

Mulvihill. According to the parties, plaintiff functioned well in this position and was successful throughout several campaigns as a "fund/friend raiser."

{¶3} Plaintiff identified a series of events beginning in March 1997 and continuing through May 2001, which he believed brought about a change in defendant's treatment of and attitude toward him.

First, plaintiff alleged that his locked office was entered without his permission while he was out of town and that defendant's employees searched through his desk and briefcase. Plaintiff claimed that the timing coincided with an investigation being conducted in response to alleged National College Athletic Association (NCAA) violations, specifically involving a basketball player named Charles Williams. Plaintiff explained that the Williams matter received a great deal of local publicity and that the NCAA eventually levied sanctions against UC. Plaintiff stated that upon learning of the search, he was extremely upset, to the point that he consulted an attorney concerning his rights and what recourse, if any, was available to him.

{¶4} Plaintiff then related that in January 1999, his title was changed to Assistant to the Athletic Director, Bob Goins, and that he reported to an Associate Director, John Sheffield. Plaintiff related that he was pleased with this move; that his job continued to be one of fund-raising and that his overall performance evaluations were good. In February 2000, plaintiff was deposed as a witness in the civil suit Mr. Williams filed against UC. Plaintiff told this court that while he testified truthfully, some statements reflected negatively on defendant. Plaintiff testified that he believed this prompted defendant to retaliate against him by changing his reporting structure so that he reported again to Mr. Mulvihill, by assigning him to remote hotel locations during out-of-state travel excursions and by changing his title to Associate

Director of UCATS (University of Cincinnati Athletic Team Scholarships). Plaintiff maintained that he viewed the change in title as a demotion because, among other things, it placed him farther away from reporting to or interacting with the athletic director.

{¶5} Next, plaintiff reported that in August 2000 he received a written reprimand from his supervisor for attending a golf outing organized for charity by Bob Huggins. Plaintiff claimed that he had regularly attended the annual outing and that he had found it unreasonable that Mr. Mulvihill had asked him to miss this event.

Plaintiff next referenced being excluded from an organizational meeting, held in autumn of 2000, where all the projects for the coming year were discussed. Plaintiff related that in November 2000, he again became upset when he learned that earlier in the year his name had been removed from a list of UC basketball coaches which was updated and sent to the National Association of Basketball Coaches annually. Plaintiff explained that the omission, if not corrected, would have resulted in plaintiff being ineligible for Final Four tickets that year. Plaintiff also mentioned that in the fall of 2000, he was denied tickets to away basketball games and that he was told several times by Mr. Mulvihill, either that Mr. Goins was ready to fire him or that his termination was imminent. Plaintiff contended that at about this same time he experienced physical ailments which he later learned were stress-related. Plaintiff stated that he began to suffer from high blood pressure, periods of insomnia, and episodes where his throat seemed to swell causing him to have difficulty swallowing.

{¶6} Plaintiff insisted he filed the original lawsuit against UC in January 2001 in order to protect his job. Plaintiff alleged that shortly thereafter defendant began documenting incidents and interactions involving him. Plaintiff stated that this was unusual

as most discussions had previously been conducted informally in the offices of either Mr. Mulvihill or Mr. Goins. Plaintiff claimed that he was denied tickets in the spring of 2001 to several rounds of the NCAA basketball playoffs and that this was very unusual. Plaintiff admitted that he had already begun to prepare for his retirement and testified he did so because he feared for his health.

In May 2001, plaintiff received three memos regarding his job performance which he interpreted as ominous based on their content.

In one of the memos, plaintiff was criticized by Mr. Goins for missing an important departmental meeting even though plaintiff claimed he had scheduled a doctor's appointment which conflicted with the meeting. Plaintiff acknowledged that he resigned his employment on May 14, 2001, but alleged that the action was not voluntary.

{¶7} Defendant contends that plaintiff voluntarily retired after more than 30 years of public service. Defendant argues that plaintiff carefully planned his retirement for nearly ten months and that prior to leaving his employment, plaintiff never communicated to his supervisors that working conditions had become intolerable. Defendant asserts that it did not engage in any retaliation and that plaintiff was not targeted for special or negative treatment. Mr. Goins and Mr. Mulvihill acknowledged that while plaintiff's job performance was good overall, he had problems controlling his impulsive and inappropriate comments and needed to focus more on completing his assigned tasks. Mr. Mulvihill testified that annual giving amounts had reached a plateau and that as the Director of UCATS he had begun instituting new measures to increase contributions.

{¶8} Both Mr. Mulvihill and Mr. Goins testified about the incidents mentioned by plaintiff. Regarding the alleged office break-in, Mr. Goins stated he was not disturbed that plaintiff

retained counsel and that he told plaintiff to hire an attorney if he felt it necessary. Mr. Goins explained that the Williams matter had taken place before he became Athletic Director and that he was not overly concerned about the events which had occurred prior to his tenure. Mr. Goins was quite candid when he testified that he tended to flare up over incidents and may well have verbalized a desire to terminate plaintiff from his position. He admitted that he might even have drafted a termination letter but he stated he never presented it to plaintiff and probably tore it up. Mr. Goins stated he never really intended to act on this and that he kept trying to find a position for plaintiff that would "be a good fit" because he believed plaintiff would not be retiring for three or four more years.

{¶9} Mr. Goins referenced the time that plaintiff had made some disparaging remarks about Mr. Mulvihill to the director of the alumni association and Mr. Goins testified he had previously warned plaintiff regarding gossip and his intense distaste for that kind of talk, especially outside the department. Mr. Goins testified that he strongly disapproved of such conduct; that it was inappropriate and unprofessional. Mr. Goins reasoned that plaintiff was excluded from the organizational meeting in the fall of 2000 because of this unprofessional conduct and because he perceived plaintiff was not working well as part of the team. Mr. Goins testified that plaintiff was not suited for the development department because he required supervision on a daily basis. Nevertheless, he insisted that plaintiff was not singled out for special treatment and was not asked to retire or resign even though it was obvious that plaintiff was becoming increasingly unhappy with his pay, his title, and his daily work assignments. Mr. Goins conveyed that although this was not his usual practice, he began documenting certain incidents in writing because he was not getting the response he wanted from

plaintiff. Mr. Goins also expressed his disappointment in plaintiff's failure to attend the departmental meeting in May 2001.

Mr. Goins maintained that attendance was especially important at this meeting, which he contended was scheduled far in advance.

{¶10} Mr. Mulvihill related that he had specifically asked plaintiff to not participate in the 2000 Bob Huggins golf outing because the date had been changed from June to August which was a much busier time for the UCATS organization. Mr. Mulvihill stated that plaintiff ignored his directive and played anyway. Although Mr. Mulvihill testified he regularly attempted to direct plaintiff toward accomplishing the tasks that were assigned to him, plaintiff never completed some projects and other reports were poorly written or incomplete. Mr. Mulvihill stated that if he gave ticket or hotel preference to persons other than plaintiff, it was because they performed a specific university-related function at away games. Mr. Mulvihill testified that he too was aware that plaintiff was unhappy with his title, reporting structure, and daily work assignments. Accordingly, Mr. Mulvihill stated he did not oppose plaintiff's request for an equity review which was conducted by defendant's Human Resources Department. (Defendant's Exhibit R.) Mr. Mulvihill testified that he did not ask plaintiff to resign or to retire.

{¶11} Plaintiff argues that he was constructively discharged and that the discharge was in violation of public policy. "To state a claim of wrongful discharge in violation of public policy, a plaintiff must allege facts demonstrating that the employer's act of discharging him contravened a 'clear public policy.'" *Painter v. Graley* (1994), 70 Ohio St.3d 377, paragraph two of the syllabus. See, also, *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228. A clear public policy may be ascertained from the federal and state constitutions, statutes, administrative

rules and regulations, and the common law. *Painter*, supra, at paragraph three of the syllabus.

{¶12} The issue whether or not an employment termination violates public policy must be analyzed according to a four-prong test set forth in *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134. However, because plaintiff voluntarily resigned his position, he must first establish that defendant'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 v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, 589. Plaintiff's belief that he was forced to resign must be evaluated "without consideration of [his] 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.

{¶13} Plaintiff testified that his resignation was not by his own choice or design; that the decision was based on his concerns for his health; and that working conditions were so intolerable that he suffered stress-related medical conditions. However, defendant submitted ample evidence showing plaintiff initiated the retirement process as early as October 2000. (Defendant's Exhibits A, B, C, and E.) Moreover, the court finds that while certain incidents may have been upsetting to plaintiff, the incidents described by him were not objectively threatening or so egregious or pervasive as to render the working conditions intolerable. Furthermore, the incidents described by plaintiff did not signify that his termination was imminent or that any adverse employment decision was being considered. Indeed, plaintiff was offered a new role

involving football ticket sales during the weeks immediately prior to his resignation.

{¶14} Ohio courts have held that an "employee has an obligation not to jump to conclusions and assume that every conflict with an employer evidences a hidden intent by the employer to terminate the employment relationship." *Simpson v. Depart. of Rehab & Corr.*, Franklin App. No. 02AP-588, 2003-Ohio-988, citing *Jackson v. Champaign Nat'l. Bank & Trust Co.* (Sept. 26, 2000), Franklin App. No. 00-170.

{¶15} Upon review of all the evidence and testimony presented at trial, the court concludes that plaintiff voluntarily resigned his position and that he has therefore failed to establish a claim either for constructive discharge or discharge in violation of public policy. In addition, plaintiff cannot prevail on his retaliation claim because he has failed to prove he was subject to an adverse employment action. Factors that courts consider when determining whether an employment action was materially adverse include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Crady v. Liberty Nat'l Bank and Trust Co.* (C.A.7, 1993), 993 F.2d 132, 136.

{¶16} Upon review, the court finds that plaintiff was never demoted; his salary remained unchanged; and he continued in much the same capacity, even being offered new opportunities and responsibilities. Plaintiff acknowledged he was not docked leave time or pay for any of the incidents including those which resulted in a reprimand. Although plaintiff attributes some negative import to the last title he was assigned, Mr. Goins testified and UC's Human Resources Department confirmed that plaintiff's title was

either Assistant Director or Assistant to the Director, Athletics. For the foregoing reasons, the court concludes that plaintiff voluntarily resigned his position; that he was not constructively discharged; and that defendant did not engage in retaliation against him. Accordingly, judgment is rendered in favor of defendant.

{¶17} The court has considered the evidence and rendered a decision filed concurrently herewith. Judgment is rendered for 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.

EVERETT BURTON
Judge

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