[Cite as *Russell v. Cleveland State Univ.*, 2016-Ohio-4678.]

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 DECISION

{¶1} On September 17, 2015, the magistrate issued a decision recommending judgment in favor of defendant. Civ.R. 53(D)(3)(b)(i) states, in part: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." On September 24, 2015, plaintiffs were granted an extension of time to file their objections, and they timely filed their objections on November 2, 2015. Plaintiffs filed a transcript of the proceedings on November 5, 2015.

{¶2} On November 9, 2015, plaintiffs filed a motion for leave to substitute corrected objections to the magistrate's decision instanter. Plaintiffs stated that due to a clerical error, a prior version of the objections was filed with the court, instead of the final version. Further, the corrected objections contained some non-substantive edits,

as well as additional footnotes. Defendant did not file a response. Plaintiffs' motion for leave to substitute corrected objections is GRANTED, and in reviewing and ruling on objections, the court only reviewed plaintiffs' substituted objections.

{¶3} On November 12, 2015, defendant filed its memorandum in response to plaintiffs' objections. Finally, on December 7, 2015, plaintiffs filed their response in support of their objections; however the response is not timely and it was not considered by the court in ruling on the objections.

{¶4} Upon review of plaintiffs' objections, the court notes the following two issues. First, the objections are 65 pages long, exceeding the 15 page limitation by 50 pages. L.C.C.R. 4(E), states as follows: "Supporting, opposing, or memorandum briefs shall not exceed fifteen pages in length, exclusive of attachments. * * * Applications for leave to file a long brief shall be by motion that sets forth the unusual and extraordinary circumstances which necessitate the filing of a long brief." Plaintiffs did not file an application for leave to file a long brief. However, the court still considered all of plaintiffs' objections.

{¶5} Second, the objections are written predominately as a brief and argument. Civ.R. 53(D)(3)(b)(ii), states as follows: "*(ii) Specificity of objection.* An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection." In *State ex rel Weimer v. Zayre Cent. Corp.* the Tenth District Court of Appeals concluded that a party's objection did not comply with the Ohio Civil Rules where it merely paraphrased arguments in briefs submitted previously and failed to even make specific reference to the magistrate's decision. 10th Dist. No. 02AP-182, 2002-Ohio-6737, ¶ 6. Further, the Tenth District noted that where a party merely states that he objects to the magistrate's decision based on the reasons contained in the attached brief, he does not comply with the specificity and particularity requirements. *Id.* at ¶ 7. While plaintiffs' objections refer to the magistrate's decision, the objections are not specific and do not state with particularity all grounds for objection.

Furthermore, even if the court does consider the objections to be specific and minimally satisfy Civ.R. 53(E)(3)(b), the court finds no error in the magistrate's decision and recommendation. The court identified the following objections from plaintiffs' substituted objections and rules on them as follows.

a. Objection 1: Plaintiffs Proved Age Discrimination Through Both Direct and Indirect Evidence

Direct Evidence

{¶6} Plaintiffs argue that the magistrate's decision incorrectly concluded that plaintiffs did not present direct evidence of age discrimination. Plaintiffs disagree with the magistrate's classification of evidence as direct and indirect in her decision. Specifically, plaintiffs argue that "[i]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."

{¶7} Plaintiffs believe that there exists direct evidence of age discrimination based on the following six actions:

1. Implementing a reorganization that terminated only older workers and promoted only younger workers;
2. Promoting a younger employee to Assistant Dean for Student Organizations without considering or allowing the older Liss or Russell to apply;
3. Promoting a younger employee to Assistant Dean for Student Activities without considering or allowing the older Liss or Russell to apply;
4. Hiring a younger employee who did not satisfy the minimum job requirements to Assistant Dean for Student Engagement while declining to promote or reassign the older Liss or Russell;
5. Hiring a younger, less qualified employee to Coordinator for Student Activities while declining to promote or reassign the older Liss or Russell;

6. Hiring a younger, less qualified employee to Coordinator for Commuter Affairs/Greek Life while declining to promote or reassign the older Liss or Russell.

{¶8} A prima facie claim for employment discrimination may be established with either direct evidence or indirect evidence. *Mauzy v. Kelly Servs., Inc.,* 75 Ohio St. 3d 578, 1996 Ohio 265, 664 N.E.2d 1272, 1276-77 (1996). Direct evidence "refers to a method of proof, not a type of evidence. It means that a plaintiff may establish a prima facie case of age discrimination directly by presenting evidence, of any nature, to show that the employer more likely than not was motivated by discriminatory intent." *Mauzy,* 664 N.E.2d at 1279. Direct evidence of discrimination may be present, such as where an employer says, "I fired you because you are disabled." *Smith v. Chrysler Corp.,* 155 F.3d 799, 805 (6th Cir. 1998). This type of evidence rarely occurs in discrimination claims.

{¶9} With regard to the first allegedly discriminatory action, defendant argues that there are hundreds of employees in the Department of Student Life, but plaintiffs identified five who were over forty years old. Of the five employees identified, Valerie Hinton-Hannah was promoted, Dan Lenhart was retained, Mary Myers was transferred, and plaintiff Russell declined to be bumped, pursuant to his collective bargaining agreement, into another position. It appears that plaintiffs are attempting to demonstrate discriminatory intent on the basis of statistical evidence.

{¶10} "Appropriate statistical data showing an employer's pattern of conduct toward a protected class as a group can, if unrebutted, create an inference that a defendant discriminated against individual members of the class." *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir.1990), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "When a plaintiff demonstrates a significant statistical disparity in the discharge rate, he or she has provided strong evidence that chance alone is not the cause of the discharge pattern." *Barnes*, 896 F.2d at 1466-69. "[F]or statistics to be

valid and helpful in a discrimination case, both the methodology and the explanatory power of the statistical analysis must be sufficient to permit an inference of discrimination." *Amini v. Oberlin College*, 440 F.3d 350, 359 (6th Cir. 2006).

{¶11} Plaintiffs' statistical evidence is insufficient to establish discriminatory intent. The magistrate correctly determined that Hinton-Hannah and Lenhart were over 40 and retained after the reorganization, and Myers, as a member of a collective bargaining unit, exercised her bumping rights to obtain a position in a different part of the university after reorganization. (Mag. Decision, Pgs. 4-5, 16.) Furthermore, plaintiffs do not provide any information about the remaining hundreds of employees in the Department of Student Life.

{¶12} With regard to the five remaining claims of direct evidence, the magistrate determined that plaintiff Russell was a member of a collective bargaining unit, and his rights under the agreement were explained to him. (Mag. Decision, Pg. 5.) Steve Vartorella, CSU's Human Resources Representative for the Department of Student Life, 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." *Id.* Further, Vartorella identified a position for him, but "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," and Russell expressed that he did not want to displace someone else out of a job. *Id.*

{¶13} The magistrate determined that "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 full-time," and that Russell declined to bump into a position. (Mag. Decision, Pg. 17.) There is not any evidence that: (1) the collective bargaining agreement did not apply to Russell; and (2) that Vartorella failed to offer Russell a position based on the collective bargaining agreement. Under the terms

of the collective bargaining agreement, Russell was not eligible for any of the new positions, thus his claim of age discrimination based on direct evidence fails.

{¶14} With regard to plaintiff Liss, the magistrate determined that "Liss has failed to prove that the reason 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." (Mag. Decision, Pg. 19.)

{¶15} As a general rule, the court will not substitute its judgment for that of the employer and will not second-guess the business judgment of employers regarding personnel decisions. *Kirsch v. Bowling Green State Univ.,* 10th Dist. No. 95AP11-1476 (1996). Additionally, in a discrimination case, the court must examine the employer's motivation, not a plaintiff's perceptions. *Wrenn v. Gould*, 808 F.2d 493, 502 (6th Cir.1987). Plaintiff Liss has provided no support for the bare allegations that placing a younger employee in a newly created position is direct evidence of age discrimination.

{¶16} However, plaintiffs claim that "[d]efendant admitted at trial that there is a 100% correlation between the age of the employee and the replacement by a younger worker." Further, plaintiffs argue that Mr. Vartorella testified that age was a factor defendant considered when terminating Liss and Russell, and promoting younger employees. Plaintiffs contend that the magistrate's decision does not address or evaluate this evidence, and had she considered said evidence, should have ruled in plaintiffs favor.

{¶17} Upon review of Steve Vartorella's testimony, the court agrees with defendant that exhibit 6, a document he prepared as a human resources representative that plaintiffs contend supports their argument, was an evaluation of the following: (1) the Department of Student Life employees, including their age, sex, and race; (2) the effect that the reorganization would have on the employees; and (3) new positions that

were being created by the reorganization and CSU's plan to fill those positions. Further, the record demonstrates that Mr. Vartorella did not testify that age was used for termination decisions; rather he testified about information in the document, including the ages of those employees that were being terminated and those employees who were assuming new duties. He also testified that the document was "a tool I presented to the office of general counsel as they do the final review for the layoff. That's why I put it together. It identifies the three people impacted by the reorganization and it identifies the people that are taking on those responsibilities." (Vartorella, Tr. at 1324: 10-16.)

{¶18} There is no evidence this document was used by anyone to discriminate against plaintiffs. Rather, it was an informational tool used by human resources professionals and the office of general counsel at CSU to evaluate the reorganization. There does not appear to be a hidden meaning behind the document; it clearly shows the age of each employee. It does not demonstrate, as suggested by plaintiffs, that age was a factor considered by defendant. Plaintiffs' argument that defendants admitted to age discrimination multiple times is not persuasive based on the evidence presented at trial.

{¶19} Additionally, plaintiffs claim that the magistrate incorrectly concluded that defendant's age-related comments were not direct evidence of discrimination. Plaintiffs contend that "Banks used ageist language to refer to older employees, stating, 'you can't teach old dogs new tricks,'" and he "described the older employees as 'elephants' and 'old fashioned,' and denigrated their programs as 'out-dated.'" Plaintiffs state that Banks used these terms pervasively in March, April, and June 2012.

{¶20} An employer's discriminatory comments may constitute direct evidence that an employee who was the subject of an adverse employment action was a victim of discrimination. Courts consider four factors to determine whether an employer's comments demonstrate an age bias:

> (1) whether the statements were made by a decision-maker or by an agent within the scope of his employment; (2) whether the statements were related to the decision-making process; (3) whether the statements were more than merely vague, ambiguous or isolated remarks; and (4) whether they were made proximate in time to the act of termination.

{¶21} *Skelton v. Sara Lee Corp.,* 249 F. App'x 450, 455 (6th Cir.2007) (citing *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 477-78 (6th Cir.2002). "[N]one of these factors is individually dispositive of age discrimination, but rather, they must be evaluated as a whole, taking all of the circumstances into account." *Peters*, 285 F.3d at 478, citing *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1330 (6th Cir.1994). Further, 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. "Statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself [cannot] suffice to satisfy plaintiff's burden * * * of demonstrating animus." *Bush v. Dictaphone Corp.*, 161 F.3d 363, 369 (6th Cir.1998).

{¶22} A review of the statements, the magistrate's decision, and plaintiffs' objections leads the court to conclude that the magistrate was correct in her analysis of defendant's alleged discriminatory statements. Plaintiffs' argument that Dr. Banks admitted that his views represented age-based stereotyping is not reflected in a review of his testimony. Dr. Banks illustrated how college students communicate and the ways in which the Department of Student Life should communicate with them. (Banks, Tr. at 931-932.) He expressed concern that CSU was not doing this in the most effective way, and that it was alarming that staff members, including Liss, were not keeping up with current changes in how college students can best be served by their University. *Id.* The statements do not constitute direct evidence of age discrimination.

{¶23} A review of the magistrate's decision shows that she properly applied the law with regard to the age discrimination claims. It is proper to consider direct evidence, and if

the plaintiff fails to prove their case via direct evidence, to then utilize the *McDonnell Douglas* framework to analyze the claim via an indirect evidence method. The magistrate did not err in considering the evidence presented for plaintiffs' age discrimination claims. As such, any objections related to direct evidence are OVERRULED.

Indirect Evidence

{¶24} Plaintiffs argue that the decision incorrectly concluded that they failed to prove age discrimination through indirect evidence. Plaintiffs agree with the magistrate that both Liss and Russell established their *prima facie* cases of age discrimination by direct evidence. However, plaintiffs argue that the decision ignores defendant's failure to articulate a legitimate, non-discriminatory reason for terminating and not rehiring plaintiffs because it refused to call Cleveland State President Berkman to testify. With regard to President Berkman, plaintiffs argue the following: (1) he was the highest decision-maker involved in the termination of plaintiffs; (2) he was the highest decision-maker in the decision to reassign or reinstate them; (3) he approved the reorganization that terminated plaintiffs, and (4) the magistrate failed to consider or weigh President Berkman's absence in any way.

{¶25} Plaintiffs do not cite any case law that addresses their argument, and in her decision the magistrate determined that "Banks and Drnek both agreed that a reorganization was necessary. Therefore, * * * both Drnek and Banks were decision makers with regard to the reorganization." (Mag. Decision, Pgs. 8-9.) Plaintiffs do not make any further objections with regard to defendant's legitimate, non-discriminatory reason for reorganization. As such, any objections related to indirect evidence and CSU's legitimate, non-discriminatory reason for reorganization are OVERRULED.

b. Objection 2: Defendant's Proposed Reasons for Terminating Plaintiffs are Pretexts for Age Discrimination

{¶26} Plaintiffs argue that defendant's stated reason for terminating Liss and Russell, reorganization of the Department of Student Life based on the Cauthen Report, was false and pretext for age discrimination, and the magistrate's decision did not address the falsity of defendant's stated reason as evidence of pretext. Plaintiffs contend that the outcome of defendant's reorganization was simply to rearrange the same duties and fire the older employees. Plaintiffs also argue that defendant's claim that plaintiffs were terminated because of the recommendations made in the Cauthen Report is not credible because plaintiffs proved that the decision to terminate was made before the creation of the report.

{¶27} Plaintiffs argue that Banks and Drnek claimed in sworn interrogatory answers that there were no meetings to discuss the reorganization until June 19, 2012. However, at trial, Banks testified that on April 24, 2012, he designated Liss and Russell for termination and designed a new organizational structure. Plaintiffs argue that by May 14, 2012, Banks revised the job descriptions for older workers and held a meeting with Drnek and other CSU employees to discuss the "Reorganization Plan." Only after this was Cauthen, a close friend of Banks, hired to evaluate the Department of Student Life. Plaintiffs argue that Banks wrote portions of the Cauthen Report, including the new job titles, and opinions and conclusions regarding plaintiffs. Essentially, plaintiffs claim that termination was a decision made by Banks many weeks prior to the report, and defendant used the report "as a cover up to create the appearance of an independent decision to reorganize the department."

{¶28} Plaintiffs accurately state the information contained in the interrogatories, however they do not point to any evidence that the magistrate failed to properly consider. Dr. Banks testified that he contemplated the initial reorganization of the department in April 2012. Furthermore, the magistrate correctly identified that meetings with Human Resources staff regarding the reorganization began in mid-May 2012. (Mag. Decision, Pg 4.) This is reflected in the testimony of Jean McCafferty. (McCafferty, Tr. at 790.) While this meeting was not specifically listed in the interrogatory, the date and substance of the meeting was revealed at trial. There is no evidence that the meeting or the failure to list in

the response to the interrogatory is pretext for discrimination. Furthermore, discussions of reorganization prior to the commission and finalization of the report is not evidence of pretext.

{¶29} Plaintiffs also argue that the decision incorrectly blurs the distinction between the stated reasons for the reorganization and the stated reason for terminating Liss and Russell. Plaintiffs contend that "there is no dispute that a reorganization took place, that reorganization - which led to no reduction in Liss's or Russell's jobs – does not explain why Liss and Russell were selected for *termination*." (Emphasis in original.)

{¶30} This objection is confusing and plaintiffs only spend two paragraphs discussing it. Plaintiffs have the burden of proving pretext. The magistrate determined that the reorganization was designed to "offer more services to students and to bring more national fraternities and sororities on campus." (Mag. Decision, Pg. 15.) Based on the evidence presented at trial, the magistrate's conclusion was correct.

{¶31} Plaintiffs further argue that defendant changed its articulated reason for terminating and not rehiring plaintiffs to one of performance, and that defendant's new claim of performance problems is false and evidence of discrimination. Plaintiffs contend that the magistrate determined that Liss and Russell were not selected for open jobs for reasons including prior performance, but the magistrate did not allow plaintiffs to testify regarding positive performance results and experience they had during their careers. Further, they argue that defendant's change of position to performance for not rehiring plaintiffs is evidence of pretext.

{¶32} The magistrate's decision is not inconsistent with the evidence presented at trial, which, contrary to plaintiffs' argument, included evidence of plaintiffs' prior performance. The magistrate determined that Liss was not selected for a new position after he was considered on his merits. (Mag. Decision, Pg. 19.) Furthermore, the magistrate specifically noted in the decision that "there is no doubt that Russell and Liss made significant contributions to CSU during their careers." (Mag. Decision, Pg. 20.) It

appears that plaintiffs overstate any reliance by the magistrate on prior performance, as the decision details a variety of reasons that plaintiffs did not fit in with defendant's reorganization plan.

{¶33} Plaintiffs also argue that defendants claimed that plaintiffs were not rehired because of their relationship with Banks, and this is inconsistent and false. Further, defendant's "changing of its explanation for terminating Liss and Russell is itself additional evidence of pretext, which the Magistrate's Decision does not address or consider."

{¶34} The transcript testimony cited by plaintiffs reveals that the defendant did not offer the relationship with Dr. Banks as a reason for termination, but rather the relationship between Russell's supervisor and Russell was important to the case. Specifically, the amount of interaction that they had during the time Russell was supervised by Dr. Banks, and the motivation for Russell to file an age discrimination suit. (Russell, Tr. at 489.) Furthermore, even if there was some issue with the relationship, "[m]ere dislike that is unrelated to the plaintiff's [age] will not support a claim of discrimination." *Smith v. Ohio Dept. of Pub. Safety*, 2013-Ohio-4210, 997 N.E.2d 597 (10th Dist.), citing *Skvarla v. Potter*, 109 Fed. Appx. 790, 801 (7th Cir.2004).

{¶35} With regard to pretext, plaintiffs additionally argue that defendant changed the minimum qualifications of the new, reorganized positions so it could recommend the firing of plaintiffs without placing them in other available positions. The magistrate identified each of the new positions and detailed plaintiffs efforts at obtaining a new position. Plaintiffs do not cite any evidence that contradicts the magistrate's analysis. Liss had the opportunity to interview for open positions and was not selected. Russell had the opportunity to exercise bumping rights into a new position but he chose not to.

{¶36} Further, plaintiffs contend that the decision does not weigh or consider as evidence defendant's failure to investigate Liss' complaints of age discrimination. The magistrate determined that "George Walker, Interim Vice President at the time of reorganization, testified that he reviewed Liss' grievance and issued a written decision.

(Plaintiffs' Exhibit 280.)" Further, "Donna Whyte, Interim Affirmative Action Officer, also testified that she investigated both Russell's and Liss' complaints of discrimination and retaliation. * * * Whyte concluded that the reorganization was based upon legitimate business reasons and it was not based upon plaintiffs' ages. (Defendant's Exhibits J1 and Y3.) It is undisputed that both plaintiffs exhausted their administrative remedies." (Mag. Decision, Pg. 21.) The evidence reflects these conclusions.

{¶37} Lastly, plaintiffs argue that the magistrate's decision commits legal error by excluding age-related remarks and statistical evidence at the pretext stage, contrary to Ohio law. The magistrate's decision did not exclude age-related remarks and statistical evidence at the pretext stage, and as discussed above, plaintiffs' statistical evidence is not persuasive, nor are the arguments related to age related remarks.

{¶38} With regard to plaintiffs' objections to the Cauthen Report, the magistrate identified issues with the report and correctly analyzed them. The magistrate determined 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' 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. * * * In short, the fact that Cauthen and Banks were friends does not show the falsity of the underlying rationale for the reorganization." (Mag. Decision, Pgs. 16-17.)

{¶39} According to the record, defendant introduced evidence that prior to the informal and formal reorganization planning, there was a shift at CSU from a traditionally commuter university to a more residential university; an unwillingness to collaborate among different offices in the Department of Student Life; the Center for Student Involvement was not being managed well; the programs being offered were not catering to the student

population; and there was not enough student activity on campus. It is clear that changes were occurring on the CSU campus in the way that students engaged with the university and the activities and services they expected from the Department of Student Life. It is not unusual for a new Associate Dean for the Department of Student Life to contemplate changes to meet the changing demands of the university. While plaintiffs argue that Banks made a decision to terminate Russell and Liss independently prior to the Cauthen Report, the evidence presented at trial does not support this conclusion. Moreover, the testimony at trial does not support the argument that the Cauthen Report was used as a cover up for age discrimination.

{¶40} As such, any objections related to pretext are OVERRULED.

c. Objection 3: Defendant Violated Plaintiff Russell's Rights Under the FMLA by Interfering with His Right to Medical Leave and by Retaliating Against Him.

{¶41} With respect to plaintiff's interference claim, plaintiff argues that the magistrate erred in concluding that Russell provided notice of his need for FMLA leave on August 30, 2012. Rather, plaintiff contends that Russell provided notice as early as May 2012. Defendant argues that plaintiff's "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*." (Emphasis in original.)

{¶42} Upon review of the transcript, plaintiff testified that he "put in for" FMLA in early May 2012; however there is no other evidence to support plaintiff's testimony. Merely because plaintiff had numerous other health issues does not support an inference that plaintiff informed defendant about his shoulder problem or gave notice in May 2012 for FMLA purposes. The court agrees with the magistrate that Russell contacted a representative from CareWorks to request FMLA on August 30, 2012, and the following 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." (Plaintiffs' Exhibits 361, 316).

{¶43} However, plaintiff failed to submit the required medical certification form, and on October 10, 2012, CareWorks notified plaintiff that his FMLA request did not qualify. (Plaintiffs' Exhibit 317). The magistrate was correct to conclude "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."

{¶44} Plaintiff Russell also argues that the decision incorrectly relies on law from the United States Court of Appeals for the Tenth Circuit that was rejected by Ohio federal district courts in finding for defendant on Russell's FMLA interference claim. In the case cited by the magistrate, *Bones v. Honeywell Int'l. Inc.*, 366 F.3d 869 (10th Cir.2004), the court considered the district court's grant of summary judgment in favor of defendant because plaintiff failed to give proper notice to defendant under the FMLA or, alternatively, defendant met its burden of proving that plaintiff would have been dismissed regardless of her request for an FMLA leave, because she failed to comply with defendant's policy which required her to notify her supervisor of her absences. *Bones,* 366 F.3d at 877. The court did specifically state that "[u]nlike the Tenth Circuit, the Sixth Circuit has explicitly made notice part of its test for interference with FMLA rights," and that it declined to follow the Sixth Circuit's approach with regard to the notice issue. *Id.* at fn.2; *see Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713, 719-22 (6th Cir. 2003).

{¶45} However, the excerpts of *Bones* that the magistrate cites in her decision are unrelated to the issue of notice in relation to FMLA rights. Thus, the magistrate's citation to *Bones*, was not inappropriate and the magistrate's conclusion 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 summer, and were ultimately approved by the end of August 2012," is supported by *Bones*. (Mag. Decision, Pg. 24.)

{¶46} Plaintiff also claims that he established his claim of FMLA retaliation, and the decision errs in failing to weigh or consider evidence of retaliation. The issue here focuses on the causal connection element of the retaliation claim. To establish his prima facie case, plaintiff must show that there was a causal connection between the exercise of his rights under the FMLA and the adverse employment action. *Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 314 (6th Cir.2001). Plaintiff argues that the close timing between Russell's protected activity and defendants' adverse actions is evidence of causation. The magistrate determined that "[t]he 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." (Mag. Decision, Pg. 25).

{¶47} The court agrees with the magistrate's conclusion. Regardless of when he initially applied to CareWorks for FMLA, formal reorganization efforts began in May 2012. While his request for FMLA and his official notice of termination were only five days apart, the termination of his position was contemplated at least four months prior. Further, statements that plaintiff should "go back to his office and get healthy" do not mean, as plaintiff argues, that Banks told Russell that he should not take medical leave. As such, any objections with regard to plaintiff Russell's FMLA rights are OVERRULED.

PATRICK M. MCGRATH
Judge

[Cite as *Russell v. Cleveland State Univ.*, 2016-Ohio-4678.]

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 JUDGMENT ENTRY

{¶48} On September 17, 2015, the magistrate issued a decision recommending judgment for defendant.

{¶49} Civ.R. 53(D)(3)(b)(i) states, in part: "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." Plaintiffs timely filed their objections.

{¶50} Upon review of the record, the magistrate's decision and the objections, the court finds that the magistrate has properly determined the factual issues and appropriately applied the law. Therefore, the objections are OVERRULED and the court adopts the magistrate's decision and recommendation as its own, including findings of fact and

conclusions of law contained therein. Judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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