.

The Court should award Russell \$574,525 plus attorneys fees, costs and expenses.

V. CONCLUSION

Cleveland State cannot escape from its words or its conduct. Cleveland State fired only the old and sick, and promoted only the young and healthy. Cleveland State picked its two youngest staff members for promotions without their request or application.

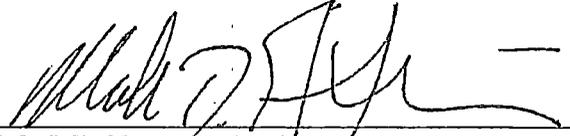
Then, to justify the terminations of Liss and Russell, Cleveland State made false statements about the "reorganization" and Plaintiffs' qualifications. Cleveland State has repeatedly made false statements under oath: in discovery, in deposition, and even in this Court. This conduct is not acceptable.

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. The Court should enter judgment in favor of Russell on his discrimination claims in the amount of \$732,391, including \$482,391 for his economic damages, \$250,000 for his noneconomic damages, plus attorneys fees and costs.

In violation of 29 U.S.C. §2612, Cleveland State interfered with Russell's FMLA rights, and retaliated against him for the exercise of those rights. The Court should also render judgment against Cleveland State and in favor of Bill Russell in the amount of \$574,525, plus attorneys fees and costs.

Respectfully submitted,



MARK GRIFFIN (0064141)

mgriffin@tpgfirm.com

SARA W. VERESPEJ (0085511)

sverespej@tpgfirm.com

CHRISTOPHER P. THORMAN (0056013)

cthorman@tpgfirm.com

THORMAN PETROV GRIFFIN CO., LPA

3100 Terminal Tower

50 Public Square

Cleveland, Ohio 44113

Tel. (216) 621-3500

Fax (216) 621-3422

Attorneys for Plaintiffs Steven Liss and William Russell

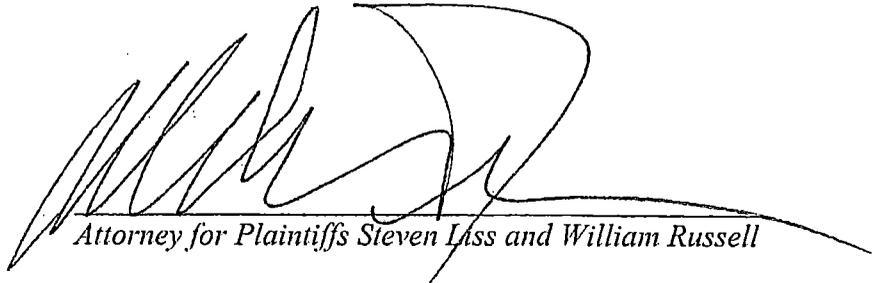
CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served via electronic mail, on this 11th day

of March, 2015 to:

Randall W. Knutti, Esq.
Amy S. Brown, Esq.
Emily M. Simmons, Esq.
Ohio Attorney General's Office
Court of Claims Defense Section
150 East Gay Street, Floor 18
Columbus, OH 43215
Randall.Knutti@OhioAttorneyGeneral.gov
Amy.Brown@OhioAttorneyGeneral.gov
Emily.Simmons@OhioAttorneyGeneral.gov

Attorneys for Defendant



Attorney for Plaintiffs Steven Lass and William Russell