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IN THE OHIO COURT OF CLAIMS

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WILLIAM RUSSELL
Plaintiff

v.

CLEVELAND STATE UNIVERSITY
Defendant

and

STEVEN LISS
Plaintiff

v.

CLEVELAND STATE UNIVERSITY
Defendant

Case Nos. 2013-00138 and
2013-00139

Judge Patrick M. McGrath
Magistrate Holly T. Shaver

CLEVELAND STATE
UNIVERSITY'S POST-TRIAL BRIEF

I. OVERVIEW

Cleveland State University eliminated William Russell's and Steven Liss's positions as a result of a departmental reorganization. It attempted to place Mr. Russell into another position, but he refused. It also encouraged Mr. Liss to interview for other positions, but his efforts were half-hearted at best, and those positions were filled by candidates who were both more interested in them and more qualified for them than he was. CSU won summary judgment as to all but three of the two men's claims. What remains are Mr. Russell's claim that CSU interfered with his FMLA rights by refusing to grant him leave to have shoulder-replacement surgery and his and Mr. Liss's claims that CSU eliminated their positions and refused to place them into new positions because they were over forty years old. Mr. Russell's FMLA claim is frivolous. As he now admits, the claim concerned just one medical issue, his attempt to schedule shoulder-replacement surgery. (Tr. at 519) His request for FMLA leave was rejected not by CSU but by its third-party administrator,

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CareWorks, *because he never obtained a medical certification authorizing the surgery.* See Exs. 316, 317. And he has still never had that surgery. (Tr. at 528)

Both Mr. Russell's and Mr. Liss's age-discrimination claims reduce to two propositions. First, they say that CSU discriminated against them because Willie Banks—the new Associate Dean whose charge was to help the Department of Student Life adapt to CSU's transition from a commuter college to a thriving and modern residential university—used words like “old fashioned” and “old school.” And second, they say that their layoffs *must have been* age-based because they were model employees. Mr. Liss heard no “ageist” remarks that were *directed toward him*. (Tr. at 378) And his laundry list of remarks that he says Dr. Banks made *about Mary Myers and Mr. Russell* includes just one that could actually be construed as discriminatory—the phrase “old dogs can't learn new tricks.” He says he is positive Dr. Banks used that phrase in April 2012, some five months before the reorganization, though the context eludes him. See Tr. at 97-98 (“I can't remember specifically. I know that . . . we would typically be talking about things that we were moving towards for the next year.”). Mr. Russell himself never heard Dr. Banks use that term in the “five or six” times he had any direct contact with Dr. Banks. (Tr. at 486-87, 536-37). And for his part, Dr. Banks is adamant that he never used that phrase at all. *Mr. Liss used it during a meeting in which he was complaining to Dr. Banks about Mr. Russell and Dr. Myers*— they were the “old dogs” in his rendering of the phrase. (Tr. at 1213-14)

As to their belief that they were model employees, suffice it to say that they were nothing of the kind. Robert Bergmann, who was the Manager of the Student Center and is now Assistant Dean of Student Organizations, testified that some of what Mr. Russell did and Mr. Liss condoned was borderline illegal. (Tr. at 1669) Student organization files *were on paper, not electronic*. There was no electronic registration system. Long defunct organizations like “Students for Dukakis” were treated as though they were still active. Some organizations had outstanding debts to CSU totaling more

than \$10,000. And fraternities and sororities were *self-reporting their grades*. See Tr. at 1671 (“When we went back and looked at the actual grades, as I recall, it was something like a full GPA point difference. So not .1 [but] 1.0 difference between what had been reported and what was actually being done.”). No one discriminated against Mr. Russell and Mr. Liss in any way, but one man— Dr. Banks— demanded that they actually do their jobs. That, not “age discrimination,” is why they are angry; that is why they filed this suit; and that is as contemptible as it is dishonest.

II. THERE WERE SERIOUS PROBLEMS IN THE DEPARTMENT OF STUDENT LIFE LONG BEFORE DR. BANKS WAS HIRED.

James Drnek was the Associate Dean of Students at the University of Arizona when he interviewed in November 2007 for the position of Dean of Student Life at CSU. It “was made clear to [him] then . . . that Student Life needed to ramp up the level of activity to engage students.” (Drnek Dep. at 193-98). He began his position as Dean in February 2008, and he focused his work on improving the Department of Student Life as a whole. One of the first things that struck him was that staff members who were doing similar work were walled off into different groups with no central reporting structure. *Id.* He was not alone in that opinion. Mr. Bergmann also noted that Student Life employees were housed in different locations and there was often “no communication” among them. Tr. at 1680. Dean Drnek delegated the day-to-day management of the Center for Student Involvement (“CSI”), a unit within Student Life, to Sandra Emerick—his Associate Dean and onetime rival for the deanship that brought him to CSU—until she left in the Fall of 2011. *Id.* Mr. Russell worked as the part-time coordinator of Greek Life in that unit. He reported to Mary Myers, the Coordinator of Student Organizations; she in turn reported to Mr. Liss, the unit’s Director; and he reported to Dr. Emerick.

The new Student Center opened in 2010, which meant that “all of the staff and Student Life” were in one place where Dean Drnek had an “opportunity to . . . observe[]” and take “mental notes” about their interactions and his developing thoughts about what kind of changes “might

work well and how [he] might change things.” *Id.* at 195. Finally, in 2011, “all of the Student Affairs-related functions, the Counseling Center, Disability Services, the Women’s Center, Veterans, Residence Life Programming [and] Recreation Center Programming” began reporting to Dean Drnek. *Id.* at 196. That was actually the first part of reorganizing the Department of Student Life, but it did not resolve all of the problems with the distribution of work in the department. *Id.*

As Mr. Bergmann testified, there still was “just no . . . team approach to educating students.” (Tr. at 1679) “[W]hen you interact with students on a daily basis and you want to educate them outside the classroom to make them better leaders or better organization members or better students or better citizens of the world, . . . you need to work together and . . . take an approach that as a department you’re all going in the same direction.” *Id.* But the individuals within Student Life were “siloe[d]” off from one another. *Id.* at 1678. “There was no team building,” and there was little interaction “because no one wanted to have someone else encroach in their little zone.” *Id.* at 1679. In addition, programs would sometimes be scheduled “at the same time in a different place,” meaning that two programs offered by Student Life would be “competing against each other for the same students’ attention.” *Id.* at 1680.

III. THE PROBLEMS IN STUDENT LIFE—PARTICULARLY IN CSI—CONTINUED AFTER DR. BANKS WAS HIRED.

Dr. Emerick resigned in 2011— just before school started, which is “the busiest time of the year” for Student Life— and Dean Drnek urged Mr. Liss to assume some of her duties. (Drnek Dep. at 197-98) But Mr. Liss refused:

I went to Steve right away and I said, “Please, would you . . . take on these additional responsibilities?” And he . . . was very upset. He said, “No, no.” And I said, “Really, do you want to think about it? You know I’m asking you. I need your help.” So then finally he said, “I’ve done all of this before [and] I don’t want to do it again.” I was “really taken aback because whenever a supervisor has come to me and said, “Would you take on additional responsibility?” I always [said] yes.

[A] day or two later Steve came back and he said, "Well, I'll do this and this but not that, that, that and that." So then I had to distribute widely across Student Life the leadership and service activities. And as a result they weren't effective.

Id. It soon became apparent to Dean Drnek that Mr. Liss was not an effective manager. He would not, for example, intervene when Dr. Myers—one of his direct reports—fell for an internet scam involving a “lottery in Africa” and began soliciting hundreds of dollars from staff and students for money she owed as a result. *Id.* at 202-03. Mr. Liss told Dean Drnek that he was “afraid of her” and he refused to “hold her accountable.” *Id.* at 204. So Dean Drnek had to issue the reprimand himself. *Id.* And Mr. Liss behaved similarly in the matter of Mr. Russell’s reprimand, which he supported “until he got pushback” from Mr. Russell. *Id.* at 86.

IV. IT LATER BECAME CLEAR THAT CSI WAS THE WEAKEST LINK IN THE DEPARTMENT OF STUDENT LIFE.

Mr. Liss was not just afraid of Dr. Myers; he was afraid of Mr. Russell too. In April 2012, he emailed Steve Vartorella, who was then Student Life’s liaison in Human Resources. The email bore the subject line “Assistance with sensitive matter,” and Mr. Russell’s and Mr. Liss’s attorneys have characterized it as his attempt to bring Dr. Banks’s so-called discrimination to Mr. Vartorella’s attention. *See* Ex. 287, Tr. at 1460. But it had nothing to do with age discrimination and everything to do with Mr. Liss’s inability to manage his staff. Mr. Vartorella recalls the meeting he arranged with Mr. Liss after receiving the email this way: Mr. Liss asked whether he “was allowed to ask” Mr. Russell and Dr. Myers to schedule appointments with students instead of seeing “walk-ins” only. (Tr. at 1460-1464) Mr. Vartorella responded, saying “if it were me, I would go back to the office today, I would say to the staff starting on Monday, this is what we’re going to be doing going forward.” *Id.* at 1767. Mr. Vartorella remembers this vividly because it was so odd. Mr. Liss was “sweating profusely,” “he was extremely, extremely nervous,” and Mr. Vartorella was surprised that *a Director* needed to seek his advice on such a basic question. (Tr. at 1766-1770)

V. MR. RUSSELL AND MR. LISS WERE TERMINATED AS A RESULT OF A RESTRUCTURING THAT DEAN DRNEK INSTITUTED.

Dean Drnek— not Dr. Banks— made the decision to go forward with the reorganization that eliminated Mr. Russell's and Mr. Liss's positions. *See* Drnek Dep. at 233 (“That was my decision.”). He had many reasons for doing so, and none of them had a thing to do with anyone's age. His hope was that the “flat organizational” structure the reorganization produced would lead to collegiality and collaboration among the staff. *Id.* at 241. And it did just that. “Student Life has really blossomed at Cleveland State since the reorganization without having them there. And staff collaborate, they work freely together [and] we were doing some really cool things.” *Id.* at 235.

VI. THE TASK OF PLACING PEOPLE INTO THE NEW POSITIONS CREATED THROUGH THE REORGANIZATION FELL TO A SEARCH COMMITTEE. MR. LISS'S INTERVIEW FOR THE COORDINATOR OF STUDENT ACTIVITIES POSITION WAS “NOT IMPRESSIVE.”

Dean Drnek prepared descriptions for the newly opened positions, and he believed that Mr. Liss met some but not all of the qualifications for those positions. He did not, for example, have sufficient experience for the Assistant Dean position, which he now argues he should have gotten. The “Assistant Dean position was an amalgamation of different pieces and parts of leadership and service and Greek Life, which hadn't been together before. So Steve hadn't done those things before. . . .” (Drnek Dep. at 140.) But Dean Drnek was not part of the committee that was formed to evaluate candidates for the new positions, including the Coordinator of Student Activities position Mr. Liss sought. Mr. Bergmann chaired that committee, and participated in its interview of all the candidates. In his view, Mr. Liss offered few “really new ideas or ways to go about positive change within that position,” and [t]hat was one of the things [the committee was] really looking for.” (Tr. at 1686-87) Compared to the other candidates, he was just “not impressive.” *Id.* at 1686.

VII. MR. RUSSELL WAS OFFERED THE OPPORTUNITY TO “BUMP” INTO ANOTHER POSITION, BUT HE REFUSED.

Steve Vartorella offered Mr. Russell the opportunity to “bump into” another position after the reorganization. “I had identified to [Mr. Russell] that there was one position that had been verified that he had the potential to bump into. . . . I believe it was the next day or the day after where he actually came to my office and we talked about it.” (Tr. at 1761) That second conversation was “much more specific.” *Id.* After Mr. Vartorella explained the process, Mr. Russell declined to go forward with the bumping process. He said “I don’t want to do that, I don’t want to bump someone for a short period of time because I’m going to retire in November.” *Id.* at 1764.

VIII. ARGUMENT

Mr. Russell’s FMLA interference claim is frivolous because his request for FMLA leave was rejected not by CSU but by its third-party administrator, CareWorks, *because he never obtained a medical certification authorizing the surgery.* See Exs. 316, 317. And he has still never had that surgery. (Tr. at 528). And his age discrimination claim relies on nothing more than a few stray and ambiguous remarks and his own rank speculation. Mr. Liss’s age discrimination, though, relies on even less. No one ever used any age-related comments *about him*, and his notion that his work performance was so outstanding that discrimination *should be presumed* is, to say the least, belied by the facts. As a result of all of this, Mr. Russell and Mr. Liss stake their cases on misleading the Court about the “inexorable zero” theory and the law concerning disparate-impact claims.

A. THE “INEXORABLE ZERO” THEORY APPLIES ONLY IN PATTERN AND PRACTICE CASES.

Courts sometimes mention the inexorable zero theory when they discuss employers whose workforces contain zero or nearly zero members of protected groups. It could never apply in an age-discrimination case against CSU, whose workforce has an average age of fifty. (Tr. at 1794) Nor could it apply in this case brought by two individual plaintiffs. If there ever was doubt as to the

ability of individual plaintiffs to press pattern-and-practice claims, the Sixth Circuit Court of Appeals laid it to rest in:

We therefore hold that the pattern-or-practice method of proving discrimination is not available to individual plaintiffs. We subscribe to the rationale that a pattern-or-practice claim is focused on establishing a policy of discrimination; because it does not address individual hiring decisions, it is inappropriate as a vehicle for proving discrimination in an individual case. *Lowery*, 158 F.3d at 761 (observing that “[t]he Supreme Court has never applied the *Teamsters* method of proof in a private, non-class suit charging employment discrimination. Rather, the Court has noted that there is a ‘manifest’ and ‘crucial’ difference between an individual’s claim of discrimination and a class action alleging a general pattern or practice of discrimination.”)

Bacon v Honda of America Mfg, Inc., 370 F.3d 565, 575 (6th Cir. 2004) (emphasis added). *See also Brown v Worthington Steel, Inc.*, 2005-Ohio-4571 (10th Dist.) at ¶7 (acknowledging *Bacon* and refusing to extend pattern-and-practice claims to individual plaintiffs like Mr. Russell and Mr. Liss.)

B. THIS IS NOT A DISPARATE IMPACT CASE, BUT IF IT WERE, THE COURT WOULD BE REQUIRED TO CONSIDER UNIVERSITY-WIDE STATISTICS.

The use of statistical evidence is common in disparate-impact cases, which involve “employment practices that are facially neutral in their treatment of different groups, but fall more harshly on one group.” *Warden v Ohio Dept. of Natural Resources*, 2014-Ohio-35 at ¶19 (10th Dist.) (citations omitted). But this is not a disparate-impact case, and, even if it were, the Court would be required to consider university-wide statistics, not just the number of older employees who were laid off in one department at one time. In other words, disparate-impact plaintiffs must prove that the effect of an otherwise neutral policy is significant, and a policy that causes an “adverse effect on a single employee, or even a few employees, is not sufficient to establish disparate impact.” *Massarsky v General Motors Corp.*, 706 F.2D 111, 121 (3d Cir. 1983). Dean Drnek was responsible for some “400 employees.” (Drnek Dep. at 189) The fact that two of those employees lost their jobs could never be legally significant. Mr. Russell’s and Mr. Liss’s “statistics” amount to nothing more than a numerator

in search of a denominator. And their suggestion that every “older” employee in Student Life was terminated grows no better through repetition. They have introduced no evidence as to how many of the 400 employees in Student Life were over forty. They have, though, discussed the ages of *exactly five employees* who were over forty. Of those *five employees*, Valerie Hinton-Hannah was promoted, Dan Lenhart was retained, Mary Myers was transferred, and Mr. Russell declined to be bumped into another position. Hence, only *one of the five*—Mr. Liss—is no longer at CSU *as a result of the reorganization*.

C. STRAY AND AMBIGUOUS REMARKS ARE NOT ACTIONABLE.

Mr. Russell and Mr. Liss ask this Court to hold as a matter of law that terms like “old fashioned,” “old school,” and “out-dated” are so plainly “ageist” that they constitute “direct evidence” of discrimination, meaning that supervisors who use those words are on that ground alone deemed to be “more likely than not” to be “motivated by discriminatory animus.” *Bymes v LCI Communication Holdings Co.*, 77 Ohio St.3d, 125, 128-29 (1996). Suffice it to say, though, that the list of words as to which courts have afforded that treatment is remarkably short. The “common use of the n-word by both staff and management”—a word that is “perhaps the most offensive word in the English language”—justifies special treatment. *Smith v Superior Prod., L.L.C.*, 2014-Ohio-1961 at ¶25. But none of the terms Mr. Russell and Mr. Liss think Dr. Banks said are that word’s equal. This is just a run-of-the-mill case in which two plaintiffs hope to rely on ambiguous terms, and they cannot do so.

D. MR. RUSSELL’S FMLA INTERFERENCE CLAIM IS FRIVOLOUS.

Whatever else might be said, this much is true. Plaintiffs with FMLA claims based on their own health must first prove that they have a serious health condition within the meaning of the statute; and they do that by providing a physician’s certification. But Mr. Russell never provided CSU with a physician’s certification that his desire to have shoulder-replacement surgery—which he

has still not had— was a serious health condition. And, in the absence of a valid medical certification, he cannot win his claim.

E. MR. RUSSELL'S AND MR. LISS'S DAMAGES CALCULATIONS ADDRESS NONE OF THE QUESTIONS THAT MUST BE ADDRESSED IN CALCULATING LUMP-SUM AWARDS FOR TERMINATED EMPLOYEES.

There are five questions that must be addressed when courts calculate lump-sum awards for terminated employees.

- (1) How long will the employee work following his or her termination?
- (2) How much will the employee earn during that period of time?
- (3) How much would the employee have earned during that same period of time if he or she had not been terminated?
- (4) Is the answer to Question 2 less than the answer to Question 3?
- (5) If so, what sum of money today can the employee reasonably invest in order to make up the difference?

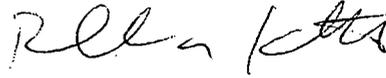
Mr. Russell and Mr. Liss rely on John Burke to answer those questions, and he recognizes that those are the questions that must be answered in order to obtain a lump-sum figure that would approximate what they would have earned if they had not been terminated. (Tr. at 674) But he cannot answer any of them. Dr. Burke's expertise as an economist is well established, but he is incapable of answering the only questions that actually matter with respect to damages.

IX. CONCLUSION

Because Mr. Russell and Mr. Liss cannot prevail on any of their claims, CSU urges the Court to grant enter judgment in its favor.

Respectfully submitted,

MICHAEL DE WINE
Ohio Attorney General



RANDALL W. KNUTTI (0022388)

AMY S. BROWN (0079650)

EMILY M. SIMMONS (0082519)

Assistant Attorneys General

Ohio Attorney General's Office

Court of Claims Defense Section

150 East Gay Street, Floor 18

Columbus, OH 43215

T: (614) 466-7447 | F: (614) 644-9185

Randall.Knutti@OhioAttorneyGeneral.gov

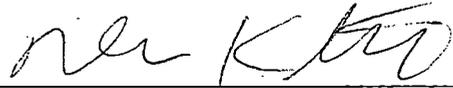
Amy.Brown@OhioAttorneyGeneral.gov

Emily.Simmons@OhioAttorneyGeneral.gov

COUNSEL FOR DEFENDANT,
CLEVELAND STATE UNIVERSITY

CERTIFICATE OF SERVICE

On March, 11, 2014 I sent a copy of this document via electronic mail to Plaintiff's Counsel:
Mark Griffin (mgriffin@tpgfirm.com) and Sara Verespej (SVerespej@tpgfirm.com).



RANDALL W. KNUTTI (0022388)
Principal Assistant Attorney General