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**IN THE OHIO COURT OF CLAIMS**

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

**PLAINTIFFS' MOTION FOR LEAVE TO SUBSTITUTE CORRECTED OBJECTIONS TO THE MAGISTRATE'S DECISION *INSTANTER***

Plaintiffs' Steven Liss and William Russell ("Plaintiffs") respectfully seek leave to substitute a corrected version of their Objections to the Magistrate's Decision for the version filed with the Court on November 2, 2015. The proposed corrected Objections are attached hereto as Exhibit A.

On October 30, 2015, Plaintiffs' counsel finalized Plaintiffs' Objections to the Magistrate's Decision. Due to clerical error, a prior version of the Objections was printed, signed, and filed with the Court instead of the final version. The attached final version contains some non-substantive edits, as well as the insertion of substantive case citations at footnotes 162, 169, and 170, that are not contained in the filed version. There are no other substantive changes

between the filed version and the attached final version. Undersigned counsel certifies that the attached final version was completed on October 30, 2015, and that Plaintiffs intended to file the attached final version.

Granting this motion will not prejudice Defendant, as the time for responding to Plaintiffs' Objections has not expired. Plaintiffs accordingly ask the Court to grant Plaintiffs' motion, and substitute the attached final version for the filed version.

Respectfully submitted,

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A true and accurate copy of the foregoing was served via electronic mail, on this 6th day of November 2015 to:

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**IN THE OHIO COURT OF CLAIMS**

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**PLAINTIFFS' OBJECTIONS TO DECISION OF THE MAGISTRATE**

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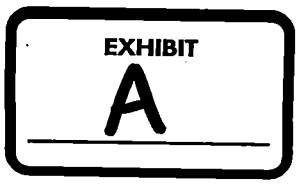

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## I. INTRODUCTION

Defendant Cleveland State University ("Defendant" or "CSU") fired Plaintiffs Steve Liss ("Liss") (age 50) and William Russell ("Russell") (age 66) because it wanted its Department of Student Life ("Student Life") to become younger to serve a "newer generation" [1] of students, and because Russell had exercised his rights under the FMLA. CSU admitted at trial, that in terminating Liss and Russell, it specifically used age as a factor in the termination decisions of Liss and Russell: "[I]n each instance, **the employees who were being laid off were evaluated with respect to their age.**"[2] CSU admitted at trial that it "looked at the age of the people. . .to be promoted as factors that they considered in the review process for the terminations...."[3]

After a trial to the Magistrate, the Magistrate issued a Decision in favor of Defendant on all claims, finding that Defendant terminated and did not rehire Plaintiffs for nondiscriminatory reasons unrelated to age or Russell's FMLA rights (the Magistrate's "Decision"). Plaintiffs object to the factual and legal conclusions contained in the Decision, including the conclusions that Plaintiffs failed to demonstrate by a preponderance of the evidence that: (1) Defendant discriminated against them in terminating their employment on the basis of age in violation of Ohio law; (2) Defendant discriminated against them in failing to transfer, retain, or rehire them on the basis of age in violation of Ohio law; and (3) Defendant interfered with and retaliated against Russell for the exercise of his FMLA rights. The Decision did not address, consider, or weigh CSU's open admissions of utilizing age as a factor in terminating Plaintiffs, which is direct evidence of age discrimination.

The Magistrate at trial correctly determined that Defendant's separation of Plaintiffs was

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[1] Ex. 56.
[2] Vartorella, Trial Transcript ("Tr.") at 1326:16-19 (emphasis added). Plaintiffs understand that a copy of the Trial Transcript has been delivered to the Court. Plaintiffs will additionally file a copy of the Transcript with the Court within 30 days of filing of these objections, pursuant to Ohio Civ. R. 53(D)(3)(b)(iii).
[3] Vartorella, Tr. at 1382:2-11 (emphasis added).

"not due to performance."[4] The Magistrate accordingly barred Plaintiffs from introducing evidence of their good work performance as irrelevant, sustaining Defendant's objection.[5] In direct opposition to this trial ruling, however, the Magistrate's Decision concludes that Defendant terminated and did not hire Plaintiffs into open positions as a result of "past performance."[6] This irregularity materially prejudices Plaintiffs, who were precluded through the Magistrate's ruling from introducing contrary evidence that would prove Defendant's claim to be false.

In February 2012, Cleveland State hired Willie Banks, a substantially younger dean, who referred to older employees as "elephants" and "old dogs."[7] Just two months after starting at CSU, Banks designed a "reorganization" of Student Life, through which he fired the oldest workers, including Plaintiffs, and promoted or hired unqualified substantially-younger employees:

| **Department of Student Life Positions Eliminated** | **Hired Into New Open Department of Student Life Positions** |
|---|---|
| Steve Liss (age 50) | Bob Bergman (age 32)[8] |
| William Russell (age 66) | Jamie Johnston (age 29)[9] |
| Mary Myers (age 50)[10] | Jill Courson (age 34)[11] |
| | Melissa Wheeler (age 30)[12] |
| | Katie Lewis (age 24)[13] |

Within five months of his arrival, Banks decided to promote all of his younger subordinates,[14] terminate only his older subordinates,[15] and replace the older workers with younger workers.[16] Defendant promoted the younger workers into open positions, without their request or application,[17]

[4] Tr., p. 355-56.
[5] Tr., p. 355-56
[6] Decision, p. 19, 20-21.
[7] Liss, Tr. at 93-97 & 103-105; Russell, Tr. at 535-536.
[8] Ex. 109; Vartorella, Tr. at 1330.
[9] Ex. 106; Vartorella, Tr. at 1330.
[10] Ex. 6.
[11] Courson, Tr. at 1466:9-13.
[12] Ex. 108; Vartorella, Tr. at 1330.
[13] Ex. 105; Vartorella, Tr. at 1330.
[14] Drnek Dep., 81-82; Banks Tr. at 970-971.
[15] Banks, Tr. at 934-935.
[16] Vartorella, Tr. at 1331:17-20.
[17] Banks, Tr. at 970-971.

while denying this same treatment to Liss and Russell. [18] Banks made ageist comments and propounded ageist stereotypes "pervasively", and specifically in February, March, April and June while he was planning the sham "reorganization." [19] Defendant then lied about Liss's qualifications in order to justify the terminations.[20] Throughout the course of litigation and trial, Defendant then offered multiple, inconsistent and false reasons for terminating and not rehiring Plaintiffs, each of which proves the others to be pretext for unlawful age discrimination in violation of O.R.C. Chapter 4112.

Defendant claims that it terminated Plaintiffs based on a purportedly-independent June 2012 consulting report (the "Cauthen Report") recommending reorganization. However, at trial, Defendant admitted that it had already actually planned Plaintiffs' termination prior to the Cauthen Report, thereby exposing its stated reason to be false and pretext for discrimination.[21] Defendant's dishonesty, coupled with overwhelming evidence of age-related bias, preferential treatment for younger workers, and hiring of unqualified younger workers without applications or interviews, requires a finding age discrimination in favor of Plaintiffs.

Defendant also violated the Family Medical Leave Act, 29 U.S.C. §2612 et seq., when it interfered with Russell's exercise of rights under the FMLA, and retaliated against Russell for his exercise of those rights. Russell applied for FMLA in 2012, because he needed shoulder replacement surgery. Defendant knew that Russell needed FMLA leave (he had a heart attack at a Cleveland State function), but Banks told Liss not to accommodate Russell's medical conditions. Although he was deemed eligible by Defendant for FMLA leave, Defendant terminated Russell and denied him the opportunity to take medical leave for surgery.

Plaintiffs object to the Decision for reasons outlined in these Objections, including:

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[18] Banks, Tr. at 970-971.
[19] Liss, Tr. at 93-94.
[20] Drnek Dep., 131-141.
[21] Ex. 2, Banks, Tr. at 954 & 993-994.

- the Decision contains legal and factual error and inequitably concludes that Defendant relied on Plaintiffs' "prior performance" when refusing to hire them into open jobs, after previously ruling at trial that Plaintiffs were terminated for reasons other than performance, and barring Plaintiffs from introducing evidence at trial of their good work performance;

- the Decision contains legal error and incorrectly applies Ohio evidentiary law regarding proof of discrimination, by erroneously segregating evidence into categories of "prima facie," "direct," and "indirect," when Ohio law requires a factfinder to evaluate all evidence in its totality at each stage of proof;

- the Decision contains legal error by concluding that Defendant met its burden to present a legitimate, nondiscriminatory reason for terminating/not rehiring Plaintiffs, when Defendant failed to present the decision-maker to testify at trial to offer Defendant's explanation for its treatment of Plaintiffs;

- the Decision contains legal error in ignoring and failing to consider as evidence Defendant's open admission that it considered the ages of Liss and Russell in making decisions to terminate their employment;

- the Decision contains legal and factual error in concluding that Plaintiffs failed to prove their age discrimination claim without inference through the direct method of proof under Ohio law;

- the Decision contains legal and factual error in concluding that Plaintiffs failed to prove age discrimination through the indirect method of proof, including by failing to consider multiple pieces of evidence of discrimination and pretext through the indirect method of proof, including but not limited to, the falsity of Defendant's stated reason for separating Plaintiffs; Defendant's offering of multiple inconsistent and false reasons for separating Plaintiffs; Defendant's dishonesty regarding Plaintiffs' qualifications for open jobs; Defendant's refusal to investigate Plaintiff's complaints of discrimination; and Defendant's preferential treatment of younger workers and applicants;

- the Decision makes legal and factual errors in concluding that Plaintiffs failed to demonstrate that the purported reorganization was pretext for discrimination, when Ohio law imposes on Plaintiffs only a burden to demonstrate that the stated reason for termination/failure to hire was discrimination;

- the Decision makes legal and factual error in concluding that Russell failed to establish a claim of FMLA interference, by relying on a Tenth Circuit Court of Appeals case rejected by federal district courts in the Sixth Circuit, when Russell established his claim under applicable Sixth Circuit case law;

- the Decision makes legal and factual error in concluding that Russell failed to establish a claim of FMLA retaliation, in ignoring evidence of retaliatory motive and temporal proximity between Russell's FMLA request and termination;

In light of these objections, Plaintiffs respectfully request that the Court decline to adopt the Decision.

This Court conducts a *de novo* review of the trial record and evidence; in the absence of the legal and factual errors identified herein, Plaintiffs submit that judgment is required in their favor on all counts. The Court should enter judgment in favor of Plaintiffs to completely compensate them for their losses. In violation of Ohio Rev. Code § 4112, Defendant discriminated against Liss on basis of his age. The Court should enter judgment in favor of Liss on his discrimination claims in the amount of $1,197,515, including $947,515 for his economic damages, $250,000 for his noneconomic damages, plus attorneys' fees and costs.

In violation of Ohio Rev. Code § 4112, Defendant 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. In violation of 29 U.S.C. §2617, Defendant interfered with Russell's FMLA rights, and retaliated against him for the exercise of those rights. The Court should render judgment against Defendant and in favor of Bill Russell in the amount of $574,525, plus attorneys' fees and costs.

Alternatively, should the Court not enter judgment in their favor, Plaintiffs respectfully request that the Court order a new trial on the merits of all claims before it.

## II. FACTS

### A. Parties.

Liss served Defendant's Department of Student Life for more than 19 years until he was abruptly terminated.[22] Liss ran Defendant's Center for Leadership and Service, and later served as Defendant's Director of the Center for Student Involvement ("CSI") for six years.[23] Liss increased the number of student groups from 134 to 211 – an increase of more than 50%.[24] CSU admitted at

[22] Liss, Tr. at 77.
[23] *See, e.g.*, Liss, Tr. at 78-79.
[24] Liss, Tr. at 81:1-15., Ex. 8.

trial that Liss consistently earned excellent performance reviews[25], such that "Liss met every goal for his prior year" and "every single evaluation criteria . . . was 'Met Expectations' or higher."[26]

Russell, a member of CSU first entering class, is a dedicated alumnus who "bleeds green"—the colors of CSU. Russell earned his bachelor's and law degrees from CSU, and beginning in 1979, served as an Adjunct Law Professor at CSU.[27] In 2000, out of his loyalty to CSU, Russell left his law practice to take on the role of Defendant's Greek Life Coordinator.[28] Russell grew the number of Greek students on campus from 28 to 289.[29] Russell increased the number of service hours by Greek students from zero to 7,000 hours annually.[30] In Russell's twelve years as the Greek Coordinator, there was never a single alcohol-violation by a Greek organization,[31] never an allegation of sexual misconduct,[32] and never an allegation of discrimination.[33]

Russell was outstanding and consistently earned high performance reviews in this role.[34] In 2005, 2007 and 2012, he was nominated for Defendant's "Distinguished Service Award,"[35] in 2006, he received Delta Sigma Phi's national "Lifetime Achievement Award,"[36] in 2008, he received Phi Delta Psi's national "Founder's Achievement Award," for bringing a national African-American fraternity to Defendant[37] and in 2009, Russell received the Greek Council's "Lifetime Service

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[25] Exs. 57-63. Liss' Annual Performance Evaluations showing "Meets Expectations", "Exceeds Expectations" or "Outstanding" for every category in every year 2007-2011.
[26] Drnek Dep., 28:14-20. *See also* Exs. 57 & 59.
[27] Russell, Tr. at 385-86; Tr. at 388 (hired as Adjunct Law Professor in 1978).
[28] Russell, Tr. at 391-92.
[29] Russell, Tr. at 393:1-21.
[30] Russell, Tr. at 393-94:22-3.
[31] Drnek Dep., 60:20-24. In contrast, while Drnek worked at the University of Arizona, among other things, a police officer was shot a fraternity, a pledge had to be hospitalized for hypothermia after being locked in freezer, and other serious crimes. Drnek Dep., 267-268.
[32] Russell, Tr. at 394:18-21.
[33] Russell, Tr. at 394-95:22-1.
[34] Exs. 23 & 85-89.
[35] Russell, Tr. at 456.
[36] Russell, Tr. at 457.
[37] Russell, Tr. at 457.

Award." Two days after he was fired, Russell received notice that he had again been nominated for the Distinguished Service Award.[38]

## B. Defendant Hired Banks, A Younger Supervisor With No Prior Experience With Urban Or Commuter Schools.

In February 2012, Defendant hired Willie Banks as the Associate Dean for Student Life.[39] Banks immediately showed his preference for younger staff. On a fairly regular basis he lunched with the younger Jamie Johnston and Bob Bergmann" but "never lunched with Bill Russell or Mary Myers or Steve Liss," the older employees.[40] Banks took an office in the "younger worker" hallway,[41] and by April had decided on a new structure for the Department that eliminated the jobs of each of the older workers despite their superior skills and experience.[42]

## C. Immediately after Joining CSU, Banks Showed His Prejudice Against Older Workers by Making Specific Age-Related Remarks in Reference to Liss, Russell and Myers

When Banks did leave his office, he made age-related remarks on a weekly basis.[43]

> [Banks'] use of terms like 'old-fashioned' and 'old school' and 'out-of-date' was pretty pervasive. You know, I was meeting with him for the most part every week starting in late February, early March, some weeks even more than once. And in, I would say a great majority of the meetings in some way or another he talked about our programs and our efforts being out-of-date and old fashioned.[44]

In February, March, April and June of 2012, Banks repeatedly and "pervasively" used ageist stereotypes and phrases.[45] Banks openly described Russell and Myers as "old dogs" who could not "learn new tricks."[46] Banks also said that older employees need to "get into the 21st Century," are "old fashioned" and need to get rid of their "old school methods."[47] Banks criticized both Russell

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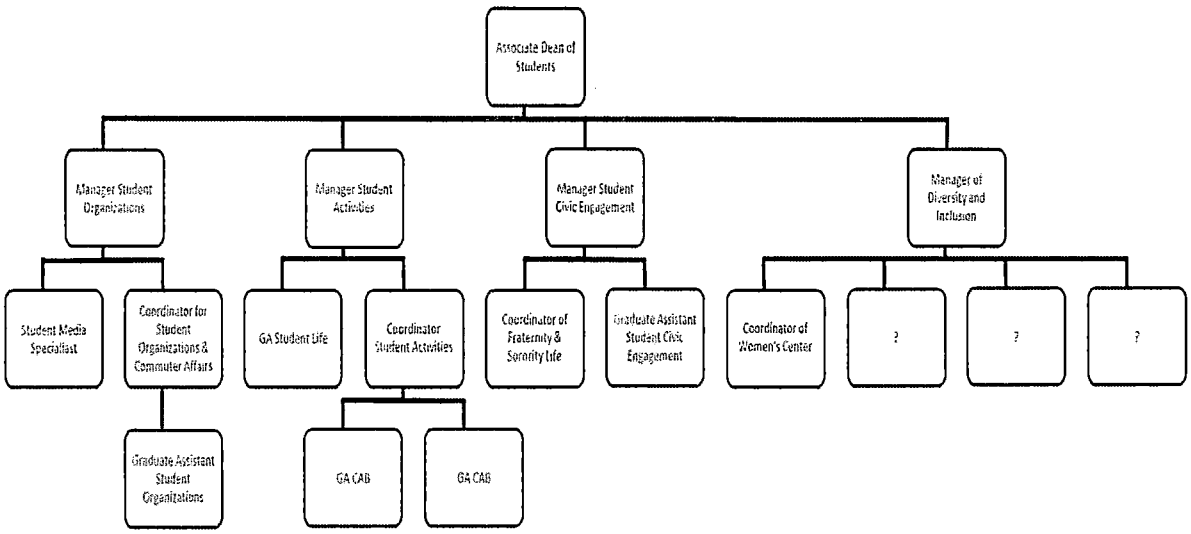
[38] Ex. 309; See also Russell, Tr. at 456: 20-24.
[39] Banks, Tr. at 1131-32:16-7.
[40] Banks, Tr. at 967:14-20.
[41] Ex. 352; Drnek Dep. 72:2-19; Ex. 346.
[42] Banks, Tr. at 965:21-966:11; Ex.6.
[43] Liss, Tr. at 90, 91 & 94.
[44] Liss, Tr. at 90:8-16.
[45] Liss, Tr. at 93-94.
[46] Liss, Tr. at 95-97.
[47] *See, e.g.*, Liss Tr. at 89-90 & 105; Banks, Tr. at 912-916.

and Myers for not being "up to date[]" and for being "old fashioned";[48] and rejected Russell's ideas, claiming they were "old school."[49] Far from being an off-hand remark, Banks' disparaging of older employees was made in the workplace, to the supervisor, and "in all cases, we were talking about the performance of my staff."[50] Banks admitted to these comments at trial and admitted they indicated a bias against older workers.[51]

## D. Banks & Drnek Designed the "Reorganization", Identified Plaintiffs' Jobs for Elimination and Drafted Job Descriptions

### 1. April 2012: Banks Designed The "Reorganization" Structure And Drafted New Job Descriptions.

In April 2012 – during the same time period that Banks made regular and pervasive ageist remarks – he set to the task of terminating his older employees through the pretense of a "reorganization." By April 24, 2012, Banks had already designed the re-organization of the Department of Student Life:[52]




The document Banks created reflecting his proposed re-organization is entitled "Org Chart AD." Banks's April 24 re-organization placed Banks—as the Associate Dean of Students—at the

[48] Liss, Tr. at 89-91, 93-94, 323 & 342.
[49] Liss, Tr. at 90 & 93; Russell, Tr. at 398, 401, 484 & 506.
[50] Liss, Tr. at 97:5-19.
[51] Banks, Tr. at 1111:15-19, 1112:18-24
[52] Banks, Tr. at 951, 954-955, 993-994 & 1011; Ex. 2.

top with three vectors underneath him: one for Student Organizations, one for Student Activities and one for Student Civic Engagement; each vector had a Manager, reporting to Banks, and a Coordinator, reporting to the respective Manager.[53]

### 2. May 2012: Defendant Meets To Review "Reorganization Plans", Including The Termination of Plaintiffs' Jobs.

On May 1, 2012, Drnek emailed Banks, Steve Vartorella (the HR representative assigned to Department of Student Life), Denise Mutti (a higher level HR representative) and Jean McCafferty (whose responsibilities included setting compensation) to meet on May 14 to discuss the "**reorg plan.**"[54] During the May 14 meeting:

- **Defendant Had Already Identified Plaintiffs' Position For Elimination**: Vartorella testified:

  Q: It's true that they identified those positions for elimination, correct?

  A: Correct.[55]

- **Defendant Had Already Identified The New Positions' Titles, Duties, And Reporting Structure**: Banks and Drnek told HR representative Jean McCafferty the titles they wanted to create and already concluded what they believed were the minimum qualifications for those new titles.[56]

- **Banks Had Already Drafted New Job Descriptions:** During the May 14 meeting, the new structure was announced and McCafferty was asked to change the job descriptions for the positions held by Liss and Russell.[57] Later that same day, Banks emailed job descriptions he had created for his proposed re-organization to HR representative Jean McCafferty.[58]

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[53] Banks, Tr. at 1012.; Ex. 2.
[54] McCafferty, Tr. at 787-789; Banks, Tr. at 944; Vartorella, Tr. at 1369; Ex. 1.
[55] Vartorella, Tr. at 1384: 1-4; *Id.* at 1384.
[56] McCafferty, Tr. at 818-819.
[57] McCafferty, Tr. at 791-792; Banks, Tr. at 949; Vartorella, Tr. at1302-1303.
[58] McCafferty, Tr. at 790-793; Banks, Tr. at 1084-1088; Ex. 3.

In short, by May 14, Banks and Drnek already knew they were going to terminate Liss, Russell and Myers (all over the age of 50), had designed the purported "reorganization" and written new job descriptions to eliminate the positions held by Liss, Russell and Myers.

## E. Banks Hides His Decision to Terminate Older Workers under the Cover of a Purportedly Independent Consultant Report.

Without issuing a "request for proposal," [59] or considering any other consultant,[60] Banks hired his close friend, T. W. Cauthen, to issue a consulting report concerning Department of Student Life. Before Cauthen had even started his interviews, Banks told Cauthen in writing that Cauthen should conclude in favor of recommending a re-organization of the Department.[61] Banks provided Cauthen with materials and Cauthen did not solicit any additional materials.[62] Although claiming that Cauthen was evaluating the entire department,[63] Banks made sure that Cauthen could only recommend the elimination of the older staff's jobs by providing Cauthen with the job descriptions only for the older Russell, Liss and Myers, [64] withholding the job descriptions for the younger employees Bergmann and Johnston.

In preparing his supposedly-independent report, Cauthen actually copied and pasted Banks' predetermined conclusions and held them out as his own:

> Q. And, in fact, in Dr. Cauthen's report on page 2 of his report he copies your opinions, correct?
>
> A. These are my words, correct.[65]

For example, although the Cauthen Report included a conclusion that "the leadership side has struggled to maintain focus and purpose," Banks admitted that Cauthen's opinion and words were, fact, Banks's and not Cauthen's.[66]

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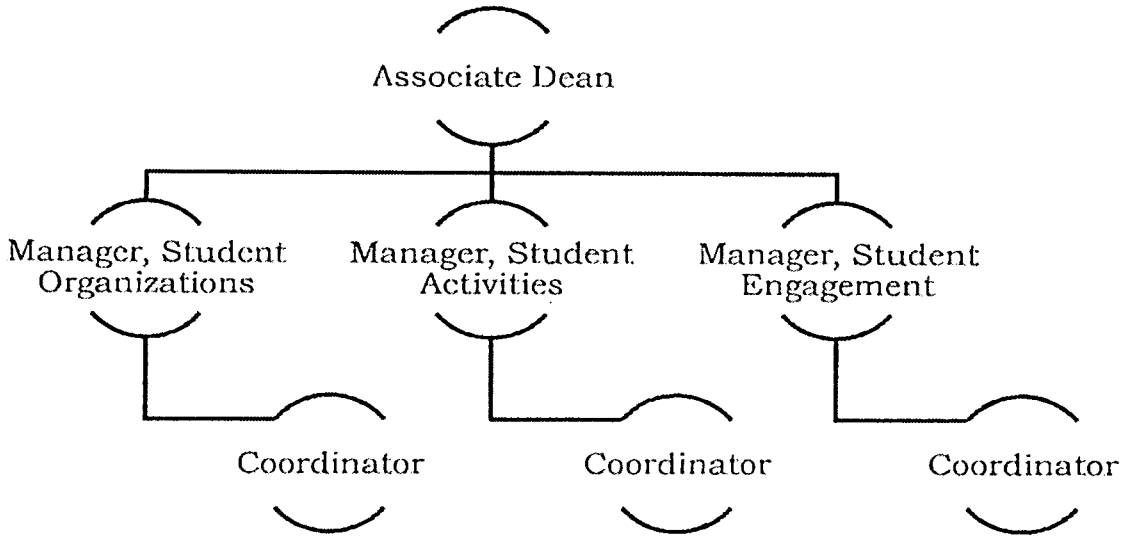
[59] Banks, Tr. at 1003.
[60] Banks, Tr. at 1003.
[61] Banks, Tr. at 1001-1002.
[62] Banks, Tr. at 1010-1011.
[63] Banks, Tr. at 1025.
[64] Banks, Tr. at 1024-1026.
[65] Banks, Tr. At 1006-07.

Banks also designed the structure and responsibilities of the reorganization, and then told Cauthen to pretend that it was Cauthen's idea. Cauthen's proposed organization is functionally identical to Banks's[67]:




Cauthen did not create and/or present his own independent work, but rather adopted Banks' predetermined outcomes and falsely passed it off as his recommendation.

Cauthen issued his Report on June 15, 2012. Cauthen revealed Banks's age bias and predetermined outcomes by excluding from his report every prior positive performance comment regarding Liss, Russell, and their older peers. For example, although CSU admitted that there had been zero alcohol-incidents and only one hazing incident in the twelve years that Russell supervised Greek Life,[68] Cauthen excluded this success of Russell's from his report.[69] In contrast, Cauthen excluded every prior negative performance comment about the younger workers.[70] While Cauthen

[66] Banks, Tr. at 1006-1007.
[67] Trial Exh. 10, p. 11.
[68] Drnek, Dep., 53-54, 60; Whyte, Tr. at 1528-29 (only one hazing incident; never suspended, disciplined or reprimanded any Greek organization)
[69] Cauthen Dep., 109-110 (objection omitted).
[70] Cauthen Dep., 136-137:22-14.

submitted negative skill assessments of the older workers, including Liss and Russell, he made no assessment of any type of the skill sets of the younger Bergmann or Johnston.[71]

## F. Liss and Russell Complained Verbally And In Writing About Banks's Age Discrimination.

In "either very late April or early May", at the same time that Banks and Drnek were meeting to discuss the sham reorganization, Liss complained to HR representative Steve Vartorella "about the ageist language I was hearing from Dr. Banks."[72] Liss complained that Banks was singling out older staff for criticism and using age-based comments.[73] Liss also complained about this conduct to Drnek, CSU's general counsel, and HR Representative Rick Horsfall.[74] Similarly, Russell complained about age discrimination to Vartorella, Horsfall and Drnek.[75] CSU did nothing to look into their reports.[76]

## G. Banks and Drnek Create Five New Open Positions and Exclude Liss and Russell from Open Positions for Which They Were Qualified.

On June 15, 2012— the same day that Cauthen issued his report—Banks told Drnek that Myers, Liss and Russell would be terminated.[77] Drnek agreed.[78] On June 25, 2012, Drnek and Banks publicly recommended that Student Life be re-organized consistent with Banks's April plans.

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[71] Banks, Tr. at 1023-1025.

[72] Liss, Tr. at 330:14-23; Liss, Tr. at 123-127, 328-330 & 332-334; Ex. 287. Liss, Tr. at 123-124 & 125. Liss met with Vartorella on or around June 4 to discuss two issues, one of which was to tell him about the kind of treatment they were receiving, including that Banks was using discriminatory language. Liss, Tr. at 125-127) The other issue addressed in this conversation was whether Liss was required to follow Banks's order to falsely reprimand Russell and Myers. Liss, Tr. at 125-126). Vartorella told Liss that he had no recourse and was required to do as Banks ordered. Within this conversation, Liss told Vartorella about the age-based comments Banks would make frequently. Liss, Tr. at 123-124. Vartorella's only response was to encourage Liss to discuss the issues with Banks's supervisor, Drnek.

[73] Liss, Tr. at 123:22-124:20.

[74] Liss, Tr. at 128-132, 331-332 & 334-343; Whyte, Tr. At 1549-1550; Ex. 304.

[75] Russell, Tr. at 403-404 & 408-413; Vartorella, Tr. at 1422-1423.

[76] *See, e.g.*, Liss, Tr. at 127-128, 131, 133 & 344; Russell, Tr. at 410-412; Whyte, Tr. at 1582.

[77] Banks, Tr. at 1100-1103; Ex. 80. Although the memo is dated Monday June 18, Banks testified that he wrote it on June 15.

[78] Drnek Dep., 133:9-20. Drnek also testified:

> Q. Okay. And at least by June 25th of 2012 you anticipated the -- the termination of Steve Liss; correct?
> A. It hadn't been approved. It was the – it was the plan.
> Q. And similarly, if we go to 5749, by June 25th of 2012 you were proposing the termination of Bill Russell; correct?
> A. Yes. (Drnek Dep., 130:8-16)

Under Banks's plan, CSU created five new jobs.[79] These jobs were: 1) Assistant Dean of Students for Student Activities; 2) Assistant Dean of Students for Student Organizations; 3) Assistant Dean of Students for Student Engagement; 4) Coordinator of Student Activities; and 5) Coordinator of Commuter Affairs & Student Center Programs.[80]

After the job descriptions for the five new positions were finalized, Drnek went back and made additional changes to the job descriptions designed to exclude Liss and Russell from eligibility for the jobs.[81] CSU admits that making changes in this manner violates Defendant policy.[82]

Banks then placed the younger Bergmann into the new position of Assistant Dean of Students for Student Organizations without asking Bergmann to apply or interview.[83] 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.[84] The salaries for the positions into which Bergmann and Johnston were placed were funded through elimination of Liss's and Russell's positions.[85] The older Liss, Myers and Russell were not placed in any of the five new positions. At or after their terminations, Liss and Russell were not offered any positions with Defendant.[86]

In addition, Defendant's discriminatory conduct toward Liss is evident from the way Banks treated Liss as compared to similarly situated younger workers. Banks testified:

> Q. Okay. So out of your three direct reports, the only one who had to put in a request was the old one, Steve Liss, right?
>
> A. What do you mean a request?

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[79] Liss, Tr. at 144-145.
[80] *See generally* Ex. 5, Banks, Tr. at 993-994).
[81] McCafferty, Tr. at 821-822.
[82] McCafferty, Tr. at 823, 826 & 829-831; Exs. 39 & 154.
[83] Banks, Tr. at 970-971 & 974-975; Vartorella, Tr. at 1327-1329; McCafferty, Tr. at 849 & 854.
[84] Banks, Tr. at 970-971 & 974-975; Vartorella, Tr. at 1327-1329; McCafferty, Tr. at 849 & 854.
[85] McCafferty, Tr. at 833-835; Ex. 155.
[86] Russell, Tr. at 467.

Q. The only one who had to request a job in the reorganization was your oldest member, Steve Liss, true?

A. True.

Q. And the only one out of your three direct reports who had to put in an application was your oldest staff member, Steve Liss, right?

A. True.

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Q. And, in fact, the only one who was fired out of your three direct reports was your oldest one, Steve Liss?

A. He was reorganized.

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Q. He was separated involuntarily, right? [***]

A. Correct.[87]

Banks further admits that he treated both Liss and Russell differently than two younger employees, Bergman and Johnston, with respect to hiring/promotion:

Q. You gave Bergmann and Johnston jobs without a request or an application, and that's different than how you treated Liss and Russell?

MS. SIMMONS: Objection.

Q. True?

THE COURT: Overruled.

A. For the reorganization of the department, that is the way that Dr. Drnek and I decided was the best way to move forward with the department.

Q. Okay. So that's true?

A. Yes.[88]

Defendant thus admitted that, with respect to open job opportunities in 2012, it provided more favorable treatment to younger employees than it provided to Plaintiffs.

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[87] Banks, Tr. 973-75.
[88] Banks, Tr. 977-78.

## H. Defendant Considered the Ages of the Employees Terminated and the Ages of the Employees Promoted.

In the course of terminating Liss and Russell, Defendant created a chart identifying each individual Banks terminated or promoted by age.[89] Vartorella admitted that the chart constitutes an evaluation of the employees being terminated, including Liss and Russell, based on their ages.[90] Defendant admits that the chart confirms that every staff member terminated was 50 or older and that every person promoted and assuming those employees' duties was 35 or younger.[91]

## I. Drnek and Banks Lied to Obtain Approval of Plaintiffs' Terminations.

On August 10, Drnek met with George Walker (then Defendant's Interim Provost and VP for Academic Affairs)[92] for approval of Plaintiffs' terminations. During the August 10 meeting, Drnek falsely told Walker that the re-organization was based on the Cauthen Report.[93]

Drnek provided Walker with a document detailing the "[r]eorganization [r]ationale," which included reasons which Banks had previously provided in writing to Drnek. Drnek falsely told Walker that Liss did not meet the minimum qualifications for the positions of: Assistant Dean for Student Engagement, Coordinator for Student Activities, and Coordinator for Commuter Affairs & Student Center Programs.[94] Drnek told Walker that because Liss did not meet the minimum qualifications for these three positions, Defendant would have to conduct a search to find suitable candidates.

CSU admits, however, that Drnek's claims to Walker were false, and that Liss did meet the minimum qualifications for Assistant Dean for Student Engagement, Coordinator for Student Activities, and Coordinator for Commuter Affairs & Student Center Programs.[95] Liss not only met

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[89] Vartorella, Tr. at 1321-1331; Ex. 6
[90] Vartorella, Tr. at 1324.
[91] Vartorella, Tr. at 1331-1332.
[92] Ex. 5, *See, e.g.*, Drnek Dep., 66:21-25.
[93] Walker, Tr. at 735-737.
[94] Walker, Tr. at 711-712; Ex. 5.
[95] *See, e.g.*, Liss, Tr. at 146-151 &155-164.

the minimum qualifications for these three positions,[96] he also met the qualifications for each of the lower-level coordinator positions.[97] Nonetheless, CSU excluded Liss from five open positions for which he was qualified based on Drnek's lies to Provost Walker.[98]

Drnek first falsely claimed to Walker that Liss did not have "three years administrative experience maintaining/developing enterprise online student organization databases, e.g. OrgSync."[99] The truth is that Drnek knew that Liss had more than four years working with Green Room, Defendant's effort to develop its own "web-based program similar to OrgSync"[100] and with OrgSync itself.[101] The pretext of this criteria is amplified by CSU's decision to hire Jill Courson, who admitted that she lacked the same qualification.[102] CSU disqualified Liss by falsely claiming he lacked 3 years of experience. For younger applicants, however, CSU falsely claimed that they were qualified even though they admittedly were not qualified.

Drnek then falsely claimed that Liss should be fired because he lacked the minimum qualification of "knowledge and experience in developing and implementing" leadership programs with a focus on "social justice."[103] At trial, however, Drnek admitted that this was false.[104] Third, Drnek informed Walker that Liss did not possess the computer and technological skills necessary for the positions for which he applied, including, but not limited to the position of Assistant Dean of Student Engagement. At trial, however, Drnek admitted this was false.[105] Liss possessed the

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[96] *See, e.g.*, Banks, Tr. at 1067 & 1099-1100.
[97] Vartorella, Tr. at 1338, 1340 & 1349.
[98] Drnek Dep. 137:23-139:11 & 140:19-141:15.
[99] *See* Ex.5, CSU_00040.
[100] Drnek Dep., 24:20-21.
[101] Drnek Dep., 24:10-11, 135:10-18, 137:6-10. Once Drnek realized that that his testimony hurt Cleveland State he tried to change his testimony:

> Q. Okay. I thought we agreed earlier that Green Room was an online student organizational database. I thought that's what your testimony was. Do you want to change that testimony?

A. Yes, I would.
[102] Courson, Tr. at 1476-1477.
[103] Ex.5, CSU-000040.
[104] Drnek Dep., 132:23-133:5.(emphasis added)
[105] Drnek Dep., 140:19-141:4.

ability to travel and supervise groups; therefore, he was qualified for the position of Assistant Dean of Student Engagement.[106]

Liss, therefore, met every one of the qualifications for the position of Assistant Dean of Student Engagement. Nonetheless, with regard to each of five separate "minimum criteria", Drnek knowingly misrepresented Liss's qualifications in order to force Liss' termination from Defendant.

### J. Defendant Refuses to Re-Hire Liss and Russell Despite Their Qualifications; Defendant Replaced Plaintiffs with Substantially-Younger Individuals.

Liss and Russell were qualified for all five of the positions within the Department of Student Life that were open at the time they were terminated.[107] Liss was ranked the same or higher in the interviewing process than the three substantially-younger individuals hired into the three open positions within the Department of Student Life.[108] Defendant treated Liss and Russell differently than it treated Bergmann and Johnston because it did not place Liss or Russell in the open positions for which they were qualified.[109]

Notwithstanding their greater qualifications, Banks hired three substantially-younger individuals into the three open positions: Assistant Dean of Student Engagement Jill Courson (age 34), Coordinator for Student Activities Catherine Lewis (age 24), and Coordinator for Commuter Affairs and Student Center Programs Melissa Wheeler (age 30).[110]

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."[111] In fact, Liss had successfully performed these duties at Cleveland State.

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[106] Drnek Dep., 141:5-15.
[107] *See, e.g.*, Tr. at 146-151 & 164-167; 1339. 1341
[108] Vartorella, Tr. at 1339-1341 & 1349-1350; Bergmann, Tr. at 1650.
[109] *See, e.g.*, Banks, Tr. at 977-978; Ex. G-1.
[110] All ages are as of December 1, 2012, by which time the hiring decisions had been made. Vartorella, Tr. at 1330-1331.
[111] Banks, Tr. at 1098-99.

Similarly, Catherine Lewis (age 24) came straight out school and had almost no work experience and was ranked lower than Liss.[112] Neither Lewis nor Wheeler had the years or level of experience that Liss and Russell possessed.[113] Russell was also qualified for the positions within the Department of Student Life that were open at the time he was terminated.[114] 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.

Following Liss's termination, Bergmann replaced Liss and assumed Liss's duties and responsibilities.[115] Following Russell's termination, Courson replaced Russell and assumed Russell's duties and responsibilities.[116]

## K. Defendant Knew That Russell Had Plans To Take FMLA Leave.

### 1. Russell's Health Conditions Were Well Known Because Russell Has Suffered A Heart Attack While At a Defendant Function.

Russell suffered a heart attack at a Defendant function in October 2011.[117] He took 10 weeks of FMLA leave in connection with his October 2011 heart attack. In 2012, Russell learned that he would need shoulder surgery. He underwent cardiac testing in advance of the surgery.

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

Banks was aware that Russell needed surgery in 2012 and that he would require FMLA leave for the surgery.[118] Banks was aware of Russell's need for FMLA leave prior to making the decision to terminate Russell.[119] In "March or April", Liss told Banks that Russell needed shoulder replacement surgery and "that the goal would be to have shoulder surgery probably late summer or

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[112] Ex. 243; Vartorella, Tr. At 1341:2-22.
[113] Exs. 78, 230, 242, 244 & 247.
[114] Russell, Tr. at 435 & 468.
[115] Banks, Tr. at 1117 & 1327.
[116] Russell, Tr. at 438-439.
[117] Russell, Tr. at 419.
[118] Liss, Tr. at 133-137; Russell, Tr. at 412-413 & 416-419; Banks, Tr. at 1052-1055.
[119] Liss, Tr. at 133-137; Russell, Tr. at 412-413.

early fall. And we – we talked about that on numerous occasions just in terms of, is it – will Bill be away for an extended period and that kind of thing."[120]

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

In May 2012, Russell submitted his application for FMLA leave and was waiting for approval.[121] Drnek was aware that Russell needed surgery in 2012 and that he would require FMLA leave for the surgery.[122] On June 27, Russell met with Drnek:

> And I went in and I said, Jim, you know what I'm going through, you know my FMLA is coming up, you know I've got these health issues . . . You know this isn't right, you know this is discriminatory, you know he's affecting – trying to affect me because he wants me to retire.[123]

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

> The dean explained why I was there, that I wanted to get rid of the – that I had complaints about being discriminated against, that I had health concerns, and he emphasized the health concern. Willie looked at me, leaned forward, leaned at me and said, "I think Bill should go back to his office and get healthy." And that's a quote.[124]

Russell needed surgery. But rather than support his need, Banks' hostility toward leave was evident in his comment that "Bill should go back to his office and get healthy." Banks' hostility is also shown by his instructions to Liss to not accommodate any of Russell's medical conditions.[125]

### 4. Defendant Fired Russell Five Days After His FMLA Leave Was Approved.

Russell was medically approved for the surgery by July 2012.[126] Russell scheduled the surgery for September 2012. On August 31, 2012, CareWorks approved Russell's FMLA leave.[127]

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[120] Liss, Tr. 135:18-24.
[121] Russell, Tr. at 421:2-10; Ex. 316.
[122] Russell, Tr. at 412.
[123] Russell, Tr. at 412:12-20.
[124] Russell, Tr. at 413:12-19.
[125] Liss, Tr. at 137; Banks, Tr. at 1056.
[126] Russell, Tr. at 599.
[127] Ex. 316.

CareWorks sent Vartorella an email notifying him of Russell's "new claim", approving Russell's FMLA leave and indicating that "he has at least 280 hours of available time."[128] Despite months of prior reorganization discussions without action, five days after Russell's FMLA was approved, Defendant fired Russell.[129]

### 5. Defendant Refused To Grant Russell FMLA Leave Unless Russell Waived All of His Rights.

Vartorella never inquired as to whether Russell's FMLA rights were being violated.[130] Defendant offered Russell the time for his surgery and the right to FMLA leave if he waived his claims to age discrimination and other employment issues.[131]

> Q. Okay. And Cleveland State said that they would allow him enough time to have the surgery and take the medical leave if he agreed to waive his claims for age discrimination and other issues, correct?
>
> A. Correct.
>
> Q. And if he did not agree to waive his claims, Cleveland State would not enlarge any period of time to allow him to take medical leave, correct?
>
> A. Correct.[132]

Defendant violated Russell's FMLA rights by conditioning approval of his medical leave on Russell waiving his claims for age discrimination. Russell did not execute a release, of course, and thus Defendant terminated his employment before he was able to take leave for his needed surgery.

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[128] Vartorella, Tr. at 1392; Ex. 361.
[129] Vartorella, Tr. at 1393;
[130] Vartorella, Tr. at 1415.
[131] Vartorella, Tr. at 1419.
[132] Vartorella, Tr. at 1419:6-16.

## III. LAW & ARGUMENT

### A. Standard of Review

This Court must evaluate Plaintiff's objections to the magistrate's decision through a *de novo* review of the evidence and record.[133]

The ultimate issue in cases alleging age discrimination under R.C. Chapter 4112 is whether the adverse employment action was motivated, at least in part, by discriminatory intent.[134] Plaintiffs need only prove their case by "the greater weight of the evidence."[135] In discrimination cases, plaintiffs do not have to prove that age was the only reason for the adverse employment action.[136] Plaintiffs only need to show that age "made a difference" in Cleveland State's treatment of Plaintiffs.[137] There may be more than one reason for the Defendant's decisions.[138] Because there is overwhelming evidence that age repeatedly "made a difference," the Court should find in favor of Plaintiffs on their age discrimination claim, and should determine Plaintiffs' damages.

### B. Plaintiffs Proved Age Discrimination Through Both Direct and Indirect Evidence.

R.C. 4112 prohibits employers from discriminating based on age when making employment decisions.[139] There are two primary methods for proving discriminatory intent: the "direct" evidence method and the "indirect" evidence method.[140] A plaintiff may pursue his evidentiary burden under either method, or under both.[141]

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[133] *McNeilan v. Ohio State Univ. Med. Ctr.*, 2011-Ohio-678, ¶ 19 (10th Dist.)
[134] *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 571, 1998 Ohio 410, 697 N.E.2d 204 (1998).
[135] Ohio Jury Instructions, § CV 533.03. See also § CV 533.05 (2012).
[136] Ohio Jury Instructions, § CV 533.03.
[137] Ohio Jury Instructions, § CV 533.03.
[138] Ohio Jury Instructions §§ CV 533.03, CV 533.05 (2012); Ohio Rev. Code § 4112.02(A); *Cleveland Civil Service Comm. v. Ohio Civil Rights Comm.*, 57 Ohio St.3d 62, 66 (1991); *Price Waterhouse v. Hopkins,* 490 U.S. 228, 240-41 (1989); *Gross v. FBL Financial Services, Inc.* 129 S.Ct. 2343 (2009); *see also Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003); *In re Lewis,* 845 F.2d 624 (6th Cir. 1988).
[139] R.C. 4112.02(A). Courts have generally adopted the federal procedural framework for proving discrimination claims when analyzing Ohio's prohibition against employment discrimination. *See, e.g., Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Com.*, 66 Ohio St. 2d 192, 196, 421 N.E.2d 128, 131 (1981); *Ahern v. Ameritech Corp.*, 137 Ohio App.3d 754, 769, 739 N.E.2d 1184, 1194 (2000).
[140] *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 581-86, 664 N.E.2d 1272, 1276-79 (1996).
[141] *See Mauzy*, 75 Ohio St.3d at 581-86,

Under the direct evidence method, a plaintiff may offer "evidence of any nature"—direct, circumstantial, or statistical—to "directly" prove the ultimate issue of unlawful intent.[142] Here, Plaintiffs' direct evidence will include Cleveland State's testimony that there is a "100 percent correlation" between the age of employee and termination. Importantly, "'direct evidence' refers to a **method** of proof, **not a type** of evidence."[143] This method differs from the indirect evidence method, which uses a multi-factor burden-shifting scheme to "indirectly" prove unlawful intent by eliminating common legitimate motives.[144] Importantly, and contrary to the evidentiary segregation the Decision undertakes, all evidence presented by the Plaintiffs may be used to prove discrimination directly, and also to prove discrimination indirectly, or through inference. Accordingly, the Court must analyze all evidence presented by Plaintiffs under both methods of proof, which the Decision fails to do.

### C. The Decision Ignored Overwhelming Evidence of Age Discrimination in Erroneously Recommending that the Court Rule in Favor of Defendant on Plaintiffs' Claims of Age Discrimination.

At trial, Plaintiffs proved that Cleveland State made at least six separate discriminatory decisions including:

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

2. **Assistant Dean for Student Organizations:** Promoting the younger Johnston without request and without considering or allowing the older Liss or Russell to apply;

3. **Assistant Dean for Student Activities**: Promoting the younger Bergman without request and without allowing the older Liss or Russell to apply;

4. **Assistant Dean for Student Engagement:** Hiring the younger Courson (who did not satisfy the minimum requirements) while declining to promote

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[142] *Mauzy*, 75 Ohio St.3d at Syllabus ¶1.

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

[144] *Id* at 581-585.

or reassign Liss or Russell (the way that the younger Johnston and Bergman were treated).

5. **Coordinator for Student Activities:** Hiring the younger less qualified Wheeler while declining to promote or reassign Liss or Russell (the way that the younger Johnston and Bergman were treated).

6. **Coordinator for Commuter Affairs/Greek Life:** Hiring the younger less-qualified Lewis while declining to promote or reassign Liss or Russell (the way that the younger Johnston and Bergman were treated).

In every one of these discrete decisions, Cleveland State selected younger workers and discriminated against the older Plaintiffs and their peers. Defendant admitted at trial that there is a 100% correlation between the age of the employee and the replacement by a younger worker.[145]

## D. The Decision Incorrectly Concluded that Plaintiffs Did Not Present Direct Evidence of Age Discrimination.

### 1. The Decision Ignored Direct Evidence that Defendant Illegally Considered Age as a Factor in Terminating Liss and Russell.

Steve Vartorella, Cleveland State's HR Representative for the Department of Student Life, testified that age was a factor that Cleveland State considered in terminating Liss and Russell, and promoting the younger Bergman and Johnston:

> Q. Yes. **It's true that Cleveland State looked at the age of the people to be hired and the people to be promoted as factors that they considered in the review process for the terminations and the reorganization**, correct?
>
> A. **Correct**, with the exception of "hired," that was not determined at that point in time.
>
> Q. Okay. "Promotion" would be a better word?
>
> A. Correct.[146]

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

One need only compare the ages of terminated employees to the ages of promoted workers to understand that Defendant's consideration of age constituted age discrimination. 100% of the

[145] Vartorella, Tr. at 1331:21-1332:8. Drnek Dep., 79:13-19.
[146] Vartorella, Tr. at 1382:2-11 (emphasis added).

workers terminated were over the age of 50.[147] In contrast, 100% of the individuals promoted or replacing older workers, like Liss and Russell, were under the age of 35.[148] CSU also admitted that only younger workers were promoted:

> Q: And as between those two columns, it's true that there's 100 percent correlation between the age of the person being laid off being over the age of 50 and the age of the person assuming most of the duties as being aged 35 or younger correct?
>
> A: That is correct.
>
> Q: Okay. And just on the face of Exhibit 6, it's true that anyone who was over the age of 50 is being replaced for most of their duties by someone under the age of 35, correct?
>
> A: Correct.[149]

Vartorella incredibly admitted that CSU specifically used age as a factor in reaching the termination decisions of Liss and Russell: "[I]n each instance, **the employees who were being laid off were evaluated with respect to their age.**"[150]

These admissions of Defendant establish, without inference, that Defendant made its decisions to terminate Liss and Russell, and not promote them or transfer them into open positions for which they were qualified, illegally because of age. Defendant admits that in terminating and not rehiring Liss and Russell, they were "evaluated with respect to their age,"[151] and that their ages were "factors that [CSU] considered...."[152] The ages of all employees terminated and of all employees promoted or hired show that when considering age, Defendant without exception chose to terminate older individuals like Liss and Russell, and retain or hire substantially younger individuals.

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[147] Vartorella, Tr. at 1331:12-16.
[148] Vartorella, Tr. at 1331:17-20.
[149] Vartorella, Tr. at 1331:21-1332:8; Drnek Dep., 79:13-19.
[150] Vartorella, Tr. at 1326:16-19 (emphasis added).
[151] Vartorella, Tr. at 1326:16-19.
[152] Vartorella, Tr. at 1382:2-11 (emphasis added).

The Decision does not address or evaluate this evidence in any way.[153] However, upon review, Defendant's admissions that it considered Liss's and Russell's ages in terminating and not rehiring them are direct evidence of age discrimination that require a finding in their favor on their claims of age discrimination.

### 2. The Decision Incorrectly Concluded that Defendant's Age-Related Comments Were Not Direct Evidence of Discrimination.

Liss and Russell presented overwhelming direct evidence of age bias by Defendant, which requires a finding in their favor of age discrimination. Cleveland State's conduct and comments reflecting age-based stereotypes constitute additional direct evidence of age discrimination.[154] Direct evidence includes employer remarks that "reflect a discriminatory attitude" or that demonstrate a "discriminatory animus in the decisional process."[155]

Banks decided to terminate Liss and Russell,[156] and also to exclude them and other older workers into the five new positions, while simultaneously promoting younger workers.[157] Banks frequently used discriminatory language in the workplace during the very same months he planned to fire Liss and Russell. Banks used ageist language to refer to older employees, stating, "you can't teach old dogs new tricks."[158] Banks described the older employees as "elephants"[159] and "old fashioned," and denigrated their programs as "out-dated."[160] Banks made these comments regarding older staff "pervasively" and specifically in March, April and June 2012.[161] Banks also invoked ageist stereotypes in Liss's work evaluation, stating that Liss needed to be more "up to date

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[153] Decision, pp. 7-13 (discussing direct evidence).
[154] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 1791 (1989) (holding performance criticisms voiced while the plaintiff was being considered for a promotion that were based in common stereotypes permitted the inference that discrimination was the motivating factor behind the denial of the promotion, even if the criticisms were true).
[155] *Kneibert v. Thomson Newspapers*,129 F.3d 444 (8th Cir. Mo.1997) quoting Beshears, 930 F.2d at 1354
[156] Ex. 2. See also Banks' testimony supra.
[157] Vartorella, Tr. at 1318-19.
[158] Liss, Tr. at 95-97.
[159] Liss, Tr. at 103-105; Russell, Tr. at 535-536
[160] *See, e.g.*, Liss, Tr. at 323 & 342.
[161] Liss, Tr. at 90-93; Russell, Tr. at 401-404.

in his work," "embrace technology, and to serve the "newer generation of students," as his staff "has difficulty dealing with change."[162]

Banks admitted that his views represented age-based stereotyping. Banks admitted that his remarks at CSU were based on the belief that "the newer generation communicates one way and the older generation communicates in a different way."[163] Critically, Banks then admitted that his generalization about older workers was "absolutely" inappropriate."[164]

Banks' remarks demonstrate an unabashed preference for a younger workforce. Discriminatory statements made by individuals who are meaningfully involved in an employment decision are highly probative of discriminatory intent.[165] Discriminatory remarks are also relevant to managerial attitudes over time and "reflect a cumulative managerial attitude among the defendant-employer's managers."[166] The Sixth Circuit has held that:

> evidence of a corporate state-of-mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the . . . timeframe involved in the specific events that generated a claim of discriminatory treatment. This is especially true when the discriminatory statement is "not an off-hand comment by a low-level supervisor" but a remark by a ***senior official*** evidencing managerial policy.[167]

The Magistrate's determination that Banks's comments are not evidence of discrimination because they were not made regarding the decision-making process is contrary to Sixth Circuit precedent.[168] Banks's comments need not concern the termination decision itself; rather, his age-

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[162] Ex. 56. The Decision excerpts Banks's comment regarding technology in finding that Banks's evaluation comments are not evidence of age discrimination, but specifically excludes and does not weigh Banks's comments regarding a "newer generation of students" and adapting to change. Banks's comments, which are nothing more than age-based stereotyping about the inability of older workers to work with younger clientele, are evidence of age discrimination ignored by the Decision. *Wexler v. White's Furniture Co.*, 317 F.3d 564, 572 (6th Cir. 2003) (7-2 decision, en banc); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993) ("Congress'[s] promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.").

[163] Banks, Tr. at 931.

[164] Banks, Tr. at 932. The Decision's conclusion that these remarks are not age-related contradicts Banks's own admission about the implicit age bias in his comments. Decision, pp. 10-12.

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

[166] *Id.*

[167] *Id* (emphasis added) (internal citations and quotations omitted).

[168] Decision, pp. 12-13.

based comments made contemporaneously and near the time the decision was made renders them direct evidence of discrimination under *Ercegovich*. The Sixth Circuit has recognized that "the eradication of such stigmatizing beliefs is precisely what [age discrimination laws] intended to target."[169] In *Wexler v. White's Furniture Co.*, the Sixth Circuit held *en banc* that statements such as Banks's, which associate "stigmatizing beliefs with an adverse employment action," are evidence of discrimination.[170]

Moreover, while the Decision separates the remarks from the reorganization decision, the remarks were made contemporaneously. Banks made these comments regarding older staff "pervasively" and specifically in March, April and June 2012.[171] In April 2012 – during the same time period that Banks made regular and pervasive ageist remarks – he set to the task of terminating his older employees through the pretense of a "reorganization." By April 24, 2012, Banks had designed the re-organization of the Department of Student Life.[172] Banks's remarks are thus relevant for showing his discriminatory views at the same time he decided to terminate Liss and Russell.

Statements like Banks's stand "alone as proof of the existence of a discriminatory motive without requiring any inferences."[173] Banks's comments: 1) were made by the person who designed the reorganization; 2) were made in the workplace; 3) concerned specific employees; 4) related to their work performance; 5) reflected a bias against older workers and an adoption of discriminatory ageist stereotypes; and 6) occurred contemporaneously with the decision to terminate the older workers and promote the younger workers. Banks made these ageist comments "pervasively",

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[169] *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993) ("Congress'[s] promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.").
[170] *Wexler v. White's Furniture Co.*, 317 F.3d 564, 572 (6th Cir. 2003) (7-2 decision, en banc).
[171] Liss, Tr. at 90-93; Russell, Tr. at 401-404.
[172] Banks, Tr. at 951, 954-955, 993-994 & 1011; Ex. 2.
[173] *Id.* at 119.

including during February, March, April and June.[174] Thereafter, even though Greek Life had grown ten-fold without a single alcohol or sexual misconduct charge, and provided 7,000 service hours of service, Banks fired all staff associated with the programs, including Liss and Russell to serve a "newer generation" of students.[175]

## E. The Decision Incorrectly Determined that Plaintiffs Failed to Prove Age Discrimination through Indirect Evidence.

The Decision correctly determined that both Liss and Russell successfully established their *prima facie* cases.

### 1. Plaintiffs Proved Their *Prima Facie* Cases for Both Their Termination and Failure to Hire Claims.

A plaintiff establishes a *prima facie* case of discrimination by showing (1) the employee is within the statutorily-protected class, (2) the employee was qualified for the position at issue, (3) the employee was discharged or not selected for hire, and (4) additional direct, circumstantial or statistical evidence tending to indicate discrimination.[176] A plaintiff satisfies the fourth prong by demonstrating that a comparable, non-protected person was treated better, replaced the plaintiff, or was selected for the open position at issue.[177] "Establishing a *prima facie* case 'creates a presumption that the employer unlawfully discriminated against the employee.'"[178]

There is no dispute as to prong one: Liss was age 50, Russell was age 66.[179] As to prong two, Cleveland State admits Liss and Russell were qualified for the positions from which they were

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[174] Liss, Tr. at 90, 93-94.
[175] Banks, Tr. at 923:12-16; Exh. 56.
[176] *Lennox Indus. v. State Civ. Rights Comm'n,* 1999 Ohio App. LEXIS 6491, 15-16 (Ohio Ct. App., Franklin County Dec. 28, 1999) citing *Ercegovich v. Goodyear Tire & Rubber Company* (1998), 154 F.3d 344, 350
[177] *Lennox Indus. v. State Civ. Rights Comm'n,* 1999 Ohio App. LEXIS 6491, 15-16 (Ohio Ct. App., Franklin County Dec. 28, 1999) citing *Ercegovich v. Goodyear Tire & Rubber Company* (1998), 154 F.3d 344, 350, see also *Bowditch v. Mettler Toledo Int'l, Inc.*, 2013-Ohio-4206, P15 (Ohio Ct. App., Franklin County Sept. 26, 2013) quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 582-83 (6th Cir.1992);*Clark v. Dublin*, 10th Dist. No. 01AP-458, 2002-Ohio-1440.
[178] *Bowditch v. Mettler Toledo Int'l, Inc.*, 2013-Ohio-4206, P15 (Ohio Ct. App., Franklin County Sept. 26, 2013) quoting *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, ¶ 11, 837 N.E.2d 1169, quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)
[179] Ex. 6.