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IN THE OHIO COURT OF CLAIMS

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

PLAINTIFFS' RESPONSE TO CLEVELAND STATE'S POST TRIAL BRIEF

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I. INTRODUCTION

Cleveland State terminated Steve Liss and Bill Russell because Cleveland believed that they were too old to communicate with the newer generation of college students. Now, Cleveland State is inventing new excuses to justify its illegal terminations.

For 19 years, Cleveland State – including Drnek – gave Liss outstanding reviews, and took credit for Liss’ successes. Now, in a desperate effort to avoid liability, Cleveland State contradicts 19 years of great reviews and asserts without any support that Liss engaged in “borderline illegal” activity. Similarly, Cleveland State praised Russell with great reviews, numerous awards and – just days after his termination -- nominated Russell for the “Distinguished Professional Staff Service Award.” Up until he filed this lawsuit, Cleveland State took credit for Russell’s growth of Greek Life ten-fold without a single alcohol or sexual misconduct allegation in 12 years. Today, Cleveland State claims that his methods were “old school” – and it fired everyone associated with Russell’s old school methods. Cleveland State’s attempt to disparage the performance of Liss and Russell is a change in its pretext for their terminations and this change, by itself, is further evidence of discrimination.¹

The defendant’s falsity of the reason given for termination is also evidence of discrimination.² Cleveland State does not even attempt to defend the Cauthen Report or Drnek’s knowing misrepresentations of Liss’ qualifications. Cleveland State’s claim of a “reorganization” is

¹ *Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 801 (6th Cir. Mich. 1996) citing *Schwartz v. Gregori*, 45 F.3d 1017, 1021 (6th Cir. 1995); *Philbrick v. Holder*, 583 Fed. Appx. 478, 487 (6th Cir. Mich. 2014)(“ An employer’s changing rationale for making an adverse employment decision can be evidence of pretext.”)

² *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).

a sham to cover up its replacement of older workers by younger workers. There were never any plans, discussions, or emails about any reorganization until Cleveland State hired Willie Banks, a young, unqualified person with no previous experience in an urban or commuter institution. Banks disparaged their practices as “old school”, “old fashioned”, “out-dated” and said that his staff were “old dogs” who could not “learn new tricks.” Banks never reviewed the past successes of Liss and Russell before he started drafting a new organization chart and new job descriptions. The “reorganization” was designed to rearranged the job duties while firing the older workers and promoting the younger workers. Banks and Drnek hired a close friend of Banks to produce a report that literally copied the material created by Banks. Drnek later lied to George Walker about Liss’ qualifications in order to terminate him.

Cleveland State’s legal arguments are without merit. In every separate employment decision by Banks and Drnek, younger workers were preferred to older workers. Contrary to their distortions of the actual holding in the case, Cleveland State’s own legal citations agree that **“pattern-or-practice evidence may be relevant to proving an otherwise-viable individual claim for disparate treatment”**.³ Further, “statistical evidence . . . if unrebutted, would allow the inference of intentional discrimination against individual members”⁴ In individual employment discrimination cases, statistical evidence is relevant “circumstantial evidence of discrimination in a disparate treatment case.”⁵

In addition, Banks’ ageist comments are evidence of his discriminatory attitudes towards older workers. Banks made ageist comments in March, April and June - the same time period Banks was planning the “reorganization” that fired older workers. Moreover, Banks made these

³ *Bacon v. Honda of Am. Mfg.*, 370 F.3d 565, 575 (6th Cir. Ohio 2004); *See also Megivern v. Glacier Hills, Inc.*, 519 Fed. Appx. 385, 399 (6th Cir. Mich. 2013)(“Evidence that an employer engaged in a pattern or practice of discrimination may be relevant to proving an otherwise-viable individual claim for disparate treatment under the *McDonnell Douglas* framework.”) .

⁴ *Boggs v. Scotts Co.*, 2005-Ohio-1264, P16-P18 (Ohio Ct. App., Franklin County Mar. 22, 2005)

⁵ *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978);

comments: 1) in the workplace; 2) regarding older workers including Plaintiffs; and 3) regarding their skills, abilities to communicate with the “younger generation” and their abilities to “learn new tricks.” Thus, there is a nexus between Banks’ comments and the contemporaneous decision to terminate the older workers.

With regard to Russell’s FMLA claim, Cleveland State’s entire argument consists of three sentences without citation to any legal authority or to the trial record. Briefly, courts are clear that a plaintiff is entitled to FMLA protection once he puts the employer on notice that he “may” need FMLA leave.⁶ He does not need to file any paperwork⁷, does not need medical certification,⁸ and is nonetheless protected from interference, discouragement and retaliation. Here, Russell put Cleveland State on notice that he would need FMLA leave – but they fired him five days after his written request and before he could complete the paperwork. Russell’s FMLA claim is valid because no formal paper work was required and because Cleveland State interfered with and retaliated against Russell for his attempt to exercise his FMLA rights.

With respect to Plaintiffs’ calculation of damages, Cleveland State poses five rhetorical questions but cites no law of any kind. In fact, the law requires only that a plaintiff make a “reasonable” estimate of damages, but is not required to have precision.⁹ Dr. John Burke is an expert economist whose methods have been upheld consistently.¹⁰ Dr. Burke testified to a

⁶ *Metroka-Cantelli v. Postmaster Gen.*, 2013 U.S. Dist. LEXIS 158303, 16-19 (N.D. Ohio Nov. 5, 2013)(rejecting defendant’s argument that FMLA request was invalid because plaintiff failed to complete FMLA paperwork after being notified of termination).

⁷ *Brown v. Travel Centers of America, LLC*, Case No. 12-CV-1496, Slip. Op., p.4 (Nov. 27, 2013).

⁸ *Johnson v. Dollar Gen.*, 880 F. Supp. 2d 967, 993-994 (N.D. Iowa 2012)(holding that “in short, a “retaliation” claim **does not require proof** that the plaintiff actually suffered a “serious health condition,” only that the plaintiff gave adequate and timely notice to the employer that he or she needed leave for a condition that the plaintiff believed, in good faith, might be covered by the FMLA.”)

⁹ *Brewer v. Brothers* 82 Ohio App.3d 148, 611 N.E.2d 492 (1992) as cited by *Collins v. Mullinax E., Inc.*, 153 Ohio App. 3d 534, 539 (Ohio Ct. App., Ashtabula County 2003) See also *Srail v. RJF Int’l Corp.*, 126 Ohio App. 3d 689, 701-702 (Ohio Ct. App., Cuyahoga County 1998)(“Where the existence of damage is established, the evidence need only tend to show the basis for the computation of damages to a fair degree of probability. *Brewer v. Brothers* (1992), 82 Ohio App. 3d 148, 611 N.E.2d 492. Only reasonable certainty as to the amount of damages is required which is that degree of certainty of which the nature of the case admits. *Bemmes*, supra.”)

¹⁰ *Miller v. Ohio DOT*, 2014-Ohio-3738, P78 (Ohio Ct. App., Franklin County Aug. 28, 2014)

reasonable degree of economic certainty as to Plaintiffs' damages.¹¹

As explained below, the Court should enter judgment in favor of Liss and Russell on all claims and should enter the full amount of damages available under R.C. § 4112.

II. FACTS

A. Disputed Facts: Cleveland State's Limited Factual Assertions Are Inaccurate.

For the most part, Cleveland State does not dispute Liss and Russell's factual claims. Nonetheless, Cleveland State's Post-Trial Brief sets forth various bald assertions that are without merit. Many of these claims have no citation to the record or are contradicted by the testimony of Cleveland State's own witnesses. Although distracting, they are generally without relevance to the issues in this case. Cleveland State's factual assertions are specifically responded to in Appendix A to this document.

B. Undisputed Facts: Cleveland State Does Not Dispute Most of the Core Issues.

After a two-week trial, and promising to make "all of one's arguments" in its Post-Trial Brief¹², Cleveland State has given up on disputing the vast majority of issues in this case that were discussed at trial. Cleveland State has abandoned Cauthen¹³ and Banks.¹⁴

In its Post Trial Brief, Cleveland State does not dispute, among other things, that:

- Liss and Russell met their *prima facie* burdens.
- Liss and Russell were over the age of 40;
- Liss and Russell were qualified for the jobs at issue; and
- Liss and Russell were replaced by, or passed over in favor of, substantially younger people.

Similarly, Cleveland State did not dispute that:

¹¹ Burke, Tr. at 616-698.

¹² Tr. at 1974.

¹³ Cleveland State has entirely abandoned the Cauthen Report. In fact, the word "Cauthen" does not even appear in its brief. Cleveland State recognizes that the Cauthen Report is a sham.

¹⁴ Similarly, Banks is barely referenced.

- Banks wrote and designed the “reorganization”; and
- Drnek knowingly misrepresented Liss’ qualifications.

Thus, the remaining issues address whether Cleveland State terminated Plaintiffs, refused to reassign them, or refused to rehire them because of their age. Plaintiffs have overwhelming statistical evidence, testimony, and documents establishing that “age made a difference.” Moreover, Cleveland State’s changing excuses are pretexts for discrimination.

III. LAW & ARGUMENT

A. Plaintiffs’ Performance Was Not Cleveland State’s Original Reason for Termination or Failure to Rehire -- Cleveland State’s Post-Trial Brief is Additional Evidence of Discrimination Because It Changes The Pretextual Reasons.

The Sixth Circuit has “specifically held in the employment discrimination context, a change in the reasons offered for a decision supports a finding that the reasons offered are pretexts for discrimination.”¹⁵

Cleveland State initially claimed that Liss and Russell were not fired, or passed over for reinstatement, because of performance. Drnek, Banks and Vartorella all testified that Liss and Russell’s performance was not the reason they lost their jobs.¹⁶ CSU President Berkman wrote that Liss’ termination was not based on performance.¹⁷ Walker conducted an investigation on behalf of Cleveland State and testified that any claims that Liss and Russell were terminated or not rehired because of performance were in conflict with his own conclusions.¹⁸

However, Cleveland State’s Post-Trial Brief is filled with ad hominem attacks on long-time employees Russell and Liss, even going so far beyond the pale as to accuse them of conduct that was “borderline illegal.” None of these claims are true. Cleveland State consistently gave Liss and

¹⁵ *Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 801 (6th Cir. Mich. 1996) citing *Schwartz v. Gregori*, 45 F.3d 1017, 1021 (6th Cir. 1995); *Philbrick v. Holder*, 583 Fed. Appx. 478, 487 (6th Cir. Mich. 2014)(“ An employer’s changing rationale for making an adverse employment decision can be evidence of pretext.”)

¹⁶ Drnek Dep., at 179-182; Banks, Tr. at 925-926, 953, 957; Vartorella, Tr. at 1306-07.

¹⁷ Ex. 98.

¹⁸ Walker, Tr. at 701-702 and 707-708.

Russell outstanding reviews, promotions and honors. They are newly-invented claims by a defendant that is desperate to change the topic away from its own discriminatory conduct. Moreover, all of Cleveland State's new claims arose after Cleveland State terminated Liss and Russell, and thus could not have been grounds for termination. In any event, Cleveland State's constant attacks on Plaintiffs' performance contradicts Cleveland State's original position that Plaintiffs' performance was not a reason for either Plaintiffs' terminations or Cleveland State's refusal to reinstate or rehire them. Cleveland State's Post-Trial Brief and its new claims of poor performance are changing rationales and are actually evidence of pretext.

B. Drnek Swore Under Oath That There Were No Plans of Reorganization Before June 19, 2012.

Recognizing its inability to explain the actions of Dr. Banks as anything but discriminatory, Cleveland State now virtually ignores Banks' clear and admitted role as a decision-maker and, instead, spends much of its Post-Trial brief discussing James Drnek's supposed role in the Department of Student Life. However, Drnek certified as true and accurate Cleveland State's Answers to Interrogatories where he claimed that there were no plans for a "reorganization" before June 19, 2012. Cleveland State cannot have it both ways: it cannot imply that Drnek had long planned a reorganization and also claim in interrogatories that there were no plans before June 19. Drnek and Cleveland State will say anything that is convenient in the moment. In deposition, when forced under oath, Drnek admitted that he made numerous, knowingly-false statements regarding Liss' qualifications.¹⁹ Once a witness lies, this Court can, and should discount the rest of his testimony.²⁰ Having made numerous false statements regarding the employment decisions in this case, Drnek's testimony has absolutely no evidentiary value.

¹⁹ Plaintiffs' Post Trial Brief pages 41-48 and 83-85.

²⁰ Ohio Jury Instructions § 409.05.

C. Statistics Are Evidence of Discrimination In Individual Discrimination Cases.

1. Statistics Apply to Individual Cases.

Cleveland State has no non-discriminatory explanation for the fact that:

1. 100% of the terminated workers were over age 50;²¹
2. 100% of the promoted workers were under age 35;²²
3. There is a 100% correlation between age and termination;²³
4. In 100% of the cases, older workers were replaced by younger workers;²⁴
5. Banks never hired anyone over the age of 35;²⁵
6. Banks never promoted anyone over the age of 35;²⁶
7. Banks never fired anyone younger than age 35;²⁷
8. Banks never reprimanded any younger employees.²⁸
9. Banks never put anyone on a Performance Improvement Plan who was younger than 35.²⁹
10. Cleveland State fired 100% of the staff involved in programs that Banks considered "old school."³⁰

Instead, Cleveland State argues that statistics are never relevant to claims of individual disparate treatment. This assertion is not true. Such statistical evidence is highly-probative. "Statistical evidence may prove discrimination when it shows a pattern of conduct against a protected group that, if unrebutted, would allow the inference of intentional discrimination against individual members."³¹ Similarly, the Sixth Circuit has

²¹ Vartorella, Tr. at 1331.

²² Vartorella, Tr. at 1331.

²³ Vartorella, Tr. at 1331-1332.

²⁴ Vartorella, Tr. at 1332.

²⁵ Banks, Tr. at 934-935.

²⁶ 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. at 935.

²⁷ Banks, Tr. at 936.

²⁸ Vartorella, Tr. at 1421.

²⁹ Vartorella, Tr. at 1421.

³⁰ Banks, Tr. at 923.

³¹ *Boggs v. Scotts Co.*, 2005-Ohio-1264, P16-P18 (Ohio Ct. App., Franklin County Mar. 22, 2005)

consistently held that “statistical data showing an employer’s pattern of conduct toward a protected class as a group can, if un rebutted, create an inference that a defendant discriminated against **individual members** of the class.”³²

In individual employment discrimination cases, statistical evidence is admissible “circumstantial evidence of discrimination in a disparate treatment case.”³³ Moreover, in “contrast [to a class-action or pattern and practice case], in individual disparate treatment cases such as this, statistical evidence, which may be helpful, though ordinarily not dispositive, need not be so finely tuned.”³⁴ As one court wrote “**contrary to Defendant’s assertion, statistical evidence can be used in an individual disparate treatment employment discrimination case.**”³⁵ The Sixth Circuit has noted that “even small statistical samples can increase the likelihood that the ‘decisions to eliminate certain positions were based on age.’”³⁶

2. Defendant’s Own Cases Actually Hold That Pattern And Pattern Evidence Is Relevant To Individual Claims of Disparate Treatment.

Cleveland State deeply distorts the holding in *Bacon v. Honda of Am. Mfg.*, 370 F.3d 565, 575 (6th Cir. Ohio 2004). Just two sentences after the section quoted by Cleveland State, the Sixth Circuit explicitly clarifies that:

However, pattern-or-practice evidence may be relevant to proving an otherwise-viable individual claim for disparate treatment under the *McDonnell Douglas* framework.³⁷

In mis-analyzing and mis-citing *Bacon*, Cleveland State fails to explain to this Court that *Bacon* was

³² *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir. 1990)(emphasis added).

³³ *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978).

³⁴ *Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 766-67 (3d Cir. 1989).

³⁵ *Waris v. HCR Manor Care*, 2009 U.S. Dist. LEXIS 10322, 50-51 (E.D. Pa. Feb. 10, 2009) citing *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1217 (1995); *Tyler v. Se. Pa. Transp. Auth.*, 2002 U.S. Dist. LEXIS 25647, 2002 WL 31965896, at *4 (E.D. Pa. 2002), aff’d, 85 Fed.Appx. 875 (2003) (table opinion) (noting that a disparate treatment plaintiff may use statistics to show that defendant was conforming to a general pattern of discrimination).

³⁶ *Cicero v. Borg-Warner Auto., Inc.*, 280 F.3d 579, 593 (6th Cir. Mich. 2002) quoting *Kulling v. Grinders for Indus., Inc.*, 115 F. Supp. 2d 828, 839 (E.D. Mich. 2000).

³⁷ *Bacon v. Honda of Am. Mfg.*, 370 F.3d 565, 575 (6th Cir. Ohio 2004); *See also Megivern v. Glacier Hills, Inc.*, 519 Fed. Appx. 385,399 (6th Cir. Mich. 2013)(“Evidence that an employer engaged in a pattern or practice of discrimination may be relevant to proving an otherwise-viable individual claim for disparate treatment under the *McDonnell Douglas* framework.”).

using the terms only “used in a technical sense to refer to the burden-shifting framework set forth in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977)” that establishes a different set of criteria for a *prima facie* case.³⁸ The *Bacon* Court was addressing the rule that in class actions, plaintiffs do not have to prove specific individual acts of discrimination if they can show a “pattern and practice.”³⁹ That is very different than preventing individual plaintiffs from using statistics to support their individual claims.

Here, in contrast, Liss and Russell are using statistics regarding specific employment decisions that affected them individually and which constitute evidence of discrimination – exactly as permitted by *Bacon* and the Sixth Circuit.

3. The Only Relevant – And Permissible Statistics – Are Those For Employees Under Banks’ Supervision.

A relevant statistical comparison of employees should only include employees who are similarly-situated.⁴⁰ Among other things, to be similar the employees must report through the same

³⁸ *Lafate v. Vanguard Group, Inc.*, 2014 U.S. Dist. LEXIS 123862, 13-14 (E.D. Pa. Sept. 5, 2014) (“The phrase “pattern or practice” discussed in the cases Defendant cites is used in a technical sense to refer to the burden-shifting framework set forth in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977), and available to class-action plaintiffs in private actions alleging discrimination, as well as to the government in 42 U.S.C. § 2000e-6 actions. See *Semsroth v. City of Wichita*, 304 Fed. Appx. 707, 716 (10th Cir. 2008); *Bacon v. Honda of Am. Mfg.*, 370 F.3d 565, 575 (6th Cir. 2004); *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 355 (5th Cir. 2001); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760 (4th Cir. 1998), vacated on other grounds, 527 U.S. 1031, 119 S. Ct. 2388, 144 L. Ed. 2d 790 (1999). By contrast, Plaintiff here appears to use the phrase in the more general sense to refer to Defendant’s allegedly unlawful employment policies and practices. While Defendant is correct that Plaintiff may not use the “pattern or practice” method of proof developed in *Teamsters* to establish his individual Title VII claims, evidence of Defendant’s employment patterns and practices may be relevant to both his disparate treatment and disparate impact claims. See *Chin v. Port Authority of NY and NJ*, 685 F.3d 135, 149 (2d Cir. 2012) (emphasizing that “evidence that the [defendant] engaged in a pattern or practice of discrimination — in the ordinary sense of those words, rather than in the technical sense describing a theory of liability for discrimination — remains relevant in assessing whether the plaintiffs proved discrimination using the individual disparate treatment and disparate impact methods of proof”); *Bacon*, 370 F.3d at 575 (“[P]attern-or-practice evidence may be relevant to proving an otherwise-viable individual claim for disparate treatment under the *McDonnell Douglas* framework.”).”)

³⁹ *Serrano v. Cintas Corp.*, 699 F.3d 884, 893 (6th Cir. Mich. 2012) (“The *Teamsters* framework is distinct. It charges the plaintiff with the higher initial burden of establishing “that unlawful discrimination has been a regular procedure or policy followed by an employer or a group of employers.” *Teamsters*, 431 U.S. at 360. Upon that showing, it is assumed “that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy” and, therefore, “[t]he [plaintiff] need only show that an alleged individual discriminatee unsuccessfully applied for a job.” *Id.* at 362.”)

⁴⁰ To prove that “a comparable non-protected person was treated better,” the plaintiff “must show that the ‘comparable[.]’ [was] similarly-situated in all respects.” *Mitchell*, 964 F.2d at 583. The “respects” in which the “comparable[.]” must be “similarly-situated” depend on “the factual context in which the * * * case arose * * * .” *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998). Thus, “the plaintiff need not

supervisory chain.⁴¹ Here, the sham “reorganization” that was designed by Banks and parroted by Cauthen only affected services under the supervision of Banks. The only duties that were “reorganized” were those that reported to Banks. The only legally-permissible comparators for statistical purposes are those in Banks’ chain of command. In contrast, comparing employees – as urged by Cleveland State – who were not under the supervision of Banks is improper. Thus, the relevant statistics are of the positions that reported through Banks. These relevant statistics are damning: showing that in every employment decision, Banks favored younger workers instead of older workers.

D. Banks’ Consistent Ageist Remarks Are Evidence of Discrimination.

1. Timing: Banks Made Ageist Remarks Contemporaneously With His Recommendations to “Reorganize” His Supervisory Chain, To Terminate Liss and Russell, and To Promote Younger Workers.

Banks made numerous and consistent ageist remarks. Liss testified that Banks used ageist language on a “pretty pervasive”⁴² basis, including during March, April and June⁴³ - the same time period that Banks was designing the sham “reorganization” and recommending the terminations of Liss and Russell. Banks’ ageist comments were made in the workplace,⁴⁴ regarding subordinates Russell and Myers,⁴⁵ and were made regarding their work performance.⁴⁶

Moreover, Banks frequently disparaged Russell and told him directly to “get into the 21st Century” and other ageist comments.⁴⁷ Russell testified:

demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered 'similarly-situated;' rather, * * * the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in 'all of the relevant aspects.'" *Id.* at 352 (quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994)). When, as here, the plaintiff has alleged "discriminatory disciplinary action resulting in the termination of [her] employment, * * * [the individual] with whom the plaintiff seeks to compare * * * her treatment must have dealt with the same supervisor" 154 F.3d at 352 (quoting *Mitchell*, 964 F.2d at 583).

⁴¹ *Id.*

⁴² Liss, Tr. at 90.

⁴³ Liss, Tr. at 93-95.

⁴⁴ Liss, Tr. at 95.

⁴⁵ Liss, Tr. at 95.

⁴⁶ Liss, Tr. at 95.

⁴⁷ Russell, Tr. at 400.

Q: How frequently or how many times would [Banks] make ageist comments to you?

A: Every time I met with him [except the first meeting].⁴⁸

Thus, the evidence is clear that Banks regularly used ageist remarks at the same time he was working on terminating Liss and Russell.

2. Nexus: There is A Nexus Between Banks' Ageist Remarks And Banks' Decisions To Recommend The Sham Reorganization, Recommend Terminating Older Workers, and Recommend Promoting Younger Workers.

In determining the relevance of discriminatory remarks, courts look “to the identity of the speaker, whether the remarks are isolated or ambiguous, and the temporal proximity of the remarks to the adverse action.”⁴⁹ Here, the speaker is Banks – a decision maker who recommended and decided the sham reorganization, the hiring of Cauthen, the terminations of Liss and Russell, the promotions of Bergman and Johnston, and the hiring of Courson. Furthermore, in every employment decision, Drnek adopted the recommendations of Banks. Although defendant now tries to claim that Drnek had long-standing issues with Student Life, the undisputed fact is that the reorganization and elimination of positions did not occur until Banks was hired and made the recommendation. Next, the remarks are not isolated: they are made pervasively to multiple people. Third, Banks' ageist remarks are “temporally proximate” because they were made from March to June – the same time that Banks was recommending the terminations of the older workers and the promotions of the younger workers. Thus, there is a nexus between Banks' remarks and the terminations of Liss and Russell, and Cleveland State's refusal to reassign or rehire them.

3. Decision Makers: Banks and Drnek were Primary Decision-Makers.

Cleveland State falsely claims that neither Banks nor Drnek were decision-makers, and that hiring decisions were passed to a committee. In fact, Banks designed the sham “reorganization”, wrote the job descriptions, hired the consultant, determined the opinions of the consultant,

⁴⁸ Russell, Tr. at 401.

⁴⁹ *Smith v. Leggett Wire Co.*, 220 F.3d 752, 759 (6th Cir. 2000)(citation omitted) (quoting *Manzer*, 29 F.3d at 1084) (internal quotation marks omitted).

recommended the terminations of older workers Liss, Russell and Myers,⁵⁰ decided the promotions of younger workers Johnston and Bergman⁵¹, and was the hiring manager who made decisions to hire and fire for Bergman, Johnston and Courson.⁵² Similarly, Drnek was a decision-maker with respect to the decision to “reorganize”, to misrepresent Liss’ qualifications to prevent him from auditing into any of the three senior positions like Bergman and Johnston, as well as decisions to no allow Liss to audit into any positions. Contrary to Cleveland State’s claims, long before any committees were created, Banks and Drnek had the opportunity to treat Liss and Russell the same way they treated Johnston and Bergman -- by auditing them into positions.

4. Discriminatory Remarks Do Not Have To Be Made By Decision-Makers.

Further, “discriminatory remarks, even by a non-decision maker, can serve as probative evidence of pretext.”⁵³ Indeed, the Sixth Circuit has determined that even “remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a meaningful role in the decision to terminate the plaintiff, were relevant.”⁵⁴

5. Banks’ Ageist Comments Do Not Have To Be Made To, Or About, Plaintiffs.

Cleveland State tries to excuse Banks’ comments by claiming that they were not made directly to Russell, or about Liss. The Sixth Circuit has rejected Cleveland State’s this excuse, noting that ageist remarks “may constitute direct evidence of age discrimination, even if the comments are not specifically directed at or about the plaintiff.”⁵⁵ Similarly, in *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 380 (6th Cir. 1993), the Sixth Circuit held that a supervisor’s

⁵⁰ See e.g. Ex. 137.

⁵¹ Vartorella, Tr. at 1318-19.

⁵² Vartorella, Tr. at 1318-19.

⁵³ *Risch v. Royal Oak Police Dep’t*, 581 F.3d 383, 393 (6th Cir. 2009).

⁵⁴ *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998).

⁵⁵ *Best v. Blount Mem. Hosp.*, 195 F. Supp. 2d 1034, 1041-1042 (E.D. Tenn. 2001) quoting *Ercegovich v. Goodyear*, 154 F.3d 344, 356-7 (6th Cir. 1998). See *id.* at 154 F.3d 356-57 (6th Cir. 1998)

ageist remarks constituted direct evidence of age discrimination even though the comments were not specifically about or directed to the plaintiff.

Moreover, recent Supreme Court decisions and circuit court decisions have recognized that most comments potentially reflecting bias have evidentiary value. See *Reeves*, 530 U.S. at 152; *Evans v. City of Bishop*, 238 F.3d 586, 591 (5th Cir. 2000) (per curiam) (“*Reeves* emphatically states that requiring evidence of discriminatory animus to be ‘in the direct context’ of the employment decision is incorrect.”); accord *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 229 (5th Cir. 2000) (“In light of the Supreme Court’s admonition in *Reeves*, our pre-*Reeves* jurisprudence regarding so-called ‘stray remarks’ must be viewed cautiously.”). Courts have held that although such comments may not be dispositive, they are still relevant and probative. See, e.g., *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999) (recognizing that comments stereotyping pregnant women had probative value even where they did not rebut proffered reason of poor interpersonal skills). Thus, there is no question that Banks’ ageist comments are at least circumstantial evidence – if not direct evidence – of discrimination.

6. Banks Has A Pattern Of Instructing Others To Say Things, And Then Claiming That They Were Not Banks’ Idea.

Banks’ discriminatory words and conduct are evidence of discrimination even for actions purportedly taken by others. Again and again, Banks uses other people to do his bidding. Banks tells them what to say, and then claims that it was the other person’s idea. For example, Banks ordered Liss to give bad evaluations to the older workers Myers and Russell. Then, Banks claimed that they were Liss’ evaluations. Next, Banks ordered Liss to issue a reprimand, and asserted that it was Liss’ reprimand. When Liss disclosed that it was actually Banks’ who wrote the reprimand, Banks was angry that he had been unmasked.

Banks told Cauthen exactly who to interview and which documents to review. Banks actually wrote large sections of the Cauthen Report and designed the structure. Then Banks allowed Cauthen to claim that he was the only author. Banks allowed Cauthen to claim that the opinions in the report were Cauthen's, when in fact Banks had written those opinions. As with Liss, he instructed Cauthen what to say and then claimed that they were Cauthen's ideas.

Similarly, with regard to Drnek, Banks told Drnek who to hire as a consultant, told Drnek that he wanted to fire Liss, Russell and Myers, and told Drnek he wanted to promote Bergmann and Johnston. Banks designed and implemented the "reorganization" and then claimed that it was Drnek's idea. As the hiring manager, Banks decided to promote Bergman and Johnston, and not promote Liss and Russell. And yet again, Banks claims that it was someone else's responsibility. Banks' words and conduct infected the entire process because of his practice of using others to act or speak for him. Thus, Banks' ageist attitudes are attributable to the others that he acted through.

E. The Court Should Discard The Entire Testimony Of Banks And Drnek Because They Have Been Untruthful.

The entirety of Cleveland State's case rests upon the testimony of Drnek and Banks – both of whom have lied during the course of this litigation. Once a witness testifies falsely, this Court should discard the rest of their testimony.

Drnek's falsehoods are outrageous. In deposition, Drnek admittedly to knowingly making false statements about Liss' qualifications. Drnek used these falsehoods to deny Liss treatment similar to younger workers and to end the 19-year career of a dedicated Cleveland State employee. Banks and Drnek both falsely certified interrogatory answers that there had been no plans to reorganize before June 19, 2012.

Banks testified that he allowed Cauthen to hold out the Cauthen Report as Cauthen's own work despite knowing that Banks had written and designed it. Banks also testified under oath that he had never communicated his plans to Cauthen, even though the plans were functionally identical, had the same job titles, same subordinates, and even the same sequence of jobs on the diagram.

Banks and Drnek are the only witnesses who testified as to the reasons for the sham "reorganization". Both Banks and Drnek are untruthful. Because their testimony has been dishonest, this Court can and should conclude that their falsehoods are pretexts for discrimination and should reject the entirety of their testimony.

F. Russell Properly Invoked His FMLA Rights By Giving Notice That He "May" Need Medical Leave.

Cleveland State violated the FMLA when it: 1) interfered with Russell's FMLA rights by discouraging him from taking leave, and then firing him nine days before he could have his long-scheduled shoulder surgery; and 2) retaliated against Russell when it fired him four days after receiving notice of his formal application. Cleveland State's half-hearted defense is merely to assert, without citation to any case law, that Russell must provide "a physician's certification." Cleveland State either misunderstands what the legal claim is in this case, or is simply wrong as a matter of law in regard to what proof is required to establish an interference or retaliation claim under the FMLA.

In *Metroka-Cantelli v. USPS*, the defendant similarly argued that "Ms. Metroka-Cantelli cannot show it ever denied her FMLA leave because she never completed the leave request paperwork."⁵⁶ The court summarily rejected this claim noting that "Once again, this is not a requirement; the statute prohibits interference with "the exercise of or the attempt to

⁵⁶ *Metroka-Cantelli v. Postmaster Gen.*, 2013 U.S. Dist. LEXIS 158303, 16-19 (N.D. Ohio Nov. 5, 2013)

exercise” FMLA rights. 29 U.S.C. § 2615(a)(1).”⁵⁷ In fact, no paper work is required because “the FMLA’s accompanying regulation broadens interference claims to include those in which an employee has **not made a formal request.**” Indeed, “interference includes more than just denying **properly made leave applications.**”

Here, as in *Metroka-Cantelli*, Russell submitted a request for FMLA. He is protected from interference and retaliation based upon this request. The fact that Russell was fired before he could provide medical certification is irrelevant.

Courts have directly rejected Cleveland State’s argument, holding that “**in short, a “retaliation” claim does not require proof that the plaintiff actually suffered a “serious health condition,” only that the plaintiff gave adequate and timely notice to the employer that he or she needed leave for a condition that the plaintiff believed, in good faith, might be covered by the FMLA.**”⁵⁸ Here, there is no dispute that Russell gave Cleveland State adequate and timely notice. Nor is there any dispute that Plaintiff believed in good faith that he was covered by the FMLA for shoulder replacement surgery.

Notably, the federal regulations “speak in terms of whether an employee “may be” entitled to FMLA leave, and “[t]he critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee’s request to take time off for a serious health condition.”⁵⁹ The employee “need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed.”⁶⁰ Courts “emphasize that the employee’s duty is merely to place the employer on notice of a probable basis for FMLA leave. He doesn’t have to write a brief demonstrating a legal entitlement. He just has to give the employer enough information

⁵⁷ *Metroka-Cantelli v. Postmaster Gen.*, 2013 U.S. Dist. LEXIS 158303, 16-19 (N.D. Ohio Nov. 5, 2013)(original emphasis by the Court).

⁵⁸ *Johnson v. Dollar Gen.*, 880 F. Supp. 2d 967, 993-994 (N.D. Iowa 2012)

⁵⁹ *Easter v. Asurion Ins. Servs.*, 2015 U.S. Dist. LEXIS 27721, 11-13 (M.D. Tenn. Mar. 6, 2015) quoting *Walton v. Ford Motor Co.*, 424 F.3d 481, 486 (6th Cir. 2005) (emphasis added); *Brohm v. JH Props., Inc.*, 149 F.3d 517, 523 (6th Cir. 1998)).

⁶⁰ *Wallace*, 764 F.3d at 585 (quoting 29 C.F.R. § 825.303(b) (emphasis added));

to establish probable cause, as it were, to believe that he is entitled to FMLA leave.”⁶¹ Thus, Russell engaged in protected conduct when he put Cleveland State on notice of his need for medical leave. He did not need to file paperwork in order to invoke the protections of the FMLA.

Similarly, courts agree that there is no “magic paperwork” required to be protected by the FMLA. Oral requests are sufficient to “constitute a statutorily protected activity.”⁶² An employee only has to show that he “**may** need FMLA leave.”⁶³

Indeed, Judge Nugent of the Northern District of Ohio has 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.”⁶⁴ The FMLA protects citizens even before they complete a formal application.

Moreover, an “employer violates the FMLA if it requests medical certification and then terminates the employee before the fifteen day period has run, absent an independent legitimate reason for termination.”⁶⁵ Here, Cleveland State terminated Russell after he requested leave and before the fifteen-day period had run.

⁶¹ *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 953 (7th Cir. 2004).

⁶² *Coleman v. Ill. Dep’t of Human Servs.*, 2013 U.S. Dist. LEXIS 136366, 59-61 (N.D. Ill. Sept. 24, 2013) (“Although Coleman failed to give written notice to the human resources department **before** her disciplinary proceeding, her conversations with Hammond requesting FMLA leave were sufficient to constitute a statutorily protected activity.”).

⁶³ In order to benefit from the protections of the statute, an employee must provide [her] employer with enough information to show that [she] *may need FMLA leave*.” *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005). However, “[a]n employee need not invoke the FMLA by name in order to put an employer on notice that the Act may have relevance to the employee’s absence from work.” *Thorson v. Gemini, Inc.*, 205 F.3d 370, 381 (8th Cir. 2000). The employer’s duties arise “when the employee provides enough information to put the employer on notice that the employee *may be in need of FMLA leave*.” *Id.* (internal quotation marks omitted).

⁶⁴ *Brown v. Travel Centers of America, LLC*, Case No. 12-CV-1496, Slip. Op., p.4 (Nov. 27, 2013).

⁶⁵ *Adams v. Auto Rail Logistics, Inc.*, 504 Fed. Appx. 453, 456 (6th Cir. 2012); See *Killian v. Yorozu Auto. Tenn., Inc.*, 454 F.3d 549, 555 (6th Cir. 2006) (finding a violation of the FMLA when the employer terminated the employee six days after requesting additional certification).

Furthermore, medical certification is not needed for Russell's interference claim because "discouraging" Russell from requesting or taking FMLA leave constitutes illegal interference.⁶⁶ Banks' comment that Russell should not take leave, but should go back to his own office to "get healthy" is illegal interference

G. Cleveland State Retaliated Against Russell And Interfered With His FMLA Rights By Cancelling Russell's Medical Insurance Because He Would Not Waive His FMLA Claims.

Further evidence of Cleveland State's retaliation against Russell is the fact that Cleveland State approved, and then revoked, Russell's health insurance because Russell would not waive his FMLA and age discrimination claims. Cleveland State assured Russell that he would have health insurance coverage through November 30.⁶⁷ Since Medicare coverage started on December 1, Russell would be assured of health insurance.⁶⁸ However, Drnek next insisted that Russell waive all of his claims.⁶⁹ When Russell refused to waive his claims, Cleveland State revoked his health insurance on October 31st without warning or notice.⁷⁰ Russell, a 66-year old, who had already had a heart attack, and needed shoulder replacement surgery, was abruptly left without health insurance. Cleveland State retaliated against Russell's desire to invoke his FMLA rights by revoking his health insurance.

⁶⁶ "An employer violates the FMLA by **discouraging** or chilling employees from exercising their FMLA rights." *Harcourt v. Cincinnati Bell Tel. Co.*, 383 F. Supp. 2d 944, 962 (S.D. Ohio 2005); *See Saroli v. Automation & Modular Comp., Inc.*, 405 F.3d 446, 454 (6th Cir. 2005); *Bachelor v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1113 (9th Cir. 2001) ("The established understanding at the time the FMLA was enacted was that employer actions that deter employees' participation in protected activities constitute 'interference' or 'restraint' with the employees' exercise of their rights."); 29 C.F.R. § 825.220(b) ("'Interfering with' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but **discouraging** an employee from using such leave.").

⁶⁷ Russell, Tr. at 1949.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Russell, Tr. at 1950.

H. Damages: Plaintiffs Have Proven Their Damages.

1. Plaintiffs Only Need To Show Damages With “Reasonable” Certainty, Not With Precision.

Where, as here, the Plaintiffs have proven discrimination and the existence of some type of damage is established, “the evidence need only tend to show the basis for that computation of damages to a fair degree of probability.”⁷¹ Only reasonable certainty as to the amount of damages is required, which is that degree of certainty of which the nature of the case admits.⁷² Once the existence of damages is shown, mere uncertainty as to amount will not preclude recovery.⁷³ Moreover, the amount of damages is a decision for the fact-finder, and will not be disturbed “unless it lacks support from any competent, credible evidence.”⁷⁴

Here, Plaintiffs submitted the expert testimony of Dr. John Burke, an economist and former professor from Cleveland State.⁷⁵ Dr. Burke analyzed Plaintiffs’ salary and compensation, their work-life expectancy, and then, estimated the Plaintiffs’ amount of lost earning capacity within a reasonable degree of economic certainty.⁷⁶ This certainly meets the requirements of the law for proof of damages, and indeed, is far more precise than the law requires.

2. Dr. Burke Is A Recognized Expert Whose Analysis Has Been Repeatedly Supported by This Court, And On Appeal.

Specifically, Dr. Burke’s methodology has been accepted repeatedly in the Court of Claims

⁷¹ *Brewer v. Brothers* (1992), 82 Ohio App.3d 148, 611 N.E.2d 492 as cited by *Collins v. Mullinax E., Inc.*, 153 Ohio App. 3d 534, 539 (Ohio Ct. App., Ashtabula County 2003) See also *Srail v. RJF Int’l Corp.*, 126 Ohio App. 3d 689, 701-702 (Ohio Ct. App., Cuyahoga County 1998)(“Where the existence of damage is established, the evidence need only tend to show the basis for the computation of damages to a fair degree of probability. *Brewer v. Brothers* (1992), 82 Ohio App. 3d 148, 611 N.E.2d 492. Only reasonable certainty as to the amount of damages is required which is that degree of certainty of which the nature of the case admits. *Bemmes*, supra.”)

⁷² *Srail v. RJF Int’l Corp.*, (1998), 126 Ohio App.3d 689, 702, 711 N.E.2d 264 as cited by *Collins v. Mullinax E., Inc.*, 153 Ohio App. 3d 534, 539 (Ohio Ct. App., Ashtabula County 2003).

⁷³ *Collins*, supra.

⁷⁴ *Srail v. RJF Int’l Corp.*, 126 Ohio App. 3d 689, 701-702 (Ohio Ct. App., Cuyahoga County 1998)(“The assessment of damages is a matter within the province of the jury. *Litchfield v. Morris* (1985), 25 Ohio App. 3d 42, 495 N.E.2d 462. When reviewing a damages award, an appellate court must not reweigh the evidence, and may not disturb an award of damages unless it lacks support from any competent, credible evidence. *Bemmes v. Public Emp. Retirement Bd.* (1995), 102 Ohio App. 3d 782, 658 N.E.2d 31.”).

⁷⁵ Burke, Tr. at 616-698.

⁷⁶ *Id.*

since at least 2005⁷⁷, and in many other courts as well.⁷⁸ Dr. Burke's calculations have been repeatedly upheld on appeal.⁷⁹

Recently, the Ohio Attorney General challenged Dr. Burke's use of "future-earning capacity" in *Miller v. Ohio DOT* before the Court of Claims.⁸⁰ In *Miller*, as here⁸¹, "Dr. Burke explained that four factors are necessary to calculate an individual's expected earning capacity: (1) how long a person will be an active member of the workforce; (2) an individual's track record of pay and benefits in the work force; (3) future rate of pay and benefits; and (4) the interest rate."⁸² Based upon Dr. Burke's testimony of expected earning capacity, the Court of Claims awarded the plaintiff \$1,300,000.⁸³

As it does here, the Defendant challenged Dr. Burke's methodology. The Franklin County Court of Appeals rejected all of the State's challenges to Dr. Burke. In *Miller*, upholding Dr. Burke's calculations of lost earnings capacity, the Court of Appeals held that "[p]redictions about future-earning capacity are necessarily somewhat speculative." *Adae v. State*, 10th Dist. No. 12AP-406, 2013-Ohio-23, ¶ 39, citing *Andler v. Clear Channel Broadcasting, Inc.*, 670 F.3d 717, 726 (6th Cir.2012), citing *Eastman v. Stanley Works*, 180 Ohio App.3d 844, 2009-Ohio-634, 907 N.E.2d 768 (10th Dist.). "An exact calculation of what the plaintiff could have earned but for her injury is not required; the plaintiff must prove damages with reasonable certainty." *Id.*, citing *Andler* at 726, *Eastman* at ¶ 24."⁸⁴

⁷⁷ *Jones v. Ohio Veteran's Home*, 2005-Ohio-3960, P13-P15 (Ohio Ct. Cl. July 12, 2005)(awarding damages based upon testimony of Dr. John Burke regarding "loss of earning capacity."); *Reed v. Ohio DOT*, 2013-Ohio-1515, P25 (Ohio Ct. Cl. Feb. 4, 2013)("Dr. Burke offered credible, admissible testimony on the loss of Traci's future earnings and benefits.")

⁷⁸ See e.g. *Novovic v. Greyhound Lines, Inc.*, 2012 U.S. Dist. LEXIS 9203, 7 (S.D. Ohio Jan. 26, 2012); *Horne v. Colonial Life & Accident Ins. Co.*, 2008 U.S. Dist. LEXIS 11494, 1-4 (N.D. Ohio Feb. 15, 2008).

⁷⁹ *Srail v. RJF Int'l Corp.*, 126 Ohio App. 3d 689, 701-702 (Ohio Ct. App., Cuyahoga County 1998); *Patrick v. Painesville Commer. Props.*, 123 Ohio App. 3d 575, 586-587 (Ohio Ct. App., Lake County 1997);

⁸⁰ 2013-Ohio-3635, P16-P20 (Ohio Ct. Cl. Apr. 4, 2013)

⁸¹ Burke, Tr. at 635-44.

⁸² *Miller v. Ohio DOT*, 2013-Ohio-3635, P16 (Ohio Ct. Cl. Apr. 4, 2013)

⁸³ *Miller v. Ohio DOT*, 2013-Ohio-3635, P20 (Ohio Ct. Cl. Apr. 4, 2013)

⁸⁴ *Miller v. Ohio DOT*, 2014-Ohio-3738, P78 (Ohio Ct. App., Franklin County Aug. 28, 2014)

Here, Dr. Burke's calculations -- as in *Miller, supra* -- more than satisfy the need to prove damages with reasonable certainty. Dr. Burke used the same methodology that was upheld in *Miller*. Accordingly, the Court has sufficient evidence for the calculation of the damages awards in this case.

I. Damages: Cleveland State Has Not Submitted Evidence Sufficient to Support Its Burden To Prove an Affirmative Defense of Mitigation.

1. Burden of Proof: Mitigation Is An Affirmative Defense For Which Cleveland State Bears The Burden of Proof.

Mitigation of damages "incurred from a wrongful termination is an affirmative defense with the burden of proof resting on the employer."⁸⁵ To "establish the defense, an employer must offer evidence proving the amount the wrongfully terminated employee earned, or in the exercise of due diligence, could have earned in appropriate employment during the period of exclusion."⁸⁶

The employer must prove that the jobs in question were similar because a "wrongfully terminated employee need only accept 'similar' employment in mitigation."⁸⁷ Moreover, just as a plaintiff must prove his damages to a reasonable degree of certainty, the employer must similarly prove the amount of purported mitigation that should be subtracted from the plaintiff's damages.⁸⁸

The employer must also prove that the offer was unconditional.⁸⁹

⁸⁵ *Moore v. Johnson*, 1997 Ohio App. LEXIS 5603, 21 (Ohio Ct. App., Franklin County Dec. 11, 1997) citing State ex rel. *Martin v. Columbus* (1979), 58 Ohio St. 2d 261, 389 N.E.2d 1123, paragraph three of the syllabus.

⁸⁶ *Id.* citing *Martin*, *supr.*, at paragraph two of the syllabus.

⁸⁷ *Id.* at 264.

⁸⁸ *Bertolini v. Whitehall City Sch. Dist.*, 2003-Ohio-2578, P46 (Ohio Ct. App., Franklin County May 20, 2003)("[I]n accordance with the *Martin* court's analysis, when calculating the correct reduction from the wronged employee's back pay award "* * * the burden of showing what an employee earned during the period of wrongful discharge rests upon the employer." State ex rel. *Martin v. Bexley City School Dist. Bd. of Edn.*(1988), 39 Ohio St.3d 36, 39, 528 N.E.2d 1250, citing *Hamlin*, *supra*.").

⁸⁹ See, e.g., *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232, 73 L. Ed. 2d 721, 102 S. Ct. 3057 (1982)(offer of reinstatement must be unconditional); *Madden v. Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 678 (6th Cir. Tenn. 2008)(where offer was not unconditional it did not serve to mitigate damages); *Nagarajan v. Tennessee State Univ.*, 1999 U.S. App. LEXIS 16950, 11-13 (6th Cir. Tenn. July 19, 1999); *Consol. Freightways*, 892 F.2d at 1056 (noting that it is "incumbent on the [employer] to extend to the injured employee a facially valid offer of reinstatement before the burden shifts to the injured employee to accept or reject the offer" (citation and internal quotation marks omitted)); *NLRB v. Seligman & Assoc.*, 808 F.2d 1155, 1163 (6th Cir. 1986)(noting that "an employee is under no obligation to decide whether to accept reinstatement until an unconditional offer of reinstatement is made").

Where an employer claims that it made an unconditional offer of reemployment, the employer must prove:

(1) the offer of a position comparable to the former position in terms of status, duties, responsibilities, working conditions, and opportunities for advancement;

(2) the offer must be more than a mere promise of a job, i.e. the offer must be specific and concrete in its terms, proposed location, fringe benefits, moving expenses, etc.; [and]

(3) the rejection of this offer by the plaintiff must be unreasonable.⁹⁰

All that Cleveland State offers on this subject is that “there was one position that had been verified that he had the **potential** to bump into....” (Post-Trial Brief p. 7). If this is Cleveland State’s attempt to claim a set-off, it fails. Cleveland State offers no legal authority, because there is no legal authority, for the proposition that the mere **potential** to bump into a position, with no specifics of the position or the salary, suffices to prove a mitigation defense.

2. Mitigation: Russell Has Attempted To Mitigate His Damages By Sending Out More Than 100 Resumes to Nearly Every College in Ohio.

A plaintiff must simply use “ordinary diligence to obtain similar employment in the same vicinity.”⁹¹ Bill Russell has been working long hours since he was a boy when he had to support his disabled father. By the time CSU fired him at age 66, Russell had been working more than fifty years and was not ready to stop. In need of health care coverage for his heart condition and shoulder-replacement surgery, Russell sent out more than 100 resumes to colleges, law firms and accounting firms.⁹² Russell has looked far beyond Northern Ohio, seeking jobs from “pretty much every college in Ohio”, including Miami of Ohio, Ohio University and other colleges throughout the state.⁹³ Russell has used far more than “ordinary diligence” and has looked far beyond the “vicinity” of Northern Ohio.

⁹⁰ *Coates v. National Cash Register Co.*, 433 F. Supp. 655, 662-663 (W.D. Va. 1977).

⁹¹ *Berge v. Columbus Community Cable Access*, 136 Ohio App. 281, 327 (Ohio Ct. App. Franklin County 1999).

⁹² Russell, Tr. at 449-50; See also Ex. 351.

⁹³ Russell, Tr. at 449-50.

3. **No Unconditional Offer: Cleveland State Never Offered Russell A Comparable Job.**

Cleveland State claims that Vartorella briefly mentioned in passing that Russell might be able to apply to pursue his bumping rights to an unspecified, undisclosed job with unknown duties and unknown requirements. It does not claim that this was an unconditional offer of employment, nor does it offer evidence of similarity in responsibilities or in pay. Employers are not permitted to have ambiguous discussions, never put anything in writing, and then claim that they made a comparable job offer.⁹⁴ Courts have held that the validity of reinstatement offer depends on “the employee’s perception of the reinstatement offer in determining whether the offer tolled the company’s backpay liability.”⁹⁵ Cleveland State cannot prove that it made an unconditional offer of a similar job to Russell because it is not true. Russell never understood that Cleveland State made any offer.

Here, Russell testified unequivocally that:

Q: Were you ever offered any position at Cleveland State after your termination?

A: No.⁹⁶

Russell also testified that during this two-minute conversation that Vartorella “never identified the job, never told me the salary, never told me anything about the job other than that I was not qualified for it.”⁹⁷ Vartorella never told Russell the hours or “anything that would allow [Russell] to determine whether or not it was comparable to what [Russell] was doing before.”⁹⁸

⁹⁴ *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1056 (D.C. Cir. 1989) citing *See Hribar Trucking, Inc.*, 166 N.L.R.B. 745, 756 n.19 (1967), *enforced in part*, 406 F.2d 854 (7th Cir. 1969); *Eastern Die Co.*, 142 N.L.R.B. 601, 604 (1963), *enforced*, 340 F.2d 607 (1st Cir.), *cert. denied*, 381 U.S. 951, 14 L. Ed. 2d 724, 85 S. Ct. 1804 (1965); *Ekco Prods. Co.*, 117 N.L.R.B. 137, 150, 152 (1957).

⁹⁵ *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1056 (D.C. Cir. 1989) citing *See Hribar Trucking, Inc.*, 166 N.L.R.B. 745, 756 n.19 (1967), *enforced in part*, 406 F.2d 854 (7th Cir. 1969); *Eastern Die Co.*, 142 N.L.R.B. 601, 604 (1963), *enforced*, 340 F.2d 607 (1st Cir.), *cert. denied*, 381 U.S. 951, 14 L. Ed. 2d 724, 85 S. Ct. 1804 (1965); *Ekco Prods. Co.*, 117 N.L.R.B. 137, 150, 152 (1957).

⁹⁶ Russell, Tr. at 467.

⁹⁷ Russell, Tr. at 1946.

⁹⁸ Russell, Tr. at 1947.

Vartorella testified in agreement that “we do not give the employee the name of the position or the name of the department”⁹⁹ and that “[Russell] did not get a copy of the job description.”¹⁰⁰ Indeed, Vartorella agreed that there was never an offer, just a “mapping out what the process would be” if he were interested, but then Russell would also have to jump through several more hoops including: “a meeting in Human Resources with Bill and with the supervisor of that position. [Russell] would not have the information of the position or the person or any of that until the actual day of the meeting.”¹⁰¹

Q. Well, you agree you didn’t provide him with any details of the job, right, you talked about it in passing?

A. I said that. **I said what our process was. I’ve described to you what that process was.**

Q. Okay. To your knowledge, is there any document where Bill Russell turned down your job offer or your bumping rights?

A. And, again, I believe I’ve answered that question, but, no, there is not.

Q. Okay. So just so we’re all clear and the Court is clear, no document exists in which Bill Russell turned down any bumping rights for any job, correct?

MS. SIMMONS: Objection.

THE COURT: Overruled.

Q. Correct?

A. Correct.¹⁰²

Furthermore, it is clear that Cleveland State never made an unconditional offer of a similar job to Russell because Cleveland State requires all job offers to be in writing:

Q. What do you understand Cleveland State’s requirements to be regarding the

⁹⁹ Vartorella, Tr. at 1761.

¹⁰⁰ Vartorella, Tr. at 1762.

¹⁰¹ Vartorella, Tr. at 1764.

¹⁰² Vartorella, Tr. at 1910-1911

making of job offers? Do you understand there to be a requirement? There's an offer letter, correct?

A. There is.

Q. Okay. For a job to be offered, a letter has to be submitted to the applicant or the employee indicating that job, correct?

A. Correct.¹⁰³

Vartorella could not have offered Russell a job because he never put it in writing:

Q. Okay. It's also true that you never put anything in writing to [Russell], right?

A. I did not.

Q. Okay. And it's true that you never sent him a notice that any jobs were available, correct?

A. The notice took place face-to-face in a meeting.

Q. I just want to be clear. You never sent him anything in writing indicating that any jobs were available to him, did you?

2 A. I did not.¹⁰⁴

Cleveland State does not make oral job offers. By rule, job offers at Cleveland State must be written.

Furthermore, Vartorella has never had authority to make a job offer to anyone:

Q. And, in fact, you don't -- you are not a hiring manager, are you?

A. I am not.

Q. You don't have authority to hire or fire, do you?

A. I do not.

Q. And you don't have authority to make a binding commitment on behalf of Cleveland State to hire anyone, right?

A. I do not.

¹⁰³ Vartorella, Tr. at 1432-1433.

¹⁰⁴ Vartorella, Tr. at 1395-1396.

Q. Okay. And, in fact, you never gave a letter to Mr. Russell regarding any jobs that he could take at Cleveland State, correct?

A. Correct.¹⁰⁵

Cleveland State never offered Russell a job. Therefore, its mitigation defense fails as a matter of law.

4. **Reality Check: Russell Needed Surgery And Never Would Have Rejected A Job That Provided Health Insurance.**

Cleveland State's story is simply not credible. Russell had a heart condition and needed shoulder replacement surgery. He would have taken any job that provided health care. Continuing at Cleveland State would also permit him to take FMLA leave. Russell testified:

Q: If you had been offered a job by Cleveland State, would you have taken it?

MR. KNUTTI: Objection.

THE COURT: Overruled.

A: Of course I would have.

Q: And why would you have taken it?

A: Because of health care coverage, besides, if I were offered a job, I was set to go out on FMLA leave, I had roughly ten weeks, two and a half months to get the surgery, get the rehab, and then make a decision sometime thereafter as to what I was going to do.¹⁰⁶

Cleveland State's assertion that it offered Russell a job is simply not true. If it had, Russell would have taken the job for the health care benefits that he so desperately needed.

5. **Amount: No Evidence of Amount to Subtract as Mitigation.**

a. **No Evidence of Amount of Salary of Purported Job Offer.**

Assuming that Russell rejected an unconditional job offer – which he never did – Cleveland State has the burden of proving the amount of the purported mitigation.¹⁰⁷ Cleveland State must

¹⁰⁵ Vartorella, Tr. at 1433.

¹⁰⁶ Russell, Tr. at 1951.

¹⁰⁷ *Bertolini v. Whitehall City Sch. Dist.*, 2003-Ohio-2578, P46 (Ohio Ct. App., Franklin County May 20, 2003)(“Still,

provide evidence of the amount that Russell would have earned. There is simply no such evidence. The Court cannot guess as to the amount.

b. **Cleveland State Cannot Argue On The One Hand That The Expert Testimony From Dr. Burke Is Inadequate, But Then Claim That Cleveland State Has Met Its Own Burden Of Proving The Amount Of Mitigation.**

In claiming that Plaintiffs failed to produce evidence of their damages, Cleveland State asserts that Dr. Burke's expert testimony was inadequate. In contrast to the Defendant's unsupported assertions of economic mitigation, Dr. Burke described his methodology, explained his conclusions, and testified that they were reached within a reasonable degree of economic certainty.

Cleveland State cannot have it both ways: Cleveland State has provided **no evidence** of the amounts that Cleveland State claims should be subtracted for Russell's purported failure to mitigate. Cleveland State bears the burden of proving these amounts. Yet, Cleveland State has failed to meet its burden of proof. It provided: no expert testimony; no pay stubs; no calculations of interest rates or future pay; or any admissible evidence. There is simply no evidentiary basis to subtract anything from the damages calculated by Dr. Burke.

6. **Similarity: Cleveland State Failed To Meet Its Burden Of Proving That it Offered Russell A Similar Job.**

Cleveland State bears the burden of proving that it offered Russell a job and that the job was "similar" to his prior work as the head of Greek Life.¹⁰⁸ Vartorella testified:

Q. Without being able to compare the job description of what Mr. Russell did and the job description of what you claimed you offered him, it's not possible to determine whether those jobs are reasonably comparable?

in accordance with the *Martin* court's analysis, when calculating the correct reduction from the wronged employee's back pay award " * * * the burden of showing what an employee *earned* during the period of wrongful discharge rests upon the employer.") citing *State ex rel. Martin v. Bexley City School Dist. Bd. of Edn.* (1988), 39 Ohio St.3d 36, 39, 528 N.E.2d1250.

A. Correct.¹⁰⁹

Because Cleveland State never told this Court – or Russell – the job description of the position in question, it is not possible to determine that the two jobs were similar. Cleveland State cannot prove any amount of mitigation because it failed to meet its burden of proving that the jobs are “similar.”

J. The Court Should Enter The Full Amount of Damages Requested.

Banks, Drnek and Cleveland State have demonstrated how age discrimination works in modern America: purported “reorganizations,” false consultants, whispered claims regarding qualifications, shifting ambiguous explanations, and shifting decision-makers.

First, Banks and Drnek designed a plan that eliminated older workers, but claimed it was a “reorganization.” Banks had already written new job descriptions and the new “org chart.” In order to cover-up their preconceived decision, they hired TW Cauthen a close friend to falsely hold himself out as an independent consultant, even though they told him who to talk to, what to read, what his opinions would be and designed the organizational structure. Then, Banks and Drnek claimed that the reorganization was based upon the work of an independent consultant. Assuming that he would never be discovered, Drnek quietly lied about Liss’ qualifications to Walker in order to justify Liss’ termination, and the promotion of younger workers. Drnek and Banks consistently lied until confronted – and then they changed their stories. Whether it was their false interrogatories, deposition testimony or testimony at trial, Cleveland State’s witnesses said whatever was convenient.

Now that it has been caught, Cleveland State is trying sweep everything under the rug. Quietly, everyone involved has been removed from Student Life. Drnek has gone to work at California State-Bakersfield. After claiming he did not like Midwestern winters, Banks is leaving

for Indiana State University in Terre Haute, Indiana. Vartorella has been reassigned to be watched in the Legal Department. This is how modern bureaucracies address the problem: they move people around to hide the problem without correcting it. Cleveland State is an enabler. Banks and Drnek will leave to do the same thing in other places. And Cleveland State will not change.

None of them are repentant: After admitting that he lied about Liss, Drnek testified that he would do it all again. So would Banks. And Vartorella testified that Cleveland State would do everything the same way. Cleveland State refuses to change: even Ms. Whyte testified that -- even though she was supposed to neutrally evaluate Liss' internal complaint -- there was nothing that would have changed her mind or led to reinstatement.¹¹⁰ Cleveland State knows that its conduct was wrong, but it will never change unless this Court forces it to do so.

Our system of justice cannot function if litigants are permitted to dissemble in Court. Cleveland State's witnesses -- especially Banks -- were shocking. This Court needs to take their conduct into account and also make Liss and Russell whole. Cleveland State has rid itself of Banks and Drnek. But it has done nothing to reverse the destruction of the careers of Liss and Russell. Only this Court can make them whole.

IV. CONCLUSION

Cleveland State cannot escape from the totality of the evidence demonstrating discrimination against the Plaintiffs, displayed in its words, its conduct, and the plain statistics. 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 concocted a report and 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.

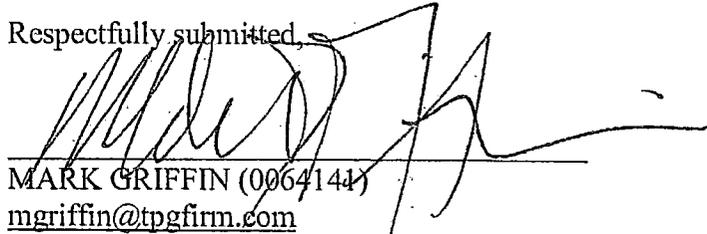
¹¹⁰ Whyte, Tr. at 1544.

This conduct is telling evidence of discrimination.

Cleveland State discriminated against Liss on basis of his age. The Court should render judgment against Cleveland State and in favor of Steve Liss in the amount of \$1,197,515, plus interest, attorneys fees and costs.

Cleveland State discriminated against Bill Russell on the basis of age, interfered with his FMLA rights, and retaliated against him for the exercise of those rights. The Court should render judgment against Cleveland State and in favor of Bill Russell in the amount of \$732,391, plus interest, attorneys fees and costs.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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Appendix A

Plaintiffs' Responses to Specific Assertions Made In Cleveland State's Post-Trial Brief

- Pages 1-4:** The first several pages of Cleveland State's Post Trial Brief focus heavily on purported issues of Plaintiffs' performance. These claims are false – and contradicted by Cleveland State's own evaluations of Liss and Russell. Liss and Russell consistently received outstanding evaluations from Drnek and others. Cleveland State's newly-invented performance claims are simply made up in order to justify terminations for which there is no other explanation than age discrimination.
- Pages 1-4:** Cleveland State relies heavily on Bergmann's testimony. Banks and Drnek were completely discredited. Bergmann is similarly discredited by virtue of: (a) the fact that his deposition testimony was impeached several times by his own trial testimony – thus calling into question his credibility, and (b) the fact the he misrepresented himself as Assistant Dean for more than nine months as a result of the “sham” audit process implemented by CSU for the younger staff.
- Page 1:** Cleveland State did NOT encourage Liss to apply for Student Life jobs. In fact, Vartorella falsely told Liss that he had already been vetted and CSU's HR department determined that Liss was not qualified. Moreover, Bergman and Johnston were given promotions and never had to apply.
- Page 1:** Liss' efforts to pursue jobs at CSU were not half-hearted. Liss submitted resumes, went to interviews and sued to seek reinstatement.
- Page 1:** The newly-created positions were not filled by more qualified candidates. In every case, Liss was ranked more highly than the younger candidates. Courson did not even meet the minimum qualifications, yet was hired. Similarly, Bergmann and Johnston did not fully meet all of the minimum qualifications for their jobs. Bergman was far from “more qualified” as he was criticized for his poor attendance, sexist remarks, and poor work habits.

Page 2: Cleveland State has claimed that it was moving away from commuters for 50 years. CSU has been around 50 years, and over those 50 has always sought to transition from a commuter school. Banks hiring was nothing new in that area.

Page 2: Cleveland State tries to minimize Banks' ageist language. In fact, even Banks' own friend TW Cauthen testified that Banks' disparaged things as "old school." Cauthen Dep. at 141.

Page 2: Cleveland State now claims that Liss and Russell had poor performance and were not "model employees." This contradicts Cleveland State's own performance reviews prior to Banks' arrival. Russell's 20 years of Adjunct Evaluations and 12 years of DSL Greek Coordinator Evaluations establish that his performance was excellent. Moreover, the current serious Greek problems on other campuses (including the CSU rape), highlight significantly what Russell accomplished in his job with part time status, no assistants, and a minimum budget. He was nominated three times for the highest honor available to professional staff.

Page 2: Without any detail or evidence, Cleveland State claims Plaintiffs' work actions were "borderline illegal." Again, this emphasis on performance contradicts the prior pretext and is evidence of discriminatory animus. It is also false. Plaintiffs' performance reviews prior to Banks' arrival were outstanding. There is also absolutely nothing in writing to support the "illegal" assertion because it is untrue. These new claims are simply Cleveland State's efforts to smear two excellent employees. They also can serve no purpose other than such smearing because they could not have influenced the decisions to terminate Liss and Russell because they were purportedly discovered after the decisions had been made.

Page 2: Cleveland State hired Russell as an Adjunct in 1978-79, complemented him since Russell would bring practical-real life experiences and modern theory examples of tax law practice to his students, quite valuable given his extensive CSU background up to that time. Russell's evaluations for the next 20 years

emphasized those attributes. What was true in 1978-79, was true in Russell's Greek Coordinator role years later.

Page 2: Student Organization files had already moved to an electronic format before Plaintiffs' terminations – a result of Liss' work to implement OrgSync.

Page 2: Long defunct groups like "Students for Dukakis" were absolutely **not** being treated as active prior to Plaintiffs' terminations. Rather, Bergmann just did not know how to make sense of Plaintiffs' files and record keeping systems. Plaintiffs' kept records in a special "historical file" for non-active groups as a way to preserve information regarding past activity on campus; this was per recommendation of the University Auditing Office.

Page 2: Cleveland State claims that Banks' "old dog / new tricks" comment came five months before the reorganization. In fact, it was actually in late April during the same time period that Banks was preparing new organizational charts and planning Plaintiffs eliminations.

Page 2: OrgSync was 100% fully up and running as an optional tool by late October, 2011. It was 100% in use as a mandatory element for student organization files/paperwork by July 1, 2012 (more than two months before Plaintiffs were fired).

Page 3: Russell on numerous occasions requested access to student grades in order to avoid self-reporting. Each time, he was refused. Only after a younger coordinator took over was that younger person allowed to access grades directly.

Page 3: Bergmann's assertion about Greek Grade Point Averages is impossible. Bergmann managed the Student Center and had virtually no responsibilities for Greek groups. Cleveland State typically found that Greeks had a total GPA of approximately 2.8; if the actual average were a full point lower – the overall Greek average would have been at 1.8 – meaning that the great majority of the Greek students would have been on academic probation or expelled for poor grades – which obviously did not happen. In fact, several Greeks carried 4.0

GPA's, and during Russell's last year, sorority member Megan Mcgervey was CSU Valedictorian. Banks did not compare apples to apples in his claim.

Page 3: The organizational structure that was "walled off" and non-functioning was supported by Drnek for 4.5 years (during which he completed a 2009/10 reorganization for the CSI unit including a new title and raise for Mary Myers).

Page 4: The "silos" in both the temporary office space and the new Student Center were created by Drnek (he determined staff placement in both locations).

Page 4: Liss did not refuse to take on duties related to Leadership and Service. In fact, Liss took on more than Drnek requested by virtue of advising Viking Expeditions, Chairing the Leadership & Service Team, and teaching the Honors Service Learning Class.

Page 5: Cleveland State asserts that Drnek determined that Liss was not an effective manager. In fact, Drnek consistently gave Liss outstanding performance evaluations.

Page 5: Liss was not afraid of his staff and certainly never indicated to anyone that he was afraid of Mary Myers or Russell Russell.

Page 5: Liss did not refuse to hold Mary Myers accountable in the situation where she solicited money from students – In fact, Liss was the first to confront/confirm the activity with her – and Liss handled the rest of the matter as he was directed by Drnek.

Page 5: Cleveland State asserts Liss supported the reprimand of Russell until Liss got pushback from him – this is 100% untrue – as documented by Banks' own notes that were introduced at trial. In addition, Liss proved at trial that Banks mandated the reprimand and also wrote the language in the reprimands.

Page 5: Cleveland State totally misrepresents the nature of Liss' late April (or early May) meeting with Vartorella. Liss' trial testimony makes this clear. The meeting was scheduled primarily so that Liss could express concerns about Banks' ageist

treatment of Liss' staff. And, of course, Liss was not sweating profusely. This is absurd.

Page 6: Cleveland State asserts Drnek reorganized Student Life to establish collegiality and collaboration – but Russell and Liss were never in any instance accused of failing to perform in these regards. Plaintiffs' performance reviews again undermine Cleveland State's new claims.

Pages 7: Cleveland State's claim that "Student Life has blossomed since the Reorganization" is untrue. Since the terminations of Liss and Russell, there are fewer student groups, fewer Greek students, the first rape charge in 114 years, the loss of National African-American chapters, loss of Nu Alpha Psi (all over 40 sorority), absolutely no alumni involvement, along with loss of alumni donations, and thousands of less community service hours by Greek orgs. Drnek has left and Banks has been driven out. According to Lenhart, it is commonly called the Department of Student Death with staff rarely showing up to work on time and little activity in the offices.

Page 8: Cleveland State claims that Drnek had 400 employees in trying to minimize the discrimination claims; this is absolutely not true. Here is a listing of the number of professional staff Drnek had reporting to him at the time Plaintiffs were terminated: Student Life - 11; Women's Center - 1; Veteran's Center - 1; Counseling Center - 7; Health Center - 4 (total = 24). Drnek also shared supervisory duties with another administrator (Clare Rahm) for these two areas: Residence Life - 8; Recreation Center - 10. Adding these folks brings the total to 42. Even if Cleveland State added all of the part-time student employees in these areas, it would come up with a total of less than 165.

Page 9: Every time that Russell met with Banks directly, he made specific ageist comments. The words were followed up by Banks' deeds, whereby he canceled programs and events under the claim of "old fashioned", "need to get into the 21st Century", "old school approach never the best approach", change Russell's "old

school ways", etc. However, most of Russell's programs and events are used today under a different name.

Russell also put into writing to the Union, that Banks was discriminating against him due to his age, and his belief that Banks was trying to "force me to leave (retire) before I planned to".

These were not stray or ambiguous remarks. They were direct commands by Banks, and given each time Russell tried to implement popular, traditional events. The events were also not necessarily Russell's initiation (e.g. the Greek Yearbook recruiting tool initiated by Greek Council representatives that had spent money and months in preparation), but Banks' actions so dominated the Greek landscape in the few months after he started that for the first time in Russell's 12 years on the job, there was student unrest. The concern was so great that in those few months after Banks started, the students compiled a Grievance that they wanted to file and took their Grievance to Student Government on Aug. 22, 2012 for resolution. At that meeting, and in an attempt to support Banks by first letting him know it was coming, and then requesting the students not file it, Russell tried to defuse the situation.

Cleveland State's claim that Banks' words were run-of-the-mill ignores the impact that they had on the students and alumni that assisted Russell in taking Greek Life from near extinction in 2000, to far and away the most engaged group of students on the CSU campus.

Page 11: As testified to, Russell's surgery was first delayed by the 4 cardiac tests after he had, per protocol, notified appropriate parties of his need for FMLA. Final clearance from Cardiologist Dr. Fares, came July 22, and surgery set with Dr. Laura Beverly, for Sept. 14.

But for his termination, Russell would have had surgery on Sept. 14. The final certification was a mere formality when Russell went in for pre admission review the day before. CSU had approved FMLA leave already.

When termination occurred 9 days before surgery and Russell's CSU health care coverage would end before rehab, Russell had to ask for a delay of surgery, pending his request for an extension of CSU coverage. Not only did CSU mandate that Russell sign a waiver of his rights to consider a slight extension, but after notifying Medicare that he would have health care coverage until December when Medicare would kick in, CSU revoked that agreement at the last possible moment, leaving Russell without health care as of Oct. 31.

After several delays, mostly caused by the changes in coverage, and the life threatening cancer issues of Russell's daughter and son in law, Russell is now back on track with a new orthopedic surgeon, Dr. Evans, and began treatment of his shoulder replacement problem on Jan. 27.