[Cite as *You v. N.E. Ohio Med. Univ.*, 2017-Ohio-4461.]

MIN YOU, PH.D. Plaintiff v. NORTHEAST OHIO MEDICAL UNIVERSITY Defendant	Case No. 2015-00747 Judge Patrick M. McGrath Magistrate Anderson M. Renick DECISION

{¶1} On March 13, 2017, defendant, Northeast Ohio Medical University (NEOMU), filed a motion for summary judgment pursuant to Civ.R. 56(B). On April 6, 2017, plaintiff filed a response. On April 10, 2017, defendant filed a combined reply and motion to strike the documents attached to plaintiff's affidavit. On the same date, defendant filed a motion for leave to file its reply, which is hereby GRANTED. On April 14, 2017, plaintiff filed a response to defendant's motion to strike. The motion to strike is DENIED. The motion for summary judgment is now before the court for a non-oral hearing.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to

have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} Plaintiff's employment with NEOMU began in November 2013 when she was hired as a tenured professor to serve as a department chair and she was appointed to the unpaid position of Associate Dean of Research. Plaintiff's claims arise from NEOMU's decision to remove plaintiff from her administrative positions as department chair and associate dean in February 2015. Plaintiff alleges breach of contract, discrimination, retaliation, and violation of due process.

{¶5} The evidence submitted by defendant shows that NEOMU faculty and staff reviewed applicants and Charles Taylor, Dean of the College of Pharmacy and Vice President for Academic Affairs, ultimately made the decision to hire plaintiff. Dean Taylor testified that by the time of plaintiff's mid-term review in either November or December 2014, he believed that plaintiff's insubordination had become an important issue. Specifically, Dean Taylor testified that on more than 12 occasions, plaintiff disregarded the chain of command and communicated in writing directly to President Jay Gershen. Dean Taylor related that President Gershen asked him to intervene with plaintiff and that he did so on numerous occasions either verbally, or in writing. President Gershen testified that he directed his assistant, Michelle Mulhern, to instruct plaintiff to stop emailing him and to relay all emails to Dean Taylor. After discussing plaintiff's insubordination with Dean Taylor on several occasions, on February 11, 2015, President Gershen met with Dean Taylor and plaintiff to discuss her communications and the chain of command. President Gershen reminded plaintiff to communicate through Dean Taylor for all college business.

{¶6} On February 13, 2015, with President Gershen's knowledge, Dean Taylor sent plaintiff a "formal written warning" regarding her communication with the president. The letter referenced previous oral and written feedback that Dean Taylor had provided

to plaintiff. Dean Taylor stated in the letter, that "[f]ailure to demonstrate immediate and sustained adherence to this directive to not communicate directly with the President, will result in disciplinary action that may include removal as department chair/associate dean." (Taylor's deposition, Exhibit 2.) The warning letter included a signature line for plaintiff to acknowledge that she accepted the terms of the letter. On the day she received the letter, plaintiff sent an email to both Dean Taylor and President Gershen stating that she "reject[ed] this warning" because she had "an essential right" as a faculty member to communicate with the president. (Plaintiff's deposition, Exhibit M.) On February 16, 2015, plaintiff sent a letter to Dean Taylor wherein she discussed her reasons for refusing to sign the acknowledgment statement on the warning letter, including her opinion that the chain of command is "not for mind controlling and communication restriction." (Plaintiff's deposition, Exhibit M.)

{¶7} On February 18, 2015, Dean Taylor notified plaintiff in writing that her administrative appointments as chair of the Department of Pharmaceutical Sciences and associate dean for the College of Pharmacy were terminated. (Taylor deposition, Exhibit 3.) Dean Taylor explained that plaintiff's duties and responsibilities as a tenured professor would continue in accordance with faculty bylaws. On February 25, 2015, plaintiff sent a document to President Gershen in an attempt to "appeal" the termination of her administrative appointments. (Defendant's Exhibit T-1.) Plaintiff relates that she has not received any response to her attempted appeal.

Breach of contract, violation of due process

{¶8} In order to prove breach of contract, plaintiff must prove the existence of a contract; performance by plaintiff; breach by defendant; and damages or loss as a result of the breach. *Samadder v. DMF of Ohio, Inc*., 154 Ohio App.3d 770, 2003-Ohio-5340 (10th Dist.). The construction of written contracts is a matter of law. *Alexander v. Buckeye Pipe Line Co*., 53 Ohio St.2d 241, paragraph one of the syllabus (1978). The cardinal purpose for judicial examination of any written instrument is to ascertain and

give effect to the intent of the parties. *Aultman Hosp. Assn. v. Community Mut. Ins. Co*., 46 Ohio St.3d 51 (1989). "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130, paragraph one of the syllabus (1987).

{¶9} An employment relationship with no fixed duration is deemed to be at will, which refers to the traditional rule that an employer may terminate the employment relationship at any time, for no cause, or any cause that is not unlawful. *Welch v. Finlay Fine Jewelry Corp*., 10th Dist. Franklin No. 01AP-508, 2002-Ohio-565; *Collins v. Rizkana*, 73 Ohio St.3d 65, 67, 1995-Ohio-135. However, the terms of discharge may be altered when the conduct of the parties indicates a clear intent to impose different conditions regarding discharge. *Condon v. Body, Vickers & Daniels,* 99 Ohio App.3d 12, 18 (8th Dist.1994).

{¶10} Both parties reference defendant's faculty bylaws for the terms and conditions regarding the termination of plaintiff's administrative appointments. NEOMU's offer letter did not provide any specified duration for plaintiff's employment. (Taylor deposition, Exhibit 1.) The offer letter references the faculty bylaws, which provide that department chairs are at-will employees who serve at the pleasure of their deans. (Plaintiff's deposition, Exhibit 2, §(F)(3).) Furthermore, according to the bylaws, a department dean has the authority and responsibility for "[a]ppointing, evaluating, and *removing* such assistant, and *associate deans, department chairs*, and other program administrators and staff needed to carry out the mission and the academic strategic plans of the College." (Emphasis added.) (*Id*., §(E)(c)(x).) Defendant represents that there is no provision for an appeal from such an administrative removal, and plaintiff has not pointed to any such provision. Accordingly, the court finds that the undisputed evidence shows that Dean Taylor acted in accordance with defendant's bylaws and that, as a matter of law, plaintiff cannot prevail on her breach of contract claim.

{¶11} Additionally to the extent plaintiff claims that NEOMU violated her constitutional due process rights, it is well settled that the Court of Claims lacks subject matter jurisdiction over claims involving constitutional and civil rights. *See Bleicher v. University of Cincinnati College of Medicine,* 78 Ohio App.3d 302, 306 (10th Dist.1992).

Discrimination

{¶12} Plaintiff also alleges that defendant discriminated against her based upon her race, her gender, and her national origin. 42 U.S.C. 2000e-2(a) states, in part: "It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *."

{¶13} R.C. 4112.02 states, in part: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race [or] color * * * 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." Case law interpreting Title VII of the Civil Rights Act of 1964 is also applicable to R.C. Chapter 4112. *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civil Rights Comm.*, 66 Ohio St.2d 192, 196 (1981).

{¶14} A plaintiff in a discrimination lawsuit may pursue "essentially, two theories of employment discrimination: disparate treatment and disparate impact." *Albaugh v. Columbus, Div. of Police*, 132 Ohio App.3d 545, 550 (10th Dist.1999), citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993). To establish an employment discrimination claim, a plaintiff is required to either "present direct evidence of discrimination or introduce circumstantial evidence that would allow an inference of discriminatory treatment." *Johnson v. Kroger* Co., 319 F.3d 858, 864-865 (C.A.6, 2003). However, plaintiff has failed to allege any facts to support either disparate treatment

disparate or impact discrimination. Furthermore, plaintiff did not allege discrimination in her attempted appeal to President Gershen.

{¶15} If there is no direct evidence of discrimination, the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), will apply. Under *McDonnell Douglas,* a plaintiff establishes a prima facie case of race discrimination by establishing that plaintiff: 1) was a member of a protected class; 2) suffered an adverse employment action; 3) was qualified for the position held; and 4) that comparable, nonprotected persons were treated more favorably. *Id*. at 802.

{¶16} If plaintiff establishes a prima facie case, the burden of production shifts to defendant to "articulate some legitimate, nondiscriminatory reason for [its action]." *Id*. If defendant succeeds in doing so, then the burden shifts back to plaintiff to demonstrate that defendant's proffered reason was not the true reason for the employment decision. *Id.* at 804.

{¶17} It is undisputed that plaintiff was a member of a protected class and the termination of plaintiff's administrative appointments was an adverse employment action inasmuch as her salary was reduced. However, even assuming that that plaintiff was qualified for the purposes of her discrimination claim, she has not provided any evidence to show that comparable, nonprotected persons were treated more favorably. Plaintiff generally contends that she has suffered harm as a result of defendant's discriminatory action. Plaintiff does not state that she has any specific personal knowledge that nonprotected persons were treated more favorably, nor does she identify any such person.

{¶18} "When the moving party puts forth evidence tending to show that there are no genuine issues of material fact, the nonmoving party may not avoid summary judgment solely by submitting a self-serving affidavit containing no more than bald contradictions of the evidence offered by the moving party. To conclude otherwise would enable the nonmoving party to avoid summary judgment in *every* case, crippling

the use of Civ.R. 56 as a means to facilitate the early assessment of the merits of claims, pre-trial dismissal of meritless claims, and defining and narrowing issues for trial." *Mosley v. Miami Shores of Moraine, L.L.C.*, 2nd Dist. No. 21587, 2007-Ohio-2138, at ¶ 13 (internal quotation omitted). *See also Porter v. Saez*, 10th Dist. Franklin No. 03AP-1026, 2004-Ohio-2498, at ¶ 43.

{¶19} Even assuming that plaintiff has presented sufficient evidence to establish a prima facie case of discrimination, the court finds that Dean Taylor had legitimate, non-discriminatory reasons for terminating plaintiff's administrative appointments.

{¶20} Both Dean Taylor and President Gershen testified that plaintiff was directed to use the chain of command and communicate through Dean Taylor for all college business. Dean Taylor testified that he informed plaintiff on numerous occasions that she should not communicate directly with President Gershen. Plaintiff refused to sign Dean Taylor's February 13, 2015 written warning which stated that he considered plaintiff's failure to follow his direction to be insubordination and that further insubordination would result in disciplinary action that could include termination of her administrative appointments. The evidence established that, as a department chair and associate dean, plaintiff served at the pleasure of Dean Taylor and that plaintiff refused to follow his explicit direction. Based upon the above facts and the applicable law, the court finds that defendant had legitimate, nondiscriminatory reasons for terminating plaintiff's employment.

{¶21} Plaintiff's assertions that defendant's decisions were based upon discriminatory animus are unsupported and do not prove pretext. Plaintiff has failed to present any evidence to overcome defendant's legitimate, nondiscriminatory reason for terminating her administrative appointments. The only reasonable conclusion to be drawn from the evidence is that plaintiff's appointments were terminated in accordance with the faculty bylaws based upon plaintiff's failure to follow Dean Taylor's direction.

Thus, defendant is entitled to judgment as a matter of law as to plaintiff's claim for discrimination.

Retaliation

{¶22} Plaintiff also alleges retaliation under R.C. 4112.02(I). Plaintiff contends that defendant retaliated against her for attempting to file an appeal from the termination of her administrative appointments. According to plaintiff, defendant accused her of mismanagement and mishandling grants under her control.

{¶23} R.C. 4112.02(I) provides that it is an unlawful discriminatory practice "[f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code." Plaintiff may prove a retaliation claim through either direct or circumstantial evidence that unlawful retaliation motivated defendant's adverse employment decision. *Reid v. Plainsboro Partners, III*, 10th Dist. Franklin No. 09AP-442, 2010-Ohio-4373, ¶ 55.

{¶24} "To establish a prima facie case of retaliation under R.C. 4112.02(I), plaintiff had to establish the following: (1) [she] engaged in protected activity; (2) [defendant] knew of [her] participation in protected activity; (3) [defendant] engaged in retaliatory conduct; and (4) a causal link exists between the protected activity and the adverse action." *Nebozuk v. Abercrombie & Fitch Co.*, 10th Dist. Franklin No. 13AP-591, 2014-Ohio-1600, ¶ 40. "The establishment of a prima facie case creates a presumption that the employer unlawfully retaliated against the plaintiff." *Id*.

{¶25} An employee's activity is 'protected' for purposes of R.C. 4112.02(I) if the employee has 'opposed any unlawful discriminatory practice' (the 'opposition clause') or 'made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code' (the

'participation clause'). *Veal v. Upreach LLC*, 10th Dist. Franklin No. 11AP-192, 2011-Ohio-5406, ¶ 18, quoting *HLS Bonding v. Ohio Civ. Rights Comm*., 10th Dist. Franklin No. 07AP-1071, 2008-Ohio-4107, ¶ 15.

{¶26} Plaintiff's "appeal" letter to President Gershen does not oppose or identify any unlawful or discriminatory practice. Plaintiff has not alleged that she participated in any related investigation, proceeding, or hearing. In her response to defendant's motion for summary judgment, plaintiff states that she has not had the opportunity to "present relevant evidence concerning defendant's retaliatory practices"; however, plaintiff bears the initial burden of establishing a prima facie case of retaliation and she has failed to present any evidence to support of her claim.

{¶27} Furthermore, plaintiff has failed to present any evidence to show that she suffered an adverse employment action as a result of sending the appeal letter. Generally, an adverse employment action is a materially adverse change in the terms and conditions of the plaintiff's employment. *Canady v. Rekau & Rekau, Inc*., 10th Dist. Franklin No. 09AP-32, 2009-Ohio-4974, ¶25; *Veal, supra*, ¶ 23. Employment actions that result in mere inconvenience or an alteration of job responsibilities are not disruptive enough to constitute adverse employment actions. *Id.*

{¶28} Plaintiff alleges that NEOMU retaliated against her for sending the appeal letter by "accusing her of mismanagement and mishandling the capital NIH grants under her control." (Complaint, ¶ 15.) Defendant submitted the affidavit of Kathryn Chudakoff, the controller for NEOMU who avers that members of defendant's grants management staff had expressed concerns about compliance with reporting requirements for plaintiff's grants, including expenses. (Defendant's Exhibit U.) Chudakoff stated that after she met with plaintiff and other relevant NEOMU personnel, she was unable to resolve the matter and she notified the Chief Operating Officer, Carrie Bast, of the concerns. According to Chudakoff, Bast participated in a December 18, 2014 meeting with Dean Taylor and plaintiff, which resulted in a process to ensure grant compliance.

Chudakoff averred that the inquiry by her department was "a matter of standard compliance oversight and monitoring," and did not constitute an investigation or internal audit of plaintiff's grants. (*Id*., ¶ 5.)

{¶29} The court finds that plaintiff has failed to sufficiently allege or present evidence of an adverse employment action. Indeed, plaintiff has not presented any evidence to support this element of her prima facie case of retaliation. Moreover, plaintiff cannot establish a causal connection between the review of her grant management and the attempted appeal to President Gershen inasmuch as Chudakoff became aware of concerns about the grant reporting approximately 10 months before plaintiff sent the letter. (*Id*., ¶ 3.) Thus, defendant is entitled to judgment as a matter of law as to plaintiff's claim for retaliation.

{¶30} For the foregoing reasons, the court finds that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment shall be granted.

PATRICK M. MCGRATH
Judge

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MIN YOU, PH.D. Plaintiff v. NORTHEAST OHIO MEDICAL UNIVERSITY Defendant	Case No. 2015-00747 Judge Patrick M. McGrath Magistrate Anderson M. Renick JUDGMENT ENTRY

{¶31} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. 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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