[Cite as *Russell v. Cleveland State Univ.*, 2015-Ohio-5639.]

IN THE COURT OF CLAIMS OF OHIO

WILLIAM RUSSELL Plaintiff

v.

CLEVELAND STATE UNIVERSITY Defendant

AND

STEVEN LISS Plaintiff

v.

CLEVELAND STATE UNIVERSITY Defendant

Case Nos. 2013-00138 and 2013-00139

Magistrate Holly True Shaver

DECISION OF THE MAGISTRATE

{¶1} On November 21, 2014, the court granted defendant's motion for summary judgment as to plaintiffs' claims for retaliation, plaintiff Steven Liss' claim of violation of Family and Medical Leave Act (FMLA) rights, plaintiff William Russell's claim of disability discrimination, and both plaintiffs' claims for breach of contract. Russell's motion for partial summary judgment was also denied. Plaintiffs' claims for age discrimination under both state and federal law, and Russell's claim of FMLA violations were tried to the court from December 8-12, 2014, and January 20-22, 2015.[1]

[1]Inasmuch as plaintiffs' motion to compel defendant to produce Ronald Berkman, Ph.D., for deposition was denied on August 28, 2014, Liss' September 3, 2014 motion for leave to file a reply in support of the motion to compel is DENIED as moot.

{¶2} In 2012, plaintiffs were both employed by defendant, Cleveland State University (CSU), in the Department of Student Life. Liss, who worked full-time as Director of the Center for Student Involvement (CSI), supervised both Mary Myers, Coordinator for Student Organizations, and Russell, who worked part-time as the Coordinator for Greek Affairs. In 2012, Liss had worked for defendant for approximately 19 years. Russell was in the first graduating class at CSU in the early 1970s, and had remained active with CSU since that time. After practicing law and teaching as an adjunct professor at Cleveland Marshall Law School for 20 years, Russell became the Coordinator for Greek Affairs in 2000. According to Russell, Greek Life was "extinct" when he took the position, and he grew it "tenfold."

BACKGROUND FACTS

{¶3} In February 2008, Jim Drnek became Dean of Students. Drnek supervised approximately 400 employees across campus, but in the Department of Student Life, Drnek supervised Liss, Sandra Emerick (Associate Dean of Students), Paul Putnam (Director for Community Service and Leadership), and Valerie Hinton Hannah, (Director of Judicial Affairs). In 2008, Putnam resigned, and due to budget constraints, CSU was unable to fill his position. Emerick continued in her position but also took on Putnam's responsibilities.

{¶4} In 2010, CSU completed the construction of a new Student Center, which Drnek described as a $45 million dollar building that was the center of campus. With regard to Greek Life, Drnek testified that he and his supervisors desired to increase the number of national fraternities and sororities and to shift away from local organizations for two main reasons: 1) national organizations provide liability insurance to their members when hazing or other violations occur while local organizations do not; and, 2) national organizations provide better networking opportunities for their members. Drnek also stated that the Campus Activities Board, a group of students that planned activities for the entire student body, was increasing its participation around campus, and CSU had built a new dormitory to house over 1,000 students. According to Drnek, the student population at CSU was changing from a traditionally commuter university to a more residential university. Drnek testified that beginning in 2010, he considered reorganizing the Department of Student Life to more effectively deliver programs and services to students.

{¶5} In 2011, Emerick resigned, and Drnek approached Liss to take on Emerick's

responsibilities. According to Drnek, Liss refused to do so and stated that he was offended that Drnek would ask him. A few days later, Liss agreed to take on a portion of Emerick's responsibilities. Drnek asked other Student Life staff to take on the remaining Service and Leadership responsibilities. Drnek testified that he expected that Liss would have agreed to take on Emerick's responsibilities at that time without question.

INITIAL PLANNING OF THE REORGANIZATION

{¶6} After a national search, in February 2012, Dr. Willie Banks was hired as Associate Dean of the Department of Student Life. Banks had worked at the University of Georgia, which has 35,000 students and 26 chapters of national fraternities and sororities. Banks then became Liss' direct supervisor.

{¶7} According to Banks, when he arrived at CSU, he observed an unwillingness to collaborate among different offices in the Department of Student Life. Banks and Drnek agreed that a reorganization was appropriate. Specifically, Banks and Drnek agreed that CSI was not being managed well, that the programs being offered in the areas of Service and Leadership were too specific and excluded certain students who did not hold a leadership position, and since the duties of the former Community Service and Leadership position had been divided among different staff, they were not being implemented effectively. According to Drnek, the Department of Student Life had been criticized for not having enough student activity on campus, and there was no position in place to coordinate events and programming for the new Student Center. Banks hired a consultant, T.W. Cauthen, who was a close friend of his from Georgia, to provide recommendations for a reorganization. As a result of multiple meetings with Human Resources staff beginning in May 2012, and in light of Cauthen's report, which was finalized on June 15, 2012, Drnek and Banks proposed a reorganization which was ultimately approved by Drnek's supervisors by the end of August 2012.

{¶8} On September 5, 2012, the reorganization was announced. (Plaintiffs' Exhibit 72.) As a result, the two full-time positions held by Liss and Myers, and the part- time position held by Russell, were abolished, and five new full-time positions were created. At the time of the abolishment, both Liss and Myers were 50 years old, and Russell was 66 years old.

{¶9} Three of the five new positions held the title of Assistant Dean. Two of the Assistant Dean positions were filled by existing employees. Specifically, the Assistant

Dean of Student Organizations, which encompassed most of Liss' former duties, was filled by existing employee Robert Bergmann, age 32. The Assistant Dean of Student Activities, which encompassed most of Myers' former duties, was filled by existing employee Jamie Johnston, age 29.

{¶10} The third Assistant Dean position, and the two new Coordinator positions were posted and interviews were conducted. As a result of the interviews, the position of Assistant Dean of Student Engagement, which assumed all of Russell's duties, was filled by Jill Courson, age 35, who was also a personal friend of Banks. The Coordinator of Student Activities position was filled by Catherine Lewis, age 24. The Coordinator of Commuter Affairs position was filled by Melissa Wheeler, age 30.

{¶11} Although all three positions in the former CSI were abolished, other employees who had worked in the Department of Student Life remained employed after the reorganization. For example, Valerie Hinton Hannah, who was 58 years old, was promoted to Assistant Dean of Judicial Affairs. Daniel Lenhart, age 50, remained in his position as the student media specialist, but reported to Bergmann instead of Liss.

{¶12} Russell was a member of a collective bargaining unit. Russell was notified via letter signed by Stephanie McHenry, Vice President for Business Affairs & Finance, that his position was being eliminated and that the layoff was effective October 5, 2012. McHenry explained Russell's rights under his collective bargaining agreement, and stated that the reorganization was necessary for purposes of efficiency and effectiveness. (Plaintiffs' Exhibit 100.)

{¶13} After the reorganization was announced, Steve Vartorella, Human Resources Consultant, met with Russell to explain that he had "bumping rights," which meant that he could be placed into another comparable position based on his seniority. Although Vartorella identified one position for him, Russell declined to exercise his bumping rights for it, stating that he did not have the skill set to perform the job, based upon requirements of word processing, spreadsheet, and database management. (Defendant's Exhibit T-4.) According to Vartorella, Russell expressed to him that he did not want to displace someone else out of a job. Inasmuch as Russell was a part-time employee, he did not have rights to be automatically placed into one of the five new positions, because they were all full-time. Russell and Vartorella continued to have meetings during which Russell identified various issues with his service credit, and expressed his desire to negotiate his end date of employment to coordinate his

upcoming shoulder surgery and ensure that he had health care coverage. (Plaintiffs' Exhibits 314-315.) Although Myers is not a plaintiff, it is undisputed that she was a member of a collective bargaining unit and exercised her bumping rights to obtain a position in a different part of the university after the reorganization.

{¶14} Liss was notified via letter, signed by President Ronald Berkman, informing him that Dean Drnek had recommended that he be laid off as part of an overall reorganization of the Department of Student Life, effective October 6, 2012. In the letter, President Berkman stated: "Please note that this decision is not based on performance. Thank you for your service to the University." (Plaintiffs' Exhibit 98.)

{¶15} Liss was not a member of a collective bargaining unit, and, consequently, he was not eligible to "bump" into any existing position. Vartorella met with Liss and presented him with three postings of jobs available in other areas of the university. Once the newly created positions in the Department of Student Life were posted, Liss applied for all three positions. After applications were screened, it was determined that Liss met the minimum qualifications for all three positions, and he was offered Skype interviews for each of them. Liss was interviewed for both of the Coordinator positions but was not selected. During the interview for the Coordinator for Student Activities, Liss inquired of the interview panel what would be done to ensure that he was not discriminated against by Banks if he were selected. Liss declined to interview for the position of Assistant Dean of Student Engagement.

{¶16} Plaintiffs argue that the reorganization was both a "sham" and a pretext for age discrimination. Liss further asserts that defendant refused to hire him for any of the newly created positions because of his age. Both plaintiffs point to remarks that Banks made to them from February to September 2012 to support their claims that the decisions to eliminate their positions were based upon age. In their amended complaint, plaintiffs also refer to a pattern and practice of age discrimination. Russell also asserts that defendant both retaliated against him for his use of FMLA leave and interfered with his rights to use FMLA leave.

AGE DISCRIMINATION

{¶17} R.C. 4112.02 provides, in pertinent part, that: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the * * * age * * * of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of

employment, or any matter directly or indirectly related to employment." The Age Discrimination in Employment Act of 1967 (ADEA) states that it is unlawful for an employer to: "(1) discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or] (2) limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age * * *." Section 623(A)(1) and (2), Title 29 U.S. Code. "Whether a plaintiff's claims are brought pursuant to Title VII, the ADEA, or R.C. 4112.02, federal case law interpreting Title VII [of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code] is generally applicable." *Clark v. City of Dublin*, 10th Dist. Franklin No. 01AP-458, 2002-Ohio-1440, ¶ 26; *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.,* 66 Ohio St.2d192,196 (1981).

{¶18} "'To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent' and may establish such intent through either direct or indirect methods of proof." *Ceglia v. Youngstown State Univ*., 10th Dist. Franklin No. 14AP-864, 2015-Ohio-2125, 15, quoting *Ricker v. John Deere Ins. Co.*, 133 Ohio App.3d 759, 766, (10th Dist.1998). "Absent direct evidence of age discrimination, a plaintiff may indirectly establish discriminatory intent using the analysis promulgated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, (1973), as adopted by the Supreme Court of Ohio in *Barker v. Scovill, Inc.*, 6 Ohio St.3d 146 (1983), and modified in *Coryell* [v. Bank One Trust Co. N.A., 101 Ohio St.3d 175, 2004-Ohio-723.]" *Id.* "Regardless of the method of proof utilized, the burden of persuasion remains at all times with the plaintiff." *Dautaras v. Abbott Labs.*, 10th Dist. Franklin No. 11AP-706, 2012-Ohio-1709, 25.

DIRECT EVIDENCE

{¶19} "Direct evidence of discrimination occurs when either the decision-maker or an employee who influenced the decision-maker made discriminatory comments related to the employment action in question." *Chitwood v. Dunbar Armored, Inc.*, 267 F. Supp.2d 751, 754 (S.D. Ohio 2003). Further, "'direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003), quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp*., 176 F.3d 921, 926 (6th Cir. 1999). "Consistent with this definition, direct evidence of discrimination does not require a factfinder to draw any inferences in order to conclude that the

challenged employment action was motivated at least in part by prejudice against members of the protected group." *Id.,* citing *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000).

{¶20} In order for a statement to be evidence of an unlawful employment decision, plaintiff must show a "nexus between the improper motive and the decision making process or personnel. Accordingly, courts consider (1) whether the comments were made by a decision maker; (2) whether the comments were related to the decision making process; (3) whether they were more than vague, isolated, or ambiguous; and (4) whether they were proximate in time to the act of alleged discrimination." *Birch v. Cuyahoga Cty. Probate Court*, 173 Ohio App.3d 696, 705, 2007-Ohio-6189, 23 (8th Dist.). However, where allegedly discriminatory comments are merely "stray remarks," unrelated to the decision-making process, such comments are not actionable. *See Bogdas v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-466, 2009-Ohio-6327 citing *Brewer v. Cleveland Schools Bd. of Edn*., 122 Ohio App.3d 378, 384 (8th Dist.1997). "Statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself [cannot] suffice to satisfy the plaintiff's burden *** of demonstrating animus." *Bush v. Dictaphone Corp*., 161 F.3d 363, 369 (6th Cir.1998.)

{¶21} The evidence shows that although Drnek had the authority to hire and fire employees, Banks and Drnek both agreed that a reorganization was necessary. Therefore, the magistrate finds that both Drnek and Banks were decision makers with regard to the reorganization.

{¶22} Liss testified that Banks used ageist remarks, such as "old-fashioned" and "out- of-date" to describe CSI on multiple occasions during weekly meetings with him from February to September 2012. Specifically, Liss stated that Banks was frustrated that CSI continued to use paper documents and that Banks desired an electronic mechanism to schedule appointments and interact with students. At the time, Myers required students to visit CSI in person during office hours and would not schedule appointments for them in advance. According to Liss, Banks was frustrated with that system and found it inefficient. Liss conceded that he also shared Banks' concerns about the lack of an appointment scheduling option for students.

{¶23} According to Liss, Banks also used the term "old-school" to describe the Greek Life yearbook that had been approved by Greek Council prior to Banks' employment. According to Liss, Banks stated that a hard-copy yearbook was "old-

school" and he stopped the project even though the contract for the vendor had been approved. Liss also testified that Banks used terms such as "old-fashioned" and "old-school" to describe the fact that CSI was not maintaining accurate rosters of its sorority and fraternity members, and that CSI permitted students to self-report their grades, instead of obtaining that information directly from the registrar's office. Liss testified that Banks was also upset that certain city-wide chapters offered membership to people who were not students of the university. Liss further stated that Banks voiced concern with regard to local chapters' lack of individualized risk management plans that did not set forth specific policies with regard to hazing or under-age drinking.

{¶24} According to Liss, Banks stated to him in April 2012, something such as, "Do you think old dogs can learn new tricks?" In response, Liss allegedly stated, "Are you talking about my staff?" and Banks replied, "Think about it." Banks disputes Liss' version of events and testified that Liss was the one who made that comment to him.

{¶25} According to Liss, whenever he would try to explain the history of CSI, Banks would say, "I don't care," and that, "History is invalid." Liss also testified that Banks referred to Liss' staff as "the elephant in the room," which, according to Liss, is another way of saying that something is old.

{¶26} Liss testified that Banks also became frustrated with CSI's level of progress with a university-wide deadline of July 1, 2012, to be connected to the OrgSync computer system, a tool for students to register and maintain organizational information online. It is undisputed that Russell had never logged in to OrgSync. It is also undisputed that Myers had logged in to OrgSync only one time during the spring semester of 2012.

{¶27} In August 2012, Banks completed an evaluation of Liss wherein Banks stated that "Steve needs to embrace technology." (Plaintiffs' Exhibit 56.) According to Liss, that statement is "ageist" because it suggests that he was "out of date." Liss testified that Banks repeatedly referred to the "newer generation of students" and their preference to interact electronically. Liss asserted that Banks' remarks show that he preferred younger employees over older employees based upon a stereotype that younger employees are more willing and able to use electronic technology. Liss also stated that Banks' use of the phrases "cutting edge" and "new" implies that Banks believed that older employees could not adapt to new technology.

{¶28} Russell testified that Banks was not interested in any historical information about Greek Life on campus, and referred to history as "invalid." With regard to the Greek

Life yearbook of which Russell was the advisor, Banks said to him, "Get rid of your old- school methods. This is old-school; that's not going to fly anymore." With regard to a social event for fraternity and sorority students that was scheduled to take place in a bar, Banks said to Russell, "Get into the 21st century." When Russell stated to Banks that sometimes older things can be the best, Banks stated to Russell, "Nonsense!" According to Russell, Banks frequently used terms such as "vibrant" and "cutting edge" with regard to programs that he wanted to see in the Department of Student Life, commented that CSI's methods were outdated, and that CSI was "the elephant in the room." Both Russell and Liss testified that they never heard any age-related comments uttered by Drnek, and Liss testified that the comments that Banks made referred to Myers and Russell but not to him personally.

{¶29} Banks testified that when he used the term "old-school" he was referring to methods, leadership, programs, or services. Banks denied using those phrases to describe particular individuals. Banks testified that an example of an "old-school" policy in his opinion was to allow local chapters of fraternities and sororities to exist, instead of moving toward national groups, mainly because local chapters presented liability issues to the university from a risk management perspective. According to Banks, when he first began at CSU, he became concerned when he could not obtain certain information from CSI staff. Banks felt that the Greek Life area was not up to par with national standards or practices. Banks testified that programming was not making its way to the students, and he desired that information be online, rather than posting paper fliers. Banks explained that there is a difference in communication with a younger generation of students, and that they expect information to be online and prefer to communicate electronically.

{¶30} With regard to the comment about old dogs not being able to learn new tricks, Banks' account is markedly different from Liss'. Banks explained that he and Liss were in Banks' office and Banks told Liss that he needed to "step it up." Banks was frustrated with Liss complaining about his staff's performance. According to Banks, Liss stated, "I don't know if old dogs can learn new tricks." Banks responded, "I don't know, Steve. Find out!"

{¶31} Banks did not remember using the phrase elephant in the room, but testified that in his opinion, that phrase is used to describe an issue that is not being addressed, and does not refer to age.

{¶32} Upon review of the evidence, the magistrate finds that Banks' comments of

"old school," "old-fashioned," and "out of date" do not constitute direct evidence of age discrimination. The magistrate finds that Banks' comments do not refer to plaintiffs' ages, but rather, the business methods of CSI. Furthermore, the phrases "old school," "old-fashioned," and "out of date" require a factfinder to draw further inferences to support a finding of discriminatory animus.

{¶33} With regard to the "old dogs, new tricks" remark, the magistrate finds that conflicting testimony was presented about who actually uttered that comment: Banks or Liss. However, even assuming for purposes of argument that Banks made that comment, the magistrate finds that plaintiffs have failed to show that the comment was made about the decision-making process. Moreover, Liss testified that the "old dogs, new tricks" comment was made by Banks to him about Russell and Myers. Therefore, Liss, as a matter of law, cannot rely on that comment as direct evidence to show that his age was a motivating factor for his job abolishment, inasmuch as the comment was not made about him.

{¶34} Similarly, Russell testified that Banks told him to "get into the 21st century" after

{¶35} Banks had learned that Russell scheduled a fraternity party to be held at a bar. The magistrate finds that Banks' remark does not constitute direct evidence of age discrimination because plaintiffs have failed to show that the remark was either related to the decision making process or that it was proximate in time to the reorganization. *See Birch, supra*. Although Russell did not specifically state when the remark was made, the evidence shows that the graffiti party that was scheduled in a bar occurred on April 11, 2012, and although the email that Banks wrote complaining that it was not up to national standards to host fraternity/sorority events in bars is not dated, the body of that email indicates that it was sent either immediately before or after the date of the party. (Defendant's Exhibit A.) Formal discussions of the reorganization began in mid- May 2012, and the reorganization was announced in September 2012. Therefore, the magistrate finds that the comment "get into the 21st century" is not direct evidence of age discrimination because it was neither made regarding the decision making process nor proximate in time to the reorganization. Finally, with regard to the comment about CSI being the "elephant in the room," the magistrate finds that remark is not direct evidence of age discrimination. The magistrate finds that "elephant in the room" does not connote age, but rather, a situation that is not being addressed despite the need to do so. In short, the magistrate finds that none of Banks' comments constitute direct

evidence of age discrimination.

INDIRECT EVIDENCE

{¶36} In order to state a prima facie case of age discrimination by indirect evidence, under *McDonnell Douglas, supra*, a plaintiff first has "the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' * * * Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981), quoting *McDonnell Douglas*, at 802, 804.

{¶37} An inference of discriminatory intent may be drawn where plaintiff establishes that he: 1) was at least 40 years old at the time of the alleged discrimination; 2) was subjected to an adverse employment action; 3) was otherwise qualified for the position; and 4) that after plaintiff was rejected, a substantially younger applicant was selected. See *Coryell, supra*, paragraph 1 of the syllabus.

{¶38} The evidence presented at trial shows that both plaintiffs have established a prima facie case of age discrimination by indirect evidence. Liss was 50 years old and Russell was 66 years old at the time of the reorganization; both of their jobs were eliminated as a result of the reorganization; and they were both qualified for the positions that they previously held. As a result of the reorganization, all of the newly created positions were filled by people who were substantially younger than plaintiffs.

{¶39} To show a legitimate, non-discriminatory reason for the reorganization, Drnek testified that the Service and Leadership component of the Department of Student Life had been lacking since 2008 when the position was not filled due to budget shortfalls. Then, when Emerick resigned in 2011, those duties were fragmented even more. Once the new Student Center opened, there was no position in place to coordinate activities. Drnek felt that the Department of Student Life needed to be reorganized to effectively get improved programming to students, and he also wanted to move toward more national fraternities and sororities. In addition, the university was becoming more residential, with a newly built residence hall. Although Drnek relied on

Cauthen's consulting report, Drnek testified that Cauthen's findings mirrored his own conclusions from the observations that he had made in the Department of Student Life during his employment. In short, Cauthen's report supported Drnek's opinions of what needed to be done.

{¶40} Moreover, Banks testified that CSI was not being managed well, leadership programs were lacking, and the Greek Life component was not meeting national best practices. In a nutshell, Banks was concerned about liability issues for the university with regard to Greek organizations, the lack of accessible data in CSI, CSI's reluctance to offer online access to its programs, and the lack of efficiency and accountability in general in CSI compared to other areas of the Department of Student Life.

{¶41} Jean McCafferty**,** compensation analyst, testified that on May 14, 2012, she met with Drnek and Banks along with Vartorella and Denise Mutti to discuss the structure of the reorganization. According to McCafferty, the rationale behind the reorganization was that the entire Department of Student Life needed to "raise its game." While there was no discussion of Liss' or Russell's performance specifically, Greek Life was cited as an area that needed improvement. McCafferty noted that reorganizations happen frequently at the university.

{¶42} Upon review of the testimony and evidence presented at trial, the magistrate finds that defendant has offered legitimate, non-discriminatory reasons for the reorganization, namely, to offer more services to students and to bring more national fraternities and sororities to campus. Thus, the burden shifts to plaintiffs to show pretext.

{¶43} "To establish pretext, a plaintiff must demonstrate that the proffered reason (1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct. Regardless of which option is chosen, the plaintiff must produce sufficient evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against him. A reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason." (Internal citations omitted.) *Knepper v. Ohio State Univ.*, 10th Dist. Franklin No. 10AP-1155, 2011-Ohio-6054, 12. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine, supra*, at 253.

{¶44} Plaintiffs assert that the following facts establish that the reorganization

was a pretext for age discrimination: that the only staff members whose positions were eliminated were over 40 years old; that the two existing employees who were promoted into the new positions were younger than 40; that the consultant who recommended the reorganization was a close personal friend of Banks with no prior consulting experience; that Courson, who was hired to replace Russell, was also a personal friend of Banks, younger than 40, and not qualified; and that Drnek falsely represented to his supervisors in his rationale for the reorganization that Liss was not qualified for the newly created positions. Plaintiffs also presented testimony throughout the trial that, in their opinion, Banks was more demanding on the staff of CSI than he was on other staff in the Department of Student Life, and that Banks generally had better relationships with other Student Life staff, including Bergmann and Johnston. Both Russell and Liss testified that they felt that Banks was unduly harsh on CSI and that Banks was "picking on" them. Liss was also critical of the fact that Drnek refused to be a mediator in a situation when Banks had asked Liss to issue a written reprimand against Russell for failing to complete a questionnaire by a specified deadline. Essentially, plaintiffs testified that in their view, the proffered reasons for the reorganization were insufficient to warrant the abolishment of their positions. Both plaintiffs point to their employment evaluations prior to Banks' arrival to show that their work was considered satisfactory until Banks became their supervisor.

{¶45} Upon review of the evidence, the magistrate finds that although the three eliminated positions affected employees who were over forty years old, that fact is relevant to the prima facie case, not to the issue of pretext. Moreover, the magistrate notes that other existing employees over 40 were retained after the reorganization, specifically, Hinton Hannah and Lenhart. Most importantly, however, the fact that CSI was eliminated does not demonstrate that the proffered reasons for the reorganization had no basis in fact, did not actually motivate the employer's challenged conduct, or were insufficient to warrant the employer's challenged conduct.

{¶46} Plaintiffs assert that the fact that Cauthen was a close personal friend of Banks, and that some of his report appears to have been written by Banks, demonstrates pretext. The magistrate finds that the "Introduction/Statement of the Problem" and the "Scope of Work" portions of Cauthen's report were, in fact, written by Banks, and that Cauthen did not make clear that those were not his words. (Plaintiffs' Exhibit 10.) However, the magistrate further finds that, although it may appear unprofessional to hire a friend to perform consulting work, plaintiffs have failed to prove that Cauthen's

observations and conclusions had no basis in fact, did not actually motivate the employer's challenged conduct, or were insufficient to warrant the challenged conduct. Cauthen conducted his own interviews and presented his own conclusions from those interviews in his report. Cauthen testified that after his interviews, he concluded that staff members in the Department of Student Life were not working collaboratively and that there were challenges in moving new ideas forward. In short, the fact that Cauthen and Banks were friends does not show the falsity of the underlying rationale for the reorganization. The magistrate further finds that although plaintiffs argued that Cauthen had no prior consulting experience, Cauthen testified that he did have consulting experience, although not in the field of a reorganization.

FAILURE TO REHIRE

{¶47} Plaintiffs' criticisms of Courson's qualifications, and plaintiffs' assertions that Drnek falsely represented that Liss was not qualified for any of the newly created positions pertain to their claims that CSU failed to offer plaintiffs any of the newly created positions because of their age.

{¶48} According to Russell, he was not offered any position after his termination. However, Vartorella testified credibly that pursuant to Russell's collective bargaining agreement, he was not entitled to be placed into any of the newly created positions because they were all full-time. Furthermore, Vartorella testified that although he found one comparable position that Russell could have "bumped" into, Russell declined to do so. Although Russell testified that he did not have the required computer skills to perform that position, Vartorella testified credibly that if Russell had wanted to displace another employee, that position would have been available to him based upon his seniority. The minimum qualifications for the position were a bachelor's degree and two years of experience with students. Although the position also required basic computer skills, Vartorella testified that the computer skills necessary were nothing more than the computer skills that Russell should have been using in his former position. In short, the magistrate finds that Russell has failed to present evidence that either the reorganization or CSU's failure to rehire him were a pretext for age discrimination.

{¶49} Turning to Liss' claims that the failure to rehire him or to place him in Bergmann's or Johnston's new positions was because of his age, the magistrate finds the following. Banks testified credibly that he believed that Bergmann and Johnston could handle the newly created positions based upon their willingness and ability to respond to

his requests for information. Banks testified that although Liss met the minimum qualifications for the new positions, Banks and Drnek did not feel he would do well in any of them. Specifically, Banks believed that Liss' leadership skills would not benefit the university. According to Banks, Liss lacked the ability to deal with conflict. For example, according to Banks, Liss complained about Russell's and Myers' performance on a daily basis but had difficulty setting expectations for them and following through. Banks further testified that it took months to get basic information from CSI that other areas of Student Life provided in a timely manner. According to Banks, he told Liss that he had to hold Russell and Myers accountable, and in response, Liss stated that he was afraid of Russell and Myers. Banks testified that his concerns with Liss' management abilities are included in his evaluation of him. (Defendant's Exhibit P-1.)

{¶50} In addition, Drnek testified that he decided to reclassify Johnston and Bergmann into the new Dean positions because of their past performance. Drnek testified that the reason that OrgSync was able to be implemented by the 2012 deadline was because those responsibilities were moved from Liss to Bergmann and Lenhart.

{¶51} Robert Bergmann testified that he was chair of the search committee for the Coordinator for Student Activities position. Bergmann testified that during Liss' Skype interview, he requested a guarantee from the interview panel that Banks would not retaliate against him if he got the job. Bergmann testified that other interviewed candidates had better interviews than Liss because they had new ideas to take the department forward. Bergmann opined that Liss' experience on paper was better than Liss' interview performance because Liss just gave general answers and did not offer new ideas to advance the program. After the Skype interviews, Liss was ranked 7th out of 9 by the interview panel. (Plaintiffs' Exhibit 229.) Neither Banks nor Drnek were members of the interview panel.

{¶52} Liss argues that because he was informed that the reorganization was not based on performance, his prior performance should not have been considered when choosing to fill the newly created positions. However, the issue in a reorganization is whether plaintiffs' supervisors could have honestly, and without considerations related to age, concluded that plaintiffs' future contributions ranked them below the other candidates for the position. *See Kundtz v. AT&T Solutions, Inc.*, 10th Dist. Franklin No. 05AP-1045, 2007-Ohio-1462, 41. Even if CSU's business judgment was ultimately wrong, it is not the province of this court to second guess that judgment. *See Manofsky v. Goodyear Tire & Rubber Co.*, 69 Ohio App.3d 663 (9th Dist.1990). The magistrate

finds that Liss has failed to prove that the reason that he was not selected for any of the new positions was his age. Rather, the greater weight of the evidence shows that defendant followed the standard hiring process with regard to the reorganized positions and that Liss was considered on his merits, along with his past performance in his prior duties at CSU. In sum, Liss has failed to prove that the reasons given for not hiring him were false, and that age discrimination was the real reason for not hiring him.

{¶53} The magistrate further finds that the fact that Jill Courson, Banks' friend, was ultimately selected for the position of Assistant Dean of Student Engagement by the hiring committee, also does not show that the reorganization or the failure to rehire Liss was a pretext for age discrimination. Vartorella testified that similar to any reorganization at CSU, once the posting closes, the department of Affirmative Action does an initial review of the applicant pool. Then the applicants are released to the search committee. The search committee then reviews all of the applications to see if the minimum qualifications are met. A list of applicants who have met the minimum qualifications is given to the Office of Institutional Equity. The applicants who have met the minimum qualifications are then evaluated to see if the preferred qualifications are met, and that list is ranked and scored. Then initial interviews through Skype are scheduled. Finally, the list is then narrowed to a minimum of three applicants who are invited to campus to interview. The evidence in the record shows that the hiring panel determined that both Courson and Liss met the minimum qualifications for the Assistant Dean of Student Engagement position, despite Courson's admission at trial that she did not have three years of experience with OrgSync at the time of her interview. Courson testified that she had two years of experience with a similar computer program. Most importantly, though, the magistrate notes that Liss withdrew his application for this position despite the fact that the hiring panel found that he met the minimum qualifications and offered him an interview. (*See* Plaintiffs' Exhibits 203-206.) It is difficult to argue that Liss should have been chosen for this position instead of Courson given the fact that Liss declined to interview for it and withdrew his application.

{¶54} In the final analysis, it is clear from the voluminous record in this case that Russell did not react well to the changes that Banks initiated, and did not provide information that Banks requested. It is also clear that Russell did not appreciate Banks' management style, which he characterized as "my way or the highway." Although there is no doubt that Russell and Liss made significant contributions to CSU during their careers, the greater weight of the evidence shows that Russell did not adjust to Banks'

management style and was resistant to following Banks' directives. Indeed, Russell was placed on a Performance Improvement Plan, part of which was for failure to provide requested information in a timely manner, and part of which required him to undergo Excel training in an effort to get the requested data in a format that Banks desired.

{¶55} The greater weight of the evidence also shows that although Liss was computer literate and attempted to comply with Banks' demands, he was not well-suited to manage either Russell or Myers, and that he did not react well to conflict. As a result of their performance, CSI was not meeting the university's expectations with regard to programs and services provided to students. In short, the magistrate is persuaded that the elimination of CSI was necessary to move the Department of Student Life forward. Accordingly, the magistrate finds that plaintiffs have failed to prove by a preponderance of the evidence that the reorganization and the failure to hire them for newly created positions was a pretext for age discrimination.

{¶56} Plaintiffs also assert that CSU failed to investigate their claims of discrimination. However, George Walker, Interim Vice President at the time of the reorganization, testified that he reviewed Liss' grievance and issued a written decision. (Plaintiffs' Exhibit 280.) Walker concluded that there was no evidence that Liss' age was the reason for reorganization.

{¶57} Donna Whyte, Interim Affirmative Action Officer, also testified that she investigated both Russell's and Liss' complaints of discrimination and retaliation. According to Whyte, she interviewed both Banks and Drnek regarding alleged discriminatory remarks that were reported, and she requested documents from Banks and Vartorella during her investigation. One of her tasks was to see whether Liss should have been placed in either of the positions that Bergman or Johnston were selected for. Whyte met with both Liss and Russell and listened to their versions of why they thought discrimination or retaliation had occurred. She then interviewed other staff. Whyte concluded that the reorganization was based upon legitimate business reasons and that it was not based upon plaintiffs' ages. (Defendant's Exhibits J1 and Y3.) It is undisputed that both plaintiffs exhausted their administrative remedies.

{¶58} Finally, in their amended complaint, plaintiffs assert that defendant engaged in a pattern and practice of making employment decisions on the basis of age. "To prevail on a theory of disparate impact age discrimination, a plaintiff must prove that an employer's facially neutral policies or practices fall more harshly on a protected group."

Caldwell v. Ohio State Univ., 10th Dist. Franklin No. 01AP-997, 2002-Ohio-2393, 66. However, to establish a prima facie case of disparate impact, a plaintiff must: (1) identify a specific employment practice; (2) show a disparate impact on a protected group; and (3) prove that the employment practice caused the disparity. See *Warden v. Ohio Dept. of Natural Resources*, 10th Dist. Franklin No. 13AP-137, 2014-Ohio-35, 43. The magistrate finds that plaintiffs have failed to identify any particular employment practice by CSU that caused a disparate impact. Plaintiffs simply argue that all of the CSI staff was over 40 years old when the reorganization occurred. But, "[a]n adverse effect on a single employee, or even a few employees, is not sufficient to establish disparate impact." *Massarsky v. Gen. Motors Corp.,* 706 F.2d 111, 121 (3d Cir.1983), citing *Whack v. Peabody* & *Wind Engineering* Co., 595 F.2d 190, 194 (3d Cir.1979); *Holt v. Gamewell Corp.,* 797 F.2d 36, 38 (1st Cir.1986). Therefore, plaintiffs' claims of disparate impact age discrimination fail as a matter of law.

FMLA

{¶59} The FMLA makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. 2615(a). Two distinct theories of recovery arise under these statutes: the "interference" theory, and the "retaliation" theory. *See Arban v. West Publishing Corp*., 345 F.3d 390, 400-401 (6th Cir. 2003.)

INTERFERENCE CLAIM

{¶60} For an interference claim, a plaintiff must establish that: "(1) he was an eligible employee, (2) defendant was a covered employer, (3) he was entitled to leave under the FMLA, (4) he gave defendant notice of his intent to take leave, and (5) the defendant denied his FMLA benefits or interfered with FMLA rights to which he was entitled." *Harris v. Metro. Gov't of Nashville & Davidson Cnty.*, 594 F.3d 476, 482 (6th Cir. 2010). The employer's intent is not a relevant part of the interference inquiry. *Arban,* at 401. However, "interference with an employee's FMLA rights does not constitute a violation if the employer has a legitimate reason unrelated to the exercise of FMLA rights for engaging in the challenged conduct." *Thorneberry v. McGehee Desha County Hospital*, 403 F.3d 972, 977 (8th Cir. 2005.)

{¶61} The evidence shows that Russell was an eligible employee, and that defendant was a covered employer. With regard to the third prong, Russell must show

that he was entitled to leave under the FMLA. Russell testified that he wanted to take FMLA leave to have shoulder surgery, which was scheduled on September 14, 2012. Pursuant to 29 USCS Section 2612(a)(1)(D), the magistrate finds that shoulder surgery would qualify as a "serious health condition that makes the employee unable to perform the functions of the position."

{¶62} The evidence shows that on August 30, 2012, at 4:12 p.m., Russell contacted a representative from CareWorks to request FMLA leave for a potential health condition. Vartorella was notified of Russell's request on August 31, 2012, at 8:38 a.m. (Plaintiffs' Exhibit 361.) The same day, CareWorks issued a letter to Russell stating that he was "eligible, *subject to submission and confirmation of required documentation and your leave being designated as FMLA*." (Emphasis added.) (Plaintiffs' Exhibit 316). The letter also stated that Russell's eligibility was subject to him submitting medical certification of a serious health condition by September 15, 2012. (*Id*.)

{¶63} Russell was notified of the abolishment of his position on September 5, 2012. Pursuant to the reorganization, Russell's last day of employment was to occur on October 5, 2012. The evidence shows that Russell began negotiating the last day of his employment soon after September 5, but that negotiations broke down in October 2012. (Plaintiffs' Exhibits 310, 314.) On October 10, 2012, CareWorks USA notified Russell that his FMLA request did not qualify based upon the fact that his medical certification form had not been received. (Plaintiffs' Exhibit 317.) Therefore, the magistrate finds that Russell has failed to prove by a preponderance of the evidence that CSU denied his FMLA benefits or interfered with FMLA rights to which he was entitled, inasmuch as Russell failed to submit the necessary paperwork to CareWorks. However, the magistrate further finds that even if Russell had established the necessary elements for an interference claim, "[a] reason for dismissal that is unrelated to a request for an FMLA leave will not support recovery under an interference theory." *Bones v. Honeywell Int'l., Inc.*, 366 F.3d 869, 877 (10th Cir. 2004.) "If dismissal would have occurred regardless of the request for an FMLA leave, however, an employee may be dismissed even if dismissal prevents [his] exercise of [his] right to an FMLA leave." *Id.* The magistrate finds that the evidence is clear that Russell's position was going to be abolished pursuant to a reorganization of the Department of Student Life, formal discussions of which began in May, continued throughout the summer, and were ultimately approved by the end of August 2012. Therefore, the magistrate finds that Russell has failed to establish a claim of FMLA interference.

RETALIATION CLAIM

{¶64} Under the retaliation theory "the employer's motive is relevant, and the issue is whether the employer took the adverse action because of a prohibited reason or for a legitimate nondiscriminatory reason." *Hodgens v. Gen. Dynamics Corp*., 144 F.3d 151, 160 (1st Cir. 1998.) The court applies the burden-shifting test articulated in *McDonnell Douglas*, *supra*, to retaliation claims under the FMLA. *Skrjanc v. Great Lakes Power Serv. Co.,* 272 F.3d 309, 313-16 (6th Cir. 2001.) Plaintiff can establish a prima facie case of discrimination by showing that (1) he availed himself of a protected right under the FMLA by notifying defendant of his intent to take leave, (2) he suffered an adverse employment action, and (3) that there was a causal connection between the exercise of his rights under the FMLA and the adverse employment action. *Id.,* at 314. If plaintiff satisfies these three requirements, the burden shifts to defendant to proffer a legitimate, nondiscriminatory rationale for discharging the employee. *Id.* at 315.

{¶65} The magistrate finds that CSU generally knew that Russell was going to have shoulder surgery after he ultimately obtained clearance from his cardiologist, but that CSU did not know of the specific date of the surgery until August 31, 2012. Indeed, in an email dated September 8, 2012, Russell wrote to Drnek: "As Steve Vartorella knows, I had contacted CareWorks in August, our FMLA provider, and after trying all summer (4 separate cardiology procedures) to get Cardiac clearance, I finally received clearance and will be having surgery." (Plaintiffs' Exhibit 315.) However, Russell has failed to show a causal connection between his job abolishment and his request for FMLA leave. The overwhelming evidence is that the reorganization discussions officially began in May 2012, and regardless of when Russell obtained clearance for shoulder surgery, his job was going to be abolished. As a result, Russell's claim for retaliation with his FMLA rights fails.

{¶66} In the final analysis, the magistrate finds that the greater weight of the evidence shows that the reorganization was not a pretext for age discrimination, and that defendant did not interfere with or retaliate against Russell for his use or attempt to use FMLA leave. The magistrate finds that defendant had legitimate business reasons for implementing a reorganization of the Department of Student Life, and that plaintiffs have failed to prove that those reasons had no basis in fact, did not actually motivate defendant's conduct, or were insufficient to warrant the challenged conduct. Accordingly, judgment is recommended in favor of defendant.

{¶67} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

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HOLLY TRUE SHAVER
Magistrate

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