

discrimination, which shifts to the employer the burden to set forth a legitimate, nondiscriminatory reason for the employment action.<sup>182</sup> If the employer satisfies this burden, a court must afford the plaintiff an opportunity to cast doubt on the employer's rationale.<sup>183</sup>

2. **The Magistrate's Decision Ignores Defendant's Failure to Articulate a Legitimate, Non-Discriminatory Reason for Terminating and Not Rehiring Plaintiffs, Which Requires Judgment For Plaintiffs.**

Liss and Russell provided overwhelming proof that Defendant discriminated against them because of their age. However, separate and apart from Plaintiffs' independent evidence of discrimination, Defendant failed to meet its legal burden to provide a neutral non-discriminatory reason, because it refused to call Cleveland State President Berkman to testify.

Pres. Berkman was the highest decision-maker involved in the termination of Liss & Russell and Cleveland State's refusal to reassign or reinstated them. Pres. Berkman approved the reorganization that terminated Liss and Russell.<sup>184</sup> As one of the final decision makers, "President Berkman could have vetoed [the reorganization] as well."<sup>185</sup> Furthermore, Pres. Berkman signed Liss' termination letter.<sup>186</sup> Pres. Berkman represented that "this decision is not based on performance."<sup>187</sup> Liss' termination was not terminated for performance reason.<sup>188</sup>

Drnek testified that although he made recommendations, his recommendations were passed up the chain of command for decisions to be made by others, but that he could not testify as to why they made those decisions.<sup>189</sup> Drnek admitted he did not know the reasons for Defendant's employment actions regarding Liss and Russell, and further, that Pres. Berkman was the final

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<sup>182</sup> *Mauzy*, 75 Ohio St.3d at 582.

<sup>183</sup> *Id.*

<sup>184</sup> Ex. 98; *See also*, Walker, Tr. at 703:17-19.

<sup>185</sup> Walker, Tr. at 703:17-19.

<sup>186</sup> Ex. 98.

<sup>187</sup> Ex. 98.

<sup>188</sup> Ex. 337.

<sup>189</sup> Drnek Dep., 268.

decision maker with respect to Liss.<sup>190</sup> Similarly, Dr. Berkman made the final decision to deny Russell's request to reinstate or rehire him.<sup>191</sup>

In failing to call Berkman at trial, Defendant failed to articulate any legitimate, non-discriminatory reason for its adverse treatment of Liss and Russell. Defendant thus failed to meet its burden of establishing a legitimate non-discriminatory reason for the challenged decisions. The Magistrate's Decision concluded that Plaintiffs established their *prima facie* case, but then failed to consider or weigh Berkman's absence in any way. Establishing a *prima facie* case shifts to the employer the burden to set forth a legitimate, nondiscriminatory reason for the employment action.<sup>192</sup> If an employer fails to satisfy this burden, judgment for Plaintiffs is required. Legally, because Cleveland State failed to present any evidence regarding the reasons for Berkman's decision, Cleveland State as a matter of law cannot rebut Plaintiffs' case. Judgment must be rendered for the Plaintiffs.

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

Pretext may be established "either directly by persuading the [trier of fact] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."<sup>193</sup> If the purported reason is unworthy of credence or likely to be false, this falsity satisfies the need to show that the reason is both pretext and is covering up discrimination.<sup>194</sup>

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<sup>190</sup> Drnek Depo., Page 105-106 (objections omitted).

<sup>191</sup> Ex. 335.

<sup>192</sup> *Mauzy*, 75 Ohio St.3d at 582.

<sup>193</sup> *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095 (1981).

<sup>194</sup> *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. at 147-48 (citing *Wright v. West*, 505 U.S. 277, 296, 112 S. Ct. 2482, 2950 (1992)) (emphasis added). *Cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2950 (1978) ("When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with some reason, based her decision on an impermissible consideration.").

Thus, “the factfinder’s disbelief of the reasons put forward by the defendant” will allow it to infer intentional discrimination.<sup>195</sup> Where, as here, there is evidence that the given reason for termination is false, a factfinder reasonably may infer that unlawful discrimination was the true motivations behind Defendant’s decision to terminate Plaintiffs.<sup>196</sup>

Proof that the defendant’s explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, **the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.** Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a **party’s dishonesty about a material fact as “affirmative evidence of guilt.”**<sup>197</sup>

As Justice Ginsburg recognized, “evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation.”<sup>198</sup>

Similarly, the Franklin County Court of Appeals has held that when the employer’s purported reason is pretextual, the fact finder may “draw the inference of intentional discrimination without any further evidence of discrimination.”<sup>199</sup> “[T]he trier of fact can reasonably infer from the falsity of the employer’s explanation that the employer is dissembling to cover up a

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<sup>195</sup> *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (quoting *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)).

<sup>196</sup> *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).

<sup>197</sup> *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. at 147-48 (citing *Wright v. West*, 505 U.S. 277, 296, 112 S. Ct. 2482, 2950 (1992)) (emphasis added). *Cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2950 (1978) (“When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer’s actions, it is more likely than not the employer, who we generally assume acts with some reason, based her decision on an impermissible consideration.”).

<sup>198</sup> *Reeves, supra*, 530 U.S. at 154.

<sup>199</sup> *Smith v. Superior Prod., LLC*, 2014-Ohio-1961, P41 (Ohio Ct. App., Franklin County 2014)(reversing trial court and finding, inter alia, that proof that employer’s stated reason was not credible was sufficient to prove ultimate question of discrimination); citing *Brock v. Gen. Elec. Co.*, 125 Ohio App.3d 403, 408, 708 N.E.2d 777 (1st Dist.1998); *Jelinek v. Abbott Labs.*, 138 Ohio St. 3d 1499 (2014).

discriminatory purpose. As such, a complainant does not always need to introduce independent evidence of discrimination to meet his or her burden of showing pretext when the trier of fact finds sufficient evidence to reject the employer's explanation."<sup>200</sup> Proof of a *prima facie* case, plus evidence of pretext is sufficient to prove intentional discrimination.<sup>201</sup>

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

**4. Plaintiffs Proved at Trial that Defendants' Stated Reason for Terminating Liss and Russell – a Reorganization based the Cauthen Report – Was False and Pretext for Age Discrimination.**

Cleveland State claimed at trial that the sole reason for its termination of Liss and Russell was a "reorganization" based on the Cauthen Report.<sup>202</sup> Liss and Russell proved this claim to be false. The falsity of Defendant's stated reason is itself evidence of pretext,<sup>203</sup> which the Decision does not address or evaluate.

First, there is no dispute that the claimed "reorganization" did not require the termination of Liss or Russell, as the number of reports to Banks remained the same. There was no change in the number of Banks' direct reports or their duties – only their ages:

Q. All right. So as a result of the reorganization, you went from three direct reports to three direct reports, right?

A. Correct.

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<sup>200</sup> *HLS Bonding v. Ohio Civ. Rights Comm'n*, 2008-Ohio-4107 (Ohio Ct. App., Franklin County Aug. 14, 2008) ("the ALJ's disbelief of the reasons put forward by HLS, together with the evidence submitted to show the elements of the *prima facie* case of retaliation, is reliable, probative, and substantial evidence that shows intentional discrimination. Consequently, we find that the trial court did not abuse its discretion and we overrule HLS's second assignment of error.") quoting *Reeves v. Sanderson Plumbing Prods., Inc.* (2000), 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105; *Peters v. Lincoln Elec. Co.*, 285 F.3d 456 (6th Cir. 2002)

<sup>201</sup> *HLS Bonding v. Ohio Civ. Rights Comm'n*, 2008-Ohio-4107 (Ohio Ct. App., Franklin County Aug. 14, 2008)

<sup>202</sup> Banks, Tr. 953, 1051:18-21.

<sup>203</sup> 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).

Q. And the result was you rearranged the duties, but fired the older guy, right?

A. I don't know that I would characterize it that way.

Q. I understand you wouldn't characterize it, but that was the effect?

A. Yes.<sup>204</sup>

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

Second, Defendant's claim that Liss and Russell were terminated because of the recommendations Cauthen Report is not credible, as Plaintiffs proved that the decision to terminate them was actually made *before* the creation of the Cauthen Report. Banks and Drnek falsely claimed in sworn interrogatory answers that there were no meetings to discuss the "reorganization" until June 19, 2012.<sup>205</sup> Both Drnek and Banks falsely swore under oath that these answers were "true and accurate."<sup>206</sup> Defendant then attempted to maintain its claim at trial that its decision to terminate Liss and Russell was made based on the independent recommendation of Cauthen.

Liss and Russell proved this claim to be false. Although Banks first claimed at trial with an "emphatic no," that he did not write the conclusions contained in the Cauthen Report,<sup>207</sup> he was forced to admit at trial that on April 24, 2012, a month before Cauthen's visit, Banks had already designated Liss and Russell for termination, and designed the new organizational structure that

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<sup>204</sup> Banks, Tr. at 1117-1118.

<sup>205</sup> Ex.11, Russell Interrogatory No. 18, pp.9-10; Ex.13, Liss Interrogatory No. 18, pp.9-10.

<sup>206</sup> Ex. 11, pp.15-16 (sworn signatures of Banks & Drnek); Ex. 13, pp.15-16 (sworn signatures of Banks & Drnek);

<sup>207</sup> In direct conflict with his testimony that he wrote those opinions, Banks swore at trial that:

Q. Okay. And you told T.W. Cauthen and in fact you wrote his conclusions regarding the leadership and skills of Steve Liss and Bill Russell, right?

A. No.

Q. No, okay. We'll get to that.

A. An emphatic no.

Q. An emphatic no?

A. Yes.

Q. So his statements regarding the leadership of the Center for Student Involvement, those are not yours?

A. No.

Banks, Tr. at 1002. Compare to Banks's testimony at Tr. 1006-07, admitting that the statements regarding leadership were his own words.

Defendant now claims was a product of the Cauthen Report.<sup>208</sup> Moreover, by May 14, a month before Cauthen's report, Banks had revised the job descriptions for the older workers and then held a meeting with Drnek, among others, to discuss the "Reorganization Plan." Only after the structure had already been designed and the job descriptions revised did Banks hire his close friend Cauthen to pretend that Cauthen had devised the plan himself. Banks wrote the new job titles used by Cauthen, and wrote the opinions and conclusions regarding Liss and Russell for Cauthen.<sup>209</sup> Cauthen asked for no documents, reviewed only the documents given to him by Banks, and only spoke with the people determined by Banks; then he recommended a reorganization that mirrored the plan designed by Banks in April.<sup>210</sup>

The overwhelming evidence shows that the terminations of Liss and Russell were not based on the Cauthen Report, but were decided independently by Banks many weeks before. Banks and CSU then used the Cauthen Report as a cover up to create the appearance of an independent decision to reorganize the department.<sup>211</sup> There is thus no dispute that, at trial, Liss and Russell proved Defendant's stated reason for terminating Liss and Russell to be false. The Supreme Court has ruled that this is, in and of itself, evidence of intentional discrimination.<sup>212</sup> The Magistrate's Decision incorrectly ignores without consideration this powerful evidence of pretext and discrimination.

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<sup>208</sup> Ex. 2; Banks, Tr. At 1012-1015; McCafferty, Tr. at 790-793 (Banks revised Plaintiffs' job descriptions before May 14); 908 (Banks had discussions before Cauthen Report); Vartorella, Tr. at 1372-1374 (At May 14<sup>th</sup> meeting, Banks and Drnek had already decided they wanted "new staffing in place."); Ex. 11 at pp. 9-10, 15 & 16; Ex. 14 at pp. 9-10, 15 & 16.

<sup>209</sup> See discussion supra; Banks, Tr. At 1006-07, 1007-09, 1013-15; cf. Cauthen Report, Ex. 10, p.11 and Banks' Organizational Chart, Ex. 2.

<sup>210</sup> See discussion supra; Banks, Tr. At 1006-07, 1007-09, 1013-15; cf. Cauthen Report, Ex. 10, p.11 and Banks' Organizational Chart, Ex. 2.

<sup>211</sup> The willingness of Banks to change his testimony at will and feign a lack of recollection is astounding and demonstrates that the Court should afford his testimony no significant weight. In addition to the submission of false interrogatory answers, Banks claimed at deposition that no discussions about the reorganization occurred until after the report, Banks admitted at trial under oath that those discussions in fact did occur. Banks, Tr. 908. Just moments later, Banks then claimed to have no recollection of the same discussions. Banks, Tr. 909-11. Banks's testimony is so riddled with inconsistencies and falsehoods as to be unreliable in every material respect.

<sup>212</sup> See, e.g., *Reeves, supra*, 530 U.S. 133, 148; *St. Mary's Honor Ctr., supra*, 509 U.S. 502, 511.

The Magistrate's Decision also incorrectly blurs the distinction between the stated reasons for the reorganization and the stated reason for *terminating* Liss and Russell. The Decision concludes that Defendant's reorganization was designed to "offer more services to students and to bring more national fraternities and sororities to campus."<sup>213</sup> Setting aside the evidence showing this conclusion to be incorrect,<sup>214</sup> the Decision also incorrectly places upon Liss and Russell a burden (contrary to law) to demonstrate that the stated reasons for reorganizing the department were false. While there is no dispute that a reorganization took place, that reorganization – which led to no reduction in Liss's or Russell's jobs – does not explain why Liss and Russell were selected for *termination*.

Defendant has clearly stated that it terminated Liss and Russell based upon the recommendation of Cauthen.<sup>215</sup> It is this termination decision for which Plaintiffs must demonstrate pretext, which they have done successfully. Temporally, Defendant's explanation is impossible, as Banks had made the predetermined decision to terminate before engaging Cauthen. The Decision ignores Liss and Russell's success in proving CSU's stated reason to be false.

5. **After Plaintiffs Proved its Stated Reason for Terminating and Not Rehiring Plaintiffs to Be False, Defendant Falsely Claimed at Trial that It Did Not Rehire Plaintiffs Because of "Performance."**

After Liss and Russell proved its claim about reliance upon the Cauthen Report to be false, Defendant changed its articulated reason for terminating and not rehiring Plaintiffs to one of performance. Vartorella claimed for the first time after a week of trial testimony that Liss and Russell were excluded from open positions due to "employee performance."<sup>216</sup> After being

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<sup>213</sup> Decision, p. 15. Plaintiffs object to this factual finding in addition to the legal error described in this section. For purposes of argument, Plaintiffs assume the Decision's factual finding to be true, but maintain their objection to it.

<sup>214</sup> Even Defendant's claimed reasons for the reorganization do not withstand scrutiny. Contrary to the Decision's conclusion that the reorganization was motivated by strategic concerns about the Department of Student Life, Banks admitted that he had never created a strategic plan, agenda, or vision for the department. Banks, Tr. 986-87. Banks had created no goals for Liss or Russell, and admitted that neither ever failed to meet any objective set for them. Banks, Tr. 988, 990.

<sup>215</sup> Banks, Tr. 953, 1051:18-21.

<sup>216</sup> Vartorella, Tr. At 1307.

impeached with his prior deposition testimony,<sup>217</sup> Vartorella changed his testimony, stating that his prior sworn deposition testimony was “not accurate.”<sup>218</sup> Defendant’s new claim of performance problems is both demonstrably false, and itself evidence of discrimination.

a. **The Decision Erroneously Concludes that Defendant Did Not Select Plaintiffs due to “Prior Performance,” but Did Not Allow Plaintiffs to Introduce Rebuttal Evidence.**

The Decision determined that Liss and Russell were not selected for open jobs for reasons including “prior performance.”<sup>219</sup> In so concluding, the Decision relies upon testimony of Banks and Drnek regarding alleged performance deficiencies of Plaintiffs.<sup>220</sup> However, on redirect examination of the Plaintiffs, the Magistrate did not allow Plaintiffs to testify regarding positive performance results and experiences they had during their careers:

Q. You were nominated to be supervisor of the year?

A. Yes.

Q. Okay.

MS. SIMMONS: Your Honor, I’m just going to object. This is getting outside of cross.

MR. GRIFFIN: I think it goes to his performance issues and –

THE COURT: Yeah. I think it’s – it’s well settled that the contention at least is that the reorganization was not due to performance issues, so you can –

MR. GRIFFIN: Okay.

THE COURT: --move on from that.<sup>221</sup>

The Magistrate thus held in trial that Liss’s and Russell’s separation from CSU was “not due to performance issues.” The Magistrate then denied Plaintiffs the opportunity to respond to or rebut Defendant’s fabricated claims of performance concerns, such evidence being unnecessary and

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<sup>217</sup> Vartorella, Tr. at 1309-1311 (Vartorella previously testified that he was not “aware of” any performance concern affecting the decisions to fill positions in the reorganization. Tr. at 1309).

<sup>218</sup> Vartorella, Tr. at 1309-1311.

<sup>219</sup> See, e.g., Decision, pp. 19-21.

<sup>220</sup> See, e.g., Decision, pp. 14, 19.

<sup>221</sup> Tr. 355-56.

irrelevant in light of Defendant's concession that Plaintiffs' performance played no role in the challenge decisions.

In the Decision, however, the Magistrate abruptly changed course, inequitably relying on Defendant's newly-created performance claims, and found Defendant's failure to rehire Plaintiffs to be justified based on Plaintiffs' work performance.<sup>222</sup> The Magistrate has thus simultaneously barred Plaintiffs from offering evidence of good performance as irrelevant, but accepted Defendant's claim of bad performance as explaining the challenged terminations. Respectfully, this ruling cannot stand, as Plaintiffs were denied the opportunity to offer evidence contrary to Defendant's claims and the Decision, specifically because of the Magistrate's prior ruling. Instead, in light of Defendant's concession, and the Magistrate's ruling that Plaintiffs were not terminated or excluded from open positions in the reorganization for any reason related to past performance, the Court must reach this same conclusion.

**b. Defendant's New Claim of "Performance" Issues Is Demonstrably False.**

The Decision ultimately concluded that Liss was not selected for reasons including "past performance in his prior duties at CSU."<sup>223</sup> The Decision continues to state that based Liss's prior performance, his supervisors concluded that his "future contributions ranked [him] below the other candidates for the position."<sup>224</sup> This factual finding is contrary to the record evidence. Defendant has no documentary support for its new claim of poor performance by Liss and Russell. To the contrary, Liss's and Russell's written performance record is superb. Defendant rated Liss and Russell on performance criteria including "interpersonal relations and team interactions," "trust, openness, and good relations among the University community", the "ability to work cooperatively with supervisors to accomplish tasks", "productivity, initiative and creativity" and "whether an individual is current on recent developments and new information in his/her department or field

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<sup>222</sup> Decision, pp. 19-21.

<sup>223</sup> Decision, p. 19.

<sup>224</sup> Decision, p. 19.

including new technology, equipment, programs and services.”<sup>225</sup> Liss and Russell received outstanding evaluations based on this performance criteria.<sup>226</sup> This lack of evidentiary support is evidence of discriminatory motive or pretext that the Decision ignores.<sup>227</sup>

Moreover, Banks admits that he had created no goals for Liss or Russell, and admitted that neither ever failed to meet any objective set for them.<sup>228</sup> Banks admits that he never evaluated Liss or Russell to determine whether they possessed the skill sets necessary to succeed at CSU.<sup>229</sup> There is no documentary evidence supporting Defendant’s claim of any poor performance by Liss or Russell or the Decision’s conclusion that prior performance played a role in Defendant’s decision to exclude Liss and Russell from job opportunities.

The Decision fails to acknowledge the overwhelming evidence, including Defendant’s admissions, that performance played no role in Defendant’s decisions not to place Liss or Russell in any other open position. CSU’s decision-makers universally testified that Plaintiffs were fired or passed over for other positions for reasons other than prior performance.<sup>230</sup> The Decision’s conclusion that Defendant passed over Plaintiffs based on past performance is contrary to Defendant’s admissions contemporaneously and at trial. No evidentiary basis exists for concluding that Defendant took any adverse employment action against Liss or Russell because of prior performance.

c. **Defendant’s Changing of Position to a New Reason of “Performance” for Not Rehiring Plaintiffs is Evidence of Pretext.**

Notwithstanding the lack of credibility surrounding Vartorella’s changed testimony, Defendant’s new attempt to claim that it considered performance is itself demonstrably false and contradicts the letter of President Berkman, Walker’s own investigation, the testimony of Drnek,

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<sup>225</sup> Vartorella, Tr. at 1304-06. See also Ex. 57.

<sup>226</sup> Liss Performance Evaluations-Exs. 56-63; Russell Performance Evaluations- Exs.85-89.

<sup>227</sup> See *Seay v. TVA*, 339 F.3d 454, 468 (6th Cir. 2003) (inconsistencies between written documents and stated reasons for refusing to hire plaintiff is evidence of pretext).

<sup>228</sup> Banks, Tr. 988, 990.

<sup>229</sup> Banks, Tr. at 994-995.

<sup>230</sup> See, e.g., Banks, Tr. at 894-895; Vartorella, Tr. at 1307; Drnek Dep. 248:17-249:3.

and the prior sworn testimony of Vartorella, which Vartorella himself attempted to recant and change. On September 5, 2012, in his letter terminating Steve Liss, Cleveland State President Berkman declared that Liss' separation was not based on performance.<sup>231</sup>

Similarly, Cleveland State conducted its own investigation and concluded that:

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

A. Yes.

Q. Okay. It was not for performance reasons.

A. No.<sup>232</sup>

Drnek corroborated Walker's testimony:

Q. Now, you talked about a variety of concerns relating to Steve and Bill today. And we've talked about a whole bunch of different issues which you believe are -- are negative instances. Did any of those impact your decision to terminate Steve Liss or Bill Russell?

A. No.

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

A. No.<sup>233</sup>

In sworn testimony, CSU thus confirmed that performance was not the reason for its decisions to terminate or not rehire Liss or Russell.

Defendant's dishonesty on this material issue "undermines its credibility generally" and allows the Court to find that discrimination was the true reason for its treatment of Plaintiffs.<sup>234</sup> The Sixth Circuit has held that inconsistent claims regarding whether "performance" was a reason for termination constitutes evidence of discrimination.<sup>235</sup> In *Gaglioti*, one supervisor claimed that

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<sup>231</sup> Ex. 337.

<sup>232</sup> Walker, Tr. at 701-702 (emphasis added).

<sup>233</sup> Drnek Dep., 248:16-249:3 (emphasis added).

<sup>234</sup> *Coburn v. Rockwell Automation, Inc.*, 238 Fed. App'x 112, 122 (6th Cir. 2007)

<sup>235</sup> *Gaglioti v. Levin Group, Inc.*, 508 Fed. Appx. 476, 483 (6th Cir. Ohio 2012)(internal citation omitted).

performance was a factor while another supervisor “however, states that work performance ‘didn’t have anything to do with why he was fired,’ relying instead on the lack-of-work justifications. Inconsistent reasons given by key decision-makers as to the reason for the firing are evidence of pretext.” Here, as in *Gaglioti*, the fact that Defendant has offered inconsistent positions regarding the reasons for Plaintiffs’ termination is evidence that its proffered reasons are pretexts for discrimination.<sup>236</sup> The Decision ignores the undisputed fact that Defendant has articulated multiple, inconsistent, and false reasons for Plaintiffs’ termination, and does not consider or weigh this evidence of discrimination.

6. **At Trial, Defendants Offered a Third Inconsistent and False Reason and Claimed that Liss and Russell Were Terminated and Not Rehired Because of Their Relationship with Banks.**

At trial, CSU attempted to offer even a third reason for firing and not rehiring Liss and Russell, claiming they did not have a good working relationship with Banks. Cleveland State claimed that “central to this entire case is Mr. Russell’s relationship with Dr. Banks” and that “if **that’s not coming in, then our case has been gutted.**”<sup>237</sup>

However, Banks revealed this third claim to be false, testifying that he did not “have any problems with Mr. Russell” and that he did not “have any feelings towards him one way or the other.”<sup>238</sup> Banks denied that he “disliked Bill” and denied that he “had a bad relationship with Bill.”<sup>239</sup> Furthermore, Dr. Walker’s concluded on behalf of Defendant that the termination and failure to rehire Liss and Russell “was not for performance reasons,” was “not for any issue with relationships,” and that “**anyone claiming that it was because of performance reasons or relationship reasons, that would be contrary to the conclusions in [his] findings.**”<sup>240</sup>

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<sup>236</sup> *Gaglioti v. Levin Group, Inc.*, 508 Fed. Appx. 476, 482 (6th Cir. Ohio 2012) (“Moreover, it is undisputed that there is no documentary evidence, such as a personal [sic] record or evaluation, that substantiates that Gaglioti’s performance was deficient. This buttresses the possibility that poor performance was a *post hoc* creation by Levin Group.”)

<sup>237</sup> Tr. 489:7-24.

<sup>238</sup> Banks, Tr. at 955:13-956:1.

<sup>239</sup> Banks, Tr. at 1058:19-22.

<sup>240</sup> Walker, Tr. at 701:17-702:3.

Plaintiffs have shown Defendant's stated reason for terminating and not rehiring Liss and Russell – reliance upon the Cauthen Report – to be false. Defendant has also shown that this reason, along with each subsequent, conflicting, and inconsistent reason, is unworthy of any credibility. Judgment in favor of Plaintiffs is required.

7. **Defendant's Creation of New Explanations for Terminating and Not Rehiring Liss and Russell Is Evidence of Pretext.**

“Sixth Circuit case law is clear that an employer's changing rationale for making an adverse employment decision can be evidence of pretext.”<sup>241</sup> After Liss and Russell proved CSU's claim that it terminated them based on the Cauthen Report to be false, CSU began to run from that explanation and offer contrary, conflicting explanations. CSU's changing of its explanation for terminating Liss and Russell is itself additional evidence of pretext, which the Magistrate's Decision does not address or consider.<sup>242</sup>

Where a defendant continuously shifts and changes its stated rationale for adverse employment decisions, each new reason proves the prior reasons to be false and unworthy of credence.<sup>243</sup> This is particularly true where, as here, the employer fails to articulate its new stated reason until trial.<sup>244</sup>

The Decision does not reconcile Defendant's conflicting stated reasons, or consider the evidentiary impact of Defendant's willingness to change and shift its reasons multiple times

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<sup>241</sup> *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996); *see also Clay v. United Parcel Serv., Inc.*, 501 F.3d 695 (6th Cir. 2007).

<sup>242</sup> *Gaglioti v. Levin Group, Inc.*, 508 Fed. Appx. 476, 481 (6th Cir. Ohio 2012), *Lynch v. IIT Educ. Servs.*, 571 Fed. Appx. 440, 449 (6th Cir. Ohio 2014); *See Cicero v. Borg-Warner Auto., Inc.*, 280 F.3d 579, 592 (6th Cir. 2002) (“Shifting justifications over time calls the credibility of those justifications into question. By showing that the defendants' justification for firing him changed over time, [the plaintiff] shows a genuine issue of fact that the defendants' proffered reason was not only false, but that the falsity was a pretext for discrimination.”); *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996) (“An employer's changing rationale for making an adverse employment decision can be evidence of pretext.”).

<sup>243</sup> *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996); *see also Clay v. United Parcel Serv., Inc.*, 501 F.3d 695 (6th Cir. 2007).

<sup>244</sup> *See Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) (“We are disquieted. . . . by an employer who ‘fully’ articulates its reasons for the first time months after the decision was made.”); *see also EEOC v. Sears Roebuck & Co.*, 243 F.3d 846 (4th Cir. 2001) (finding pretext where the non-discriminatory reason for not hiring the plaintiff emerged only after the beginning of litigation).

throughout litigation and trial. Judgment for Plaintiffs is required, as Defendant has revealed each of its claimed reasons for terminating Liss and Russell to be false.

**8. Defendant’s Lies and Misrepresentations of Plaintiffs’ Qualifications and Experience are Evidence of Pretext.**

The evidence Plaintiffs presented at trial proves that Defendant did not provide them with equal employment opportunities in connection with open positions within the student life department. On June 25, Drnek submitted the “reorganization” plan including new purportedly-finalized job descriptions. However, weeks later, Drnek changed those finalized job descriptions in advance of his August 10 meeting with Walker during which he sought approval of Plaintiffs’ terminations. Drnek changed the minimum qualifications to add in new criteria which he used to recommend the firing of Plaintiffs without placing them in other available positions.<sup>245</sup>

On August 10, 2012, Drnek met with Cleveland State Vice Provost George Walker seeking his approval to fire Liss and Russell and to “reorganize” Department of Student Life.<sup>246</sup> Drnek provided Walker a written explanation for the reorganization, which explained that Liss and Russell should be terminated because they did not meet the qualifications required for the newly created positions.<sup>247</sup> Specifically, Drnek provided in writing to Walker a list of minimum qualifications that Drnek claimed Liss did not meet, and explained to Walker that Liss would not be retained because he did not meet these minimum qualifications. Walker confirmed that Drnek gave no other reason for not retaining Liss.<sup>248</sup>

When confronted under oath at trial, however, Drnek was forced to admit that his claims to Walker regarding Liss’s qualifications were false:

<b>Drnek’s Lies To Fire Steve Liss</b>	<b>Drnek’s Admissions At Deposition Under Oath</b>
<b>Lie To Fire Liss:</b>	Truth Under Oath: For four years from 2008 to 2012, Liss “work[ed] with either

<sup>245</sup> Drnek Dep. 131:19-134:1.

<sup>246</sup> Walker, Tr. 715-16.

<sup>247</sup> Walker, Tr. 706-07; Ex. 5.

<sup>248</sup> Walker, Tr. 711; Ex. 5.

<b><u>Drnek's Lies To Fire Steve Liss</u></b>	<b><u>Drnek's Admissions At Deposition Under Oath</u></b>
Liss lacked "three years administrative experience maintaining/developing enterprise online student organization databases, e.g., OrgSync." Ex. 5, p. Cleveland State 0040.	<p>Green Room [a web-based program similar to OrgSync] or OrgSync." Drnek Dep.26:22-27:10.</p> <p>Q. And, in fact, you knew that Steve had been experienced with Green Room and had been involved in an online student organization database since at least 2008; right?</p> <p>A. Well, Green Room is different than OrgSync.</p> <p>Q. I appreciate that. It's an online student organization database; right?</p> <p>A. Yeah.<sup>249</sup></p> <p>Drnek even selected Liss to lead Cleveland State's initiative to implement OrgSync. Id. 121:2-15.</p>
<p><b>Lie To Fire Liss:</b></p> <p>Liss lacked "significant knowledge and experience in developing and implementing leadership and service programs with focus on social justice, student leadership and service learning." Ex. 5, p. Cleveland State 0040.</p>	<p><b>Truth Under Oath:</b></p> <p>Q. And, in fact, Steve used to run the Center for Leadership and Service; right?</p> <p>A. He -- he ran the Center for Student Involvement.</p> <p>Q. But before that he ran, and you talked about your conversations with him about his prior experience with the Center for Leadership and Service; right?</p> <p>A. Before I worked there, yes.</p> <p>Q. And -- and you were aware that he had knowledge and experience in developing these kinds of leadership and service programs; right?</p> <p>A. Right.</p> <p><b>Q. Okay. So that's not correct either, is it?</b></p> <p><b>A. It appears that it wouldn't be.</b></p> <p>Drnek Dep. 138:22-139:11 (emphasis added).</p>
<p><b>Lie to Fire Liss:</b></p> <p>Liss was not "technologically proficient and experienced with database, word, spreadsheet and presentation applications." Ex. 5, p. Cleveland State 0040.</p>	<p><b>Truth Under Oath:</b></p> <p>"Steve Liss is proficient with database, Word, spreadsheet, [and] presentation applications." Drnek Dep. 136:10-12.</p>
<p><b>Lie to Fire Liss:</b></p> <p>Liss lacked "ability to travel with and supervise student groups." Ex. 5, p. Cleveland State 0040.</p>	<p><b>Truth Under Oath:</b></p> <p>Q: [I]n fact, you know that Steve does travel and he does supervise student groups from time to time; correct?"</p> <p>A: Yes.</p> <p>Drnek Dep. 136: 21-24.</p>
<p><b>Lie to Fire Liss:</b></p> <p>Liss lacked "ability to design and execute a comprehensive Greek Life</p>	<p><b>Truth Under Oath:</b></p> <p>In every evaluation, Drnek rated Liss "meets expectations" or better for his area leadership which included Greek</p>

<sup>249</sup> Liss, Tr. 135:10-18.

<u>Drnek's Lies To Fire Steve Liss</u>	<u>Drnek's Admissions At Deposition Under Oath</u>
program in an urban setting." Ex. 5, p. Cleveland State 0040.	<p>Life.<sup>250</sup></p> <p>Q. [Cleveland State's] Greek Life program had increased and had not had a single alcohol warning and just one hazing incident; right?</p> <p>A. Right. Drnek Dep. 140:13-15.</p> <p>Q. You never criticized or reprimanded Steve Liss or Bill Russell for their ability to design or execute a comprehensive Greek Life program [at Cleveland State]?</p> <p>A. No. Drnek, Dep. 47:13-16.</p> <p>Under Liss and Russell, every year Cleveland State's Greek organizations won the most awards for student involvement. <i>See, e.g.,</i> Drnek Dep. 106:24-107:11.</p>

Drnek thus admitted that the purported lack of qualifications he reported to Walker regarding Liss was false, and that, in fact, Liss did meet the qualifications for the open positions.

This admission is critical. Provost Walker admitted that if he knew that Liss "had met all of the requirements or the minimum qualifications like Bob Bergmann and Jamie Johnston, he would have been retained."<sup>251</sup> Moreover, Walker "would never approve a reorganization if the qualification of Steve Liss had been intentionally misstated."<sup>252</sup> Thus, Drnek's misrepresentations were material, as they were the cause of Liss's separation from CSU.

The Magistrate's Decision incorrectly concludes that Liss "failed to prove that the reasons given for not hiring him were false."<sup>253</sup> This is a mistaken conclusion and contrary to the record. Defendant claimed at trial that Liss was excluded because of Drnek's claim that he did not meet the minimum qualifications for open positions, but admitted that Drnek's representations were false. It is thus un rebutted that Defendant's stated reason for not rehiring Liss is false and a pretext for discrimination. Judgment for Plaintiffs is required.

<sup>250</sup> Drnek Dep., 28:14-20; Exs. 57 & 59.

<sup>251</sup> Walker, Tr. at 716-17.

<sup>252</sup> Walker, Tr. 721:9-13.

<sup>253</sup> Decision, p. 19.

The Decision determines that Russell was not discriminated against solely on the basis of his bumping rights under his union collective bargaining agreement.<sup>254</sup> While Russell had been a union employee with certain bumping rights, these rights did not limit Defendant's ability to consider him for or place him into any of the full-time open positions for which he was qualified. In short, CSU has not offered, and the Decision does not contain, any conclusion to explain why Russell was not given the same employment opportunities as younger workers. Russell was equally eligible, separate and apart from any bumping rights he may have enjoyed, to serve in open positions made available during the claimed reorganization.

9. **Defendant Provided Younger Workers Preferential Treatment Compared to Plaintiffs, Which Is Evidence of Discrimination.**

Throughout the course of the reorganization, Defendant offered more favorable treatment to younger workers than it did to older workers, including Liss and Russell. This is evidence of pretext and age discrimination.

Banks placed the younger Bergmann into the new position of Assistant Dean of Students for Student Organizations without asking Bergmann to apply or interview.<sup>255</sup> Banks similarly placed the younger Johnston into the new position of Assistant Dean of Students for Student Activities and Events without asking Johnston to apply or interview.<sup>256</sup> This word of mouth hiring, without a job posting, application process, or interview opportunity, deprived Liss and Russell from the equal employment opportunity for these two jobs that Defendant provided to the younger Bergmann and Johnston.

Liss was qualified for all five positions but was not even considered. Instead, unlike Bergman and Johnston, he was not given any job – even the lower coordinator positions – without application, interview or request. Russell was also qualified for the positions within the Department

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<sup>254</sup> Decision, pp. 17-18.

<sup>255</sup> Banks, Tr. at 970-971 & 974-975; Vartorella, Tr. at 1327-1329; McCafferty, Tr. at 849 & 854.

<sup>256</sup> Banks, Tr. at 970-971 & 974-975; Vartorella, Tr. at 1327-1329; McCafferty, Tr. at 849 & 854.

of Student Life that were open at the time he was terminated.<sup>257</sup> Russell was also denied the opportunity to be reassigned without request into: 1) his replacement's job, or 2) the lower coordinator position for commuter affairs and Greek Life. By not even considering the older workers for reassignment, Drnek conceded that he "did not hold Jamie Johnston and Bob Bergman to the same standards that [he] held Steve Liss and Bill Russell."

In filling the open positions, CSU ignored its own job descriptions and hiring criteria by hiring younger unqualified and less qualified workers to fill the positions of 1) Assistant Dean of Student Engagement; 2) Coordinator of Student Activities; and 3) Coordinator of Commuter Affairs and Greek Life. In every instance, Banks hired a younger, less qualified candidate. Courson did not meet the minimum requirement of 3 years of experience with student online databases. Further, Courson "had no prior experience at a commuting or urban university before she was hired at Cleveland State."<sup>258</sup> Similarly, Catherine Lewis (age 24) came straight out school and had almost no work experience and was ranked lower than Liss.<sup>259</sup> Neither Lewis nor Wheeler had the years or level of experience that Liss and Russell possessed.<sup>260</sup> Defendant cannot dispute Plaintiffs' qualifications for any of the positions that were ultimately offered to the substantially younger employees, including, but not limited to Courson, Lewis, and Wheeler.

#### **10. Defendant's Failure To Investigate Complaints Is Evidence of Discrimination.**

The Magistrate's Decision does not weigh or consider as evidence Defendants' failure to investigate Liss's complaints of discrimination. A defendant's failure to investigate complaints of discrimination permits a factfinder to infer a discriminatory motive.<sup>261</sup> Before his termination, Liss

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<sup>257</sup> Russell, Tr. at 435 & 468.

<sup>258</sup> Banks, Tr. at 1098-99.

<sup>259</sup> Ex. 243; Vartorella, Tr. At 1341:2-22.

<sup>260</sup> Exs. 78, 230, 242, 244 & 247.

<sup>261</sup> *Malik v. Carrier Corp.*, 202 F.3d 97, 105 (2d Cir. 2000) ("an employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer.") (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998); *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1033 (9th Cir. 2006) ("The summary judgment record does not indicate affirmatively whether Electra's Board of Directors investigated or evaluated Cornwell's concern that

“complained to five different administrators at the University six times in total” regarding discriminatory treatment.<sup>262</sup> Cleveland State never investigated the complaints of either Liss or Russell that Banks was discriminating against them.<sup>263</sup> Thus, in addition to ageist comments, statistics, and disparate treatment, Cleveland State’s failure to investigate Plaintiffs’ complaints is further evidence of discriminatory animus.

**11. The Magistrate’s Decision Commits Legal Error by Excluding Age-Related Remarks and Statistical Evidence at the Pretext Stage, Contrary to Ohio Law.**

In evaluating whether to disbelieve Cleveland State’s proffered reason, the factfinder must also consider the direct evidence cited previously.<sup>264</sup> The Magistrate’s Decision fails to consider or weigh at the pretext stage the direct and statistical evidence that Liss and Russell presented.

As described above in the discussion regarding direct evidence, Liss and Russell presented overwhelming evidence of Banks’s age-related comments regarding workers at or near the time of the reorganization. Banks:

1. Disparaged older workers as old dogs who can’t learn new tricks;<sup>265</sup>
2. Disparaged older workers as elephants;<sup>266</sup>
3. Regularly used terms like “old school” and “out-dated” to refer to the performance of older workers;<sup>267</sup>
4. Disparaged older generations as being unable to communicate with younger generations;<sup>268</sup> and
5. Disparaged Greek Life as “old school” and fired everyone involved in old school programs.<sup>269</sup>

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Sharp’s actions were racially motivated. A reasonable jury could view Electra’s failure to investigate as an attempt to conceal Sharp’s illegitimate motives.”); *Collins v. Cohen Pontani Lieberman & Pavane*, 2008 U.S. Dist. LEXIS 58047, \*35-36 (S.D.N.Y. July 30, 2008) (“A reasonable jury could find that Pavane’s failure to investigate this complaint pursuant to CPLP’s discrimination policy was evidence that he was covering up discriminatory treatment.”).

<sup>262</sup> Liss, Tr. at 1924:7-17.

<sup>263</sup> Vartorella, Tr. at 1423:11-13.

<sup>264</sup> *Mauzy*, 75 Ohio St.3d at Syllabus ¶1. The *Mauzy* court, in clarifying the meaning of “direct evidence” as it is used in reference to the “direct evidence method,” emphasized that the term “is, in a sense, a misnomer.” *Id* at 586. It does not refer to “direct evidence” as the term is traditionally used relative to circumstantial evidence, *i.e.*, it does not refer to that type of evidence from which the factfinder need not draw any inference to establish the fact for which the evidence is offered. *Id*.

<sup>265</sup> Liss, Tr. at 93-94 & 95-97.

<sup>266</sup> Liss, Tr. at 103-105; Russell, Tr. at 535-536.

<sup>267</sup> Banks, Tr. at 912-916; Liss, Tr. at 89-90 & 323-342.

<sup>268</sup> Banks, Tr. at 929.

<sup>269</sup> Banks, Tr. at 923:12-16.

Coupled with the evidence Liss and Russell presented regarding the falsity of Defendant's stated reason for terminating and not rehiring them, Banks' repeated and "pervasive" age-related comments are evidence that Defendant discriminated against them on the basis of their age. The Magistrate's Decision, however, commits legal error by not evaluating this evidence at the pretext stage as required by *Mauzy*.

Similarly, although the Magistrate's Decision considered statistical evidence as part of Plaintiffs' *prima facie* cases,<sup>270</sup> it refused to consider the same evidence at the pretext stage. This failure is legal error. The facts and statistics show that the sham "reorganization" is just a pretext to getting rid of the older Student Life workers:

1. 100% of the terminated workers were over age 50;
2. 100% of the promoted workers were under age 35;
3. There is a 100% correlation between age and termination;
4. In 100% of the cases, older workers were replaced by younger workers;
5. Banks never hired anyone over the age of 35;<sup>271</sup>
6. Banks never promoted anyone over the age of 35;<sup>272</sup>
7. Banks never fired anyone younger than age 35;<sup>273</sup>
8. Banks never reprimanded any younger employees.<sup>274</sup>
9. Banks never put anyone on a Performance Improvement Plan who was younger than 35.<sup>275</sup>
10. Cleveland State fired everyone involved in programs that Banks considered "old school."
11. The effect of the "reorganization" was to keep the same duties, but fire the "older guy."

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<sup>270</sup> Decision, p. 16

<sup>271</sup> Banks, Tr. at 934:13-935:4.

<sup>272</sup> Drnek Dep., 81; Banks, Tr. at 934-935 & 937:3-6. In contrast to HR VP Vartorella's testimony that Banks made the decisions to promote Johnston and Bergman, Banks claims that he has no such power, Tr. 935.

<sup>273</sup> Banks, Tr. at 936:18-20.

<sup>274</sup> Vartorella, Tr. at 1421.

<sup>275</sup> Vartorella, Tr. at 1421.

The Decision, however, specifically excludes this evidence at the pretext stage, contrary to Ohio Supreme Court precedent. This evidence, coupled with Defendant's repeated dissembling to cover up the reasons for terminating and not rehiring Liss and Russell, requires a finding in favor of Plaintiffs.

**12. Banks's Discriminatory Remarks and Conduct Are Attributable To Cleveland State.**

Drnek participated in decisions to fire only the older workers, to promote without application the younger workers, and to approve the reorganization. Drnek also made numerous false statements regarding Liss' qualifications in order to fire him – dishonest conduct that is evidence of discrimination. Thus, there is independent evidence of Drnek's illegal motives.

Defendant is liable for Banks' discriminatory conduct. Under the "cat's paw" doctrine, the discriminatory comments of Banks are attributable to Cleveland State because Banks was a supervisor, he participated in the decisions, and he provided untruthful and inaccurate statements that led to Cleveland State's discriminatory scrutiny, terminations of Plaintiffs and refusals to rehire.<sup>276</sup> First, Banks instructed Drnek to hire Cauthen.<sup>277</sup> Thereafter, on each and every employment decision, Drnek adopted Banks' recommendations.<sup>278</sup> Defendant is thus liable for Banks's acts of discrimination.

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

Separately, Russell has a claim for the violation of his FMLA rights. Under the FMLA, an "eligible" employee may take up to twelve weeks of unpaid leave in certain situations, including for a serious medical condition.<sup>279</sup> Accordingly, "any eligible employee who takes [FMLA] leave . . . shall be entitled, on return from such leave—to be restored by the employer to the position of employment held by the employee when the leave commenced; or to be restored to an equivalent

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<sup>276</sup> *Chattman v. Toho Tenax America, Inc.*, 686 F.3d 339 (6th Cir. 2012)

<sup>277</sup> Banks, Tr. at 1003.

<sup>278</sup> Banks, Tr. at 984-985.

<sup>279</sup> 29 U.S.C. § 2612(a)(1).

position[.]”<sup>280</sup> The FMLA creates two distinct types of claims: “interference” claims and “retaliation” claims.<sup>281</sup> Employers may not “interfere with, restrain or deny the exercise of or attempt to exercise, any [FMLA] right provided.”<sup>282</sup> Similarly, an employer may not retaliate against an employee for invoking his right to FMLA leave.<sup>283</sup>

1. **The Magistrate’s Decision Incorrectly Relies on Tenth Circuit Law Rejected by Ohio Federal District Courts in Finding for Defendant on Russell’s FMLA Interference Claim.**

To assert an interference claim, “the employee only needs to show that (1) he was entitled to benefits under the FMLA and (2) that he was denied them.”<sup>284</sup> “Under this theory, the employee need not show that he was treated differently than others [and] the employer cannot justify its actions by establishing a legitimate business purpose for its decision.”<sup>285</sup> “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.”<sup>286</sup> “An interference action is not about discrimination, it is only about whether the employer provided the employee with the entitlements guaranteed by the FMLA.”<sup>287</sup> Because an FMLA interference claim is not about discrimination, a *McDonnell-Douglas* burden-shifting analysis is not required.<sup>288</sup>

A plaintiff prevails on an FMLA interference claim when he establishes the following: (1) he is an “eligible employee,” (2) the defendant is an “employer,” (3) the employee had a serious health issue for which he was entitled to leave under the Act, (4) the employee gave the employer

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<sup>280</sup> *Id.* at § 2614(a)(1).

<sup>281</sup> *Daugherty v. Sajar Plastics, Inc.*, 2008 U.S. App. LEXIS 21574, \*25-26 (6th Cir. Oct. 16, 2008).

<sup>282</sup> 29 U.S.C. § 2615(a)(1)

<sup>283</sup> *Id.* at § 2615(a)(2); *Bryson v. Regis Corp.*, 498 F.3d 561, 570 (6th Cir. 2007).

<sup>284</sup> *Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005) (citing 29 U.S.C. §§ 2612(a), 2614(a)).

<sup>285</sup> *Id.* at 119-20.

<sup>286</sup> *Brown v. Travel Centers of America, LLC*, Case No. 12-CV-1496, Slip. Op., p.4 (Nov. 27, 2013).

<sup>287</sup> *Id.* at 120.

<sup>288</sup> See *Parker v. Hahnemann Univ. Hosp.*, 234 F. Supp. 2d 478, 485 (D.N.J. 2002) (citing *Hodgens v. Gen'l Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998); Similarly, in *Bachelor v. American West Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001), the Ninth Circuit found that 29 C.F.R. 825.220(c) is the controlling authority for an FMLA interference claim.<sup>288</sup> The Ninth Circuit, therefore, found its analysis “fairly uncomplicated” and refused to apply the traditional anti-discrimination burden-shifting frameworks. *Id.*

notice of his intention to take leave, and (5) the employer denied the employee benefits or interfered with FMLA rights to which he was entitled.<sup>289</sup> “Interference” includes any discouragement by the employer. Unlike a claim for retaliation or discrimination, an employer’s intent is not relevant to a claim for FMLA interference.<sup>290</sup>

In this case, Russell established all five prongs of his FMLA interference claim at trial. Russell was an FMLA-eligible employee because he worked full time from 2008 to 2011.<sup>291</sup> Cleveland State is covered by the FMLA.<sup>292</sup> Russell informed Defendant in May 2012, that he required FMLA leave for his serious health condition.<sup>293</sup> Russell gave notice to Cleveland State that he needed to take leave to have shoulder surgery and intended to take FMLA leave.<sup>294</sup> Banks admitted at trial that he knew about Russell’s need for shoulder replacement surgery and that Russell would need FMLA leave.<sup>295</sup> Vartorella, Cleveland State’s HR representative, testified that he was aware of Russell’s need for FMLA leave prior to Banks and Drnek making the decision to terminate Russell.<sup>296</sup> Under the FMLA, Russell had a right to remain as a Cleveland State employee with medical coverage until his surgery was completed or his FMLA leave time expired. However, Cleveland State told Russell that he could not do so because he would no longer be employed. As a matter of law, Cleveland State denied Russell his right to take FMLA leave.

Additionally, Cleveland State “interfered” with Russell’s FMLA rights by doing the following: (1) firing him before he could take leave; (2) asking him to waive his age discrimination claims in exchange for being granted FMLA leave; (3) ordering Russell to go back to his office and “get healthy” and (4) instructing Russell’s supervisor Liss not to accommodate Russell’s medical

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<sup>289</sup> See *Arban v. West Publ’g Corp.*, 345 F.3d 390, 400 (6th Cir. 2003); *Hoge v. Honda of Am. Mfg., Inc.* 384 F.3d 238, 244 (6<sup>th</sup> Cir., 2004).

<sup>290</sup> *Edgar v. JAC Prods.*, 443 F.3d 501, 507 (6th Cir. 2006).

<sup>291</sup> See Ex. 361 (approving Russell’s FMLA leave and indicating that he had at least 280 hours of available leave).

<sup>292</sup> See Ex. 361. See also Vartorella, Tr. at 1385:18-20 (Cleveland State is subject to FMLA).

<sup>293</sup> See Russell, Tr. at 421:2-10; Ex. 316, 361.

<sup>294</sup> See Ex. 316 & 361.

<sup>295</sup> See Banks, Tr. at 1055-1056.

<sup>296</sup> See Vartorella, Tr. at 1393:14-22.

needs.<sup>297</sup> There is no dispute that Cleveland State terminated Russell instead of providing him FMLA benefits to which he was entitled. In fact, Cleveland State fired Russell just five days after he was deemed eligible for FMLA leave by CareWorks, Cleveland State's third-party FMLA administrator.<sup>298</sup> Termination following a request for FMLA leave, standing alone, would discourage a reasonable employee from asserting rights under the FMLA. As such, Cleveland State interfered with Russell's rights under the FMLA. Russell is entitled to a judgment as to his FMLA interference claims against Cleveland State.

The Magistrate's Decision makes both factual and legal errors in evaluating Russell's interference claim. First the Magistrate's Decision concludes that Russell provided notice on August 30, 2012 of his need for FMLA leave, when he contacted Defendant's third-party administrator for leave.<sup>299</sup> The ignores, however, the un rebutted evidence that Russell informed Defendant as early as May 2012.<sup>300</sup>

The Decision also ignores the binding law of this Circuit in concluding that Russell cannot establish an interference claim because Defendant articulated a reason for dismissal unrelated to FMLA leave.<sup>301</sup> The Decision relies on a 10<sup>th</sup> Cir. case, *Bones v. Honeywell*, for this proposition. *Bones*, however, has been rejected by federal district courts in the Sixth Circuit.<sup>302</sup> As the Northern District of Ohio has ruled, "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

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<sup>297</sup> Russell, Tr. at 413; Liss, Tr. at 137.

<sup>298</sup> See Vartorella, Tr. at 1392; Ex. 361.

<sup>299</sup> Decision, p. 23.

<sup>300</sup> See Russell, Tr. at 421:2-10; Ex. 316, 361.

<sup>301</sup> Decision, p. 24, citing *Bones v. Honeywell Int'l., Inc.*, 366 F.3d 869, 877 (10th Cir. 2004.)

<sup>302</sup> *Compton v. HPI Acquisition Co.*, 2004 U.S. Dist. LEXIS 27701, 2004 WL 3327265 (E.D. Tenn. Nov. 22, 2004) (noting that "the Sixth Circuit has not adopted the position" announced in *Bones v. Honeywell* that a Plaintiff must show a relation between discharge and FMLA leave); *Mason v. Steelcraft, Inc.*, 2009 U.S. Dist. LEXIS 18821, 2009 WL 650387 (S.D. Ohio Mar. 10, 2009) (explaining that the *Bones* court specifically distinguished Sixth Circuit law and declined to follow Sixth Circuit law in rendering its decision).

procedures.”<sup>303</sup> This Court is not free to ignore federal precedent from within the Sixth Circuit interpreting the FMLA in favor of out-of-district precedent. The Court, upon review, must address this legal error and find in favor of Russell.

The Magistrate’s Decision thus incorrectly applies the law of this Circuit in denying Russell’s interference claim. As Russell established all five elements of his interference claim at trial, judgment in his favor is required.

**2. Russell Established His Case of FMLA Retaliation, and the Magistrate’s Decision Errs in Failing to Weigh or Consider Evidence of Retaliation.**

Cleveland State retaliated against Russell for exercising his rights under the FMLA. The "retaliation" theory of recovery under the FMLA arises from 29 U.S.C. § 2615(a)(2). It provides that "it shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter."<sup>304</sup> With respect to FMLA retaliation claims, the Sixth Circuit applies the burden-shifting test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to retaliation claims under the FMLA.<sup>305</sup>

Russell must first establish a *prima facie* case of retaliation by showing that: (1) he engaged in protected activity; (2) the defendant knew of the protected activity; (3) he was subject to an adverse action; and (4) there was a causal connection between the two.<sup>306</sup> The burden of producing a non-discriminatory reason for the adverse action then shifts to the defendant.<sup>307</sup>

Russell engaged in protected conduct by exercising his rights under the FMLA. Russell took medical leave in 2011 as a result of suffering a heart attack. In May 2012, Russell requested leave again for shoulder replacement surgery. Cleveland State was further aware of Russell’s request for

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<sup>303</sup> *Brown v. Travel Centers of America, LLC*, Case No. 12-CV-1496, Slip. Op., p.4 (Nov. 27, 2013).

<sup>304</sup> *See Arban v. West Pub. Co.*, 345 F.3d 390, 401 (6th Cir. 2003).

<sup>305</sup> *Edgar*, 443 F.3d at 508, citing *Skrjanc v. Great Lakes Power Service Co.*, 272 F.3d 309, 315 (6th Cir. 2001)).

<sup>306</sup> *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 860 (6th Cir.1997); *see also Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006).

<sup>307</sup> *DiCarlo v. Potter*, 358 F.3d 408 at 420 (6th Cir. 2004); *Williams v. Nashville Network*, 132 F.3d 1123, 1131 (6th Cir. 1997).

medical leave. Cleveland State's HR representative testified that he was aware of Russell's requests for medical leave.<sup>308</sup> Moreover, Banks and Drnek were aware of Russell's protected conduct under the FMLA.<sup>309</sup> As such, Russell established the first two elements of his prima facie case of FMLA retaliation. There is similarly no dispute that Defendant subjected Russell to adverse employment actions.

To show a causal connection, a plaintiff is required to "proffer evidence 'sufficient to raise the inference that his protected activity was the likely reason for the adverse action.'"<sup>310</sup> This burden is "minimal" and requires "merely that the plaintiff establish that the protected activity and the adverse action were not wholly unrelated."<sup>311</sup> The Magistrate's Decision fails to weigh, consider, or even mention the compelling direct evidence of retaliation and damning temporal proximity.

The close timing between Russell's protected activity and Defendants' adverse actions is evidence of causation. "[T]emporal proximity between the events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation."<sup>312</sup> The Sixth Circuit has held that adverse actions that fall within a three-month period of time between the protected activity and the adverse action is sufficient to create a causal connection for the purposes of establishing a *prima facie* case.<sup>313</sup>

In the instant case, on June 27<sup>th</sup>, Russell told Drnek and Banks that he needed time for surgery, and Banks told Russell to go back to his office and "get healthy."<sup>314</sup> The next day, June

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<sup>308</sup> See Vartorella, Tr. at 1393:14-22.

<sup>309</sup> See Banks, Tr. at 1055-1056; Russell, Tr. at 412-13.

<sup>310</sup> *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 862 (6th Cir. 1997); citing *Zanders v. Nat'l R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990).

<sup>311</sup> *Avery Dennison* at 862; *Simmons v. Camden Cty. Bd. of Ed.*, 757 F.2d 1187, 1189 (11th Cir. 1985).

<sup>312</sup> *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 525 (6th Cir. 2007); citing *Clark Cty. School Dist. v. Bredeen*, 532 U.S. 268, 273 (2001).

<sup>313</sup> See *Id.*; *Goeller v. Ohio Dep't. of Rehab. & Corr.*, 285 F. App'x. 250, 257 (6th Cir. 2008) (two months); *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 563 (6th Cir. 2004) (three months).

<sup>314</sup> Russell, Tr. at 412-13.

28<sup>th</sup>, Banks emailed Drnek with reasons to terminate Russell.<sup>315</sup> Moreover, Cleveland State terminated Russell's employment just five days after being approved to take medical leave. On August 31, 2012, CareWorks approved Russell's FMLA leave<sup>316</sup> and sent Cleveland State's HR representative, Vartorella, an email notifying him that Russell's FMLA leave was approved.<sup>317</sup> Five days after receipt of this notification, Cleveland State terminated Russell's employment. As such, the proximity in time establishes the "causal connection" element of Russell's FMLA retaliation claim.

There is additional evidence - separately and cumulatively - of CSU's open hostility towards FMLA and evidence that CSU retaliated against Russell. Banks told Russell that instead of taking medical leave, he should "go back to his office and get healthy."<sup>318</sup> Banks further instructed Liss not to accommodate Russell's medical condition.<sup>319</sup> Such actions demonstrate open hostility toward the exercise of federally guaranteed rights under law. Thus, in addition to temporal proximity, there is overwhelming additional evidence that CSU retaliated against Russell because he invoked his FMLA rights.

3. **Defendants' Stated Reasons for Terminating Russell's Employment Are Pretextual.**

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

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<sup>315</sup> Ex. 137.

<sup>316</sup> See Ex. 316.

<sup>317</sup> See Vartorella, Tr. at 1392; Ex. 361.

<sup>318</sup> See Russell, Tr. at 413:12-19.

<sup>319</sup> See Liss, Tr. at 137.

## IV. DAMAGES

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

RC 4112.99 provides that “whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.”<sup>320</sup> “When a party is injured by a violation of R.C. Chapter 4112, they are entitled to ‘make whole’ relief.”<sup>321</sup> A plaintiff is made whole by being returned to the position the plaintiff would have occupied had the discrimination not occurred.<sup>322</sup>

#### **1. Plaintiffs Are Entitled to Damages for Lost Back Pay.**

Plaintiffs are entitled to “back pay” including “lost wages and benefits, including any increases in wages or benefits lost because of [the discrimination].”<sup>323</sup> “The amount of wages and benefits due is determined by calculating the amount that would have been earned from the date of the [discrimination] to the present.”<sup>324</sup> Damages for back pay “include all forms of compensation that the employee proved he/she would have earned, but for [the discrimination], including salary, bonuses, vacation pay, pension, health insurance and other benefits.”<sup>325</sup>

#### **2. Plaintiffs Are Entitled to Damages for Lost Front Pay.**

Plaintiffs are also entitled to future economic losses, which “includes the amount the employee would have earned from the date of the verdict until the date you find the Employee’s loss of future pay and benefits will cease.”<sup>326</sup> Front Pay includes calculations for the employee’s age, salary and benefits, expenses associated with finding new employment, and the replacement value of fringe benefits.<sup>327</sup>

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<sup>320</sup> R.C. 4112.99

<sup>321</sup> *Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.*, 69 Ohio St.3d 89, 93, 1994 Ohio 515, 630 N.E.2d 669 (1994).

<sup>322</sup> *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111 (7th Cir.1986).

<sup>323</sup> Ohio Jury Instructions, §533.25 (1).

<sup>324</sup> Ohio Jury Instructions, §533.25 (1).

<sup>325</sup> Ohio Jury Instructions, §533.25 (1).

<sup>326</sup> Ohio Jury Instructions, §533.25 (2).

<sup>327</sup> Ohio Jury Instructions, §533.25 (2).

### 3. Plaintiffs Are Entitled to Non-Economic Damages.

Plaintiffs are also entitled to non-economic damages for, among other things, suffering, inconvenience, mental anguish and annoyance. Plaintiffs are entitled to an additional amount "that will reasonably compensate the employee for the actual (injury)(damage) proximately caused by the conduct of the employer."<sup>328</sup> In deciding this additional amount, the factfinder should "consider the nature, character, seriousness and duration of any (emotional pain) (suffering) (inconvenience) (mental anguish) (loss of enjoyment of life) the employee may have experienced."<sup>329</sup>

In similar discrimination cases, factfinders have awarded significant damages for non-economic injuries.<sup>330</sup> Indeed, the Sixth Circuit has upheld significant compensatory verdicts.<sup>331</sup> In *Miller v. Alldata Corp*, the plaintiff brought a gender discrimination claim under Michigan law. At trial, the jury awarded plaintiff \$16,000 in lost pay and \$300,000 for emotional distress based solely on her testimony.<sup>332</sup>

Factfinders commonly award victims of discrimination significant damages for the emotional distress caused in the employment context under state law. In *Kluss v. Alcan Aluminum Corp.*,<sup>333</sup> the plaintiff claimed defamation arising out of his termination from employment. The court refused to disturb a \$400,000 award of damages for non-economic damages.<sup>334</sup>

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<sup>328</sup> Ohio Jury Instructions, §533.25 (3). *Kishmarton v. William Bailey Constr., Inc.*, 93 Ohio St. 3d 226 (Ohio 2001)("Section 16, Article I of the Ohio Constitution states that "every person, for an injury done him \* \* \* shall have remedy by due course of law." Emotional distress injuries are injuries for which our Constitution guarantees a right to a remedy. . . . To continue to disallow emotional distress damages unfairly exposes innocent persons to harm that a wrongdoer has no incentive to avoid or mitigate.")

<sup>329</sup> Ohio Jury Instructions, §533.25 (3).

<sup>330</sup> See, *Ellis v. HBE Corp.*, 2000 U.S. App. LEXIS 28293, 1, 229 F.3d 1151 (6th Cir. Tenn. 2000)(verdict of \$400,000 for compensatory damages and \$55,500 in back pay upheld in sexual harassment case)(attached); *Miller v. Alldata Corp.*, 14 Fed. Appx. 457 (6<sup>th</sup> Cir. 2001)(verdict of \$16,000 in economic damages and \$300,000 for emotional distress damages upheld).

<sup>331</sup> *U-Haul Co. of Cleveland v. Kunkle*, 1998 WL 681253 (6<sup>th</sup> Cir. 1998)(verdict of \$950,000 on ADA and Section 4112.02 claims upheld)(attached).

<sup>332</sup> See also, *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6<sup>th</sup> Cir. 1996)(plaintiff can prove emotional injury by testimony without medical support; plaintiff's own testimony along with the circumstances of a particular case, can suffice to sustain the plaintiff's burden on emotional distress).

<sup>333</sup> *Kluss v. Alcan Aluminum Corp.*, 106 Ohio App. 3d 528 (Cuyahoga App. 1995).

<sup>334</sup> *Kluss*, at 540. The court further noted, "given the jury's unique role in determining damages for personal anguish, humiliation and emotional distress, in such circumstances, we cannot say that the substantial award was excessive or shocks the conscience," citing *Cooper v. Grace Baptist Church*, 81 Ohio App. 3d 728, 736 (1992).

Compensatory damages in excess of \$ 1 million are common in discrimination cases.<sup>335</sup> Here, Cleveland State has destroyed the careers of Liss and Russell. The Court should award the maximum available non-economic damages.

**4. Any Ambiguity Is Resolved in Favor of Plaintiffs and against Cleveland State.**

The “employee is not required to prove with unrealistic precision the amount of lost earnings, in any, due him/her.”<sup>336</sup> Moreover, any “uncertainties in the amount the employee could have earned should be resolved against the employer.”<sup>337</sup>

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

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

In his job as Director of CSI, Liss earned approximately \$63,377 per year, plus benefits. Dr. Burke testified that within a reasonable degree of economic certainty that Liss will suffer \$947,515 in lost wages as a result of being terminated as the Director of the Center for Student Involvement.<sup>338</sup> The three Assistant Dean positions each paid \$52,500 per year plus benefits. Liss’ damages for Defendant’s repeated refusal to rehire him as any one of three Assistant Deans is \$743,000. The two coordinator positions each paid \$39,068 in annual salary plus benefits. Liss’

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<sup>335</sup> See also *Sadowski v. Philips Medical Systems*, No. 477154 (Cuyahoga Cty. March 7, 2003)(verdict of \$1.365 million in non-economic upheld where plaintiff’s expert testified to \$815,000 in economic losses.); *Srail v. RJF Internatl. Corp.*, 126 Ohio App.3d 689 (Cuyahoga App. 1998)(Eighth District upheld the jury’s verdict of \$1,066,000 in compensatory damages); *Ahern v. Ameritech Corp.*, 137 Ohio App.3d 734 (Cuyahoga App. 2000) (Eighth District upheld a compensatory award of \$578,000); *Zifcak v. National City Bank*, Case No. 1:93 CV 2025 (N.D. Ohio 1996)(jury verdict in an age discrimination case of \$1,115,000); *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169 (2000)(Ohio Supreme Court upheld a jury’s award of \$1.65 million in an employment tort claim); *Watkins v. Cleveland Clinic Found.*, 130 Ohio App.3d 262 (Cuyahoga App. 1998)(upholding award of compensatory damages in fraud and battery case of \$9,660,000.).

<sup>336</sup> Ohio Jury Instructions § CV 533.25 (Comment) citing *Worrell v. Multipress, Inc.*, 45 Ohio St. 3d 241, 246 (1989).

<sup>337</sup> Ohio Jury Instructions § CV 533.25 (Comment) citing *Worrell v. Multipress, Inc.*, 45 Ohio St. 3d 241, 246 (1989).

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

<sup>338</sup> Burke, Tr. at 646:7-13.

damages for Cleveland State's refusal to rehire him as into either of the two open coordinator positions is \$486,271.<sup>339</sup>

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

*Steve Liss*  
*Economic Damages (Lost Wages & Benefits)*

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

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

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

Cleveland State destroyed Steve Liss' career. Banks fabricated a report to fire the older staff members. Drnek lied about Liss's skills at least five times to justify Liss' termination. Then, Defendant repeatedly made false statements about the reorganization, and lied to this Court. Non-economic damages are awarded to compensate for "emotional pain", "inconvenience" or "mental anguish."<sup>340</sup> However, Defendant's conduct, and the pain that its actions and words have caused, is compensable. Liss has been lied to, lied about, and forced to endure continuing embarrassment that is far beyond the mere "emotional pain", "inconvenience" or "mental anguish" for which non-economic damages are intended to compensate.

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

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<sup>339</sup> Burke, Tr. at 650:8-652:6.

<sup>340</sup> Ohio Jury Instructions, §533.25 (3).

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

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

In 2012, in his job as Coordinator of Greek Life, Russell earned approximately \$26,228 per year, plus benefits. Dr. Burke testified that within a reasonable degree of economic certainty that Russell will suffer \$300,643 in lost wages as a result of his termination as Coordinator of Greek Life.<sup>341</sup> Dr. Burke testified that Russell had been injured in the amount of \$482,391 if he had been promoted into the similar Assistant Dean position that assumed his responsibilities in Greek Life.<sup>342</sup>

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

***Bill Russell***  
***Economic Damages (Lost Wages & Benefits)***

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

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

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

For 47 years, Russell devoted himself to Defendant. Russell devoted the last 12 years to "giving back" to Defendant. That is why when Banks and Drnek fired Russell to replace him with younger staff, Russell was devastated. Russell has been through hard times. He has had a heart attack. He has watched his daughter fight cancer. "But the betrayal that I felt, the unbelievable

<sup>341</sup> Burke, Tr. at 646:7-13. This includes back pay in the amount of \$92,134. Burke, Tr. at 645:8-13.

<sup>342</sup> Burke, Tr. at 692:2-19.

cutting off at the knees after a 47-year affiliation, my whole adult life at Cleveland State, has been tough to take.”<sup>343</sup>

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

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

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

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

The remedies available to Russell for Defendant’s violation of his FMLA rights include compensatory damages, interest, liquidated damages, attorneys’ fees and costs, as well as equitable relief. 29 U.S.C. § 2617. The remedies are set forth in 29 U.S.C. § 2617 and include economic damages, monetary losses, interest, liquidated damages, attorneys’ fees and costs, and equitable relief.<sup>344</sup>

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

As indicated above, and as calculated by Dr. Burke, Russell has lost wages and benefits of between \$482,291 and \$300,643. Under the FMLA, Russell is also entitled to liquidated damages equal to the amount of back pay.<sup>345</sup> Dr. Burke calculated the amount of Russell’s lost back pay as

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<sup>343</sup> Russell, Tr. at 470:12-15.

<sup>344</sup> *Johnson v. Honda of America Mfg., Inc.*, 221 F.Supp.2d 853, 858 (S.D. Ohio 2002) citing 29 U.S.C. §2617 *et seq.*

<sup>345</sup> 29 U.S.C. § 2617(a)(1)(A)(iii).

\$92, 134.<sup>346</sup> The table below shows Russell’s economic damages, liquidated damages and the sum of those two amounts.

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

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

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

Russell is also entitled to attorneys, costs and expenses. Attorneys’ fees and costs (including expert fees) are awarded in post-trial briefing only after a finding of violation of the FMLA.<sup>347</sup> In this case and others, the amount of attorneys’ fees is not known until the briefing is completed and judgment is entered.<sup>348</sup> Thus, Russell requests that upon a finding that Defendant violated Russell’s FMLA rights that he be permitted to submit a petition for attorneys’ fees, costs and expenses.

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

## V. CONCLUSION

Plaintiffs respectfully request that the Court decline to adopt the Magistrate’s Decision. Instead, Plaintiffs respectfully request that the Court find:

<sup>346</sup> Burke, Tr. at 643:6-8.

<sup>347</sup> See e.g. *Hoge v. Honda of Am. Mfg.*, 2003 U.S. Dist. LEXIS 4068, 2 (S.D. Ohio Feb. 28, 2003)(awarding attorneys’ fees and costs following previously-entered verdict).

<sup>348</sup> See e.g. *Robinson v. Hilton Hospitality, Inc.*, 2008 U.S. Dist. LEXIS 124665, 2 (S.D. Ohio Sept. 30, 2008)(“Following the entry of judgment, plaintiff filed a motion for attorneys’ fees and costs . . . On August 23, 2007, Plaintiff filed a motion for supplemental attorney fees, seeking compensation of \$5270.00 for services rendered subsequent to her original fee application.”)

In violation of Ohio Rev. Code § 4112, 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 \$947,515, plus attorneys' fees and costs.

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

Alternatively, should the Court not find in favor of Plaintiffs at this juncture, Plaintiffs respectfully request that the Court order a new trial before it.

Respectfully submitted,



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*Attorneys for Plaintiffs Steven Liss and William Russell*

**CERTIFICATE OF SERVICE**

A true and accurate copy of the foregoing was served via electronic mail, on this 30th day of  
October, 2015 to:

Randall W. Knutti, Esq.  
Amy S. Brown, Esq.  
Emily M. Simmons, Esq.  
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Court of Claims Defense Section  
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*Attorneys for Defendant*



*Attorney for Plaintiffs Steven Liss and William Russell*

**TPG**

THORMAN PETROV GROUP

October 29, 2015

**Via Overnight Fedex Mail**

The Ohio Judicial Center  
Court of Claims of Ohio  
65 South Front Street  
Third Floor  
Columbus, OH 43215

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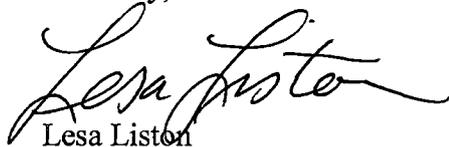
Re: *Liss v. Cleveland State University-Case No.: 2013-00139*  
*Russell v. Cleveland State University-Case No.: 2013-00138*

Dear Sir/Madam:

I have enclosed an original and one copy of *Plaintiffs' Objections to Decision of the Magistrate* for the cases referenced above. The original is for filing with the Clerk and the copy we would like to have time-stamped. Please return the time-stamped copy to me in the enclosed self-addressed postage-prepaid envelope. *AL*

Thank you for your attention to this matter. Please do not hesitate to call me should you have any questions.

Sincerely,



Lesa Liston  
Paralegal  
[lleston@tpgfirm.com](mailto:lleston@tpgfirm.com)

Enclosures

Cc: Randall W. Knutti, Esq.  
Amy S. Brown, Esq.  
Emily M. Simmons, Esq.



THORMAN PETROV GROUP

October 29, 2015

Via Overnight Fedex Mail

The Ohio Judicial Center  
Court of Claims of Ohio  
65 South Front Street  
Third Floor  
Columbus, OH 43215

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Thank you for your attention to this matter. Please do not hesitate to call me should you have any questions.

Sincerely,

Lesa Liston  
Paralegal  
[lleston@tpgfirm.com](mailto:lleston@tpgfirm.com)

Enclosures

Cc: Randall W. Knutti, Esq.  
Amy S. Brown, Esq.  
Emily M. Simmons, Esq.