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IN THE OHIO COURT OF CLAIMS

WILLIAM RUSSELL Plaintiff v. CLEVELAND STATE UNIVERSITY Defendant And STEVEN LISS Plaintiff v. CLEVELAND STATE UNIVERSITY Defendant	Case Nos. 2013-00138 and 2013-00139 Judge Patrick M. McGrath Magistrate Holly T. Shaver **CLEVELAND STATE UNIVERSITY'S MEMORANDUM IN RESPONSE TO PLAINTIFFS' OBJECTIONS**

I. OVERVIEW

William Russell and Steven Liss have filed objections to Magistrate Shaver's decision, though it is far from clear that they have actually read the decision. Their argument is recycled from their previous filings, and this time it reduces to three long-debunked lies and their conjecture that they would have won if only Magistrate Shaver had let them tell a few more stories about all they achieved in the Department of Student Life before Jim Drnek and Willie Banks came to town.

- **The first lie: CSU did not "admit" that it "used age as a factor in the termination decision."** They repeat that lie over and over again, each time more breathlessly than the last. *See, e.g.*, Objections at 24 ("Vartorella incredibly admitted that CSU specifically used age as a factor in reaching the termination decisions of Liss Russell: [I]n each instance, the employees who were being laid off were evaluated with respect to their age."). Mr. Vartorella was a human resources professional, and the "evaluation" was to ensure that the reorganization and layoff *did not discriminate against older workers.*

- **The second lie: CSU did not fire all the "older" workers in Student Life.** There are hundreds of employees in Student Life, but Mr. Russell and Mr. Liss identified just five who were over forty years old. Of those five, Valerie Hinton-Hannah was promoted, Dan Lenhart was retained, Mary Myers was transferred, and Mr. Russell declined to be bumped into another position.

- **The third lie: CSU has never said that Mr. Russell and Mr. Liss were terminated because of their "past performance."** They were terminated because of a reorganization that focused on the Center for Student Involvement, which was the most dysfunctional unit within Student Life. Mr. Liss's countless failings as a manager could hardly be ignored, though, when he applied to be re-hired into other positions.

- **The conjecture: Mr. Russell and Mr. Liss testified at length about their past performance, and they have proffered nothing additional that could possibly have changed the outcome of the trial.** In fact, their only quarrel appears to be that Magistrate Shaver sustained an objection to a question on rebuttal about Mr. Liss's onetime nomination for "supervisor of the year." (Objections at 38)

II. MR. RUSSELL'S FMLA CLAIM IS FRIVOLOUS.

As he conceded at trial, that claim concerned just one medical issue, his attempt to schedule shoulder-replacement surgery. (Tr. at 519) His request for FMLA leave was rejected not by CSU but by its third-party administrator, CareWorks, *because he never obtained a medical certification authorizing the surgery. See* Exs. 316, 317. And he has still never had that surgery. (Tr. at 528)

III. MR. RUSSELL'S AND MR. LISS'S AGE-DISCRIMINATION CLAIMS ARE BASELESS.

Mr. Russell and Mr. Liss say that CSU discriminated against them because Willie Banks used words like "old fashioned" and "old school." And second, they say that their layoffs *must have been* age-based because they were model employees. Mr. Liss heard no "ageist" remarks that were *directed toward him.* (Tr. at 378) And his laundry list of remarks that he says Dr. Banks made *about Mary Myers and Mr. Russell* includes just one that could actually be construed as discriminatory— the phrase "old dogs can't learn new tricks." He says he is positive Dr. Banks used that phrase in April 2012, some five months before the reorganization, though the context eludes him. *See* Tr. at 97-98 ("I can't

remember specifically. I know that . . . we would typically be talking about things that we were moving towards for the next year."). Mr. Russell himself never heard Dr. Banks use that term in the "five or six" times he had any direct contact with Dr. Banks. (Tr. at 486-87, 536-37). And for his part, Dr. Banks is adamant that he never used that phrase at all. *Mr. Liss used it during a meeting in which he was complaining to Dr. Banks about Mr. Russell and Dr. Myers*— they were the "old dogs" in his rendering of the phrase. (Tr. at 1213-14)

As to their belief that they were model employees, suffice it to say that they were nothing of the kind. Robert Bergmann, who was the Manager of the Student Center and is now Assistant Dean of Student Organizations, testified that some of what Mr. Russell did and Mr. Liss condoned was borderline illegal. (Tr. at 1669) Student organization files *were on paper, not electronic.* There was no electronic registration system. Long defunct organizations like "Students for Dukakis" were treated as though they were still active. Some organizations had outstanding debts to CSU totaling more than $10,000. And fraternities and sororities were *self-reporting their grades. See* Tr. at 1671 ("When we went back and looked at the actual grades, as I recall, it was something like a full GPA point difference. So not .1 [but] 1.0 difference between what had been reported and what was actually being done."). No one discriminated against Mr. Russell and Mr. Liss in any way, but one man— Dr. Banks— demanded that they actually do their jobs. That, not "age discrimination," is why they are angry; that is why they filed this suit; and that is as contemptible as it is dishonest.

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

James Drnek was the Associate Dean of Students at the University of Arizona when he interviewed in November 2007 for the position of Dean of Student Life at CSU. It "was made clear to [him] then . . . that Student Life needed to ramp up the level of activity to engage students." (Drnek Dep. at 193-98). He began his position as Dean in February 2008, and he focused his work on improving the Department of Student Life as a whole. One of the first things that struck him

was that staff members who were doing similar work were walled off into different groups with no central reporting structure. *Id.* He was not alone in that opinion. Mr. Bergmann also noted that Student Life employees were housed in different locations and there was often "no communication" among them. Tr. at 1680. Dean Drnek delegated the day-to-day management of the Center for Student Involvement ("CSI"), a unit within Student Life, to Sandra Emerick—his Associate Dean and onetime rival for the deanship that brought him to CSU—until she left in the Fall of 2011. *Id.* Mr. Russell worked as the part-time coordinator of Greek Life in that unit. He reported to Mary Myers, the Coordinator of Student Organizations; she in turn reported to Mr. Liss, the unit's Director; and he reported to Dr. Emerick.

The new Student Center opened in 2010, which meant that "all of the staff and Student Life" were in one place where Dean Drnek had an "opportunity to . . . observe[ ]" and take "mental notes" about their interactions and his developing thoughts about what kind of changes "might work well and how [he] might change things." *Id.* at 195. Finally, in 2011, "all of the Student Affairs-related functions, the Counseling Center, Disability Services, the Women's Center, Veterans, Residence Life Programming [and] Recreation Center Programming" began reporting to Dean Drnek. *Id.* at 196. That was actually the first part of reorganizing the Department of Student Life, but it did not resolve all of the problems with the distribution of work in the department. *Id.*

As Mr. Bergmann testified, there still was "just no . . . team approach to educating students." (Tr. at 1679) "[W]hen you interact with students on a daily basis and you want to educate them outside the classroom to make them better leaders or better organization members or better students or better citizens of the world, . . . you need to work together and . . . take an approach that as a department you're all going in the same direction." *Id.* But the individuals within Student Life were "siloed" off from one another. *Id.* at 1678. "There was no team building," and there was little interaction "because no one wanted to have someone else encroach in their little zone." *Id.* at 1679.

In addition, programs would sometimes be scheduled "at the same time in a different place," meaning that two programs offered by Student Life would be "competing against each other for the same students' attention." *Id.* at 1680.

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

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

> I went to Steve right away and I said, "Please, would you . . . take on these additional responsibilities?" And he . . . was very upset. He said, "No, no." And I said, "Really, do you want to think about it? You know I'm asking you. I need your help." So then finally he said, "I've done all of this before [and] I don't want to do it again." I was "really taken aback because whenever a supervisor has come to me and said, "Would you take on additional responsibility?" I always [said] yes.
>
> *[A] day or two later Steve came back and he said, "Well, I'll do this and this but not that, that, that and that." So then I had to distribute widely across Student Life the leadership and service activities. And as a result they weren't effective.*

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

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

Mr. Liss was not just afraid of Dr. Myers; he was afraid of Mr. Russell too. In April 2012, he emailed Steve Vartorella, who was then Student Life's liaison in Human Resources. The email bore

the subject line "Assistance with sensitive matter," and Mr. Russell's and Mr. Liss's attorneys have characterized it as his attempt to bring Dr. Banks's so-called discrimination to Mr. Vartorella's attention. *See* Ex. 287, Tr. at 1460. But it had nothing to do with age discrimination and everything to do with Mr. Liss's inability to manage his staff. Mr. Vartorella recalls the meeting he arranged with Mr. Liss after receiving the email this way: Mr. Liss asked whether he "was allowed to ask" Mr. Russell and Dr. Myers to schedule appointments with students instead of seeing "walk-ins" only. (Tr. at 1460-1464) Mr. Vartorella responded, saying "if it were me, I would go back to the office today, I would say to the staff starting on Monday, this is what we're going to be doing going forward." *Id.* at 1767. Mr. Vartorella remembers this vividly because it was so odd. Mr. Liss was "sweating profusely," "he was extremely, extremely nervous," and Mr. Vartorella was surprised that *a Director* needed to seek his advice on such a basic question. (Tr. at 1766-1770)

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

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

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

Dean Drnek prepared descriptions for the newly opened positions, and he believed that Mr. Liss met some but not all of the qualifications for those positions. He did not, for example, have

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

IX. MR. RUSSELL WAS OFFERED THE OPPORTUNITY TO "BUMP" INTO ANOTHER POSITION, BUT HE REFUSED.

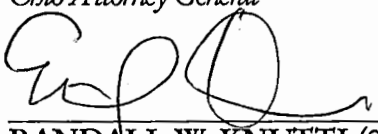
Steve Vartorella offered Mr. Russell the opportunity to "bump into" another position after the reorganization. "I had identified to [Mr. Russell] that there was one position that had been verified that he had the potential to bump into. . . . I believe it was the next day or the day after where he actually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

X. CONCLUSION

Mr. Russell and Mr. Liss have raised no objections that could ever justify the Court's reversal of Magistrate Shaver's decision; CSU urges the Court to uphold it.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General



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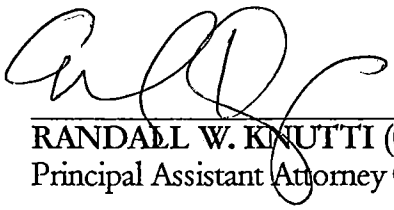
CERTIFICATE OF SERVICE

On November 12, 2015, I sent a copy of this document via electronic mail to Plaintiff's Counsel: **Christopher Thorman** (cthorman@tpgfirm.com) and **Daniel Petrov** (dpetrov@tpgfirm.com).



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