

FILED
COURT OF CLAIMS
OF OHIO

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IN THE OHIO COURT OF CLAIMS

WILLIAM RUSSELL,

Plaintiff,

vs.

CLEVELAND STATE UNIVERSITY,

Defendant.

) CASE NO.: 2013-00138
)
)
) JUDGE PATRICK M. McGRATH
)
) MAGISTRATE HOLLY T. SHAVER
)
)
)

ORIGINAL

STEVEN LISS,

Plaintiff,

vs.

CLEVELAND STATE UNIVERSITY,

Defendant.

) CASE NO.: 2013-00139
)
) JUDGE PATRICK M. McGRATH
)
) MAGISTRATE HOLLY T. SHAVER
)
)
)

**PLAINTIFFS' REPLY IN SUPPORT TO OBJECTIONS TO DECISION OF THE
MAGISTRATE**

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I. INTRODUCTION

Defendant Cleveland State University (“Defendant” or “CSU”) provides no response of any kind to the specific objections that Plaintiffs Steve Liss (“Liss”) and William Russell (“Russell”) have raised to the Magistrate’s Decision. Although Defendant recycles its post-trial arguments regarding liability, it does not contest the specific legal and evidentiary objections that Plaintiffs have made to the Magistrate’s Decision. In its silence, Defendant tacitly admits that:

- 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 (Objections, pp. 38-39);¹
- 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 (Objections, pp. 49-51);
- 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 (Objections, pp. 31-32);
- 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 (Objections, p. 23);
- 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 (Objections, pp. 23-27);
- 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

¹ Defendant highlights the error in the Decision by stating, in bold text, “CSU has never said that Mr. Russell and Mr. Liss were terminated because of their ‘past performance.’” Although Plaintiffs dispute this claim, Defendant’s emphatic denial of this point strengthens Plaintiffs’ objection to the Magistrate’s conclusion that Plaintiffs were separated due to their “prior performance.” (Decision, pp. 19-21).

workers and applicants (Objections, pp. 32-49);

- the Decision contains 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 (Objections, pp. 36-37);
- the Decision contains 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 (Objections, pp. 52-55);
- the Decision contains 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 (Objections, pp. 55-58);

In light of these objections, and Defendant's decision to not oppose these objections, Plaintiffs respectfully request that the Court decline to adopt the Decision.

II. ARGUMENT

In the face of Plaintiffs objections to the Decision's erroneous evidentiary rulings, burden-shifting frameworks, and legal standards, Defendant provides the Court with nothing showing these challenged portions of the Decision to be legally correct. Defendant stunningly does not cite for the Court a single case, let alone a case demonstrating that Plaintiff's objections are unfounded under Ohio law. Defendant strenuously argues its view of the facts; however, in doing so, Defendant actually strengthens the conclusion that the legal and factual errors in the Decision caused substantial prejudice to Plaintiffs.

A. Defendant's Presents Only a Red Herring to the Court Regarding Russell's FMLA Claim.

Defendant's only "argument" opposing Russell's FMLA claim is that Russell did not obtain FMLA leave because it did not reject his request for leave. (Response, p. 2). It is difficult to understand what significance Defendant attaches to this point; nonetheless, the law is clear that a plaintiff is entitled to FMLA protection once he puts the employer on notice that he "may" need

FMLA leave.² He does not need to file any paperwork³, does not need medical certification,⁴ and is nonetheless protected from interference, discouragement and retaliation. Russell put Defendant on notice that he would need FMLA leave – but they fired him five days after his written request and before he could complete the paperwork. Defendant does not dispute these points, but apparently misunderstands their legal significance under Sixth Circuit law.

Defendant does not contest Plaintiff's objections to the Decision's factual and legal determinations evaluating Russell's FMLA claims, either with respect to Russell's date of notice or the Decision's ignoring of the binding law.⁵ Contrary to the Decision's conclusion, 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 procedures."⁶ This Court is not free to ignore federal precedent from the Sixth Circuit interpreting the FMLA in favor of out-of-district precedent. The Court, upon review, must address this legal error (that Defendant does not contest) and find in favor of Russell.

B. Defendant Fails to Address or Contest Plaintiffs' Objections to the Decision's Denial of Their Age Discrimination Claims.

Plaintiffs have raised distinct objections to the Decision's denial of their age discrimination claims, including that the Decision (1) erroneously barred Plaintiffs from introducing evidence of good performance, while simultaneously relying on their "prior performance" to find in favor of Defendant; (2) incorrectly segregated evidence into categories of "prima facie," "direct," and

² *Metroka-Cantelli v. Postmaster Gen.*, 2013 U.S. Dist. LEXIS 158303, 16-19 (N.D. Ohio Nov. 5, 2013)(rejecting defendant's argument that FMLA request was invalid because plaintiff failed to complete FMLA paperwork after being notified of termination).

³ *Brown v. Travel Centers of America, LLC*, Case No. 12-CV-1496, Slip. Op., p.4 (Nov. 27, 2013).

⁴ *Johnson v. Dollar Gen.*, 880 F. Supp. 2d 967, 993-994 (N.D. Iowa 2012)(holding that "in short, a "retaliation" claim **does not require proof** that the plaintiff actually suffered a "serious health condition," only that the plaintiff gave adequate and timely notice to the employer that he or she needed leave for a condition that the plaintiff believed, in good faith, might be covered by the FMLA.")

⁵ Decision, p. 24, *citing Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 877 (10th Cir. 2004).

⁶ *Brown v. Travel Centers of America, LLC*, Case No. 12-CV-1496, Slip. Op., p.4 (Nov. 27, 2013).

“indirect,” when Ohio law requires a factfinder to evaluate all evidence at each stage of proof; (3) does not consider the Defendant’s failure to present the decision-maker at trial to offer Defendant’s explanation for its treatment of Plaintiffs; (4) failed to consider Defendant’s admission that it considered the ages of Liss and Russell; (5) concluded that Plaintiffs failed to prove their age discrimination claim without inference through the direct method of proof; (6) concluded 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; and (7) erroneously stated Plaintiff’s evidentiary burden at the pretext stage. Defendant responds only to points (4) and (5), apparently conceding error on all remaining points. Even in its response, however, Defendant highlights the Decision’s error and the resulting prejudice to Plaintiffs.

With respect to the Decision’s failure to consider or address Vartorella’s admission that Defendant considered Liss’s and Russell’s ages in making employment decisions, Defendant’s only response is strangely to call Plaintiff’s quotation of Vartorella’s trial testimony a “lie,” and then to claim with no record citation that an “evaluation” was conducted to ensure that no discrimination occurred. Even in offering its unsupported defense, however, Defendant admits that such an “evaluation” actually occurred. Defendant thus concedes that Vartorella’s testimony was true: “[I]n each instance, **the employees who were being laid off were evaluated with respect to their age,**”⁷ and that Defendant “looked at the age of the people. . .to be promoted as factors that they considered in the review process for the terminations....”⁸

Vartorella’s admission directly leads one to conclude that Liss and Russell were terminated for discriminatory reasons, and to this conclusion, Defendant can offer no meaningful rebuttal founded upon record evidence. Defendant’s inability to provide any evidentiary response highlights

⁷ 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).

⁸ Vartorella, Tr. at 1382:2-11 (emphasis added).

the prejudice to Plaintiffs in the Decision's failure to consider or address this evidence. Had the Decision taken into account Vartorella's admission, it necessarily would have concluded that it was evidence of age discrimination, because Defendant provides no evidence supporting any other conclusion.

Defendant then expends effort arguing that the age-related remarks of its decision-makers were not age-related. Defendant, however, ignores the entire point of Plaintiff's objection and the error in the Decision on this issue, which was that the Decision erroneously determined that Banks's comments were not evidence of discrimination, *because* they were not made regarding the decision-making process. This is contrary to Sixth Circuit precedent.⁹ Banks's comments need not concern the termination decision itself; rather, his age-based comments made contemporaneously and near the time the decision was made renders them direct evidence of discrimination under *Ercegovich* and *Wexler*.¹⁰ Defendant does not contest this point.

C. Defendant's Response Exposes the Prejudice of the Decision's Evidentiary Rulings Through Its Reliance on Arguing that Plaintiffs Were Poor Performers.

Defendant's Response contains pages and pages of criticism of Plaintiffs' work performance, presumably intended as support for their position. In offering this criticism, however, Defendant simply highlights the overwhelming prejudice present in the contradiction between the Magistrate's trial ruling and the conclusions in the Decision.

The Decision determined that Liss and Russell were not selected for open jobs for reasons including "prior performance."¹¹ In so concluding, the Decision relies upon testimony of Banks,

⁹ Decision, pp. 12-13.

¹⁰ *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."); *Wexler v. White's Furniture Co.*, 317 F.3d 564, 572 (6th Cir. 2003) (7-2 decision, en banc).

¹¹ See, e.g., Decision, pp. 19-21.

Drnek, and others regarding alleged performance deficiencies of Plaintiffs.¹² Defendant cites the same evidence in support of the same arguments regarding Plaintiffs' allegedly poor performance.

At trial, however, the Magistrate barred Plaintiffs from offering into evidence testimony regarding their actual good performance. 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.¹³

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

The Decision, in contrast, found Defendant's failure to rehire Plaintiffs to be justified based on Plaintiffs' work performance.¹⁴ The Magistrate thus simultaneously barred Plaintiffs from offering evidence of good performance as irrelevant, but accepted Defendant's claim of bad

¹² See, e.g., Decision, pp. 14, 19.

¹³ Tr. 355-56.

¹⁴ Decision, pp. 19-21.

performance as explaining the challenged terminations. Defendant's continuation of this line of argument in its Response only highlights the prejudice of the Magistrate's trial ruling and subsequent about face. 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.

D. Defendant Ignores the Admissions of Its Own Decision-Makers That Plaintiffs' Performance Played No Role in Firing or Not Rehiring Plaintiffs.

The remainder of Defendant's Response is a collection of criticisms of Plaintiffs with no attempt to address or contest Plaintiff's Objections. Defendant, however, fails to acknowledge the overwhelming evidence, including its own 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.¹⁵ 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.

II. CONCLUSION

For the foregoing reasons, including Defendant's failure to address or contest Plaintiff's Objections, Plaintiffs respectfully request that the Court decline to adopt the Magistrate's Decision. Instead, Plaintiffs respectfully request that the Court find:

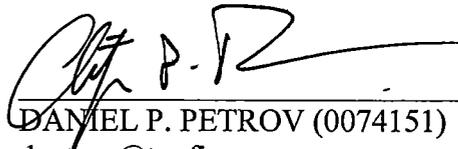
¹⁵ See, e.g., Banks, Tr. at 894-895; Vartorella, Tr. at 1307; Drnek Dep. 248:17-249:3; Walker, Tr. at 701-702.

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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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served via electronic mail, on this 4th day
of December 2015 to:

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THORMAN PETROV GROUP

December 4, 2015

Via Overnight Fedex Mail

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

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' Reply in Support to 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. *Ac*

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

Sincerely,

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Enclosures

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