[Cite as *Silberstein v. Montgomery Cty. Community College Dist.*, 2009-Ohio-6138.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

DAVID R. SILBERSTEIN	:	
	:	Appellate Case No. 23439
Plaintiff-Appellant	:	
	:	Trial Court Case No. 2008-CV-3053
v.	:	
	:	(Civil Appeal from
MONTGOMERY COUNTY	:	Common Pleas Court)
COMMUNITY COLLEGE DISTRICT	:	
	:	
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 20TH day of November, 2009.

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FAIN, J.

{¶ 1} Plaintiff-appellant David Silberstein appeals from a summary judgment rendered in favor of defendant-appellee Montgomery County Community College

District. Silberstein contends that the trial court erred in finding that he failed to produce evidence of pretext for sex and age discrimination. Silberstein further contends that sufficient evidence exists to allow a reasonable factfinder to find that circumstances support the suspicion that Montgomery County Community College District discriminates against males. Finally, Silberstein contends that the trial court erred in concluding that interview notes that were destroyed are not public records.

{¶ 2} We conclude that Silberstein failed to present sufficient evidence to sustain his burden on the issue of age discrimination. Although Silberstein presented a prima facie case of age discrimination, the prospective employer offered legitimate non-discriminatory reasons for its hiring decisions, which were not rebutted. We further conclude that Silberstein failed to establish a prima facie case of sex discrimination, because his proof, even when viewed in a light most favorable to him, did not meet the modified test applied in cases of reverse discrimination, which requires applicants to demonstrate background circumstances supporting the suspicion that a defendant is the unusual employer who discriminates against the majority, and that the employer treated differently employees who are similarly situated but are not members of the protected class. Finally, we conclude that the trial court did not err in rejecting Silberstein's claim for violation of R.C. 149.351, which prohibits destruction of public records. Personal notes of the hiring committee members were used for their own convenience and are not public records that must be disclosed.

{¶ 3} Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 4} In 2006, Jan Tyler became employed as the Director of Academic Advising for Montgomery County Community College District, which is also known as Sinclair Community College (hereinafter "Sinclair"). Tyler began looking for ways to improve the Academic Advising Department, which only employed senior academic advisors. Tyler was successful in adding a new entry-level position of academic advisor, and Sinclair then posted job openings for two entry-level academic advisor positions in September 2007, after an internal search failed to produce viable candidates.

{¶ 5} Approximately 282 people applied for the position, including 196 females, 82 males, and four persons whose sex was "undisclosed." Tyler formed a search committee to review the applications and interview candidates. The committee consisted of Tyler, who was the female chairperson, as well as two other females, and one male, all of whom were employed by Sinclair. One female was a senior academic advisor, and the other was an associate professor in the Life and Health Science Division. The male was a part-time senior academic advisor, and was one of three males out of about 24 academic advisors at Sinclair.

{¶ 6} The members of the search committee individually reviewed the application materials of the 282 people who had applied, and then met as a group to choose finalists to interview. Nine finalists were selected, including Silberstein, who was the only male chosen.

{¶ 7} Among the requirements for the position were a bachelor's degree in education or other relevant academic area, and a minimum of two years experience in education or business. Candidates were also required to have a thorough knowledge of degree requirements and course names, and an understanding of the needs of a

diverse student body, especially underprepared and/or underachieving students.

{¶ 8} At the time of his interview, Silberstein was fifty-nine years old. Silberstein had excellent credentials, including an undergraduate degree in history, and a master's degree in education in student personnel services and higher education. After graduating from college, Silberstein worked for Cleveland State University for two and a half years as coordinator of evening student affairs. Cleveland State was a four-year college. Silberstein was then employed by Quinsigamond Community College in Massachusetts for a year and a half as coordinator of student affairs. This position was similar to that of an academic advisor, with new student orientation included. Silberstein was hired by Indiana University East (IUE) in 1980, and was still employed there when he interviewed with Sinclair.

{¶ 9} Between 1980 and the early 2000s, IUE was a two- and four-year degree-granting institution, but primarily granted two-year degrees. When Silberstein first started at IUE, Indiana did not have a community college system. During the present decade, Indiana has officially created community colleges from what were previously called "ivy techs," which were trade-type schools that did not offer two-year degrees. As part of this process, Indiana moved developmental course work from colleges like IUE to the community colleges.

{¶ 10} When Silberstein first became employed at IUE, he was the director of academic advising. He advised all students who did not have a major, supervised a number of other units, and was responsible for new student orientation. As director, Silberstein had supervisory responsibilities over three academic advisors, a work-study employee, and a clerical employee. Throughout his career at IUE, which spanned 28

years, Silberstein worked with undecided students, and at times also worked with probationary and suspended students. Silberstein's credentials also included membership in the National Academic Advising Association, where he had presented six or seven times at the national meeting.

{¶ 11} Silberstein was interested in the Sinclair position for several reasons, including the fact that he lived in the Dayton area and did not want to continue commuting to Richmond, Indiana, where IUE was located. Furthermore, Silberstein's position was changing, due to decentralization of the academic advising department at IUE. IUE was also making admission requirements more stringent, as part of the new community college system. Remedial students were Silberstein's area of specialization, and he favored Sinclair's open admission policy, which would still allow him to deal with these students.

{¶ 12} Silberstein was also acquainted with Tyler, who had worked at IUE as the director of career counseling before coming to Sinclair. Silberstein and Tyler were on friendly terms, and had worked together closely on a project that was not yet completed when Tyler left to take a job at Sinclair.

{¶ 13} When Silberstein applied, he was unaware that Sinclair had more than one level of academic advisors, and he was not told that it was an entry-level position. The minimum salary listed for the position was substantially less than Silberstein currently earned at IUE. Nonetheless, Silberstein wanted the job, for the reasons previously mentioned, and because he loved working with students.

{¶ 14} Silberstein interviewed with the search committee on October 17, 2007. Prior to the interviews, the committee developed a set list of questions. The committee

members asked the same questions during each interview, along with follow-up questions that varied, depending on the answers to the set questions. After all the interviews were concluded, the committee met to discuss the candidates and decide who would be hired.

{¶ 15} One of the top candidates was a female who was employed as an academic advisor at The Ohio State University, but she withdrew before an offer could be made. A position was then offered to Linda Bakkum, who was employed at the time as an assistant director of undergraduate studies in business at Bowling Green State University. Bakkum had also previously worked as an academic advisor in undergraduate studies in business at Bowling Green from 1995 to 1998, and in student support services from 1988 to 1995.

{¶ 16} Bakkum was selected because of her background in academic advising and good communication skills. She also had a strong background in business advising, which was needed in Sinclair's advising office. In addition, Bakkum had thorough knowledge of transfer assurance guides and had worked extensively with Sinclair students who were transferring to Bowling Green. Bakkum was over forty years of age.

{¶ 17} The other position was offered to Tanya Sturm, who was twenty-four years old. Sturm met the minimum qualifications for the position, having received a bachelor's degree in psychology and personnel and industrial relations in 2004. Sturm also had about two years of work experience in the educational area in a variety of internships and paid positions, none of which were full-time. At the time of the interview, Sturm was pursuing a master's degree in student affairs in higher education

at Wright State University. Sturm had also worked as an academic advising intern with Sinclair from June 2007 though October 2007. This was an unpaid internship for which Sturm received academic credit.

{¶ 18} During her internship, Sturm was supervised by Tyler and worked directly with Douglas Erhard, one of the committee members. Tyler indicated that one of the factors leading to Sturm's identification as a top candidate was her experience as an intern in the academic advising office, which gave Sinclair the ability to see Sturm demonstrate her skills with students. Sturm also had an understanding of the academic advising center and Sinclair's curriculum.

{¶ 19} As to why Silberstein was not selected, Tyler stated as follows during her deposition:

{¶ 20} "This position is an entry level grunt, to be perfectly blunt, grunt level academic advisor position. This position is at your desk, seeing students back to back, no committee work, no coordinating significant projects in the office, day-to-day, in and out, academic grunt level advising. David has wonderful experience. He has been an advisor and he's been an administrator. And looking at this grunt-level position, there would be no opportunities to do the kinds of work that he had done in his previous employment. In my mind, David would make a great senior academic advisor because of the level of administrative responsibility as well as day-to-day advising." Tyler Deposition, p. 42.

{¶ 21} Tyler further commented in a later affidavit that:

{¶ 22} "David Silberstein was not one of the top candidates. Silberstein lacked the community college experience the committee preferred and lacked the requisite

knowledge of and experience in Ohio's collegiate system as compared to other candidates. His experience was as the Director of a small academic advising department at Indiana University East. While he had significant leadership, presentation and management skills, which were evident in his application materials, these were not qualities the committee was looking for in the position of Academic Advisor. I felt his skills would be better utilized in a Senior Academic Advising position, and I discussed this option with him after the entry level position was offered to the other candidates." Affidavit of Jan Tyler, attached as Exhibit 1 to Sinclair's Motion for Summary Judgment, at ¶8.

{¶ 23} Silberstein was informed on October 31, 2007, that he had not been selected for the job. The following day, Silberstein's wife, who is an attorney, sent a public records request to Tyler, asking for all public records in Sinclair's possession concerning the recently filled position of Academic Advisor, including affirmative action or demographic information showing the sex, age, and ethnicity of the successful candidates. Silberstein also asked for all notes of interviews conducted with Silberstein and the successful candidates by any persons involved in the interviews, and all notes and correspondence regarding meetings that were held after the interviews or that related to the selection of the successful candidates or to Silberstein's non-selection. Sinclair's legal department promptly responded, stating that it would provide the requested records, but stressing that not all notes of an individual are public records. Silberstein was then furnished various records in mid-November 2007, including Tyler's notes. However, the notes of other committee members were not provided. The committee members were never contacted by anyone to request that they preserve

their notes. Consequently, the committee members destroyed their notes within weeks or months after the interview process. The committee members were concerned about possessing the confidential information on the applications, and felt disposing of the documents was the appropriate course.

{¶ 24} Silberstein filed suit against Sinclair in April 2008, alleging that Sinclair had discriminated against him on the basis of age and sex. Silberstein filed an amended complaint in January 2009, adding claims for spoliation and for destruction of public records in violation of R.C. 149.351. Sinclair filed motions for summary judgment directed to all claims, and the trial court subsequently rendered summary judgment in favor of Sinclair.

{¶ 25} The trial court concluded that Silberstein failed to establish a prima facie case of sex discrimination, because the field of academic advising is primarily female, and an imbalance in the number of males interviewed and hired is merely reflective of the applicant pool. The court further concluded that Silberstein had established a prima facie case of age discrimination, but that Sinclair had asserted legitimate, non-discriminatory reasons for failing to hire Silberstein. Silberstein did not, however, demonstrate that Sinclair's explanation for hiring Bakkum and Sturm is pretextual. The trial court additionally found the spoliation claim without merit, and also concluded that the committee members' notes are not public records.

{¶ 26} Silberstein appeals from the judgment of the trial court.

II

{¶ 27} Silberstein's First Assignment of Error is as follows:

{¶ 28} "THE TRIAL COURT ERRED IN FINDING THAT APPELLANT FAILED

TO PRODUCE EVIDENCE OF PRETEXT FOR SEX AND AGE DISCRIMINATION."

{¶ 29} Under this assignment of error, Silberstein contends first that he presented sufficient evidence of pretext from which a reasonable factfinder could conclude that he was denied an academic advisor position due to his age. Silberstein also contends that the record contains sufficient evidence from which a reasonable factfinder could infer that Sinclair discriminates against males in filling positions within its academic advising department.

{¶ 30} "We review summary judgment decisions *de novo*, which means that we apply the same standards as the trial court." *GNFH, Inc. v. W. Am. Ins. Co.*, 172 Ohio App.3d 127, 133, 2007-Ohio-2722, at ¶16. "A trial court may grant a moving party summary judgment pursuant to Civ. R. 56 if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." *Smith v. Five Rivers MetroParks* (1999), 134 Ohio App.3d 754, 760.

{¶ 31} R.C. 4112.02(A) provides that it is an unlawful discriminatory practice "[f]or any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, * * * to refuse to hire, or otherwise to discriminate against that person with respect to hire, * * * or any matter directly or indirectly related to employment."

{¶ 32} "A claim of discrimination may be proven by either direct or circumstantial evidence. * * * To establish a discrimination claim based upon circumstantial evidence, a plaintiff must initially demonstrate a prima facie case of discrimination." *Temple v.*

City of Dayton, Montgomery App. No. 20211, 2005-Ohio-57, at ¶85. (Citations omitted). A plaintiff can establish a prima facie case by establishing that "(1) she was a member of a protected class; (2) she applied for and was qualified for the position * * *; (3) she was considered for and denied the position, and (4) she was rejected in favor of another person with similar qualifications who was not a member of her protected class." *Betkerur v. Aultman Hosp. Assn*., (C.A.6 1996), 78 F.3d 1079, 1095, citing *Brown v. Tennessee* (C.A. 6 1982), 693 F.2d 600.

{¶ 33} In *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, the Supreme Court of Ohio modified the fourth prong of this test, by replacing it with "a requirement that the favored employee be substantially younger than the protected" individual. Id. at ¶19. The Supreme Court of Ohio declined to define "substantially younger." Id. at ¶22. Instead, the court noted that "[t]he term 'substantially younger' as applied to age discrimination in employment cases defies an absolute definition and is best determined after considering the particular circumstances of each case." Id. at ¶23.

{¶ 34} Once a plaintiff establishes a prima facie case, the burden shifts to the employer, who must show that it had a "legitimate, nondiscriminatory reason for its action. * * * The burden of persuasion, however, always remains with the plaintiff. * * * If the employer articulates such a reason, the employee must show that the articulated reason was merely a pretext for discrimination." *Temple*, 2005-Ohio-57, at ¶85. (Citations omitted.)

{¶ 35} Silberstein met his initial burden of establishing a prima facie case of age discrimination. At age 59, he was within the protected class, and met the minimum

requirements for the position. Silberstein's application was also rejected in favor of persons with similar qualifications who were substantially younger. Although Bakkum's precise age is not disclosed, she received her bachelor's degree in 1983. Assuming a college graduation age of 22 years, Bakkum would have been approximately 46 years old, or substantially younger than Silberstein, even though she was still within the protected class. More importantly, however, Sturm was only 24 years of age, and was not within the protected class.

{¶ 36} Sinclair also met its burden of articulating legitimate, non-discriminatory reasons for its actions. Although Sturm's overall resume is not as impressive as Silberstein's, Tyler voiced legitimate reasons for preferring Sturm and Bakkum as candidates. Unlike these two candidates, Silberstein did not have experience with Ohio community colleges or with transfer regulations. More than one committee member also expressed concern about Silberstein's ability to be satisfied with entry-level work, given the high-level decision-making he had been doing as a director.

{¶ 37} Silberstein contends that Sinclair's stated reasons are pretextual, for several reasons. He notes first that expertise in Ohio's collegiate system is not a stated requirement for the position. Second, Silberstein observes that he worked in Ohio's collegiate system for about two years, from 1976-1978, and at a community college in Massachusetts, for about two years, from 1978-1980. Silberstein also contends that Sturm did not meet the minimum qualifications for the position, and that a gross disparity exists between their qualifications. Finally, Silberstein contends that Sinclair's hiring process was improperly subjective, because there were no precise or formal selection criteria.

{¶ 38} We disagree. As an initial point, we note that all applicants were subjected to the same interview process and the same set of standard questions. There was also no evidence that subjectivity entered this process, beyond intangible factors that are necessarily inherent in any hiring process. We have previously acknowledged that "the use of overly subjective criteria in hiring decisions can mask discriminatory intent * * * ." *Senu-Oke v. Bd. of Edn. of Dayton City School Dist*., Montgomery App. No. 20967, 2005-Ohio-5239, at ¶37 (citation omitted). Nonetheless, we also stressed in *Senu-Oke* that "consideration of somewhat intangible factors, such as interpersonal skills and teamwork, is worthwhile and appropriate." Id.

{¶ 39} There is no doubt that Silberstein is well-qualified in the field of academic advising. This fact, however, does not necessarily mean that Silberstein was the best person for the positions in question, which were entry-level positions. Furthermore, the candidates who were hired had specific experience working with Sinclair students, the Ohio community college system, and the Ohio transfer process – qualifications that Silberstein did not possess. Silberstein also offered no proof that Sinclair's explanation was a pretext, other than the mere fact of his age. We noted in *Senu-Oke* that "mere conjecture that an employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment." Id. at ¶38 (citation omitted).

{¶ 40} Citing *Bender v. Hecht's Dept. Stores* (C.A. 6, 2006), 455 F.3d 612, Silberstein contends that summary judgment should have been denied because his qualifications were so far superior to those of Sturm that no reasonable employer would have chosen Sturm. In *Bender*, the Sixth Circuit Court of Appeals noted that:

{¶ 41} "[I]n the case in which there is little or no other probative evidence of

discrimination, to survive summary judgment the rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former. In negative terms, evidence that a rejected applicant was as qualified or marginally more qualified than the successful candidate is insufficient, in and of itself, to raise a genuine issue of fact that the employer's proffered legitimate, non-discriminatory rationale was pretextual." Id. at 627.

{¶ 42} If the position at issue were that of a senior advisor or a director of academic advising, we might agree with Silberstein. But the position was an entry-level position, for which a reasonable argument could be made that Sturm was more qualified in the sense of being better suited for the position. Two committee members also had an opportunity to work closely with Sturm for several months, and were able to observe her ability to perform and to relate to students. Under the circumstances, we cannot say that no reasonable employer would have preferred Sturm for the academic advisor position. In *Bender*, the court stressed that "If two reasonable decisionmakers could consider the candidates' qualifications and arrive at opposite conclusions as to who is more qualified, then clearly one candidate's qualifications are not significantly better than the other's." Id. at 628.

{¶ 43} Accordingly, the trial court did not err in concluding that Silberstein failed to present sufficient evidence to sustain his burden on the issue of age discrimination. We reject Silberstein's arguments about sex discrimination for the same reasons.

{¶ 44} Silberstein's First Assignment of Error is overruled.

III

{¶ 45} Silberstein's Second Assignment of Error is as follows:

{¶ 46} "THE TRIAL COURT ERRED IN FINDING THAT INSUFFICIENT EVIDENCE WAS CONTAINED IN THE RECORD TO ALLOW A REASONABLE FACT FINDER TO CONCLUDE THAT CIRCUMSTANCES SUPPORTED THE SUSPICION THAT APPELLEE DISCRIMINATES AGAINST MALES."

{¶ 47} Under this assignment of error, Silberstein contends that the record contains evidence that Sinclair discriminated against males in filling positions within its academic advising department. The evidence Silberstein cites is statistical, as follows: (1) only three of Sinclair's 24 academic advisors are male; (2) three of the four search committee members are female; (3) the head of the academic advising department is female; and (4) Silberstein is the only male candidate out of the nine candidates that the committee interviewed.

{¶ 48} The trial court concluded that Silberstein failed to establish a prima facie case of sex discrimination, because his proof did not meet the modified test applied in cases of reverse discrimination. We agree with the trial court.

{¶ 49} "[I]n a 'reverse discrimination' case, the complainant 'bears the burden of demonstrating that he was intentionally discriminated against "despite his majority status[,]" ' and, in order to establish such a claim, the typical requirements for a prima facie case of sex discrimination are modified. * * * Thus, a prima facie case of reverse discrimination requires the plaintiff to demonstrate: '(1) background circumstances that support the suspicion that defendant is that unusual employer who discriminates against the majority; and (2) that the employer treated differently employees who were

similarly situated but not members of the protected class.' " *Kundtz v. AT & T Solutions, Inc*., Franklin App. No. 05AP-1045, 2007-Ohio-1462, at ¶47 (citations omitted). Accord, *Mitchell v. Lemmie*, Montgomery App. No. 21511, 2007-Ohio-5757, at ¶122.

{¶ 50} Silberstein notes in his brief that females dominate the field of higher education and academic advising, in particular. In view of this fact, and the other facts relating to a low degree of male participation in advising at Sinclair, Silberstein contends that a suspicion of discrimination in academic advisor positions can be inferred. We disagree. If a field is dominated by females, the fact that an employer interviews and hires fewer males does not, without more, demonstrate that the employer is the unusual employer who discriminates against males. In addition, Silberstein failed to present evidence that Sinclair generally treats males differently from females.

{¶ 51} Accordingly, the Second Assignment of Error is overruled.

IV

{¶ 52} Silberstein's Third Assignment of Error is as follows:

{¶ 53} "THE TRIAL COURT ERRED IN FINDING THAT INTERVIEW QUESTION FORMS DESTROYED [SIC] MUNN, KRONENBERGER, AND ERHARDT WERE NOT PUBLIC RECORDS."

{¶ 54} Under this assignment of error, Silberstein contends that the trial court erred in finding that the interview questions forms that were destroyed are not public records. As was noted, the committee devised a set of standard questions that were asked of each candidate. The interview question forms also had spaces where the committee members could take notes. Sinclair's legal department provided

Silberstein with Tyler's interview notes, but the other committee members had destroyed their own notes. Because the committee members used their notes when discussing the candidates, Silberstein contends that the notes are public records under R.C. 149.43. Silberstein also contends that because Sinclair provided Tyler's notes, that constitutes a concession that the personal notes of the other committee members are public records.

{¶ 55} R.C. 149.43(A)(1) defines a "public record" as "records kept by any public office * * * ." R.C. 149.43(B)(1) requires public records to be made available for inspection and copying upon request. R.C. 149.43(B)(3) further provides that "If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied." If a party believes the public office has not properly disclosed records, R.C. 149.43(C)(1) authorizes a mandamus action to compel production of the public records.

{¶ 56} When Silberstein asked for records relating to the academic advisor positions, Sinclair's legal department said it would release various items. Sinclair also maintained, however, that not all notes of an individual constitute public records. Sinclair cited *State ex rel. Steffen v. Kraft*, 67 Ohio St.3d 439, 1993-Ohio-32, as legal authority for its position. In response, Silberstein asked for the notes of all interviewers. When Silberstein subsequently received the records, it would have been obvious that only one interviewer's notes were included. Nonetheless, Silberstein never commenced a mandamus action to compel production of the records, as authorized by R.C. 149.43(C)(1).

{¶ 57} Silberstein instead filed his complaint for age and sex discrimination in April 2008. He then filed an amended complaint in January 2009, and added claims for spoliation and for improper destruction of records under R.C. 149.351. Silberstein has abandoned the spoliation claim on appeal, but still contends that the documents were public records and that they should not have been destroyed.

{¶ 58} R.C. 149.351(A) prohibits the destruction, removal, or disposal of public records except as provided "under the records programs established by the boards of trustees of state-supported institutions of higher education under section 149.33 of the Revised Code." This statute also states that the "records shall be delivered by outgoing officials and employees to their successors and shall not be otherwise removed, transferred, or destroyed unlawfully." R.C. 149.351(B) provides for either a civil action for injunctive relief to compel compliance with R.C. 143.351(A), or a civil action for forfeiture in the amount of $1,000 for each violation. Regardless of which remedy is chosen, an aggrieved party is entitled to reasonable attorney fees. In the amended complaint, Silberstein asked for forfeiture of $1,000 for each violation of R.C. 149.351.

{¶ 59} In moving for summary judgment, Sinclair argued that the notes of the committee members were for their own personal use, were not disclosed to others, and are not public records. The trial court concluded that the committee members' personal notes are not public records under *State ex rel. Cranford v. Cleveland,* 103 Ohio St.3d 196, 2004-Ohio-4884, and *State ex rel. Steffen v. Kraft* (1993), 67 Ohio St.3d 439, 1993-Ohio-32. Silberstein argues that *Cranford* and *Steffen* do not control, because they were decided prior to *Kish v. Akron,* 109 Ohio St.3d 162,

2006-Ohio-1244, which broadly defines the scope of public records.

{¶ 60} In *Cranford*, the Supreme Court of Ohio considered whether personal notes taken during a predisciplinary conference by the Cleveland City Planning Commission Director are "public records" under R.C. 149.43(A)(1), and should have been disclosed to an employee. 2004-Ohio-4884, at ¶1 and 13. Relying on *Steffen*, the Supreme Court of Ohio stressed that "R.C. 149.43(A)(1) defines 'public record' as a 'record that is kept by any *public office*' (emphasis added); it does not define a 'public record' as any piece of paper on which a public officer writes something ." Id. at ¶14 (citation omitted). The court also noted that in both *Steffen* and *Cranford*, the notes were kept for the officials' "own convenience" and were not "public records." Id. at ¶16 and 18. Furthermore, other officials in *Cranford* did not have access to, nor did they use the notes. Id. at ¶18. The Supreme Court of Ohio, thus, held that:

{¶ 61} "Therefore, based on *Steffen*, * * * [the planning commission director's] personal notes are not public records subject to disclosure under R.C. 149.43. See *State ex rel. Murray v. Netting* (Sept. 18, 1998), Guernsey App. No. 97-CA-24, 1998 WL 666742, applying *Steffen* to handwritten notes of public officials during interviews of police chief candidates ('We see no reason to distinguish between a Judge's handwritten notes and the handwritten notes in the instant case. The notes were personal papers of the interviewers, used to complete the evaluation forms, to which relator is entitled. The mere fact that some of these notes happened to end up in the custody of respondent does not render them public records') * * *." *Cranford*, 2004-Ohio-4884, at ¶21 (bracketed material supplied).

{¶ 62} The Supreme Court of Ohio also stressed in *Cranford* that its decision was

consistent with courts in other jurisdictions, which had held that "personal notes of public officials generally do not constitute public records. * * * " Id. at ¶22. *Kish* was decided a few years later, but it does not alter the prior holdings in either *Steffen* or *Cranford*.

{¶ 63} In *Kish*, the Supreme Court of Ohio considered the interpretation of R.C. 149.011(G), which defines "records" to include "any document, device, or item, regardless of physical form or characteristic, * * * created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." The Supreme Court of Ohio observed that "there is great breadth in the definition of 'records' for the purposes here." *Kish*, 2006-Ohio-1244, at ¶20. Notably, the "purposes" at issue in *Kish* are employee overtime records, and whether employees' separate comp-time sheets, as opposed to a compilation of the time sheets, should be counted as individual records for purposes of R.C. 149.351. Id. at ¶10-13.

{¶ 64} The court concluded in *Kish* that because of the broad nature of R.C. 149.011(G), both the time sheets and the compilations of these records would be considered Individual records for purposes of assessing damages under R.C. 149.351. Id. at ¶14-26. In reaching this conclusion, the court noted that:

{¶ 65} "Indeed, any record that a government actor uses to document the organization, policies, functions, decisions, procedures, operations, or other activities of a public office can be classified reasonably as a record. * * * So can any material upon which a public office could rely in such determinations. * * * The document need not be

in final form to meet the statutory definition of 'record.' " Id. (Citations omitted).

{¶ 66} *Kish* does not deal with personal notes, and does not indicate an intention to change the law previously established by the Supreme Court of Ohio in *Cranford* and *Steffen*. In fact, after *Kish* was decided in March 2006, the Supreme Court of Ohio once again rejected an attempt to obtain personal notes. See *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714. *Carr* was decided in December 2006, and involves a request for various records, including assessments done in connection with promotional examinations for the City of Akron's Division of Fire. Id. at ¶1-26. The Supreme Court rejected requests for the assessors' personal notes, stating that "the assessors' personal notes are not public records." Id. at ¶56, citing *Cranford*, 2004-Ohio-4884, ¶21-22.

{¶ 67} Like the individuals in *Cranford* and *Steffen*, the Sinclair committee members took personal notes for their own convenience, and their notes were not used by others. The notes, therefore, are not public records for purposes of R.C. 149.43, and Sinclair did not violate R.C. 149.351 by disposing of the notes. Furthermore, the fact that Sinclair provided Tyler's interview notes does not mean that the notes are public records. As was noted in *Cranford*, "t]he mere fact that some of these notes happened to end up in the custody of respondent does not render them public records * * *" 2004-Ohio-4884, at ¶21.

{¶ 68} Accordingly, Silberstein's Third Assignment of Error is overruled.

V

{¶ 69} All of Silberstein's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

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