

ORIGINAL
IN THE OHIO COURT OF CLAIMS

FILED
COURT OF CLAIMS
OF OHIO

2015 MAR 25 PM 3:55

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 REPLY BRIEF

I. OVERVIEW

Throughout this case, William Russell and Steven Liss have struggled to explain just what their claims are and what evidence supports them. In his complaint, Mr. Liss pled an age-discrimination claim and promised to add a disability-discrimination claim, but that never materialized, and he and Mr. Russell were left only with age-discrimination claims.¹ Initially, the linchpin of those age claims appeared to be the fact that Willie Banks—the CSU Associate Dean toward whom they direct the bulk of their animosity—is gay and the consultant he hired to analyze the Department of Student Life is gay too. But they never managed to explain how either man's

¹ See Complaint at ¶2, n. 1 (“Liss will, upon amendment of the complaint at a later date, assert claims under 42 U.S.C. § 12101 et seq. (Americans with Disabilities Act, as amended) . . . once the claim is perfected following the issuance of a “Notice Right-to-Sue” by the U.S. Equal Employment Opportunity Commission.”).

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sexual orientation could pass as proof of age-discrimination.² Instead, they turned to an argument based on the so-called “inexorable zero” theory. But CSU explained that that argument was nonsensical and that they lacked standing to make it, and they never mentioned it again.³ Next up was their would-be disparate-impact claim. They filed no such claim, and the facts of this case could never give rise to one, but they did use the term “disparate impact” once in opposing summary judgment.⁴ And at the close of trial, they promised that they would include their “evidence” of disparate impact in their brief.⁵ But they have now abandoned that argument too. Their brief does not address the issue at all.

Their new argument—their last and best hope, which first appears in their post-trial brief—is that they can win their age-discrimination claims without proving that they were laid off “because of” age-discrimination.⁶ Instead, they say, they can win those claims merely by proving that their ages were a “motivating factor” that “made a difference” in the decision-making. *Id.* What their own cases make clear but their brief does not is that the “motivating factor” standard is unique to Title VII claims because that statute explicitly uses the term “motivating factor.” *But they have not filed Title VII claims, and Title VII does not even apply to age discrimination.* In short, their

² See, e.g., Mr. Russell and Mr. Liss’s proposed Reply in Support of Motion to Compel Defendant to Produce Dr. Berkman for Deposition at 2 (describing Dr. Banks’s relationship with Dr. Cauthen, which is platonic, as “spectacularly relevant” to their age-discrimination claims but offering no hint why).

³ See Plaintiffs’ Consolidated Memorandum in Opposition to Defendant’s Motion for Summary Judgment at 13-14. See also CSU’s proposed Reply in Support of its Motion for Summary Judgment at 2, 6-7.

⁴ See Plaintiffs’ Consolidated Memorandum in Opposition to Defendant’s Motion for Summary Judgment at 22.

⁵ See Tr. at 1972-73 (THE COURT: “Okay. And so if there is a disparate impact claim, I’d like for you to brief what you’ve presented as evidence for disparate impact. MR. GRIFFIN: “Okay. We will.”).

⁶ See Post-Trial Brief at 64, n. 296, citing, among other cases, *Price Waterhouse v Hopkins*, 490 U.S. 228, 240-41 (1989) and *Gross v FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009).

newest argument is as frivolous as those that preceded it. And the half-truths and outright misrepresentations that litter nearly every page of their brief cannot be ignored.

II. MR. RUSSELL AND MR. LISS ARE TWO INDIVIDUAL PLAINTIFFS, AND THEY ARE REQUIRED TO PROVE THEIR AGE-DISCRIMINATION CLAIMS IN THE USUAL WAY—WITH PROOF THAT THEY WERE TERMINATED “BECAUSE OF THEIR AGE.”

This is not a pattern-and-practice case or a disparate-impact case or a hostile-workplace case or a class action. It is just a garden-variety age-discrimination case under the ADEA and R.C. 4112. The ADEA makes it unlawful for an employer “to discriminate against any individual . . . *because of* such individual’s age.” 29 U.S.C. §623(a)(1)(emphasis added). And R.C. 4112.02(A) makes it unlawful for an employer, “*because of the . . . age . . . of any person . . . to discriminate against that person.*” (Emphasis added) In contrast, Title VII claims—which apply only to “race, color, religion, sex, [and] national origin”—warrant a more lenient standard of proof. Under Title VII, “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin *was a motivating factor* for any employment practice, *even though other factors also motivated the practice.*” 42 U.S.C. §2000e-2(m) (emphasis added). And, if a Title VII plaintiff meets that minimal standard, the entire *burden of persuasion*—not just the burden of production—shifts to the employer to demonstrate that it “would have taken the same action in the absence of the impermissible motivating factor.” 42 U.S.C. §2000e-5(g)(2)(B).

It would not have taken Mr. Russell and Mr. Liss much time to research all of this. After all, their argument that “plaintiffs do not have to prove that age was the only reason for the adverse employment action” rests on two main cases—*Price Waterhouse v Hopkins*, 490 U.S. 228, 240-41 (1989) and *Gross v FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009)—and they cite both of those cases in the same footnote. See Brief at 64, n. 296. And *Gross* itself explains exactly why Mr. Russell’s and Mr. Liss’s argument is wrong:

The words “because of” mean “by reason of: on account of.” 1

Webster's Third New International Dictionary 194 (1966); see also 1 Oxford English Dictionary 746 (1933) (defining "because of" to mean "By reason of, on account of" (italics in original)); The Random House Dictionary of the English Language 132 (1966) (defining "because" to mean "by reason; on account"). *Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act.*

* * *

It follows, then, that under §623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the "but-for" cause of the employer's adverse action. Indeed, we have previously held that the burden is allocated in this manner in ADEA cases.

129 S.Ct. 2343, 2350-2351 (emphasis added). Mr. Russell's and Mr. Liss's attempt at lowering the required standard of proof implicitly recognizes that they cannot meet the "but for" standard.

III. MR. RUSSELL'S AND MR. LISS'S AGE-DISCRIMINATION CLAIMS ARE BASED ON STRAY REMARKS, ONLY ONE OF WHICH— "OLD DOGS CAN'T LEARN NEW TRICKS"— COULD EVER BE CONSTRUED AS AGEIST. THE ONLY PERSON WHO CLAIMS TO HAVE HEARD DR. BANKS MAKE THAT REMARK IS MR. LISS, WHO CONCEDES THAT IT WAS NOT DIRECTED TOWARD HIM. MOREOVER, THOUGH THEIR BRIEF IGNORES THE POINT, DR. BANKS TESTIFIED THAT IT WAS MR. LISS WHO ACTUALLY MADE THAT REMARK.

Mr. Russell and Mr. Liss stake their case on a laundry list of words and phrases that they say were ageist and that they say offended them— "old fashioned," "21st century," "up to date," "outdated," "old school," "elephant in the room," and "old dogs can't learn new tricks." *See* Brief at 72-73. The first five of those are common phrases that could never be construed as direct evidence of age discrimination. *See, e.g., Pearson v City of Manhattan*, 33 F.Supp. 2d 1306, 1315 (D. Kan. 1999) ("[N]ot every reference to the word 'old' indicates that the person speaking is talking about a person's age. . . . Just as a twenty year old man can be considered 'old fashioned,' so can anyone, of any age, be considered to be part of an 'old boy's club' or have 'old ways.' These comments are clearly not direct evidence that the plaintiff's age was a determining factor in his dismissal."); *Ridegauer v Martin Marietta Materials, Inc.*, 55 F.Supp. 2d, 899, 905 (C.D. Ill. 1999) ("the term 'old-

fashioned' relates to style, not age and, therefore, does not constitute direct evidence of age discrimination and is not probative of an intent to discriminate based upon age.”). Mr. Russell and Mr. Liss appear to be the only plaintiffs who have ever argued that the sixth phrase— “the elephant in the room”— refers to the elephant’s age rather than its size, but courts in discrimination cases do sometimes use that phrase *as a way of showing that there is no evidence of discrimination*. See, e.g., *Perry v Clinton*, 831 F.Supp. 2d 1 (D. D.C. 2011) at *16 (“Furthermore, throughout Ms. Perry’s attempts to show pretext, the elephant in the room is the absence of any evidence that any person with influence over her grade level was actually motivated by racism or sexism.”).

As a purely academic matter, that leaves Mr. Russell and Mr. Liss with exactly one phrase that could honestly be construed as ageist, “old dogs can’t learn new tricks,” and even that phrase is circumstantial evidence, not direct evidence. See, e.g., *Lepanto v Illinois Community College District # 525*, 2000 WL 15098 (N.D. Ill. Jan. 4, 2000) at *5 (“These stray remarks are not direct evidence of age discrimination.”). Moreover, Mr. Liss concedes that Dr. Banks neither directed that remark nor any other so-called ageist remark toward him. (Tr. at 378). Mr. Russell never heard the remark at all. And not a single witness other than Mr. Liss claims to have heard Dr. Banks make it. But this is not a purely academic matter *because the issue about that remark— which Mr. Russell and Mr. Liss ignore— is that Dr. Banks swears that it was Mr. Liss who said it about Mr. Russell and Dr. Myers*. Mr. Liss “can’t remember specifically” what the context was. (Tr. at 97-98) But Dr. Banks is crystal clear about it:

It was one of the many meetings that I had. [Mr. Liss] was in my office. I was seated in my chair behind my desk. We were talking about [Mr. Russell] and [Dr. Myers], the lack of performance. I encouraged him that he was going to have to step it up, he needed to hold them accountable. That my expectation for work is that they show up, do their job well, that they needed to do work, and I told him that I was at the end of my rope from him coming into my office complaining about them on a daily basis, and that at some point in time he was going to have to be the manager, especially since they reported to him, and do something about it. And that’s when he said, well, “I’m not sure I’m the person for this job, I may be too nice, I

don't know, can you teach old dogs new tricks[?],” and I said I don't know, Steve, find out.

(Tr. at 1213-14). And the only time that remark ever found its way into writing is when Dr. Banks told Donna Whyte about it, and she wrote in her notes that “Steve said ‘can you teach an old dog new tricks.’” *Id.* at 1583; Ex. V-3.

In sum, no one testified that Dr. Banks ever used even one ageist term in reference to Mr. Liss; only Mr. Liss claims to have heard him use an ageist term in reference to Mr. Russell; there is not a single scrap of paper documenting any of this; but there is documentation of Dr. Banks saying that *it was Mr. Liss who used that phrase*. And, much more important, the context in which Dr. Banks places that comment— during one of many meetings in which Mr. Liss complained about Mr. Russell's and Dr. Myers's performance but could not or would not bring himself to do anything about it— is entirely consistent with both Dean Drnek's testimony and Steve Vartorella's testimony. *See, e.g.*, Drnek Dep. at 202-04 (noting that Mr. Liss said he was “afraid of” Dr. Myers) and (Vartorella testimony; Tr. at 1766-70) (noting that Mr. Liss asked him if he “was allowed to ask” Mr. Russell and Dr. Myers to schedule appointments with students instead of seeing “walk-ins” only).

IV. APART FROM STRAY REMARKS, MR. RUSSELL'S AND MR. LISS'S AGE-DISCRIMINATION CASE RESTS ON NOTHING MORE THAN HALF-TRUTHS AND OUTRIGHT MISREPRESENTATIONS.

Their lists and charts of “older” and “younger” workers always manage to ignore the fact that Dan Lenhart *was never terminated*, Dr. Myers *was never terminated*, Valerie Hinton-Hannah *was promoted*, and Mr. Russell was *offered another position* which he declined. *See, e.g.*, Brief at 1. Their attacks on Dr. Cauthen—a consultant whose recommendation was not even required— serve no point. *Id.* at 3. Their repeated claim that Mr. Vartorella admitted that “there is a 100% correlation between [the employees'] age and [their] termination” would be true only in a world devoid of context. *Id.* Their attempt to buttress Mr. Russell's FMLA claim— which related to *shoulder surgery*— with fragments of testimony concerning his earlier *heart attack* is irrelevant

and ignores the fact that he never obtained medical clearance to have that surgery. Their numerous references to “younger” and “older” hallways and to luncheon pairings in a communal lunch room are hardly the stuff of serious debate. *Id.* at 5.⁷ Their quibbling about “position statements” and “minimum qualifications” ignores the facts that (a) Mr. Liss *was interviewed* whether he met those qualifications or not, (b) the lists of responsibilities for others were *drafts* that were works in progress and were always understood to be viewed subjectively, not objectively, and (c) Ms. Courson was hired by Dr. Banks only after a search committee headed by Valerie Hinton-Hannah— one of the “older” employees they consistently forget to mention— recommended her as a top candidate. (Tr. at 864-69, 1800-01) Finally, perhaps nothing is more deceitful than their suggestion that CSU created charts identifying employees by age *in order to discriminate against older employees* when it actually created those charts *to evaluate whether older employees had been victims of discrimination.*

V. CONCLUSION

Mr. Russell’s FMLA claim is frivolous for two reasons: no court has ever held that employers are precluded from terminating employees who are on leave or who are scheduled for leave; and Mr. Russell never obtained a physician’s certification to have the shoulder surgery that that claim concerns. His discrimination claim rests on only one comment that could be construed as ageist; and Mr. Liss’s discrimination claim rests on no comments at all but apparently on his mere status as a member of the age-protected class. Moreover, to accept either Mr. Russell’s or Mr. Liss’s arguments would require the Court to determine that everyone who had any involvement in the reorganization or in considering applicants for the new positions that it created was a liar who harbored negative and stereotypical attitudes toward older people. In short, Mr. Russell and Mr. Liss

⁷ Nor are those arguments correct. As Mr. Bergmann put it, “older workers” and “younger workers” were not separated “because Valerie Hinton-Hannah, Olga Lee, Yolanda Sullins, [and] Marilyn Warner” were in the same location as those employees Mr. Russell and Mr. Liss refer to as “younger.” (Tr. at 1697)

were required to prove— really prove— that CSU's reasons for laying them off were false and that the real, "but for" reason for the layoffs was age discrimination. But their 115-page brief offers nothing that even hints at age discrimination.

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CERTIFICATE OF SERVICE

On March 25, 2014 I sent a copy of this document via electronic mail to Plaintiff's Counsel:
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