

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DR. MUHAMMAD ASHRAF,	:	Case No. 1:13-cv-533
Plaintiff,	:	
	:	Judge Timothy S. Black
vs.	:	
	:	
DR. THOMAS BOAT,	:	
Dean of the University of	:	
Cincinnati College of Medicine,	:	
Defendant.	:	

**ORDER DENYING PLAINTIFF'S MOTION
FOR A TEMPORARY RESTRAINING ORDER**

This civil lawsuit and its pending motion for emergency injunctive relief present the question whether a tenured faculty member, who resigns his position voluntarily, without conditions, and whose resignation is formally and fully accepted in writing by the Dean, can then change his mind thirty days later, revoke his resignation, and require the University to terminate him only for cause.

The law here is clear, as established by the Supreme Court of Ohio:

A public employee may rescind or withdraw a tender of resignation at any time prior to its effective date, so long as the public employer has not formally accepted such tender of resignation.

Acceptance of a tender of resignation from public employment occurs where the public employer or its designated agent initiates some type of affirmative action, preferably in writing, that clearly indicates to the employee that the tender of resignation is accepted by the employer.

Davis v. Marion County Eng'r, 573 N.E.2d 51, 55 (Ohio 1991).

In the present case, the facts are undisputed that the Dean formally and clearly indicated to Dr. Ashraf, in writing, that his resignation was accepted. Plaintiff's late-breaking legal position that the Dean was not empowered to accept resignations, and, therefore, the resignation could be revoked, runs counter to logic, practice, procedure, and, ultimately, the law.

I. BACKGROUND FACTS

Dr. Ashraf has been a faculty member at the University of Cincinnati College of Medicine for 35 years, since 1978. He has been a tenured professor and a member of the AAUP. The terms of his employment with the University are governed by a collective bargaining agreement. (Doc. 2, Ex. A).

Dr. Ashraf's research is focused on identifying therapies that prevent cell damage and/or death in the ischemic heart, as well as therapies that may be useful in minimizing cell and tissue injury following a heart attack. The National Institute of Health ("NIH") funds Dr. Ashraf's research at the University, and he is currently the Principal Investigator on grants totaling \$1,929,081. Dr. Ashraf is one of the highest funded medical researchers at the University of Cincinnati and leads a research team of approximately 15 individuals.

In August 2012, the University decided to conduct an investigation into whether Dr. Ashraf had committed self-plagiarism or other research misconduct. (Doc. 10 at ¶ 4). Dean Boat formed an investigative committee pursuant to University rules to investigate

allegations of research misconduct against Dr. Ashraf and an associate professor who had collaborated on two research publications. (*Id.*) Dr. Ashraf and the other authors of the article repeatedly explained that the photographs were placed in the article by mistake, that they had not intentionally falsified any data, that they could provide the correct photographs, and that the article containing the incorrect photographs had never been publicly disseminated or used for any purpose.

The year while the investigation of allegations of misconduct was pending was a difficult one, as acknowledged by both parties at oral argument.

At the end of the academic year, on June 5, 2013, Dr. Ashraf informed Dean Boat via email of his intent to resign his position at the College of Medicine effective July 31, 2013. That same day, Dean Boat sent a written reply by email stating: “I accept your resignation from the University of Cincinnati College of Medicine faculty as of July 31, 2013.” (Doc. 10 at 8). .

Over the course of the next month, however, it became clear to Dr. Ashraf that UC would not relinquish all of his NIH grants to the institution to which Dr. Ashraf intended to transfer his research. As a result, on July 5, 2013, Dr. Ashraf sent Dean Boat a new email stating his desire “to withdraw my resignation.” (Doc. 2, Ex. B). On July 10, 2013, Dean Boat formally notified Dr. Ashraf in writing that his resignation was still in place. (Doc. 10 at 13). Dean Boat explained that the University had previously accepted Dr. Ashraf’s resignation to allow him to take a position at another institution and had

since made plans and taken steps to move forward based on Dr. Ashraf's resignation. (*Id.*). Dean Boat stated that he continued to expect Dr. Ashraf's resignation to be effective July 31, 2013 and would continue to work with him to ensure a smooth transition. (*Id.*).

Subsequently, on July 16, 2013, Dr. Boat sent a letter to Dr. Ashraf informing him that he was being recommended for dismissal as a result of alleged research misconduct (*Id.* at 13) and a separate letter informing him that UC intended to request that NIH transfer two of his grants, worth \$1,322,887.00, to another faculty member at UC (*Id.* at 14). In response, Dr. Ashraf's counsel sent a letter to the University reiterating Dr. Ashraf's intent to remain employed at the College of Medicine and to exercise his right to challenge the University's research misconduct charge. (Doc 2, Ex. E).

On July 29, 2013, counsel for the University confirmed that "the University of Cincinnati continues to expect that Dr. Ashraf's last day of work with the University will be July 31, 2013." (*Id.*, Ex. F). The University also informed Dr. Ashraf that he would not be permitted to challenge his dismissal or discipline pursuant to Article 9 or any other provision in the CBA, presumably because his current status was a retired faculty member, and not a currently employed faculty member.

On July 31, 2013, Dr. Ashraf filed this lawsuit asking the Court to enjoin the University from accepting his resignation. The Court held a hearing and oral argument on Plaintiff's Motion for Temporary Restraining Order (Doc. 2) on the second-to-next

business day, the Defendants having filed a memorandum in opposition on an accelerated basis (Doc. 8). The Court now issues its decision, within four business days of the filing.

II. STANDARD OF REVIEW

Dr. Ashraf seeks “an extraordinary remedy invoking the exercise of very far-reaching power, which is to be applied ‘only in limited circumstances which clearly demand it.’” *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000).

Under the familiar test to determine whether or not to grant injunctive relief, this Court must weigh four factors: (1) whether the moving party has shown a strong likelihood of success on the merits; (2) whether the moving party will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction. *Overstreet v. Lexington-Fayette Urban County Gov’t*, 305 F.3d 566, 573 (6th Cir. 2002). These four considerations are factors to be balanced, not prerequisites that must be met. *McPherson v. Michigan High Sch. Athletic Ass’n, Inc.*, 119 F.3d 453, 459 (6th Cir. 1997), and there is no “rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief.” *Tate v. Frey*, 735 F.2d 986, 990 (6th Cir. 1984) (citations omitted).

Plaintiff bears the heavy burden of demonstrating his entitlement to a temporary restraining order and preliminary injunction, as an “injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the

circumstances clearly demand it.” *Overstreet*, 305 F.3d at 513 (emphasis supplied); *see also Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (temporary restraining orders and preliminary injunctions are “extraordinary remed[ies] invoking the exercise of very far-reaching power, which is to be applied ‘only in limited circumstances which clearly demand it.’”) (citation omitted).

In the Sixth Circuit, “[t]he standard for issuing a temporary restraining order is logically the same as for a preliminary injunction with emphasis, however, on irreparable harm[.]” *Reid v. Hood*, No. 1:10 CV 2842, 2011 U.S. Dist. LEXIS 7631, at *2 (N.D. Ohio Jan 26, 2011) (citing *Motor Vehicle Bd. of Calif. v. Fox*, 434 U.S. 1345, 1347 n.2 (1977)). Moreover, “[a]lthough no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal.” *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 225 F.3d 620, 625 (6th Cir. 2000).

III. ANALYSIS

As set forth below, the Court finds categorically that Plaintiff is not entitled to injunctive relief because he has not evidenced a substantial likelihood of success on the merits, and, in truth, will never be able to do so, given the undisputed material facts and the law. Moreover, none of the additional factors the Court must consider support the issuance of injunctive relief.

A. Likelihood of Success on the Merits

The crux of the matter is whether Dean Boat had the authority to accept Dr. Ashraf's resignation and did so properly.

The law which applies here, as established by the Supreme Court of Ohio, provides that:

“[A] public employee may rescind or withdraw a tender or resignation at any time prior to its effective date, so long as the public employer has not formally accepted such tender of resignation.” *Davis*, 573 N.E.2d at 55 (emphasis added). Moreover, the “acceptance of a tender of resignation from public employment occurs where the public employer or its designated agent initiates some type of affirmative action, preferably in writing, that clearly indicates to the employee that the tender of resignation is accepted by the employer.” *Id.* at 55-56 (emphasis added).

Here, the Court finds that Dr. Ashraf's resignation was “formally accepted” when the University's “designated agent” - the Dean of the College of Medicine - responded in writing that “I accept your resignation from the University of Cincinnati College of medicine faculty as of July 31, 2013.” (Doc. 10 at 8).

Plaintiff maintains, however, that Defendant was not “empowered” by the University to accept his resignation. Specifically, Plaintiff cites an Ohio Court of Appeals case for the proposition that “[t]he power to accept a public employee's

resignation resides with the entity or person having the authority to appoint or remove the employee.” *Holben v. Ohio State Med. Bd.*, 924 N.E.2d 851, 855 (Ohio App. 2009) (emphasis added). Plaintiff argues that because Dean Boat does not have the authority to appoint or remove him, as that authority resides only with University of Cincinnati Board of Trustees, *see* Ohio Revised Code § 3361.03, Dean Boat similarly did not have the authority to accept Dr. Ashraf’s resignation.

However, Plaintiff’s notice of resignation was provided to Dean Boat consistent with Article 6.2.5 of the Collective Bargaining Agreement which provides that “[a] Faculty Member who accepts an appointment elsewhere shall promptly give notice to the Dean or administrator.” (Doc. 10 at 7). Such language is indicia that Dean Boat was the “designated agent” of the University Board of Trustees to accept resignations from the faculty of the College of Medicine. *Davis*, 573 N.E.2d at 55-56. Additionally, Dean Boat maintains that it is, and has been for years, standard practice and procedure for him to accept such resignations. (Doc. 10 at ¶ 2) (“I have the authority to accept the resignations of faculty members from the College of Medicine. I commonly accept such resignations and do not submit them for approval to either the President of the University of Cincinnati or the University of Cincinnati Board of Trustees.”). Moreover, the fact that Plaintiff sent his resignation to Dean Boat in the first instance is further indicia that

the Dean was the University's "designated agent."¹

Furthermore, "the crucial factor in determining the legal effectiveness of a withdrawal of resignation from public employment period to its effective date is the manner of acceptance conveyed by the employer to the employee." *Davis*, 573 N.E.2d at 53. Here, it is undisputed that on June 5, 2013, Dean Boat responded to Dr. Ashraf in an unambiguous writing via email, stating "I accept your resignation from the University of Cincinnati College of Medicine faculty as of July 21, 2013." (Doc. 8, Ex. 1 at ¶ 5). Dean Boat further stated, "[w]e will work with you and others to begin to make Department of Pathology changes to accommodate your resignation." (*Id.*)

Accordingly, Dean Boat's acceptance of Plaintiff's resignation was effective and Plaintiff's subsequent purported rescission of his resignation does not place him in the position of being involuntarily terminated and entitled to the same due process procedures and protections that would apply in the case of an involuntary termination. Therefore, Plaintiff has not shown a likelihood of success on the merits.²

¹ This finding is not inconsistent with *Holben*, as there was no evidence nor argument in *Holben* that the Executive Director, who accepted Holben's resignation, was the "designated agent" or had the requisite "authority" to accept such resignation. Moreover, *Holben* is an Ohio Court of Appeals case and is therefore merely persuasive authority; and the decision of the Supreme Court of Ohio in *Davis* is binding authority. See, e.g., *Columbus v. Sheppard*, No. 83AP 961, 1984 Ohio App. LEXIS 8726, at *2 (Ohio App. Feb. 9, 1984) (decisions of the Supreme Court of Ohio are binding, whereas decisions of a lower Ohio court are merely persuasive authority).

B. Irreparable Harm

If a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated. *Bonnel v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001). Here, however, Plaintiff is unable to show a likelihood of success on his constitutional claim and thus there is no basis to find irreparable harm based on any threat to a constitutional right.

Moreover, in the absence of a threat to a constitutional right, courts have held that damages such as the deprivation of income for an indefinite period, embarrassment, humiliation, and damage to an individual's reputation fall short of irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 89 (1974). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Id.* at 90.

Additionally, there is no evidence indicating that the continuation of the research Plaintiff was involved in at the University is dependent upon his employment as a faculty member at the University as the University has already designated another faculty member to take over Dr. Ashraf's role as Principal Investigator . (Doc. 9 at ¶ 2).

Accordingly, Plaintiff fails to evidence irreparable harm.

² The Court's finding that there is no likelihood of success on the merits is fatal. However, the Court will address the other three factors nonetheless. *Gonzales*, 225 F.3d at 625.

C. Substantial Harm to Others or the Public

The focus of the final parts of the four-part test is on the harm that a defendant will suffer if the requested injunctive relief is granted, as well as the interests of the public.

Lander v. Montgomery Cty. Bd. Comm'rs, 159 F. Supp.2d 1044, 1054 fn. 19 (S.D. Ohio 2001). Here, the University has properly initiated processes to address the transition upon Plaintiff's notice of resignation. For example, the University has already notified nine employees in the laboratory that their positions will be terminated, and has initiated abolishment proceedings. (Doc. 9 at ¶ 5). The University claims that it will be subject to significant personnel and faculty member disruption and confusion if Plaintiff returns. (*Id.* at ¶ 4). Under such circumstances, the balance of equities weighs against injunctive relief when it would create disputes and uncertainty in the employer's workforce. *See, e.g., Burkholder v. UAW*, 444 F. Supp.2d 817, 821-33 (N.D. Ohio 2006). Moreover, another faculty member has already agreed to become the Primary Investigator for the research grants that the University has requested NIH to continue at the University. (Doc. 9 at ¶ 4).

Additionally, without a showing of likelihood of success on the merits, Dr. Ashraf has not demonstrated that he has suffered a violation of his constitutional rights and thus injunctive relief is not in the public interest, as it would be if there were evidence of a constitutional violation.

IV. CONCLUSION

The Court finds that Plaintiff has not met his burden of establishing his entitlement to a temporary restraining order. Accordingly, Plaintiff's motion for a temporary restraining order (Doc. 2) is **DENIED**.

A district court's denial of a motion for a temporary restraining order generally is not appealable. *Office of Pers. Mgmt. v. Am. Fed'n of Gov't Employees, AFL-CIO*, 473 U.S. 1301, 1304-06 (1985). Such a ruling is appealable, however, if it is tantamount to a ruling on a preliminary injunction. *Wilson v. Wilkinson*, 28 Fed. Appx. 465, 466 (6th Cir. 2002) (citing *Manbourne, Inc. v. Conrad*, 796 F.2d 884, 887 n.3 (7th Cir. 1986)). This Court is prepared to find that its Order denying Plaintiff's motion for a temporary restraining order is tantamount to an Order denying a motion for a preliminary injunction and, therefore, to certify that the Court's Order denying Plaintiff's motion for a temporary restraining order is a final appealable order as there is no just reason for delay. However, the Court wishes to confer with counsel first, and, therefore, this case is set for conference by phone on this Friday, August 9, 2013, at 1:00 p.m.³

IT IS SO ORDERED.

Date: 8/6/13

/s/ Timothy S. Black
Timothy S. Black
United States District Judge

³ COUNSEL SHALL TIMELY CALL: 1-888-684-8852, access code 8411435, security code 123456, and wait on the line for the Court to join the conference.