



transplantation department into a nationally recognized program. She served as principal investigator on clinical trials and was involved in extensive research. She was also responsible for the clinical care of all patients in the program.

{¶3} Over time, plaintiff's work expanded to the extent that she was working with as many as 200 patients at a time, and was on call 24 hours a day, 7 days a week. Consequently, in 1994, UC hired Dr. Lynn Wagoner as an assistant professor. Dr. Wagoner was then 36 years old; plaintiff was 49. Plaintiff participated in and supported the hiring of Dr. Wagoner. However, it soon became apparent that the two did not work well together. There were many problems and disagreements throughout Dr. Wagoner's first year and continuing into late 1995. About that same time, there was an outbreak of Aspergillus<sup>1</sup> infection in the cardiac unit and the patient survival rate dropped. Questions arose as to possible causes for these problems. Ultimately, Dr. John Hutton, Dean of the Medical School, suspended performance of heart transplants at UC until an external review could be completed and the problem(s) identified.

{¶4} The external consultants released their reports in early 1996. Among the causes cited for the Aspergillus problem were construction work that was taking place at UC and the type of air filtration systems that were in use, both of which increased exposure of immunosuppressed patients to infection. It was also recommended that the immunosuppression protocol, that had been selected by plaintiff, be changed. With respect to patient deaths, the consultants cited causes such as surgical mortality, patient selection, and internal problems involving micro-management and a

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Aspergillus is an airborne fungus which is generally harmless to healthy individuals. However, it can be fatal to heart-transplant patients because their immune systems are suppressed.

lack of central leadership. Nevertheless, the evidence is clear that no one, either within UC or among the consultants, blamed plaintiff for the patient deaths.

{¶5} As a result of the external review, changes were made in the cardiac programs. Within a matter of days, the immunosuppression protocol was changed. Additionally, Dr. Richard Walsh, director of UC's division of cardiology and its cardiovascular center, requested that plaintiff resign from her position as director of the cardiac transplant program. Plaintiff did resign from that position in May 1996. Dr. Wagoner was named interim director of cardiac transplantation. Then, after conducting a nationwide search, Dr. Walsh hired Dr. William Abraham in June 1997. Dr. Abraham started with UC in the fall of 1997, and took over as director of both the heart failure and transplantation programs. He was 38 years old at the time.

{¶6} On July 31, 1997, after Dr. Abraham was hired, plaintiff filed an age discrimination claim with the Equal Employment Opportunity Commission (EEOC). Dr. Walsh learned of the charge through UC's in-house counsel. In her EEOC claim, plaintiff alleged that Dr. Walsh discriminated against her because of her age, sex and national origin by, among other things, requesting that she relinquish her directorship title, and by appointing Dr. Abraham to replace her. She also claimed that after she was asked to step down as director of the transplantation program, Dr. Walsh continued to demean, harass, and discriminate against her. The instant action asserts many of the same allegations.

{¶7} In this case, plaintiff claims that because of her age and in retaliation for filing the EEOC claim, Dr. Walsh initiated a series of adverse employment actions against her. For example, plaintiff contends that she was singled out for "demotion" as a result of the outbreak of Aspergillus infection and the patient

mortality issues; that she was denied access to her discretionary funds; that her travel was restricted; that her pay was cut by approximately \$36,000 per year; that she was removed as principal investigator for all clinical trials, and that UC denied her the opportunity to conduct a clinical trial of a new heart failure medication, known as Bosentan, a trial that the manufacturer had specifically requested she handle. Plaintiff further contends that because of these allegedly discriminatory and retaliatory actions she was constructively discharged from UC. She left there in October 1997 and subsequently took a position at the University of Louisville in Kentucky.

{¶8} UC has advanced numerous arguments in response to plaintiff's claims. From a procedural standpoint, UC contends that plaintiff's claims are barred by the applicable federal and state statutes of limitations and/or by the doctrine of collateral estoppel. With respect to the public policy tort claim, UC maintains that plaintiff cannot prevail because she was a member of a bargaining unit and not an at-will employee. Finally, UC contends that all of plaintiff's claims fail on their merits.

{¶9} UC first raised the defenses of statute of limitations and collateral estoppel in a motion for summary judgment that was overruled by this court on July 10, 2002. UC then raised the issues as preliminary matters at trial and again in its post-trial brief. UC also supplemented its collateral estoppel arguments with citations to a case that was decided subsequent to the date of the filing of the post-trial briefs. The court declined to adopt the statute of limitations argument at trial, but reserved ruling on the issue of collateral estoppel. Accordingly, the court will not further address the matter of statute of limitations; the court will consider the collateral estoppel issue. However, having heard all of the evidence, the testimony of the witnesses, and upon review of

the exhibits and post-trial briefs, the court shall first address the merits of plaintiff's claims.

#### AGE DISCRIMINATION

{¶10} The Ohio Supreme Court has adopted the federal case law analysis used under Title VII and the ADEA, Sections 621 through 634, Title 29, U.S.Code, when interpreting and deciding age-discrimination claims brought under R.C. 4112.02 and 4112.14. *Mauzy v. Kelly Services, Inc.*, 75 Ohio St. 3d 578, 582, 1996-Ohio-265.

{¶11} Where a plaintiff cannot establish a prima facie case of discrimination through direct evidence, indirect evidence may be sufficient to establish discriminatory intent under the burden-shifting analysis established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. See, also, *Mauzy*, supra at 587. The purpose for shifting the burden of proof is to assure that a plaintiff has a day in court despite the unavailability of direct evidence. See *St. Mary's Honor Ctr. v. Hicks* (1993), 509 U.S. 502, 507.

{¶12} In this case, plaintiff presented no direct evidence of age discrimination. Thus, pursuant to *McDonnell Douglas*, an inference of discriminatory intent may be drawn where plaintiff establishes that she: 1) was at least 40 years old at the time of the alleged discrimination; 2) was subjected to an adverse employment action; 3) was otherwise qualified for the position; and 4) was replaced by a person outside the protected class. If the plaintiff establishes a prima facie case, the burden shifts to the employer to set forth some legitimate, nondiscriminatory reason for the action taken. *Id.*

{¶13} Once a legitimate, nondiscriminatory reason is presented, the presumption of discrimination is rebutted, and the plaintiff must then show that the stated reason is a pretext for

discrimination. *Id.* Additionally, because plaintiff is claiming disparate treatment as a result of her age, she must show that her age was the motivating factor for the employer's decisions. *Albaugh v. Columbus Div. of Police* (1999), 132 Ohio App.3d 545, 550-551.

{¶14} Upon consideration of the testimony and evidence presented in the instant case, the court finds that plaintiff has established a prima facie case of age discrimination. The only seriously contested element of the *McDonnell Douglas* test is whether plaintiff was subjected to an "adverse" employment action. Generally, an adverse employment action is defined as a material, adverse change in the terms and conditions of employment. *Kocsis v. Multi-Care Management, Inc.* (C.A.6, 1996), 97 F.3d 876, 885. For example, courts have held that an adverse employment action is evidenced by either a termination of employment or a demotion demonstrated by a decrease in wage or salary or a material loss of benefits. *Id.* at 885.

{¶15} The actions alleged with respect to age discrimination concern both the request that plaintiff resign as director of cardiac transplantation and the placement of the younger Dr. Wagoner in that position, and the hiring of the younger Dr. Abraham to replace plaintiff as overall director of both cardiac transplantation and the heart failure program. UC contends that these actions were not adverse because the title "program director" was an administrative designation that did not carry with it any increase in salary or benefits. Thus, UC maintains that the loss of that title resulted neither in any significant change in plaintiff's employment status nor any direct economic harm. Rather, it is UC's position that because plaintiff continued as full professor, with no loss of pay or benefits and was actively

involved in all the clinical work of the department, the status quo was maintained.

{¶16} The court is not persuaded by UC's contentions. The decision whether a particular employment action is "adverse" must be determined on a case-by-case basis. In *Zerilli v. New York City Transit Authority* (E.D.N.Y. 1997), 973 F. Supp. 311, 324, the court stated that because there are no bright-line rules defining an adverse employment action, courts must pore over each case to determine whether the challenged employment action reaches the level of adverse. Similarly, in *Joiner v. Ohio Dept. of Transp.* (S.D. Ohio 1996), 949 F. Supp. 562, 567, it was noted that a court must look at the cumulative weight of all the evidence to determine whether an employment action is adverse. Thus, an adverse action may be found even where there has been no termination of employment, loss of benefits or decrease in salary.

{¶17} In the present case, the court finds that loss of the two director's positions had a significant effect on plaintiff's status within her particular working environment. She lost not only the prestige associated with the director's title, but also the level of responsibility and the perception of her professional capabilities associated with those roles. Therefore, even though there was no change in salary or benefits, the court finds that these role changes constituted adverse employment actions under the circumstances of this case. See *Fortner v. State of Kansas* (D. Kan. 1996), 934 F. Supp. 1252, 1266.

{¶18} However, plaintiff has also contended that she was constructively discharged from UC and that such discharge was itself an adverse employment action. The court does not agree with that argument. Because plaintiff voluntarily resigned her position, she must establish that UC's actions "made working conditions so intolerable that a reasonable person under the

circumstances would have felt compelled to resign. \*\*\* In applying this test, courts seek to determine whether the cumulative effect of the employer's actions would make a reasonable person believe that termination was imminent." *Mauzy*, supra, at 589. Further, in evaluating plaintiff's belief that she was forced to resign the court must do so "without consideration of [her] undue sensitivities." *Risch v. Friendly's Ice Cream Corp.* (1999), 136 Ohio App.3d 109, quoting *Wilson v. Firestone Tire & Rubber Co.* (C.A.6, 1991), 932 F.2d 510, 515.

{¶19} Plaintiff claims that her decision to resign was based on the cumulative effect of all of the actions taken against her, and not just those which she alleges were discriminatory. While the court has found that certain conduct constituted actions of adverse employment, the court does not find that the incidents identified by plaintiff were objectively "threatening" or so egregious or pervasive as to render working conditions intolerable. Indeed, plaintiff continued working at UC for almost 18 months after she stepped down as director of the transplantation program. Furthermore, the incidents described by plaintiff did not objectively suggest that her termination was imminent. To the contrary, the evidence shows that plaintiff's faculty appointment had been renewed through 2000. In short, it is the court's opinion that plaintiff could have remained at UC, albeit in a different status, until such time as she was able to resolve her differences with Dr. Walsh and Dr. Wagoner. However, plaintiff made a decision to leave UC for her own subjective reasons, and she spent more than a year looking for other, more rewarding, positions before leaving UC. Therefore, the court concludes that plaintiff has failed to establish an adverse employment action constituting constructive discharge.



{¶20} Notwithstanding the determination that plaintiff did not demonstrate an adverse employment action of constructive discharge, the court has found that plaintiff did establish a prima facie case of age discrimination. Thus, pursuant to *McDonnell Douglas*, the question becomes whether UC has articulated any legitimate, nondiscriminatory reasons for its actions and, if so, whether plaintiff has proved the reasons proffered were a mere pretext for age discrimination.

{¶21} A great deal of evidence was presented on the question of why UC took the actions complained of. Upon consideration of all of the proffered reasons, the court finds at the outset that the overwhelming weight of the evidence establishes that UC made its decisions for legitimate business and professional reasons that were totally unrelated to plaintiff's age. For example, notwithstanding testimony concerning the frequency of disagreements among groups of physicians working together, the court finds that the ongoing disputes between plaintiff and Dr. Wagoner were of a different kind and nature than the type of disagreements commonly encountered between working professionals. Although Dr. Walsh was the primary target of plaintiff's claims of retaliation and adverse employment actions, the court found him to be an entirely credible witness. Specifically, Dr. Walsh testified that in his 25 years of experience he had never had to deal with a professional dispute that was as "intense, involved and protracted" or that had such a disproportionate amount of time focused upon it, as that between plaintiff and Dr. Wagoner.

{¶22} Moreover, Dr. Walsh testified, and the evidence makes clear, that he consistently supported plaintiff throughout her career at UC; he supported her promotions, her work, her programs and gave her excellent work reviews. In sum, he testified that while he believed that plaintiff had been qualified for the

director's positions when the program was small and developing and when she was in complete control of the department, she ceased to be the most qualified after the problems with Dr. Wagoner developed and the results of external review had been received.

{¶23} Dr. Walsh's decisions are also supported by the opinions of the external consultants and by Dr. Abraham. The consultants did not specifically recommend that plaintiff be removed as director; however, they clearly identified a need for changes in the staffing and structure of the cardiac transplant and heart failure programs. Among comments contained in the consultants reports are the following:

{¶24} "Must improve medical-surgical communications and transplant surgeons must be involved as part of team in day-to-day care of transplant patients." (Report of Jay A. Fishman, M.D.);

"Immunosuppression NOT changed with infectious outbreak. More worrisome than infections themselves.

{¶25} "Current director [could be] reassigned to another program \*\*\*." (Report of Margaret Allen, M.D.);

{¶26} "A heart transplant surgeon, preferably an associate professor or above, should be the overall Director of Cardiac Transplant Program. This surgeon should \*\*\* preferably be certified for lung transplants as well as trained in immunosuppression. The director should possess leadership and communications skills and be empowered to make all final decisions \*\*\*." (Report of Mark Barr, M.D.)

{¶27} Finally, the testimony at trial established that Dr. Abraham visited UC and spoke with faculty there before he accepted the position. He subsequently communicated to Dr. Walsh that he did not envision a continued role for plaintiff in the transplant program. That opinion was based upon his observations of the

department's functioning, and the comments and advice that he received from other faculty members.

{¶28} "The employer's burden is only one of production, satisfied upon the presentation of an explanation legally sufficient to justify judgment for the employer." *Kemo v. City of St. Clairsville* (1998), 128 Ohio App.3d 178. Here, the court finds that ample evidence of legitimate, professional reasons for changes in plaintiff's role with UC has been presented. Moreover, in the court's view, plaintiff's inability to work well with Dr. Wagoner, in and of itself, is a legally sufficient justification for UC's actions. Absent a finding of illegal purpose or discriminatory intent, the general rule is that this court will not substitute its judgment for that of an employer and may not second-guess the business judgments of employers regarding personnel decisions. See, e.g., *Watson v. Kent State University* (Aug. 8, 1994), Court of Claims No. 91-06627; *Dodson v. Wright State University* (Dec. 3, 1997), Court of Claims No. 93-03196; *Washington v. Central State Univ.* (Apr. 24, 1998), Court of Claims No. 96-08849. Similarly, as stated by one court in the context of an ADEA claim, "[t]he ADEA was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers." *Bienkowski v. American Airlines, Inc.* (C.A. 5, 1988), 851 F.2d 1503, 1507-1508.

{¶29} With respect to demonstrating that UC's reasons were pretextual, the most persuasive evidence contrary to plaintiff's arguments is the fact that she was 45 years of age when she was named director of the cardiac transplant program. She served in that position with Dr. Walsh's full support until she was asked to resign at approximately 50 years of age. Further, Dr. Walsh was only one year younger than plaintiff. It strains credulity to believe that the motivation behind Dr. Walsh's actions was a

discriminatory animus against an individual over the age of 40 and in his own age group. Additionally, evidence was presented to show that, prior to hiring Dr. Abraham, UC attempted to replace plaintiff with a physician who was herself over the age of 40; however, that physician refused UC's offer.

{¶30} Based upon the totality of the evidence, the court concludes that plaintiff has failed to prove her claims of age discrimination by a preponderance of the evidence.

#### RETALIATION

{¶31} Plaintiff has alleged that she was retaliated against for filing her EEOC complaint. In order to prevail on such claim, she must prove that: 1) she engaged in a protected activity under federal or Ohio law; 2) she was the subject of adverse employment action; and, 3) there was a causal link between her protected activity and the adverse action of her employer. *Cooper v. City of North Olmsted* (C.A. 6, 1986), 795 F.2d 1265, 1272. Plaintiff has the burden of proving a prima facie case of retaliation before UC is required to present any evidence that the adverse action against plaintiff was taken for a legitimate, nondiscriminatory reason. *Neal v. Hamilton County* (1993), 87 Ohio App.3d 670.

{¶32} For essentially the same reasons stated with respect to plaintiff's age discrimination claim, the court finds that plaintiff has not demonstrated a causal link between the filing of her EEOC claim and the adverse actions taken against her. Moreover, the EEOC claim was filed in August 1997. Shortly thereafter, Dr. Abraham came on board as overall director of the heart failure/transplantation program. The evidence shows that plaintiff had been given notice in May 1996 that the ultimate administrative structure of the program would be determined by the new director. Thus, the restriction of plaintiff's travel, her removal as principal investigator, and the denial of access to her

discretionary funds were matters that were clearly within Dr. Abraham's authority to change and should reasonably have been expected.

{¶33} The court has found, based upon the totality of the evidence, that Dr. Walsh and Dr. Abraham made their decisions for legitimate business and professional reasons that were totally unrelated to plaintiff's age. Similarly, those reasons militate against any finding that such actions were taken for retaliatory reasons. Thus, even if plaintiff could establish a causal connection, her retaliation claim would fail upon UC's showing of the legitimate reasons for its actions.

#### VIOLATION OF PUBLIC POLICY

{¶34} Plaintiff contends that UC violated public policy when it constructively discharged her by both discriminating against her on the basis of her age and retaliating against her for filing an EEOC claim. This claim must be examined in the light of the Ohio Supreme Court's decision in *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, and its progeny. In *Greeley*, the court held that "[p]ublic policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute." *Id.* at paragraph one of the syllabus. In this case, plaintiff has neither pled nor proved that she was wrongfully discharged or disciplined. Moreover, she was a member of the AAUP union, and not an employee at will. In *Haynes v. Zoological Society of Cincinnati* (1995), 73 Ohio St.3d 254, the Supreme Court qualified its holding in *Greeley* to the extent that the exception was applicable only to employees at will, and could not be extended to employees who were subject to a collective bargaining agreement. The rationale is that union members, unlike at-will employees, are able to raise such claims in the post-termination proceedings

provided for by their collective bargaining agreement. Thus, the Court of Claims is not the proper forum in which to raise this type of public policy claim. Accordingly, plaintiff cannot prevail on this claim.

#### COLLATERAL ESTOPPEL

{¶35} UC maintains that plaintiff's claims are barred by the doctrine of collateral estoppel. In so doing, UC relies, in part, upon *Bush v. Dictaphone Corp.*, Franklin App. No. 00AP-1117, 2003-Ohio-883, which it submitted to supplement its post-trial brief.

{¶36} In *Bush*, the plaintiff was an executive employee of defendant who had worked his way up from a position as a sales representative to one of regional vice president. As vice president, he developed performance problems and was ultimately removed from the job on the grounds that he had created a hostile working environment. He subsequently accepted a lower-ranking position in another division. However, his problems continued and he was eventually terminated. As a result, Bush filed an action in state court alleging various claims, including breach of contract and promissory estoppel. That case was removed to federal court and consolidated with two cases Bush had filed in that court that alleged both state and federal claims of age discrimination, sex discrimination, and retaliation. The federal court retained jurisdiction of all state and federal claims and decided the cases in defendant's favor upon motion for summary judgment. The decision was affirmed on appeal.

{¶37} Bush then filed a second suit in state court alleging, among other things, a claim of handicap discrimination.<sup>2</sup> Again, the case was disposed of on summary judgment in favor of

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As of March 17, 2000, Ohio's anti-discrimination statutes were amended to replace the term "handicap" with the term "disability." The amendment was not in effect at the time that Bush's lawsuits were pending.

defendants; this time on the basis that plaintiff's claims were barred by the doctrine of res judicata. Further proceedings ensued. In the decision offered as authority in the present case, the Court of Appeals found that although res judicata did not prevent Bush from litigating a handicap discrimination claim, the doctrine of collateral estoppel barred him from litigating the same issues that were decided by the court in the federal action. Specifically, collateral estoppel precluded any argument that the employer failed to produce evidence of a legitimate, nondiscriminatory reason for its employment actions, or that the employer's stated reasons were a mere pretext for unlawful discrimination. Those issues had been determined in the federal action.

{¶38} As asserted herein by UC, the facts of this case are "remarkably similar" to those in *Bush*. Plaintiff in this case also filed claims in federal court, where she alleged retaliation and discrimination on the basis of gender and national origin. The case was tried to a jury and judgment was rendered in favor of UC.

Thus, UC argues that plaintiff's claims are barred by collateral estoppel because the reasons for UC's actions were litigated and, in finding for UC, the federal jury would have had to decide that the reasons for UC's actions were legitimate and that plaintiff had not shown they were pretextual.

{¶39} The court agrees with UC's arguments on this issue. Had the *Bush* decision been released prior to a full trial on the merits, this court would have found there to be sufficient authority to grant judgment in UC's favor. Having now reviewed the issue, the court finds that collateral estoppel is an additional basis for denial of plaintiff's claims.

{¶40} Based upon the totality of the evidence, the court finds plaintiff has failed to prove any of her claims by a preponderance and, accordingly, judgment shall be rendered in favor of UC.

{¶41} This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. 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.

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FRED J. SHOEMAKER  
Judge

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