**[Cite as *Wu v. Northeast Ohio Med. Univ.*, 2018-Ohio-3888.]**

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| JIASHIN WU<br><br>Plaintiff<br><br>v.<br><br>NORTHEAST OHIO MEDICAL UNIVERSITY<br><br>Defendant | Case No. 2017-00564JD<br><br>Judge Patrick M. McGrath<br>Magistrate Anderson M. Renick<br><br>DECISION |

**{¶1}** On May 25, 2018, defendant, Northeast Ohio Medical University (NEOMU), filed a motion for summary judgment pursuant to Civ.R. 56(B). On June 18, 2018, plaintiff filed a response to defendant's motion for summary judgment. On June 29, 2018, with leave of court, defendant filed reply. Plaintiff's July 3, 2018 motion to strike defendant's reply 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 claims arise from NEOMU's decision to issue a notice of non-reappointment of his faculty position on March 9, 2016. Plaintiff alleges breach of contract, discrimination, retaliation, and "harassment."

**{¶5}** In January 2014, plaintiff began working as a consultant for NEOMU after his wife, Min You, Ph.D., was hired as a department chair and an associate dean for the Department of Pharmaceutical Sciences. (Taylor deposition, p. 13-14.) Plaintiff worked as a special assistant to Charles Taylor, Dean of the College of Pharmacy. In September 2014, plaintiff accepted defendant's offer of a non-tenure track faculty appointment as an associate professor in NEOMU's College of Pharmacy. (*Id*. p. 16.) Plaintiff was also appointed to an unpaid administrative position of Director of International Collaboration and Research Services in the College of Pharmacy. (Complaint, Exhibit A.) According to the offer letter, plaintiff's specific duties were to be determined in conjunction with his department chair and direct supervisor, Vice Dean Richard Kasmer. Dr. Kasmer served as plaintiff's direct supervisor because defendant's anti-nepotism policy prohibited spouses from supervising each other, and plaintiff's wife, Dr. You, served as the department chair. (Defendant's Exhibit O.) In February 2015, Dr. You was removed from the department chair position and Dr. Steven Schmidt was named as the interim chair. Thereafter, plaintiff reported to Dr. Schmidt for his faculty duties, and he continued to report to Dr. Kasmer for his administrative duties. *Id.*

**{¶6}** In fall of 2015, the College of Pharmacy began a new research direction resulting in a research focus area (RFA) for the College of Pharmacy under the leadership of Dr. Schmidt. (Defendant's Exhibit O.) Dr. Schmidt determined that plaintiff's teaching and cardiovascular research efforts did not align with the department's focus on neurodegenerative diseases and aging and that the needs prompting plaintiff's employment no longer existed. (Defendant's Exhibit P.) Dr. Schmidt recommended non-reappointment of plaintiff to Dr. Kasmer, who in turn recommended to Dean Taylor that he issue a notice of non-reappointment.

(Defendant's Exhibit O-1.) On March 11, 2016, Dean Taylor delivered a notice of non-reappointment to plaintiff which explained the reasons for the decision. (Defendant's Exhibit Q.) In accordance with defendant's faculty bylaws, plaintiff's last day of service with NEOMU was June 30, 2017.

**Breach of contract**

**{¶7}** 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).

**{¶8}** 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).

**{¶9}** NEOMU's offer letter did not provide any specified duration for plaintiff's employment and plaintiff testified that he understood that his employment was "open-ended." (Plaintiff's deposition, p. 124.) Both parties reference defendant's faculty bylaws for the terms and conditions regarding the rights and responsibilities of the

parties. Plaintiff's offer letter stated that plaintiff would "receive all attendant rights and responsibilities as provided for in the University Bylaws of the Faculty." (Complaint, Exhibit A.)

**{¶10}** NEOMU's bylaws for pharmacy faculty defines a "Notice of Non-reappointment" as follows:

> "(14) 'Notice of Non-reappointment.' A Notice of Non-reappointment is a written notification by the Dean that the College intends to terminate a faculty member's appointment at a specified time. Notice of Non-reappointment will be given by March 15. During the first year of service, the last day of service will be June 30 of the calendar year in which the notice is given. After one or more years of service, the last day of service will be June 30 of the next calendar year." (Exhibit O-4, § (A)(14).)

**{¶11}** Plaintiff was hired as a faculty member in September 2014 and his non-reappointment letter was issued on March 11, 2016. In accordance with NEOMU's bylaws, plaintiff was advised that his employment was effective through June 30, 2017. The bylaws provide that "[a] recommendation for non-reappointment is not considered a dismissal for cause, and as such cannot be appealed." (Exhibit O-4, §(D)(3)(d).) Plaintiff's appointment as Director of International Collaboration and Research Activities in the College of Pharmacy was administrative. (Complaint, Exhibit A.) The University Bylaws provide that the Dean of a particular college has the authority and responsibility for "[a]ppointing, evaluating and *removing* * * * program administrators and staff needed to carry out the mission and the academic and strategic plans of the college." (Emphasis added.) (Exhibit O-3, § (E)(1)(c)(x).) Based upon the undisputed evidence, the court finds that NEOMU acted in accordance with the faculty bylaws.

**{¶12}** Plaintiff states that the contract provides for a 12-month faculty appointment and there is no dispute that plaintiff worked for more than 12 months after the notice of non-reappointment was issued. However, plaintiff has failed to identify any instance where defendant committed a breach of the contract. Therefore, as a matter of law, plaintiff cannot prevail on his breach of contract claim.

**Discrimination**

**{¶13}** Plaintiff also alleges that defendant discriminated against him based upon his race and national origin, in violation of 42 U.S.C. 2000e, Title VII of the Civil Rights Act of 1964 and R.C. 4112. 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 * * *."

**{¶14}** 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).

**{¶15}** 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).

**{¶16}** 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. A plaintiff may indirectly establish a prima facie case of discrimination "by

showing that: (1) he or she was a member of a statutorily protected class; (2) he or she was subjected to an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by, or that the removal permitted the retention of, a person not belonging to the protected class." *Tessmer v. Nationwide Life Ins. Co.*, 10th Dist. No. 98AP-1278, 1999 Ohio App. LEXIS 4633 (Sept. 30, 1999), citing *Kohmescher v. Kroger Co.*, 61 Ohio St. 3d 501, 504 (1991).

**{¶17}** If a plaintiff establishes a prima facie case, a burden shifting occurs, causing the employer to have to articulate some legitimate, nondiscriminatory reason for the adverse employment action. If the employer satisfies this burden, the burden shifts back to the plaintiff to show "that the proffered reason was not the true reason" for the adverse employment action. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

**Direct evidence**

**{¶18}** Plaintiff contends that he has presented direct evidence to support his claim for discrimination. According to plaintiff, defendant "physically segregated" faculty members of Chinese race and national origin. Specifically, plaintiff alleges that he was separated from non-Chinese faculty members when defendant reassigned him to a different office and that "no other faculty members were reassigned or relocated."

**{¶19}** Under Ohio law, "[d]irect evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. * * * If that evidence is credible, 'discriminatory animus may be at least part of an employer's motive, and in the absence of an alternative, non-discriminatory explanation for that evidence, there exists a genuine issue of material fact suitable for submission to the jury without further analysis by the court.'" *Ceglia v. Youngstown State Univ.*, 10th Dist. Franklin No. 14AP-864, 2015-Ohio-2125, ¶ 16, 38 N.E.3d 1222, quoting *Norbuta v. Loctite Corp.*, 1 Fed.Appx. 305, 312 (6th Cir.2001). "[D]irect evidence of discrimination does not require a factfinder to draw any inferences in order

to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir.2003); *Ray v. Ohio Dept. of Health*, 10th Dist. Franklin No. 17AP-526, 2018-Ohio-2163, ¶ 27.

**{¶20}** The court finds that the fact that plaintiff was relocated to a different office is not direct evidence to support his discrimination claim inasmuch as the reassignment does not require the conclusion that discrimination was at least a motivating factor in the action. Furthermore, plaintiff admitted that the relocation occurred after his non-reappointment, during the period of time when defendant was focusing on its new RFA.

**Indirect evidence**

**{¶21}** Defendant does not dispute that plaintiff was a member of a protected class based upon his race or national origin and there is no question that the non-reappointment notice was an adverse employment action inasmuch as his employment was to be terminated on June 30, 2017. However, even assuming that that plaintiff was qualified for the purposes of his discrimination claim, the court finds that he has not provided any proper evidence to show that comparable, nonprotected persons were treated more favorably.

**{¶22}** The Tenth District Court of Appeals has observed that "Civ.R. 56(C) sets forth an exhaustive list of evidence that a court may consider when ruling on a motion for summary judgment. Under Civ.R. 56(C), a court may consider 'pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action[.]' Civ.R. 56(C) expressly cautions that 'no evidence or stipulation may be considered except as stated in this rule.' * * * The proper procedure for introducing evidentiary matter of a type not listed in Civ.R. 56(C) is to incorporate the material by reference into a properly framed affidavit." *Six v. Gahanna Trailer Servs.*, 10th Dist. Franklin No. 16AP-91, 2017-Ohio-7131, ¶ 21, quoting *Cunningham v. Children's Hosp*., 10th Dist. Franklin No. 05AP-69,

2005-Ohio-4284, ¶ 14-15. *See also Polivka v. Cox*, 10th Dist. Franklin No. 02AP-1364, 2003-Ohio-4371, ¶ 18.

**{¶23}** Plaintiff contends that he was replaced by a person outside of his protected classes or race and national origin. Specifically, plaintiff states that Dr. Vanessa Fitsanakis replaced him on May 1, 2017. The only documents that plaintiff has offered to support his contention are "exhibits" which were attached to his response. However, those exhibits were neither documents that may be considered pursuant to Civ.R. 56(C), nor incorporated by reference in a properly framed affidavit.

**{¶24}** Furthermore, the evidence submitted by defendant shows that Dr. Fitsanakis did not "replace" plaintiff in his former position. Defendant submitted the affidavit of Dr. Kasmer, wherein he averred that Dr. Fitsanakis was a tenure-track faculty member (unlike plaintiff), and she was hired to help grow the RFA of neurodegenerative diseases and aging, whereas plaintiff's faculty role was in cardiovascular research, unrelated to the RFA. Additionally, Dr. Fitsanakis' salary was supported by outside grant funding; plaintiff's salary was entirely funded by defendant.

**{¶25}** Plaintiff further contends that he established a prima facie case of discrimination by showing that Dr. Richardson was one of multiple similarly-situated "comparable non-protected persons" who were treated more favorably. However, plaintiff did not present any allowable evidence regarding either Dr. Richardson or any other employee of defendant to support such a claim.

**{¶26}** According to Dr. Kasmer's affidavit, unlike plaintiff, Dr. Richardson was hired for the purpose of supporting the RFA and her job responsibilities were "very different" from those performed by plaintiff. Although plaintiff states that the documents he submitted show that both he and Dr. Richardson had the same "position number," Dr. Kasmer explains in his affidavit the number listed in plaintiff's exhibit represents a "funding source" and does not define a particular job function or faculty role. Additionally, Dr. Kasmer states that Dr. Richardson's job responsibilities were allocated

to both the Department of Pharmaceutical Sciences and the College of Graduate Studies. *Id.*

**{¶27}** Dr. Schmidt averred that plaintiff was the only non-tenure track associate professor who was being funded by the college whose expertise did not align with the new focus of the RFA. Dr. Schmidt stated that he decided to recommend the non-reappointment of plaintiff for that reason and because the needs of the university which prompted plaintiff's employment no longer existed. (Defendant's Exhibit P.)

**{¶28}** "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.

**{¶29}** 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 issuing the notice of non-reappointment. Both Dr. Schmidt and Dr. Kasmer averred that they were involved in the decision to recommend non-reappointment. (Defendant's Exhibits O and P.) In his affidavit, Dr. Kasmer explained the reasons for the decision not to reappoint plaintiff as follows:

**{¶30}** "6. In Fall, 2015, the College of Pharmacy launched efforts to create a new research direction under the leadership of Dr. Schmidt. These efforts resulted in a research focus area (RFA) for the College of Pharmacy, entitled Neurodegenerative

Diseases and Aging. This became the fifth RFA at NEOMED and the first RFA for the College of Pharmacy.

**{¶31}** "7. As a result of the launch of the new RFA, there was a need to review and properly align all faculty resources within the Department of Pharmaceutical Sciences. I reviewed the Department's personnel needs with Dr. Schmidt, and concluded that the non-tenure track faculty position held by Dr. Wu did not meet the requisite skills, expertise and administrative duties for the strategic direction of the Department and the new RFA. The reasons for my recommendation are detailed in a memorandum to Dean Taylor, dated March 9, 2016. A true and accurate copy of this memorandum is attached as Exhibit O-1. As detailed in this memorandum, the basis for my recommendation was:

- The Department of Pharmaceutical Sciences did not intend to dedicate future resources to cardiovascular research, which is Dr. Wu's area of training and expertise;
- Dr. Wu's participation in the publication of scholarly articles was all in the area of liver disease, which was not his area of expertise. While the University at large may have had a liver-based research area at that time, the Department of Pharmaceutical Sciences was no longer directing college resources toward liver research activities, nor was it one of our research focus areas;
- Dr. Wu's role in support of International Collaborations for the College of Pharmacy was no longer necessary, because the University elected to elevate international collaborations to be managed as a University priority instead of a college project; and
- Dr. Wu's role in support of the Research Services, a role that was created for him upon his hire, was subsumed by Dr. Schmidt when he

replaced Dr. You as Department Chair and Associate Dean of Research.

**{¶32}** "8. Before making my recommendation of non-reappointment, I approached several department chairs and senior faculty to see if anyone had a role for Dr. Wu in their respective departments. Specifically, I approached Dr. John Chiang, Distinguished University Professor, College of Medicine; Dr. Susan Bruce, Department Chair, College of Pharmacy; Dr. William Chilian, Professor and Chair of the Department of Integrative Medical Sciences; and Dr. Elisabeth H. Young, Vice Dean of the College of Medicine. Each of these faculty members replied that they had either no interest or no need for Dr. Wu's services. Attached to this affidavit as Exhibit O-2 are true and accurate copies of my March 2016, correspondence with these faculty members regarding employment opportunities for Dr. Wu.

**{¶33}** "9. For the reasons set forth in my memorandum (Ex. O-1) and this affidavit, I recommended Dean Taylor issue a Notice of Non-Reappointment to Dr. Wu in accordance with § (E)(1)(c)(x) of the University Bylaws. A true and accurate copy of the University Bylaws is attached to this affidavit as Exhibit O-3. Dean Taylor issued the Notice of Non-Reappointment to Dr. Wu in March, 2016, in accordance with the timeframes set forth in § (A)(14) of the College of Pharmacy's Appendix A to the University Bylaws. A true and accurate copy of the College of Pharmacy's Appendix A to the University Bylaws is attached to this affidavit as Exhibit O-4.

**{¶34}** "10. I did not make the recommendation of non-reappointment to retaliate against Dr. Wu because his wife, Dr. You, had filed a lawsuit against NEOMED, or for any other legally impermissible reason. Further, I did not make the recommendation of non-reappointment to discriminate against Dr. Wu based on his race or national origin. I do not have any animus toward people of Chinese descent, and I never treated Dr. Wu differently based upon his race or national origin. My recommendation for non-reappointment was made based on the needs of the College and the Department, and

because Dr. Wu's skills did not align with the direction of the new RFA." (Defendant's Exhibit O.)

**{¶35}** The court finds that defendant presented evidence of a legitimate, nondiscriminatory reason for the non-reappointment of plaintiff's position. To establish pretext, plaintiff must demonstrate the proffered reason "'(1) has no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct.'" *Warden v. Ohio Dept. of Natural Resources*, 2014-Ohio-35, 7 N.E.3d 533, ¶ 31 (10th Dist.), quoting *Crase v. Shasta Beverages, Inc.,* 10th Dist. Franklin No. 11AP-519, 2012-Ohio-326, at ¶ 28.

**{¶36}** To show that defendant's decision had no basis in fact, plaintiff contends that Dean Taylor's testimony that most of the College of Pharmacy faculty were non-tenure track employees conflicts with Dr. Schmidt's testimony that "all core faculty members of the Department were either tenured or on the tenure-track, had skills aligned with the new RFA, or were on the non-tenure track but supported by way of grant funding." (Plaintiff's brief, page 11.) However, as Dr. Kasmer states in his affidavit, plaintiff fails to distinguish between college and department faculty, which accounts for the alleged conflict. Furthermore, alleged differences in testimony regarding whether plaintiff was replaced and how his salary was funded are not supported by the evidence and the evidence to which plaintiff refers does not indicate that the reason for plaintiff's non-reappointment was pretext for discrimination. Plaintiff has presented no evidence to support his contention that his non-reappointment was not due to a change in focus on the new RFA, that his role in the department could not be assumed by other faculty, or that defendant's reasons either did not actually motivate its decision or were insufficient to warrant that decision.

**{¶37}** Plaintiff's assertions that defendant's decisions were based upon discriminatory animus are unsupported and do not prove pretext. Furthermore, Dr. Kasmer attempted to find another position for him within the university. The court

concludes that plaintiff failed to establish a triable issue regarding pretext. 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 the reasons stated in Dr. Kasmer's March 9, 2016 memorandum to Dean Taylor. Thus, defendant is entitled to judgment as a matter of law as to plaintiff's claim for discrimination.

**Retaliation**

**{¶38}** Plaintiff also alleges retaliation under R.C. 4112.02(I). Plaintiff contends that defendant retaliated against him because his wife filed a legal action against NEOMU.

**{¶39}** 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.

**{¶40}** "To establish a prima facie case of retaliation under R.C. 4112.02(I), plaintiff had to establish the following: (1) [he] engaged in protected activity; (2) [defendant] knew of [his] 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*.

**{¶41}** 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.

**{¶42}** Plaintiff has not alleged that he engaged in any protected activity that is recognized under Ohio law, other than serving as a witness in cases that were filed by his wife both in the Portage County Court of Common Pleas (April 10, 2015) and in this court in Case No. 2016-00280. Even assuming that his participation in his wife's action against NEOMU was a protected activity, he failed to establish that a causal link exists between the legal action and the notice of non-reappointment.

**{¶43}** With regard to establishing a causal link between the protected activity and the adverse action, the court may look to the temporal proximity between the adverse action and the protected activity to determine whether there is a causal connection. *Harrison v. Metro Govt. of Nashville & Davidson Cty., Tenn*., 80 F.3d 1107, 1118-1119 (6th Cir. 1996). "'The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close.'" *Id*., quoting *Clark Cty. School Dist. v. Breeden*, 532 U.S. 268, 273 (2001). The Sixth Circuit Court of Appeals has held that closeness in time is only one indicator of a causal connection and that temporal proximity, standing alone, is not enough to establish a causal connection for a retaliation claim. *Spengler v. Worthington Cylinders*, 615 F.3d 481, 494 (6th Cir. 2010); *Skrjanc v. Great Lakes Power Serv. Co.,* 272 F.3d 309, 317 (6th Cir. 2001).

**{¶44}** In this case, the evidence shows that plaintiff was notified of his non-reappointment in March 2016, approximately seven months after Dr. You filed her legal action. Defendant continued to employ plaintiff for an additional fifteen months after the

notice of non-reappointment. The length of time between these events are too remote to establish retaliation. "[W]here some time elapses between the employer's discovery of a protected activity and the subsequent adverse employment action, the employee must produce other evidence of retaliatory conduct to establish causality." *Aycox v. Columbus Bd. of Educ.*, 10th Dist. Franklin No. 03AP-1285, 2005 Ohio 69, ¶ 21, citing *Kipp v. Mo. Highway & Transp. Comm'n*., 280 F.3d 893, 897 (8th Cir.2002) (holding that an "interval of two months between complaint and adverse action 'so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in [plaintiff's] favor on the matter of causal link.'") *Dautartas v. Abbott Laboratories*, 10th Dist. Franklin No. 11AP-706, 2012-Ohio-1709, ¶ 55.

**{¶45}** Plaintiff failed to establish that defendant's decision to issue the non-reappointment notice was causally related to his wife's lawsuit. Furthermore, plaintiff has presented no evidence to support his retaliation claim, other than a self-serving affidavit. In his affidavit, plaintiff states that his ID badge "was disabled multiple times between June and October 2015 after [his] wife, Dr. Min You, filed her lawsuit against NEOMED" and that his office was moved after he received notice of non-reappointment. Plaintiff also lists several administrative actions in his complaint which he contends were retaliatory, including removal from a committee, performance evaluations that he disagreed with and accusations of insubordination. However, the administrative actions do not affect the terms and conditions of plaintiff's employment.

**{¶46}** "The adverse action need not result in pecuniary loss, but must materially affect the plaintiff's terms and conditions of employment. * * * Factors to 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.' * * *

Changes in employment conditions that result merely in inconvenience or an alteration of job responsibilities are not disruptive enough to constitute an adverse employment action." *Hart v. Columbus Dispatch/Dispatch Printing Co.*, 10th Dist. Franklin No. 02AP-506, 2002-Ohio-6963, ¶ 35, quoting *Peterson v. Buckeye Steel Casings*, 133 Ohio App.3d 715, 727 (1999).

**{¶47}** The Tenth District Court of Appeals has recognized that "Both Title VII's and R.C. 4112.02's antiretaliation provisions make it unlawful for an employer to take adverse employment action against an employee 'because' of certain criteria." *Smith v. Ohio Dept. of Pub. Safety*, 2013-Ohio-4210, ¶ 59 (10th Dist.) "This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Id*.

**{¶48}** According to the affidavits of Drs. Schmidt and Kasmer, they determined that plaintiff's non-tenure track faculty position was inconsistent with the Neurodegenerative Diseases and Aging RFA which was being established in the NEOMU College of Pharmacy. Dr. Kasmer related that he attempted to place plaintiff in another university position, but was not successful. Kasmer also testified that it was not unusual to move a faculty member's office to be closer to a lab. Dr. Schmidt testified that he moved plaintiff's office because he wanted to locate a newly recruited faculty member with an active research program closer to the equipment and colleagues needed to support her program. Both Drs. Kasmer and Schmidt were unaware that plaintiff had difficulty with badge access, however, they noted that such malfunctions were common. Kasmer also testified that committee assignments are adjusted frequently. Schmidt and Taylor acknowledged that plaintiff was removed from a committee due to a realignment of committee assignments related to an accreditation process. Both Kasmer and Schmidt testified that plaintiff's performance evaluations were based upon actual performance.

**{¶49}** Based upon the undisputed evidence the court finds that plaintiff has failed to establish a prima facie case of retaliation and that unlawful retaliation motivated NEOMU's decision to issue the notice of non-reappointment. Therefore, defendant is entitled to judgment as a matter of law as to plaintiff's claim for retaliation.

**Harassment**

**{¶50}** "To establish a claim brought under R.C. Chapter 4112 against an employer for a hostile work environment created by racial harassment, a plaintiff must establish: (1) the employee was a member of the protected class; (2) the employee was subjected to unwelcome harassment; (3) the harassment complained of was based upon race; (4) the harassment had the purpose or effect of unreasonably interfering with the employee's work performance or creating an intimidating, hostile, or offensive work environment; and (5) the existence of *respondeat superior* liability." *Zacchaeus v. Mt. Carmel Health Sys.*, 10th Dist. Franklin No. 01AP-683, 2002-Ohio-444.

**{¶51}** Plaintiff has not presented any evidence to show that he was subjected to harassment based upon his race or national origin that had the purpose or effect of interfering with his work performance or creating a hostile work environment. Indeed, he did not address such a claim in his response to defendant's motion for summary judgment. Therefore, defendant is entitled to judgment as a matter of law on plaintiff's harassment claim.

**{¶52}** For the foregoing reasons, the court finds that there are no genuine issues as to any 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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| JIASHIN WU<br><br>Plaintiff<br><br>v.<br><br>NORTHEAST OHIO MEDICAL UNIVERSITY<br><br>Defendant | Case No. 2017-00564JD<br><br>Judge Patrick M. McGrath<br>Magistrate Anderson M. Renick<br><br>JUDGMENT ENTRY |

**{¶53}** 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

**Filed August 1, 2018**
**Sent to S.C. Reporter 9/25/18**