**[Cite as *Grubach v. Univ. of Akron,* 2019-Ohio-2370.]**

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| PAUL GRUBACH<br><br>Plaintiff<br><br>v.<br><br>UNIVERSITY OF AKRON<br><br>Defendant | Case No. 2017-00750JD<br><br>Judge Patrick M. McGrath<br>Magistrate Holly True Shaver<br><br>DECISION |

**{¶1}** On November 27, 2018, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). With leave of court, on January 31, 2019, plaintiff filed a response in opposition.[1] With leave of court, on February 14, 2019, defendant filed a reply. The motion for summary judgment is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D). Depositions of the following individuals were submitted: Paul Grubach, Stephen Weeks, Hazel Barton, Anne Wiley, Randy Mitchell, Peter Lavrentyev, and Zhong-Hui Duan.

**{¶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*

[1]Plaintiff's January 31, 2019 motion for leave to exceed the page limitation is GRANTED, instanter.

*Gilbert v. Summit Cty.,* 104 Ohio St.3d 660, 661, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327 (1977).

**Facts**

**{¶4}** In June 2014, plaintiff contacted Dr. Stephen Weeks via email to inquire about defendant's Integrated Bioscience (IB) PhD program in Biology. (Defendant's Exhibit A.)[2] Plaintiff had previously obtained a Master's Degree in Biology, and had written publications in the areas of ichthyology and ecology. After a series of email with Dr. Weeks, in August 2014, plaintiff began his studies at defendant in the IB doctoral program. When plaintiff started the IB program, he was 61 years old.

**{¶5}** Pursuant to the IB Graduate Student Handbook (IB Handbook), prior to the completion of the first semester of graduate work, the IB graduate student must choose a major advisor, and the student's PhD Advisory Committee, consisting of at least four faculty members, is to work with the student to prepare and approve a Program of Study. (Defendant's Exhibit E, ¶¶ F,G.) Plaintiff chose Dr. Weeks to be his major advisor because of his expertise in clam shrimp. (Defendant's Exhibit A.) Plaintiff selected Dr. Randy Mitchell, Dr. Zhong-Hui Duan, Dr. Anne Wiley, and Dr. Peter Lavrentyev as his PhD Advisory Committee members, along with Dr. Weeks, who served as committee chair.

**{¶6}** As a condition of his enrollment in the IB program, plaintiff also served as a Teaching Assistant (TA), where he was paid a bi-weekly stipend during the academic year. (Plaintiff's Exhibit 25.) It is undisputed that plaintiff was described as an outstanding teacher and a good researcher.

**{¶7}** Pursuant to the IB Handbook, the student is required to meet with the PhD Advisory Committee at least once per year to present a progress report. The student's proposed Program of Study, Doctoral Candidacy Exam and Research Proposal

[2]All of defendant's exhibits have been authenticated via affidavit from Sharon Messner, legal assistant to defendant's office of general counsel.

Defense are to be administered by the PhD Advisory Committee no later than the beginning of the third year of residency. (Defendant's Exhibit E, ¶ G.) The IB program curriculum is to be individually tailored to each student's research interests and built around a set of core courses, elective courses, seminar courses, and dissertation research. (Id., ¶ H.) A student is considered a PhD candidate only after having passed the Doctoral Candidacy Examination and the Research Proposal Defense. (Id., ¶ I.) Potential student grievances regarding a student's candidacy are handled according to the specific grievance procedures outlined in the Graduate Student Bulletin. (Id.)

**{¶8}** Per the IB Handbook, the comprehensive written examination "shall be administered by the PhD Advisory Committee before the beginning of the 5th semester." (Id., ¶ J.) The IB Handbook also states: "No topic shall be specifically excluded from the examination. *There shall be only two possible outcomes of the examination, determined by a majority vote of the PhD Advisory Committee: Pass or Fail.* The Examination will consist of two parts: a written exam that, if passed, is followed by an oral exam. If the student fails either of the exams, they will be given *one chance to retake the entire exam*. A student cannot fail more than one exam (i.e., cannot fail the written, pass on the second try, and then fail the oral.) Failure to pass the make-up exam or failing more than one exam results in dismissal from the program. A brief written report shall be prepared by the Advisor as chair of the PhD Advisory Committee outlining the results of all examinations, regardless of the outcome. This report, indicating areas of both strengths and weakness, will be distributed to the student, the student's PhD Advisory Committee, and the Integrated Bioscience Program Director within one week of the examination." (Emphasis added.) (Id., ¶ J.)

**{¶9}** Plaintiff took his written comprehensive exam in July 2016. Each advisory committee member wrote their own questions, graded the answers, and individually determined a grade of pass or fail. On July 26, 2016, Dr. Weeks sent the committee members the following email:

**{¶10}** "Please get me your scores by the end of the week. I will need to report two things to [plaintiff]:

1) An overall scoring of 'pass' or 'fail' for your portions of the writtens. That can be determined however you see fit. Everyone had multiple questions, so you will need to determine whether [plaintiff] did an acceptable job across all your questions. You can weight questions equally or differently as you see fit.
2) "A short overview of how [plaintiff] did, which includes both positives and negatives in his performance. If you believe he failed the writtens, please think about how much specific feedback you want to give [plaintiff] in case you will be asking him a similar set of questions for his second attempt (i.e., don't 'telegraph' exactly what he should have said on your various questions if you think you will ask him the same or similar questions for round 2)." (Defendant's Exhibit G.)

**{¶11}** Drs. Weeks and Mitchell both rated plaintiff as "fail." Drs. Wiley and Duan both rated plaintiff as "overall pass."

**{¶12}** Dr. Lavrentyev's initial response to Dr. Weeks was the following:

**{¶13}** "I have reviewed Paul's written exam now. I did expect a deeper understanding and more work at the PhD level, particularly given the fact that the exam was open-book. However, I accept his answers as satisfactory. So he passes the exam.

**{¶14}** "Specifically, Paul is a bit shaky on some key ecological concepts such as meta-population and trophic cascades. While his answers are not wrong per se, they are verbose, generic, and not very precise. This is especially true about the second question (eco-physiology). The literature sources he used are few and mostly dated. He also needs to learn how to build and test research hypotheses (third question). * * * (Defendant's Exhibit G.)

**{¶15}** Dr. Weeks responded with the following message: "BTW – I just wanted to let you know that both Randy and I failed Paul on our portions of the written exams. It was for the exact same reason that you noted: he did not show a deep understanding of the material. Thus, if you really feel that his understanding of the topic(s) on your questions weren't up to the level expected of a PhD student, please don't feel that you would be 'the bad guy' if you failed him. Let me know if you think he really showed an acceptable level of understanding for your questions." (Id.) Dr. Lavrentyev then replied: "I hate to reverse my own evaluation, but I didn't know that passing/failing could be done separately for different questions. While his first answer was OK, the second and third were pretty weak. I just don't know whether he didn't take the exam seriously enough or it is the true measure of his abilities * * *. (Id.) Dr. Weeks responded: "You can score it however you deem appropriate. Both Randy and I scored each question separately and then came up with the overall score for the exam. It was easy for the two of us because he failed all 3 questions for both of us, so he naturally failed the entire exam for both Randy and myself.

**{¶16}** "If you think he passed one question and failed two others, then you need to decide if all 3 questions were equally important. If so, then he failed the entire exam. On the other hand, if the one question he passed is much more important than the other two, then you would have to make a judgment call as to whether he should pass the exam overall.

**{¶17}** "It is fine to 'reverse' your decision, if you feel he did poorly. From your message below, if you are questioning whether he 'took it seriously enough,' to me that suggests you believe he didn't do well enough to pass? If you feel that way, then that is how you should score his performance. * * * (Id.)

**{¶18}** Dr. Lavrentyev replied:

**{¶19}** "In this case, I think he should redo the 2nd and 3rd questions to pass." (Id.)

**{¶20}** On July 28, 2016, Dr. Weeks wrote to the committee members that plaintiff "passed two but failed three of the written exams, and thus he failed overall." (Defendant's Exhibit H.) Dr. Weeks stated in his email to the committee members that he would tell plaintiff that he "needs to 'regroup' and talk to his committee members about how he performed and what the committee members think he should do to prepare for a second round of the exam." (Id.) When Dr. Weeks met with plaintiff, he and plaintiff got into a heated discussion of plaintiff's examination performance and his progress in the PhD program. Plaintiff no longer wanted Dr. Weeks to be his major advisor. On August 18, 2016, Dr. Weeks emailed plaintiff and stated the following:

**{¶21}** "I am now emailing you as the Director of the IB program. We have been keeping closer oversight on our IB students going forward to attempt to keep them on track in their degree. As you hopefully know, you have 5 years of funding in the PhD program as long as you are making sufficient progress towards your degree. After that time, the funding is not at all secure. Thus, we are trying to keep everyone on a 5-yr plan.

**{¶22}** "You are just finishing your 2nd year. By this time, you should have taken your writtens, orals, and defended your PhD proposal. I am well aware that you took your writtens and didn't pass. You have also requested a new advisor, which will certainly lead you to finding a whole new set of projects. These events will put you on a trajectory that requires very quick changes to get you back onto a path that would allow you to complete your degree in 5 years.

**{¶23}** "So, for everyone in your situation, we've been requesting a written 'plan' that outlines how you are going to get back on track by the end of the following semester (in your case, by the end of Fall semester). For everyone we've notified, that plan is due by August 26th, next Friday.

**{¶24}** "Because of your special situation, I can give you a bit longer: to the end of the following week (Sept. 2).

"So, what I need from you is the following:

1) The name of your new major advisor
2) A plan from you and your new advisor on the following:
    a. By which time you will have a new committee formed
    b. By what date you plan to take your written exams
    c. By what date you plan to take your oral exams
    d. By what date you plan to defend your PhD proposal

**{¶25}** "Once we have these plans, and have determined they are reasonable, we will hold you to the timelines you and your advisor have outlined. If you miss those deadlines, then we will have to re-evaluate whether you are making sufficient progress towards your degree and thus should still continue to get financial support through IB.

**{¶26}** "Please let me know if you have any questions." (Defendant's Exhibit K.)

**{¶27}** On September 30, 2016, Dr. Weeks sent plaintiff another email, also copied to Dr. Hazel Barton, the new Director of the IB program, wherein Dr. Weeks told plaintiff that he had not received any information from him regarding a new advisor or a plan to move forward. Dr. Weeks advised plaintiff, "Unless we hear about your plan soon, you could be deemed 'not making sufficient progress' on your degree, which will put your funding at jeopardy." (Id.) The same day, plaintiff responded to Drs. Weeks and Barton that he had met with two faculty members but neither agreed to be his major advisor. (Id.)

**{¶28}** On October 18, 2016, Dr. Barton presented plaintiff with an academic plan to complete his PhD program requirements. However, plaintiff refused to sign the agreement on the basis that it was "flawed." (Plaintiff's Exhibit 16.)

**{¶29}** On January 18, 2017, Dr. Barton sent plaintiff a letter stating that he was behind on his PhD studies and that in order to meet the necessary milestones he needed to complete the following by the end of the Spring 2017 semester: 1) complete and pass candidacy written exam; 2) complete and pass candidacy oral exam; 3)

complete and pass proposal defense; 4) submission of a yearly progress report. Plaintiff testified that he did not receive this letter until his attorney gave it to him in April or early May 2017. (Plaintiff's Deposition, p. 98.)

**{¶30}** On April 14, 2017, plaintiff's counsel sent a letter to Dean Beneke in an attempt to get assistance for plaintiff to find a new advisor. (Plaintiff's Exhibit 17.) In the letter, counsel for plaintiff complained of the "discriminatory, unfair, and inappropriate treatment" of plaintiff by Dr. Weeks. On May 1, 2017, counsel for plaintiff sent a second letter asking for help to find plaintiff a new advisor. (Id.)

**{¶31}** On May 10, 2017, plaintiff's PhD advisory committee met to determine plaintiff's progress. Plaintiff attended the meeting and was given an opportunity to discuss his progress. The committee found that plaintiff had failed his written exam in the summer of 2016 and that he had not retaken the test or found another major advisor. The committee voted unanimously that plaintiff was not making satisfactory progress toward his PhD. On May 17, 2017, Dr. Barton sent plaintiff a letter explaining that pursuant to the IB Handbook and the Graduate Bulletin, a student who fails to make satisfactory progress toward the declared goals of the PhD program is subject to academic dismissal. Dr. Barton notified plaintiff that she had sent a recommendation of dismissal to Dr. Chand Midha, the Dean of the Graduate School. (Defendant's Exhibit K.) On May 18, 2017, Dean Midha notified plaintiff that he was academically dismissed as a result of his failure to complete his written or oral candidacy exams or pass his proposal defense in accordance with the guidelines set forth in the IB Handbook. (Defendant's Exhibit M.)

**{¶32}** On May 31, 2017, plaintiff filed a request for a grievance hearing to Dean Midha. Mark Stasitis, Assistant General Counsel for defendant, reviewed the request and concluded that the proper forum for the complaint was defendant's Office of Equal Employment Opportunity Programs and Affirmative Action (EEO/AA). On August 4, 2017, defendant's EEO/AA completed its review of plaintiff's allegations of age

discrimination against Drs. Weeks and Barton, and found that they were not in violation of university policy or applicable laws. (Defendant's Exhibit L.)

**{¶33}** In his complaint, plaintiff alleges breach of contract, age discrimination, and retaliation in violation of R.C. Chapter 4112. Specifically, plaintiff alleges that defendant breached the contract as found in the IB Handbook, Graduate Assistant Handbook, and Graduate Bulletin in the following ways: 1) failing to ensure that Dr. Weeks and other faculty members treated plaintiff fairly, professionally, and appropriately and free of arbitrary conduct; 2) failing to ensure that plaintiff was free from discrimination and retaliation; 3) failing to allow plaintiff a grievance hearing; 4) failing to provide written policies, procedures, and remedies for age discrimination perpetrated by faculty members on graduate students such as plaintiff; 5) failing to hold progress meetings with plaintiff or notify him that his academic dismissal was imminent; 6) failing to help plaintiff find a new academic advisor; 7) failing to place plaintiff on probation before dismissing him; 8) failing to permit plaintiff sufficient time to meet his academic goals prior to dismissing him from the program; 9) permitting Dr. Weeks to "chair" the meeting that resulted in plaintiff's dismissal from the program after Dr. Weeks was no longer his advisor and after plaintiff had accused him of age discrimination; 10) conflating the written exam with the PhD proposal defense; and 11) failing to permit plaintiff to re-take Dr. Lavrentyev's written exam and permitting other arbitrary and unfair actions with respect to the written exam. (Complaint, ¶ 42.)

**{¶34}** With regard to his age discrimination claim, plaintiff asserts that Dr. Weeks made age-related comments to him during the time that Dr. Weeks was his advisor, that Dr. Weeks treated him differently than he treated younger students in the program by giving him a longer reading list, by giving him bad advice with regard to how to prepare for his written exam, and by dismissing him from the program and terminating his employment as a TA. Regarding his retaliation claim, plaintiff asserts that Dr. Weeks and other university employees retaliated against him by dismissing him from the

program after he secured an attorney who sent letters to the university opposing age discrimination and complaining that he was being treated unfairly in the PhD program.

**{¶35}** Defendant asserts that it is entitled to summary judgment on plaintiff's claims of age discrimination and retaliation because his relationship with defendant arose from being a student, which is governed by the IB Handbook, not R.C. 4112. However, even if R.C. 4112 governs plaintiff's employment as a TA, defendant asserts that plaintiff has failed to state a prima facie case of either age discrimination or retaliation. Furthermore, defendant asserts that plaintiff has not produced evidence of any breach of contract, and that plaintiff has failed to show that defendant's employees did not actually exercise professional judgment when they dismissed him from the program.

**Law and Analysis**

**I. Breach of Contract**

**{¶36}** It is well-settled that the relationship between a college and a student who enrolls, pays tuition, and attends class is contractual in nature, and that the terms of this contractual relationship may be found in the handbook, catalog, and other guidelines supplied to students. *Bleicher v. Univ. of Cincinnati College of Med.*, 78 Ohio App.3d 302, 308 (1992); *Embrey v. Central State Univ.*, 10th Dist. Franklin No. 90AP-1302, citing *Smith v. Ohio State Univ.*, 53 Ohio Misc.2d 11, 13 (1990). "A court's standard for reviewing the academic decisions of a college 'is not merely whether the court would have decided the matter differently but, rather, whether the faculty action was arbitrary and capricious.'" *Jefferson v. Univ. of Toledo,* 10th Dist. Franklin No. 12AP-236, 2012-Ohio-4793, ¶ 16, quoting *Bleicher* at 308, citing *Bd. of Curators of Univ. of Mo. v. Horowitz,* 435 U.S. 78, 91 (1978); *see also Stratton v. Kent State Univ.,* 10th Dist. Franklin No. 02AP-887, 2003-Ohio-1272, ¶ 40. "A trial court must defer to the academic decisions of colleges unless the decisions so substantially depart from accepted academic norms as to demonstrate that the committee or person responsible

did not actually exercise professional judgment." *Eckel v. Bowling Green State Univ.,* 10th Dist. Franklin No. 11AP-781, 2012-Ohio-3164, ¶ 52. *See also McDade v. Cleveland State Univ.,*10th Dist. Franklin No. 14AP-275, 2014-Ohio-4026, at, ¶ 27.

**{¶37}** "To prevail on a breach of contract claim, a plaintiff must prove the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff." *Prince v. Kent State Univ.,* 10th Dist. Franklin No. 11AP-493, 2012-Ohio-1016, ¶ 24. "Contract interpretation is a matter of law, not a question of fact." *Harbor View v. Jones,* 10th Dist. Franklin Nos. 10AP-356 & 10AP-357, 2010-Ohio-6533, ¶ 64. "Courts construe contracts to give effect to the intent of the parties and such intent is presumed to be in the language used in the contract." *Boggs v. Columbus Steel Castings Co.,* 10th Dist. Franklin No. 04AP-1239, 2005-Ohio-4783, ¶ 6.

**{¶38}** Plaintiff asserts that Dr. Weeks improperly influenced Dr. Lavrentyev to change his initial passing grade to a fail, which resulted in an overall failure. Plaintiff contends that Dr. Weeks wanted plaintiff to fail his written exams because Dr. Weeks had a personal animus against him because of his age. Plaintiff contends that if Dr. Weeks had not improperly influenced Dr. Lavrentyev, he would have received an overall pass and would have advanced to the oral examination.

**{¶39}** Upon review of the emails between Dr. Weeks and Dr. Lavrentyev, it is clear that the discussion between two committee members regarding plaintiff's written exam scores was not a breach of the contract. Indeed, the IB Handbook requires that the PhD advisory committee take a majority vote to determine whether the IB student passes or fails the written exams. After determining that two of the committee members had rated plaintiff as "overall pass," and two committee members had rated plaintiff as "fail," the IB Handbook required that Dr. Weeks, as chair of the committee and plaintiff's major advisor, determine whether plaintiff passed Dr. Lavrentyev's portion of the exam. The contents of the emails show that Drs. Weeks and Lavrentyev were discussing plaintiff's performance on the questions that they had drafted pursuant to the

procedures in the IB Handbook. The end result of the discussions was a determination that plaintiff had failed three portions and passed two portions, resulting in an overall fail. Nothing in the email shows that Dr. Weeks harbored a discriminatory animus toward plaintiff based on his age. Furthermore, the discussion displayed in the emails shows that all of the committee members were using their professional judgment to determine whether plaintiff was demonstrating the level of understanding of the material expected from a PhD candidate. In short, the emails demonstrate that the committee members were exercising their professional judgment regarding plaintiff's performance on the written exams.

**{¶40}** Plaintiff also argues that Dr. Weeks asked him questions that should not have been on the exam, specifically about his thesis proposal. Plaintiff argues that Dr. Weeks gave him an excessively long required reading list for his portion of the exam, that Dr. Lavrentyev did not provide a reading list, and that plaintiff was a victim of "information overload" so that he did not have sufficient time to study for Dr. Mitchell's exam. (Plaintiff's deposition, pgs. 10-14.) However, plaintiff's allegations that he was given a reading list that was too long, that Dr. Weeks gave him "bad advice" on how to study for the written exams, that Dr. Weeks failed to hold progress meetings with him, and that his advisory committee members generally did not prepare him well enough for the written exams amount to a claim that the educational services provided to him were substandard. "A claim that educational services provided were inadequate constitutes a claim for 'educational malpractice.'" *Lawrence v. Lorain County Community College*, 127 Ohio App.3d 546, 549 (9th Dist.1998), citing *Matulin v. Academy of Court Reporting*, 1992 Ohio App. LEXIS 1899, * 13 (Apr. 8, 1992), Summit App. No. 14947, unreported. Ohio does not recognize claims for educational malpractice. *Leiby v. Univ. of Akron*, 10th Dist. Franklin No. 05AP-1281, 2006-Ohio-2831, ¶ 27.

**{¶41}** Furthermore, although plaintiff argues that Dr. Lavrentyev offered for plaintiff to re-do two questions, and Dr. Weeks refused to permit that, the IB Handbook

does not provide for a student to re-take a portion of the written exams. The IB Handbook states: "The Examination will consist of two parts: a written exam that, if passed, is followed by an oral exam. If the student fails either of the exams, they will be given *one chance to retake the entire exam*. A student cannot fail more than one exam (i.e., cannot fail the written, pass on the second try, and then fail the oral.) Failure to pass the make-up exam or failing more than one exam results in dismissal from the program." (Emphasis added.) (Defendant's Exhibit E, ¶ J.)

**{¶42}** Despite plaintiff's arguments, it is undisputed that he failed the written exams in July 2016, that Dr. Weeks intended for him to sit for another round of the written exams (Defendant's Exhibit H), and that plaintiff never sat for a second round of the written exams. Therefore, the only reasonable conclusion is that Dr. Weeks' refusal to allow plaintiff to re-take two questions from Dr. Lavrentyev's portion of the exam was not a breach of contract.

**{¶43}** Plaintiff argues that defendant breached the contract when advisory committee members failed to help him find a new academic advisor. However, the requirement to choose a major advisor is a responsibility of the student. (Defendant's Exhibit E, ¶ F; deposition of Wiley, p. 84.) Regardless, Dr. Barton did reach out to plaintiff in an attempt to secure a new advisor for him after he left Dr. Weeks' lab. (See October 10, 2016 email between plaintiff and Dr. Barton, Barton Deposition Exhibit 13.) In addition, although plaintiff asserts that defendant breached the contract by failing to notify him that his academic dismissal was imminent, the evidence shows that plaintiff was advised repeatedly in emails from both Drs. Weeks and Barton beginning in September 2016, that if he did not meet certain milestones in certain time periods, he was subject to dismissal. (Defendant's Exhibit K.) In addition, the IB Handbook contains no requirement that a student be placed on academic probation prior to dismissal. Therefore, plaintiff has failed to create a genuine issue of material fact regarding these alleged breaches of contract.

**{¶44}** Finally, plaintiff has failed to produce evidence that, if believed, shows the committee members' actions were arbitrary and capricious. Although plaintiff disagrees with the criticism of his abilities, the emails from the committee and their deposition testimony show that the committee members took their responsibilities seriously and provided thoughtful feedback to plaintiff's written exam answers, and that they exercised professional judgment when they graded his written exam answers. No reasonable fact finder could conclude that the committee and faculty failed to exercise professional judgment in its treatment of plaintiff. Although plaintiff alleges that it was improper for Dr. Weeks to serve on the committee dismissing him from the program, plaintiff has pointed to no provision in IB Handbook prohibiting that. Lastly, with regard to plaintiff's allegation that he was entitled to a grievance hearing, the only reasonable conclusion is that defendant exercised professional judgment when it directed plaintiff to the EEO office of the university to hear his complaints, when he specifically complained of unfair and discriminatory treatment. Accordingly, the only reasonable conclusion is that defendant did not commit a breach of contract when it dismissed plaintiff from the program for failing to meet the required milestones in the IB program. Furthermore, inasmuch as plaintiff's employment as a TA was a condition of him making sufficient academic progress, his dismissal from the program required that his employment as a TA also end.

**II. Age discrimination**

**{¶45}** Assuming, without deciding, that plaintiff could state a claim for age discrimination under R.C. 4112 by way of his employment as a TA, the court will analyze plaintiff's employment claims. Plaintiff asserts a claim of age discrimination in violation of R.C. Chapter 4112. R.C. 4112.02 states, "It shall be an unlawful discriminatory practice: (A) For any employer, because of the * * * age * * * 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." In Ohio, "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.,* 66 Ohio St.2d 192, 196 (1981).

**{¶46}** To prevail in an employment discrimination case, a plaintiff must prove discriminatory intent and may establish such intent through either direct or indirect methods of proof. *Ricker v. John Deere Ins.* Co., 133 Ohio App.3d 759, 766 (10th Dist.1998), citing *Mauzy v. Kelly Servs., Inc.,* 75 Ohio St.3d 578, 583 (1996).

**{¶47}** Plaintiff alleges that Dr. Weeks made certain age-related statements to him which show that Dr. Weeks held a discriminatory animus against him because of his age. Specifically, plaintiff asserts that Dr. Weeks made the following comments to him:

1) In the summer of 2014, when he first met plaintiff, Dr. Weeks said, "I don't mean to sound ageist, but you are older than the typical graduate student. Are you sure you want to continue? It may be a long time for you to find a job." (Plaintiff's deposition, p. 38.)
2) In the fall of 2014, Dr. Weeks said, "So, how old are you?" Plaintiff replied, "sixty-one." Dr. Weeks replied, "Oh" in a loud manner. (Plaintiff's deposition, p. 44.)
3) In the fall of 2014, plaintiff and Dr. Weeks were discussing plaintiff's hobby of practicing mixed martial arts. Dr. Weeks asked him, "So why do you still do that at your –" and he stopped short before saying the word "age." (Plaintiff's deposition, p. 44-45.)
4) In the summer of 2015, Dr. Weeks saw plaintiff in a hallway and said, "You look surprisingly good for your age." (Plaintiff's deposition, p. 50.)
5) In October 2015, Dr. Mitchell was asking plaintiff highly complex questions that plaintiff was not answering to Dr. Mitchell's satisfaction. Plaintiff asked

for more time to prepare his answers, and Dr. Mitchell asked, "Well, how much time do you need? How old are you?" (Plaintiff's deposition, p. 63.)

6) In the spring of 2016, plaintiff told Dr. Weeks that he had gone out to look for fairy shrimp with Dr. Ott, who had recently retired, and Dr. Weeks asked, "So when is he going to retire?" (Plaintiff's deposition, p. 45.)
7) In various times between 2014 and 2017, plaintiff alleges that Dr. Weeks, Dr. Barton, and Dr. Mitchell stated that plaintiff "could not think critically, and 'synthesize information.'" (Plaintiff's deposition, p. 53.)
8) In the May 17, 2017 meeting, Dr. Mitchell stated, "Paul, I've had you now for four years, and I can tell you, you're really good at citing facts and figures, but you're not so good at synthesizing information." (Plaintiff's deposition, p. 63.)

**Direct method**

**{¶48}** "[D]irect evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir.1999). Direct evidence "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). In order for a statement to be evidence of an unlawful employment decision, plaintiff must show a "nexus between the improper motive and the decision making process or personnel. Accordingly, courts consider: (1) whether the comments were made by a decision maker; (2) whether the comments were related to the decision making process; (3) whether they were more than vague, isolated or ambiguous; and (4) whether they were proximate in time to the act of alleged discrimination." *Birch v. Cuyahoga Cty. Probate Court.*, 173 Ohio App.3d 696, 705, 2007-Ohio-6189, ¶ 23 (8th Dist.). However, "stray remarks, remarks by non-decision makers, comments that are vague, ambiguous, or isolated, and comments that are not

proximate in time to the act of termination" do not constitute direct evidence. *Johnson v. Kroger Co.,* 160 F. Supp.2d 846, 853 (S.D.Ohio 2001), rev'd on other grounds, 319 F.3d 858 (6th Cir.2003).

**{¶49}** Upon review of the above-mentioned comments, the only reasonable conclusion is that any comments made in 2014 and 2015 are not proximate in time to the act of termination, i.e., dismissal from the IB program. Therefore, the first five comments are not direct evidence of age discrimination. With regard to the comment about when Dr. Ott was going to retire, the only reasonable conclusion is that the comment would require a fact finder to draw some inference which plaintiff does not specify between Dr. Ott's retirement date and plaintiff's abilities in the IB program. With regard to the general comments that plaintiff could not think critically or synthesize information, the only reasonable conclusion is that those comments require an inference to be drawn between age and critical thinking and synthesizing information. Lastly, while the comment made in the May 17, 2017 meeting was proximate in time to plaintiff's dismissal, it again requires that an inference be drawn between age and critical thinking and synthesizing information. Thus, none of the comments plaintiff alleges can be considered direct evidence of age discrimination.

**Indirect method**

**{¶50}** Thus, in order to state a prima facie case of age discrimination by the indirect method of proof, plaintiff must establish that he: 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, or the discharge permitted the retention of, a person of substantially younger age. *Coryell v. Bank One Trust* Co., *N.A.,* 101 Ohio St.3d 175, 2004-Ohio-723. Alternatively, a plaintiff can establish the fourth prong by demonstrating that a "comparable non-protected person was treated better." *Mitchell v. Toledo Hosp*., 964 F.2d 577, 582-83 (6th Cir.1992).

**{¶51}** "If the plaintiff establishes a prima facie case, then the burden of production shifts to the employer to present evidence of 'a legitimate, nondiscriminatory reason' for the employer's rejection of the employee." *Williams v. City of Akron,* 107 Ohio St.3d 203, 2005-Ohio-6268, ¶ 12. "If the employer meets its burden of production, 'the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Id.* at ¶ 14, quoting *Texas Dept. of Comm. Affairs v. Burdine,* 450 U.S. 248, 253 (1981). "To establish pretext, a plaintiff must demonstrate that 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. *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir.2000). Regardless of which option is chosen, the plaintiff must produce sufficient evidence from which the trier of fact could reasonably reject the employer's explanation and infer that the employer intentionally discriminated against him. *Johnson v. Kroger Co.*, 319 F.3d 858, 866 (6th Cir.2003). A reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)." *Knepper v. Ohio State Univ.,* 10th Dist. Franklin No. 10AP-1155, 2011-Ohio-6054, ¶ 12. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine, supra,* at 253.

**{¶52}** Plaintiff alleges in his complaint that he was given excessive and unreasonable amounts of reading materials for his comprehensive written exams, he was not permitted to re-do two questions on Dr. Lavrentyev's exam, and he was dismissed from the program for not making sufficient academic progress when other similarly situated students had not been similarly dismissed. However, even construing the evidence most strongly in plaintiff's favor, the actions he complains of relate to his status as a student in the IB program, not to his employment as a TA. Even if plaintiff

could prove a prima facie claim of age discrimination, defendant has set forth a legitimate, nondiscriminatory reason for its actions. Specifically, plaintiff's failure to make sufficient academic progress toward his IB doctorate. Construing the evidence most strongly in plaintiff's favor, the only reasonable conclusion is that plaintiff has failed to produce a genuine issue of material fact regarding pretext for age discrimination.

**III. Retaliation**

**{¶53}** R.C. 4112.02(I) states that it shall be an unlawful discriminatory practice: "For 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." An investigation contemplated under 4112.01 to 4112.07 of the Revised Code pertains to proceedings or hearings with the Ohio Civil Rights Commission (OCRC).

**{¶54}** In order to establish a prima facie case of retaliation, plaintiff is required to prove that: "'(1) plaintiff engaged in a protected activity; (2) the employer knew of plaintiff's participation in the protected activity; (3) the employer engaged in retaliatory conduct; and (4) a causal link exists between the protected activity and the adverse action.'" *Motley v. Ohio Civ. Rights Comm.,* 10th Dist. Franklin No. 07AP-923, 2008-Ohio-2306, ¶ 11, quoting *Zacchaeus v. Mt. Carmel Health Sys.,* 10th Dist. Franklin No. 01AP-683, 2002-Ohio-444. Protected activity involves either the "opposition clause," when an employee has opposed any unlawful discriminatory practice, or the "participation clause," when an employee 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. *See Motley, supra*, citing *Coch v. GEM Indus., Inc.*, Lucas App. No. L-04-1357, 2005-Ohio-3045, ¶ 29.

**{¶55}** To engage in a protected opposition activity, a plaintiff must "make an overt stand against suspected illegal discriminatory action." *Motley*, quoting *Comiskey v. Auto. Indus. Action Grp.*, 40 F. Supp.2d 877, 898 (E.D.Mich. 1999). "Opposition" requires that that the employee communicate to his employer "a belief that the employer has engaged in * * * a form of employment discrimination." *Crawford v. Metro. Govt. of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 276 (2009). For purposes of a retaliation claim, opposition to "demeaning and harassing conduct," without complaining of illegal discrimination or taking an overt stand against such suspected illegal discriminatory action, does not constitute a protected activity. *Murray v. Sears,* Case No. 1:09 CV 702, 2010 U.S. Dist. LEXIS 34256, * 24 (N.D. Ohio April 7, 2010); *see also Fox v. Eagle Distrib. Co.,* 510 F.3d 587, 591-592 (6th Cir.2007). "[A] vague charge of discrimination in an internal letter or memorandum is insufficient to constitute opposition to an unlawful employment practice." *Booker v. Brown & Williamson Tobacco Co., Inc.,* 879 F.2d 1304, 1313 (6th Cir.1989).

**{¶56}** Plaintiff alleges that the letters that his attorney sent to university officials in an effort to obtain a new advisor and to generally complain of plaintiff's treatment in the program constitute a protected activity. However, it is undisputed that any participation that plaintiff engaged in, specifically, filing an EEO action, occurred after he was dismissed from the program. Therefore, any retaliation claim on that basis fails as a matter of law. Lastly, any opposition activity, i.e., letters from plaintiff's attorney, fall into the category of "a vague charge of discrimination in an internal letter or memorandum" and thus, are insufficient to constitute opposition to an unlawful employment practice. *See Booker, supra*. Accordingly, construing the evidence most strongly in plaintiff's favor, the only reasonable conclusion is that plaintiff has failed to state a prima facie case of retaliation.

**{¶57}** For the foregoing reasons, judgment shall be rendered in favor of defendant.

PATRICK M. MCGRATH
Judge

**[Cite as *Grubach v. Univ. of Akron*, 2019-Ohio-2370.]**

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| PAUL GRUBACH<br><br>Plaintiff<br><br>v.<br><br>UNIVERSITY OF AKRON<br><br>Defendant | Case No. 2017-00750JD<br><br>Judge Patrick M. McGrath<br>Magistrate Holly True Shaver<br><br>JUDGMENT ENTRY |

**{¶58}** 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 April 1, 2019**
**Sent to S.C. Reporter 6/14/19**