

11-0233

Gillian Giannini-Baur

Appellant,

v.

Schwab Retirement Plan Services,
Inc., et al.

Appellees.

On Appeal from the Summit
County Court of Appeals,
Ninth Appellate District

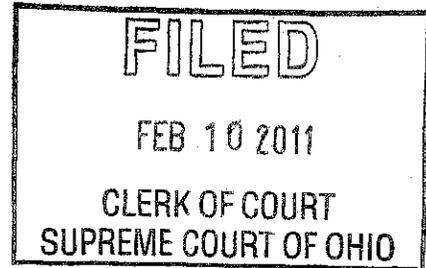
Court of Appeals
Case No. 2010 CA 25172

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT GILLIAN
GIANNINI-BAUR

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i. 12/29/10 Judgment Entry, Ninth District Court of Appeals

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WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST.

I. Prior to trial, appellees filed a motion in limine seeking a definitive and exclusionary Order prohibiting appellant from introducing or attempting to introduce any evidence of harassment directed at her relative to her co-worker's sexual orientation. Prior to voir dire, the trial court granted appellees' motion in limine. The appellate court's refusal to review the exclusion of this evidence at trial is an issue of great public or general interest.

II. The appellate court held, *sua sponte*, that appellant failed to preserve her right to appeal the exclusion of evidence of harassment directed at her relative to her co-worker's sexual orientation. Such judicial activism is inconsistent with fundamental principles of due process and the adversarial system and, therefore, is an issue of great public or general interest as well as constitutional import.

III. The appellate court refused to review the trial court's exclusion of evidence of harassment directed at appellant relative to her co-worker's sexual orientation with respect to the "totality of the circumstances" of her sex/pregnancy harassment claim. Whether all evidence of a supervisor's harassment is relevant to the "totality of the circumstances" in a harassment claim is an issue of great public or general interest.

IV. The appellate court held that for purposes of a retaliation claim under R.C. § 4112.02(I), complaints of harassment based on sexual orientation do not constitute a protected act. Whether an employee who reasonably believes that her supervisor is behaving in an unlawfully discriminatory manner and complains about his conduct to their employer is entitled to protection from retaliation is an issue of great public or general interest.

V. The appellate court held that the trial court properly dismissed appellant's retaliation claim on summary judgment because she was not subjected to an adverse employment action.

Federal law defines an adverse action as conduct that may dissuade an employee from making a charge of discrimination. When appellant complained about her supervisor's harassment to appellee's Director of Human Resources, he refused to investigate her complaints and left her under her harasser's supervision. Whether such conduct would dissuade a reasonable employee from making a complaint of discrimination is an issue of great public or general interest.

VI. The appellate court held that appellant failed to establish a constructive discharge because the only harassment that occurred after her initial complaint was that a co-worker told her "there's a rat on our team." Whether conduct before and after a complaint of harassment, including the employer's refusal to investigate and leaving a victim of harassment under the harasser's supervision, are relevant to whether a reasonable person would find her/his working conditions so difficult or unpleasant that she/he had no choice but to resign are issues of great public or general interest.

VII. Although sexual orientation has yet to attain protected status under R.C. § 4112, the State of Ohio prohibits such discrimination against state employees. As a matter of public policy, citizens of Ohio's private employers are entitled to the same protection. Protecting employees from discrimination and retaliation on the basis of sexual orientation is of great public interest as established by Executive Order 2007 and of constitutional import with respect to the issues of privacy and equal protection under the law.

VIII. The refusal to send the claim for punitive damages to the jury in light of appellee's failure to investigate or stop the harassment present issues of great public or general interest and constitutional import.

STATEMENT OF THE CASE AND FACTS

Plaintiff-appellant, Gillian Giannini-Baur (“Giannini-Baur”), filed her Complaint against defendants-appellees, Charles Schwab Retirement Plan Services, Inc. (“Schwab”) and Kevin Bagdon (“Bagdon”) (collectively as “defendants-appellees”) in the Summit County Court of Common Pleas on October 20, 2008 alleging claims for sex/pregnancy discrimination, retaliation, and violation of public policy. Defendants-appellees filed their Answer to the Complaint on December 19, 2008. On July 31, 2009, defendants-appellees filed their Motion for Summary Judgment as to Giannini-Baur’s claims. Giannini-Baur filed her response on August 11, 2009. Defendants-appellees filed their reply brief on August 21, 2009. Giannini-Baur filed supplemental authority in support of her response on September 17, 2009. On September 21, 2009, defendants-appellees filed their response to Giannini-Baur’s supplemental authority. On November 5, 2009, the trial court granted summary judgment as to Giannini-Baur’s retaliation and public policy claims, but denied summary judgment on her sex/pregnancy harassment claim.

On November 13, 2009, defendants-appellees filed a motion in limine to exclude all testimony, evidence and exhibits regarding harassment based on sexual orientation. Giannini-Baur filed her response on November 16, 2009. Prior to voir dire, the trial court granted defendants-appellees’ motions in limine to exclude this evidence, “when we finish this trial I don’t want any jurors to be wondering about homosexuality in any respect, about employees being homosexual, about employers trying to get rid of homosexuals. I don’t want any jurors – that topic to even dawn on them. Do you understand that?”

Trial commenced as to Giannini-Baur’s sex/pregnancy harassment claim on November 17, 2009. The case went to the jury on Friday, November 20, 2009. At the end of the day, the jury advised the trial court and parties that they were hopelessly deadlocked 5/3. The trial court

instructed the jury and sent them home for the weekend. On November 23, 2009, the jury returned with a verdict in favor of defendants-appellees. On December 11, 2009, the trial court entered judgment in favor of defendants-appellees.

On January 5, 2010, Giannini-Baur filed her Notice of Appeal and Docketing Statement with the November 5, 2009 Judgment Entry granting summary judgment as to her claims for retaliation and public policy and the December 11, 2009 Judgment Entry on Giannini-Baur's sex/pregnancy harassment claim attached. The record was filed on March 18, 2010. After the parties' respective briefs were filed and oral argument held, on December 29, 2010, the Ninth District Court of Appeals issued its Decision and Journal Entry overruling each of Giannini-Baur's assignments of error. The facts elicited on summary judgment and at trial include the following:

Giannini-Baur began employment with Schwab in May 2002 as a loan processor and subsequently transferred to the Personal Choice Retirement Account ("PCRA") team. Giannini-Baur was Schwab's most experienced PCRA team member. Bagdon became Giannini-Baur's supervisor in April 2004. Giannini-Baur received favorable performance reviews from Bagdon. Giannini-Baur received an award for Excellence in Service for the fourth quarter 2005 and first quarter 2006. Giannini-Baur received a promotion to senior client analyst in January 2006. In her 2006 annual review, Bagdon rated Giannini-Baur's management of all PCRA-related matters, training and communications skills as "exceptional." While Giannini-Baur was on pregnancy leave, Bagdon lowered her 2006 "Exceptional" performance rating to mediocre. On October 22, 2007, while Giannini-Baur was on pregnancy leave, Bagdon rated her fourth out of the seven employees he supervised.

In January 2007, Giannini-Baur told Bagdon that she was pregnant; he was “a little short in his tone” and acted “a little shocked.” Giannini-Baur noticed a change in Bagdon after this conversation. Giannini-Baur, who then sat next to Bagdon, noticed a “lack of communication.” Bagdon’s tone was “short” with her, he was less friendly and he “ignored” her. Giannini-Baur wanted to use her four week sabbatical in conjunction with her 12 week pregnancy leave. Bagdon told Giannini-Baur that she could not take her sabbatical with her pregnancy leave. This was not true. Giannini-Baur asked Bagdon if it would be possible for her to go part-time when she returned from pregnancy leave. Bagdon told her that was not an option for her.

Giannini-Baur went on pregnancy leave on July 30, 2007; she delivered her daughter on August 1, 2007. Giannini-Baur called Bagdon several times during her pregnancy leave and left messages for him, but he never returned her calls. Giannini-Baur returned to work on November 26, 2007. Giannini-Baur’s work environment changed when she returned from pregnancy leave – she was isolated from her teammates, excluded from meetings, denied employment opportunities and retaliated against after she refused to participate in and complained about Bagdon’s harassment. When Giannini-Baur returned from pregnancy leave, Bagdon did not have a desk or computer for her to use. Instead of sitting with her teammates as she had in the past, Giannini-Baur was “isolated,” sitting “as far away as you can possibly go in our quadrant” from Bagdon and her teammates. The isolation interfered with Giannini-Baur’s communications with her co-workers. There was no reason for Giannini-Baur to be isolated; there were empty cubicles with her team. While Giannini-Baur was isolated from her team, Jason Jordano (“Jordano”), a male temporary employee, sat with her teammates.

William Friel (“Friel”) was transferred into PCRA from the call center after he complained that his supervisor, a former lover, was retaliating against him after their break-up.

When Giannini-Baur returned from pregnancy leave, she immediately noticed the hostility on her team toward Friel. Giannini-Baur witnessed Jordano, a close friend of Bagdon's, giving Friel incorrect information, lying that Friel made mistakes and spewing nasty comments, including that Friel was a "fag." Even though Jordano was a temporary employee, Bagdon permitted him to monitor and report on Friel's performance and to display hostility toward Friel. Eric Strohecker, a PCRA teammate, testified that he was "thankful" he wasn't put under the same microscope as Friel. Danny Miller, another PCRA teammate, testified that Friel was treated differently than he, and Bagdon instructed him to keep track of Friel's mistakes.

Bagdon frequently asked Giannini-Baur if she "had anything" on Friel and instructed her not to assist him with his job duties. Bagdon created a spreadsheet with nasty comments about Friel that he left on the shared drive for anyone at Schwab to view. Giannini-Baur saw the spreadsheet and was horrified to find that Bagdon lied about comments that she supposedly made about Friel. In December 2007, Bagdon called Giannini-Baur into a meeting. During this meeting, Bagdon, referring to Friel, told Giannini-Baur, "he needed to get the fucking faggot off the team, he thought he left this in San Francisco." Giannini-Baur was offended. Bagdon also told Giannini-Baur that if she helped get Friel off the team, he would get her a part-time position.

In February 2008, Schwab conducted an investigation into Bagdon's harassment of Friel. In less than one month, Schwab cleared Bagdon of any wrongdoing. When the harassment continued, Friel took a leave of absence in early April 2008 and never returned to Schwab.

Despite going to the trouble to rate Giannini-Baur's performance while she was on pregnancy leave, Bagdon never scheduled a year-end review with her. Giannini-Baur was the only PCRA team member with whom Bagdon failed to review their performance. Bagdon excluded Giannini-Baur from team meetings. When Giannini-Baur would show up at a team

meeting, Bagdon told her “there’s really nothing about PCRA. You don’t have to cover this one.” Friel testified that Giannini-Baur wasn’t present at the monthly PCRA meetings which struck him as odd. On a number of occasions, Giannini-Baur was invited to the meeting after the fact because her co-workers did not know answers to specific questions that she did. Bagdon also began scrutinizing Giannini-Baur’s hours which he had never done previously. Prior to Giannini-Baur’s pregnancy leave, Bagdon told her she would be on special projects and cross-trained to learn the Transfer of Assets and deconversion processes. When she returned from pregnancy leave, this never happened. Instead, Bagdon sent Strohecker, a male, in Giannini-Baur’s place. Bagdon also permitted his buddy, Jordano, to interfere with Giannini-Baur’s daily job performance. Jordano scrutinized everything Giannini-Baur did. Jordano changed the way various procedures were done and told her teammates that Giannini-Baur didn’t want the procedures changed, which was untrue. Giannini-Baur sent emails to Bagdon requesting assistance from her teammates, but he never responded. At the time, Giannini-Baur was performing both her’s and Friel’s job duties because Bagdon harassed Friel out of the workplace.

Although Bagdon previously warned Giannini-Baur not to go to Human Resources or she’d be “labeled,” when Bagdon went on vacation, she complained to Human Resources about the hostile work environment. On March 26, 2008, Giannini-Baur met with Mark Craig (“Craig”), Schwab’s Director of Human Resources, and told him that when she came back from pregnancy leave, she returned to a hostile work environment. Giannini-Baur told Craig that she felt like she was not part of the team after her pregnancy leave, Bagdon isolated her from her team and hadn’t given her a performance review or one-on-one meeting. Giannini-Baur told Craig she asked for help which wasn’t provided. Because she believed that Bagdon’s harassment of Friel based on his sexual orientation was unlawful, Giannini-Baur complained to

Craig about Bagdon's harassing conduct toward Friel. Giannini-Baur told Craig that Bagdon asked her to give him negative information on Friel to give to Human Resources, that if she helped him get Friel fired then he would get her part-time employment, that Bagdon asked other members of the team to report Friel's errors to him and about Bagdon's "fucking fag" statement. Giannini-Baur told Craig she needed her job but she didn't know how much more she could take, and that she was willing to move to another team to get out of the bad situation.

Craig told Giannini-Baur that Schwab would put Bagdon on paid administrative leave while he investigated her complaints and he would keep her posted. When Giannini-Baur heard nothing from Craig for several days, she called him. Craig told Giannini-Baur that nothing was going to happen to Bagdon and that, if he had any time, he'd look into her complaints. Giannini-Baur's work environment worsened after her complaint to Craig. Shortly after Giannini-Baur complained to Craig, her co-worker told her that "there's a rat on our team."

Bagdon scheduled a meeting with Giannini-Baur on April 4, 2008. During that meeting, Bagdon told Giannini-Baur that he would try to get her a part-time position if she got Friel off the PCRA team. Giannini-Baur again went to Craig and asked if she could move to another team; Craig told her that she was not getting "special treatment." Giannini-Baur interviewed with the Participant Services Department, but there were no jobs available. Schwab kept Bagdon as Giannini-Baur's supervisor. Unlike Giannini-Baur, when Friel left the workplace due to Bagdon's harassment, he was offered reinstatement with a supervisor other than Bagdon.

As a result of the harassment, Giannini-Baur was "losing sleep, not eating, getting headaches, [her] blood pressure was higher." Kristin Winkler ("Winkler"), a Schwab employee and former co-worker of Giannini-Baur's, testified that Giannini-Baur's demeanor changed when she returned from her pregnancy leave. Winkler stated that Giannini-Baur was not happy

and acted depressed. Friel testified that Giannini-Baur was “frustrated,” “frantic,” and “stressed out” from the harassment. Giannini-Baur resigned on April 18, 2008 with a two week notice. As of that date, Craig had not even spoken to Bagdon or Jordano regarding Giannini-Baur’s March 26th complaint. Craig testified that he made no effort to keep Giannini-Baur in the workplace even after receiving an email from her on April 23, 2008 titled “Hostile Work Environment.” Craig did not even bother to speak to Bagdon and Jordano about Giannini-Baur’s complaints until April 23, 2008. When he spoke to them that date, Craig did not ask Bagdon or Jordano about Giannini-Baur’s complaint that they were making it very difficult for her in the workplace. On April 24, 2008, Giannini-Baur sent a follow up email explaining that her resignation was effective immediately due to the retaliation and hostile work environment. Craig did not finish his “investigation” until May 15, 2008 almost one month after Giannini-Baur submitted her resignation.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Evidence excluded via an “exclusionary” or “definitive” motion in limine prior to trial is reviewable on appeal.

The Ninth District Court of Appeals refused to consider whether evidence of Bagdon’s harassment of Giannini-Baur relative to her co-worker’s sexual orientation was improperly excluded, two of the judges deciding that they were not going to “comb” the record for Giannini-Baur’s attempts to admit this evidence at trial. Schwab and Bagdon’s motion in limine sought a definitive and exclusionary Order prohibiting Giannini-Baur from introducing or attempting to introduce all testimony and exhibits evidencing harassment directed at Giannini-Baur relative to her co-worker’s sexual orientation. Prior to voir dire, the trial court issued its Order granting defendants-appellees’ motion in limine excluding all references to sexual orientation and discriminatory statements made about homosexuals. Unlike a “preclusionary” motion in limine

that does not seek a definitive ruling that evidence cannot be introduced, a “definitive” or “exclusionary” motion in limine is a “final pre-trial determination with respect to inadmissibility of a particular matter.” *Ohio v. Echard*, (9th Dist. 2009), 2009 Ohio App. LEXIS 5549 at ¶ 20 (*citation omitted*). Such motions prevent counsel and witnesses from even mentioning the excluded evidence during the trial. *Id.* Whether or not a trial court’s ruling on a “definitive” or “exclusionary” motion in limine is reviewable on appeal is an issue of great public or general interest. Where a trial court issues an Order granting a “definitive” or “exclusionary” motion in limine, litigants are put in the no-win situation of forfeiting review on appeal by complying with the trial court’s Order. Permitting appellate review of “definitive” or “exclusionary” motions in limine balances a trial court’s decision to exclude evidence while preserving a party’s right to appeal. Giannini-Baur respectfully requests that this Honorable Court assume jurisdiction over her First Proposition of Law.

Proposition of Law No. II: A *sua sponte* decision by an appellate court to refuse to review evidence excluded by a definitive or exclusionary motion in limine is inconsistent with fundamental principles of due process and the adversarial system.

Notwithstanding the fact that appellees’ counsel never raised the issue and, in response to inquiry from the court at oral argument, he stated Giannini-Baur went “too far” in attempting to admit this evidence at trial, the Ninth District Court of Appeals held that evidence regarding harassment of Giannini-Baur relative to her co-worker’s sexual orientation was not reviewable on appeal because the court was not going to “comb the record” for evidence that attempts were made to introduce the excluded testimony and exhibits at trial. Giannini-Baur attempted, within the confines of the trial court’s Order granting defendants-appellees motion in limine, to introduce this evidence. All of the disputed exhibits were admitted in their redacted form; Giannini-Baur proffered the unredacted versions. Defendants-appellees never argued that

Giannini-Baur failed to preserve her right to appeal the exclusion of this evidence. The Ninth District's judicial activism on behalf of defendants-appellees creates an issue of great public or general interest as the court's refusal to review Giannini-Baur's assignment of error based on the exclusion of this evidence is inconsistent with fundamental principles of due process and the adversarial system. "[A]ppellate courts should not render decisions that adversely impact life, liberty, or property of a party without given the party an opportunity to be heard on the issue the court deems dispositive." Adam A. Milani and Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, Tenn.L.Rev. Vol. 69, No. 2, Winter 2002.

Giannini-Baur respectfully requests that this Honorable Court assume jurisdiction over her Second Proposition of Law.

Proposition of Law No. III: The "totality of the circumstances" demands that all conduct by all perpetrators be considered in determining the existence of a hostile work environment.

In determining whether or not an employee was subjected to a hostile work environment, the "totality of the circumstances" demands that all conduct by all perpetrators is considered. The Ninth District Court of Appeals refused to review the trial court's exclusion of evidence of harassment of Giannini-Baur relative to her homosexual co-worker. Whether all evidence of harassment is relevant to the "totality of the circumstances" in determining whether an employee was subjected to a hostile work environment is an issue of great public or general interest. Giannini-Baur respectfully requests that this Honorable Court assume jurisdiction over her Third Proposition of Law.

Proposition of Law No. IV: An employee engages in a protected act when she reasonably believes the employer's discriminatory conduct is unlawful.

The Ninth District Court of Appeals held that for purposes of a retaliation claim under R. C. § 4112.02(I), complaints regarding the harassment of a co-worker based on sexual orientation

do not constitute a protected act. Employees who reasonably believe that their supervisors are engaging in unlawful discriminatory conduct, and complain about this harassment to their employer, are entitled to protection from retaliation. Whether such a complaint is a protected act is an issue of great general interest and constitutional import as Ohio's employees must be free to oppose what they reasonably believe is unlawful discrimination without fear of reprisal.

Giannini-Baur respectfully requests that this Honorable Court assume jurisdiction over her Fourth Proposition of Law.

Proposition of Law No. V: For purposes of a retaliation claim, an employer's refusal to investigate an employee's complaints of harassment while leaving the employee under the harasser's supervision establishes an adverse action.

The Ninth District Court of Appeals held that Giannini-Baur could not establish her retaliation claim with respect to her complaints of sex/pregnancy discrimination because she was not subjected to a tangible employment action only "personality conflicts." The uncontroverted evidence established that Giannini-Baur complained to Craig on March 26, 2008 that she was subjected to a hostile work environment when she returned from pregnancy leave. When she heard nothing from Craig for several days, Giannini-Baur called him. Craig told Giannini-Baur that nothing was going to happen to Bagdon and that, if he had any time, he'd look into her complaints. Giannini-Baur's work environment worsened and her co-worker told her "there's a rat on our team." Bagdon scheduled a meeting with Giannini-Baur on April 4, 2008 and told her that he would try to get her a part-time position if she got Friel off the PCRA team. Giannini-Baur again went to Craig and asked if she could move to another team. Craig told her that she was not getting "special treatment" and Bagdon remained her supervisor. Giannini-Baur resigned on April 18, 2008 with a two week notice. As of that date, Craig had not spoken to Bagdon or Jordano regarding Giannini-Baur's March 26th complaint. Craig testified that he

made no effort to keep Giannini-Baur in the workplace even after receiving an email from her on April 23, 2008 titled "Hostile Work Environment." Craig did not speak to Bagdon and Jordano about Giannini-Baur's complaints until after she sent this email and, when he spoke to them, he did not ask either about her complaint that they were making it very difficult for her in the workplace. On April 24, 2008, Giannini-Baur resigned effective immediately due to the retaliation and hostile work environment.

Under federal law, an adverse action is one that [might dissuade] a reasonable employee from complaining about discrimination. Addressing what conduct establishes an adverse action for purposes of a retaliation claim presents an issue of public or great general interest. Giannini-Baur respectfully requests that this Honorable Court assume jurisdiction over her Fifth Proposition of Law.

Proposition of Law No. VI: An employer's conduct before and after a complaint of harassment is relevant to a constructive discharge.

The Ninth District Court of Appeals held that Giannini-Baur failed to establish a constructive discharge because the only harassment that occurred after her initial March 26, 2008 complaint was that a co-worker told her "there's a rat on our team." Harassment before and after a complaint of harassment, including the employer's refusal to investigate the employee's complaint and leaving her under the supervision of the harasser, are relevant to whether a reasonable person would find her/his working conditions so difficult or unpleasant that she/he no choice but to resign. This case is of great public or general interest to address what evidence is relevant in establishing a constructive discharge in context of a retaliation claim. Giannini-Baur respectfully requests that this Honorable Court accept jurisdiction over her Sixth Proposition of Law.

Proposition of Law No. VII: A clear public policy exists to prohibit discrimination on the basis of sexual orientation.

The Ninth District Court of Appeals affirmed the trial court's decision granting summary judgment as to Giannini-Baur's public policy claim holding that, because R.C. § 4112.02 does not prohibit discrimination based on sexual orientation, public policy does not prohibit discrimination based on sexual orientation. Giannini-Baur respectfully asserts that this Court's decision in *Genaro v. Cent. Transport, Inc.* (1999), 84 Ohio St.3d 293, 296, 703 N.E.2d 782, 785¹, as well as Executive Order 2007-10S prohibiting discrimination against state employees on the basis of sexual orientation, create a clear public policy on which an employee may rely to oppose such discriminatory conduct in the workplace. Whether or not there exists a clear public policy preventing discrimination on the basis of sexual orientation is a matter of great public interest and constitutional import to the issues of privacy and equal protection under the law. Giannini-Baur respectfully requests that this Honorable Court accept jurisdiction over her Seventh Proposition of Law.

Proposition of Law No. VIII: An employer's refusal to investigate allegations of harassment creates a jury issue as to whether the employer acted with a conscious disregard for rights that had a great probability of causing substantial harm to its employee.

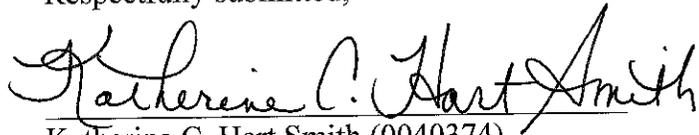
Based on the uncontroverted evidence that defendants-appellees failed to investigate or stop the harassment, the trial court's decision granting a directed verdict against Giannini-Baur with respect to punitive damages is inconsistent with "substantial justice." This case presents an issue of great public or general interest as well as constitutional import with respect to the trial court's denial to send the claim for punitive damages to the jury. Giannini-Baur respectfully requests that this Honorable Court assume jurisdiction over her Eighth Proposition of Law.

¹ "This court has noted in numerous cases the existence of a strong public policy against discrimination. A majority of this court have, time and time again, found there is no place in this state for any sort of discrimination nor matter its size, shape or form or in what clothes it might masquerade. * * *"

CONCLUSION

This case presents a number of issues of public or great general interest involving constitutional rights to a fair trial, due process, equal protection, the integrity of the legal system and employee rights under Ohio public policy and the Revised Code. Giannini-Baur respectfully requests that this Court accept jurisdiction of her eight propositions of law so that the issues presented will be reviewed on the merits.

Respectfully submitted,



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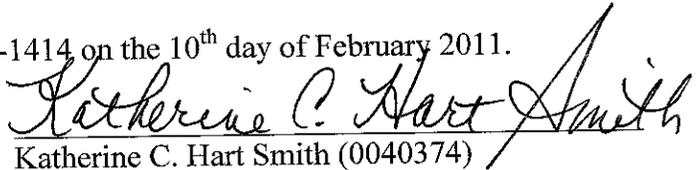
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction has been sent by regular U.S. mail to counsel for defendants-appellees, Schwab Retirement Plan Services, Inc., et al., Thomas R. Simmons at TUCKER ELLIS & WEST LLP, 1150 Huntington Building, 925 Euclid Avenue, Cleveland, Ohio 44115-1414 on the 10th day of February 2011.



Katherine C. Hart Smith (0040374)

STATE OF OHIO

COUNTY OF SUMMIT

COURT OF APPEALS
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)ss: NINTH JUDICIAL DISTRICT
7:19 DEC 29 AM 7:50

GILLIAN GIANNINI-BAUR SUMMIT COUNTY C. A. No. 25172

CLERK OF COURTS

Appellant

v.

SCHWAB RETIREMENT PLAN
SERVICES, INC., et al.

Appellees

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2008 10 7280

DECISION AND JOURNAL ENTRY

Dated: December 29, 2010

MOORE, Judge.

{¶1} Appellant, Gillian Giannini-Baur, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} In 2002, Giannini-Baur began work for appellant, Schwab Retirement Plan Services, Inc., located in Richfield, Ohio. She most recently worked on the Personal Choice Retirement Account team under the supervision of appellant, Kevin Bagdon. By all accounts, Giannini-Baur was a good employee.

{¶3} In 2007, Giannini-Baur announced her pregnancy and felt that Bagdon's response was less than enthusiastic. After the announcement, she felt that Bagdon's tone was shorter and that he ignored her. She sought to combine her pregnancy leave with a four-week sabbatical. Although Bagdon was not certain such a combination was possible, Schwab eventually granted

Giannini-Baur's request. Bagdon and his wife hosted a baby shower for Giannini-Baur, the only surprise party he has thrown for an employee.

{¶4} On July 30, 2007, Giannini-Baur began her pregnancy leave. Bagdon congratulated her on the birth of her daughter. On November 26, 2007, after a four-month hiatus, Giannini-Baur returned to Schwab. Her old cubicle, located next to Bagdon's, was now occupied by a new employee, William Friel, in order to facilitate Friel's training. On the day of her return, Giannini-Baur's computer was not set up. Bagdon, however, quickly rectified the situation. Shortly after her return, Giannini-Baur requested to switch her hours to part-time. Because of the work situation, including the necessity to train Friel, a part-time schedule was not available. She was granted the opportunity to regularly work from home.

{¶5} Although she and Bagdon had previously discussed a cross-training opportunity in another area, business needs dictated that another employee receive the training. Giannini-Baur did not request additional cross-training opportunities. She asserted that she was excluded from team meetings and that Bagdon did not meet with her to discuss her 2007 performance review.

{¶6} Giannini-Baur alleged that Bagdon was trying to remove Friel from the team due to his sexual orientation. She claimed that Bagdon offered her part-time hours in exchange for help in getting Friel fired. There was no dispute that Friel was subjected to greater scrutiny than other team members.

{¶7} On March 26, 2008, Giannini-Baur approached Mark Craig, a human resources manager at Schwab, and requested a part-time position. Further, she complained of a hostile work environment due to harassment of herself and Friel. She told Craig she was willing to move to another department. No position was available at that time. Craig began an

investigation of Bagdon. When she heard nothing, Giannini-Baur called Craig and was told that nothing was going to happen to Bagdon. Shortly after her complaint, a co-worker told her that “there’s a rat on our team[.]”

{¶8} On April 18, 2008, Giannini-Baur tendered her resignation, giving two weeks’ notice. At that time, Craig had not yet spoken with Bagdon or Jason Jordano, a temporary co-worker, in the course of his investigation. On April 24, 2008, Giannini-Baur sent an e-mail tendering her resignation effective immediately due to the retaliation and hostile work environment.

{¶9} On October 28, 2008, Giannini-Baur filed a complain in the Summit County Court of Common Pleas asserting claims for sex/pregnancy discrimination, retaliation, and violation of public policy. On November 5, 2009, the trial court granted summary judgment to Schwab and Bagdon on Giannini-Baur’s retaliation and public policy claims. From November 17, 2009, through November 20, 2009, the remaining claim was tried to a jury. Upon Schwab and Bagdon’s motion, the trial court granted a directed verdict on Giannini-Baur’s request for punitive damages and attorney’s fees. On November 23, 2009, the jury returned a verdict in favor of Schwab and Bagdon.

{¶10} Giannini-Baur timely filed a notice of appeal and has raised four assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED BY GRANTING [SCHWAB AND BAGDON’S] MOTION FOR SUMMARY JUDGMENT AS TO [GIANNINI-BAUR’S] CLAIM FOR RETALIATION UNDER R.C. §§4112.02(I)/4112.99.”

{¶11} In her first assignment of error, Giannini-Baur contends that the trial court erred in granting Schwab's motion for summary judgment as to her retaliation claim. We do not agree.

{¶12} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶13} Pursuant to Civil Rule 56(C), summary judgment is proper if:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶14} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶15} “The state courts may look to federal case law regarding cases involving alleged violations of R.C. Chapter 4112.” *Lindsay v. Children's Hosp. Med. Ctr. of Akron*, 9th Dist. No.

24114, 2009-Ohio-1216, at ¶11, citing *Varner v. The Goodyear Tire & Rubber Co.*, 9th Dist. No. 21901, 2004-Ohio-4946, at ¶10.

Retaliation

{¶16} Schwab and Bagdon moved for summary judgment on Giannini-Baur's retaliation claim on the bases that 1) she did not engage in a protected activity in defense of Friel because he, as a homosexual, is not a member of a protected class, and 2) she did not, as she claims, experience either a hostile work environment or a constructive discharge as a result of her complaint.

“To establish a case of retaliation, a claimant must prove that (1) she engaged in a protected activity, (2) the defending party was aware that the claimant had engaged in that activity, (3) the defending party took an adverse employment action against the employee, and (4) there is a causal connection between the protected activity and adverse action.” *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, at ¶13, citing *Canitia v. Yellow Freight Sys., Inc.* (C.A.6, 1990), 903 F.2d 1064, 1066.

{¶17} In order to prove retaliation, the employee must show “that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” (Internal quotation and citations omitted.) *Burlington Northern & Santa Fe Ry. Co. v. White* (2006), 548 U.S. 53, 68. In that case, the United States Supreme Court noted that it was important to distinguish between significant and trivial harms. *Id.* (stating that “[a]n employee’s decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.”) The *Burlington* Court further observed that “courts have held that personality conflicts at work that generate antipathy and snubbing by supervisors and co-workers are not actionable[.]” (Citations and quotations omitted.) *Id.* This Court has held that:

“[i]n considering whether an employment action was materially adverse, the court may consider the following factors: whether employment was terminated, whether the employee was demoted, received 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.” (Quotations and citations omitted.) *Eakin v. Lakeland Glass Co.*, 9th Dist. No. 04CA008492, 2005-Ohio-266, at ¶19.

Adverse actions are to be viewed objectively, to judge their effect on the reasonable employee in light of the particular circumstances. *Burlington*, 548 U.S. at 68-69.

{¶18} On March 26, 2008, Giannini-Baur met with Mark Craig, Schwab’s Director of Human Resources, and complained that when she returned from pregnancy leave she faced a hostile work environment. She also complained about the negative treatment of William Friel, which she attributed to his sexual orientation. Because sexual orientation is not protected under Ohio law, we focus our analysis on whether Giannini-Baur faced retaliation for complaining about her treatment upon her return from pregnancy leave. R.C. 4112.02(A); see, also *Cooke v. SGS Tool Co.* (Apr. 26, 2000), 9th Dist. No. 19675, at *3.

{¶19} In their summary judgment motion, Schwab and Bagdon argued that the only alleged harassment Giannini-Baur experienced after her complaint was a co-worker’s statement that “there’s a rat on our team[.]” In response, she pointed to testimony indicating that Craig informed her that Bagdon was not going to be removed as her supervisor and that she would not be given “special treatment” in terms of moving to a new position when no relevant openings existed. She also pointed to her affidavit in support of summary judgment, which included the non-specific complaint that “the harassment escalated.” The affidavit also included the statement that “I resigned because my physical and emotional health was deteriorating rapidly as a result of Mr. Bagdon’s conduct.” Giannini-Baur then resigned on April 18, 2008, and provided Schwab two weeks’ notice. On April 24, 2008, Giannini-Baur sent an e-mail resigning her

employment effective immediately due to what she termed the retaliation and hostile work environment. Upon receiving the e-mail, Schwab placed Giannini-Baur on paid administrative leave while the investigation was completed. She did not return to Schwab.

{¶20} Viewing the evidence in the light most favorable to Giannini-Baur, she has not pointed to evidence in the record which establishes an adverse action against her resulting from her March 26, 2008 complaint. She has not provided evidence that any negative treatment went beyond “personality conflicts” or that she was terminated, demoted, or faced other negative consequences that would dissuade a reasonable employee from lodging a complaint. See *Burlington and Eakin*, supra. She has, therefore, failed to carry her reciprocal burden to create a question of material fact. *Dresher*, 75 Ohio St.3d at 293.

Constructive Discharge

{¶21} To prove constructive discharge, an employee must show that “the employer’s actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign.” *Mauzy v. Kelly Servs., Inc.* (1996), 75 Ohio St.3d 578, paragraph four of the syllabus. Constructive discharge requires “a showing of more adverse conditions than would a hostile environment harassment claim, because the latter requires only a showing that the conditions were severe and pervasive enough to affect working conditions.” *White v. Bay Mechanical & Elec. Corp.*, 9th Dist. No. 06CA008930, 2007-Ohio-1752, at ¶16.

{¶22} Schwab and Bagdon again contend that Giannini-Baur’s retaliation claim which led to the alleged constructive discharge is supported only by evidence that a co-worker told her “there’s a rat on our team[.]” In response, Giannini-Baur failed to provide adequate evidence of retaliation stemming from the March 26, 2008 complaint to create a question of material fact as to the existence of a hostile work environment. She did not, therefore, present adequate evidence

to demonstrate constructive discharge, which requires “a showing of more adverse conditions than would a hostile environment harassment claim[.]” *White*, at ¶16.

{¶23} Therefore, Giannini-Baur has not demonstrated that she was subjected to working conditions so intolerable that she would have felt compelled to resign. *Mauzy*, 75 Ohio St.3d at paragraph four of the syllabus. Accordingly, she cannot demonstrate constructive discharge on the basis of retaliation and the trial court correctly granted summary judgment to Schwab and Bagdon. Giannini-Baur’s first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED BY GRANTING [SCHWAB AND BAGDON’S] MOTION FOR SUMMARY JUDGMENT AS TO [GIANNINI-BAUR’S] PUBLIC POLICY CLAIM.”

{¶24} In her second assignment of error, Giannini-Baur contends that the trial court erred in granting Schwab and Bagdon’s motion for summary judgment with regard to her public policy claim. We do not agree.

{¶25} In this case, the trial court determined that because Giannini-Baur could not establish her retaliation or constructive discharge claims, she was also unable to establish her claim alleging a violation of public policy. We did not consider evidence of discrimination flowing from Giannini-Baur’s refusal to participate in any discriminatory behavior towards Friel based on his sexual orientation; however, we consider whether public policy prevents discrimination based on sexual orientation.

{¶26} The Supreme Court of Ohio has recognized a public policy exception to the employment-at-will doctrine. *Greeley v. Miami Valley Maint. Contrs., Inc.* (1990), 49 Ohio St.3d 228, overruled in part by *Tulloh v. Goodyear Atomic Corp.* (1992), 62 Ohio St.3d 541. In *Painter v. Graley* (1994), 70 Ohio St.3d 377, the Supreme Court expanded the sources of public

policy from statutes to include “the Constitutions of Ohio and the United States, administrative rules and regulations, and the common law.” *Id.* at paragraph three of the syllabus.

{¶27} The Supreme Court later adopted a four-part test to determine when a termination violated public policy. The factors are:

“1. That [a] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).

“2. That dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the jeopardy element).

“3. The plaintiff’s dismissal was motivated by conduct related to the public policy (the causation element).

“4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).” (Emphasis, citations and quotations omitted). *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 69-70.

{¶28} As it is dispositive of the issue, we first address the clarity element. Clarity is a question of law to be determined by the court. *Id.* In her complaint, Giannini-Baur pointed to Cleveland Ordinance 663.02 to demonstrate that a clear public policy exists against discrimination on the basis of sexual orientation. None of the activities or actions upon which this suit is based occurred in Cleveland, Ohio. Moreover, the clarity of public policy must be established at the state, as opposed to local, level. *Greenwood v. Taft, Stettinius & Hollister* (1995), 105 Ohio App.3d 295, 299. Therefore, regardless of the language contained in Cleveland Ordinance 663.02, it cannot support Giannini-Baur’s claim. In support of her response to Schwab and Bagdon’s motion for summary judgment, she also attached a copy of Executive Order 2007-10S, which Governor Strickland signed on May 17, 2007. The *Greenwood* Court also discussed a previous executive order from Governor Richard Celeste that “made it unlawful for any agency, department, board or commission within the executive branch of the state government to discriminate in state employment against any individual based on that

individual's sexual orientation." *Id.* at 299. That court determined that R.C. 4112.02 instead applied. *Id.* Currently, as noted above, R.C. 4112.02 does not forbid discrimination on the basis of sexual orientation. As Giannini-Baur has cited no authority establishing a clear public policy against discrimination based on sexual orientation, Schwab and Bagdon were entitled to judgment as a matter of law on this claim. Accordingly, Giannini-Baur's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE AT TRIAL
RELATIVE TO [GIANNINI-BAUR'S] SEX/PREGNANCY HOSTILE WORK
ENVIRONMENT CLAIM."

{¶29} In her third assignment of error, Giannini-Baur contends that the trial court erred in excluding evidence at trial relative to her sex/pregnancy hostile work environment claim. We do not agree.

{¶30} A decision to admit or exclude evidence will be upheld absent an abuse of discretion. *State ex rel. Elsass v. Shelby Cty. Bd. of Commrs.* (2001), 92 Ohio St.3d 529, 533. Under this standard, we must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶31} Giannini-Baur contends under the authority of *Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, and *Williams v. General Motors Corp.* (C.A.6 1999), 187 F.3d 553, that the trial court erred in excluding evidence of harassment against Friel due to his sexual orientation because hostile-environment harassment claims are to be analyzed under the totality of the circumstances.

{¶32} Giannini-Baur has not, however, demonstrated to this Court that she preserved for review any error below with regard to exhibits 18, 29 and 37, or any testimony about Friel's sexual orientation. Prior to trial, Schwab and Bagdon filed a motion in limine in an effort to preclude testimony and exhibits regarding Friel. The trial court granted the motion to the extent that any evidence referenced Friel's sexual orientation but overruled the motion with regard to other evidence of harassment against Friel. In the one citation to the transcript, Giannini-Baur directs this Court to the introduction of exhibit 37. The transcript makes clear that she only attempted to introduce a copy of the exhibit which complied with the court's ruling on the motion in limine. Accordingly, she has failed to demonstrate that she tested the court's ruling on the motion in limine as events developed by attempting to offer the exhibits into evidence at trial. Instead, at the close of her case, she attempted to proffer a number of exhibits including 18, 29 and 37. With regard to testimony, she has failed to direct this Court to any attempt to introduce at trial evidence related to Friel's sexual orientation. This Court will not comb nearly 700 pages of trial transcript in an effort to make an argument that Giannini-Baur has not made. As we have repeatedly held, "[i]f an argument exists that can support this assignment of error, it is not this court's duty to root it out." *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8.

“[A] motion in limine does not preserve the record on appeal[;] *** [a]n appellate court need not review the propriety of such an order unless the claimed error is preserved by an objection *** when the issue is actually reached *** at trial. The failure to timely advise a trial court of possible error, by objection or otherwise, results in a [forfeiture] of the issue for purposes of appeal.” (Internal citations and quotations omitted.) *State v. Kleinfeld*, 9th Dist. No. 24736, 2010-Ohio-1372, at ¶8, quoting *State v. Gray*, 9th Dist. No. 08CA0057, 2009-Ohio-3165, at ¶7.

{¶33} “By forfeiting the issue for appeal, [Giannini-Baur] has confined our analysis to an assertion of plain error.” *Gray* at ¶7, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23.

“In applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings.” *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121.

{¶34} This case does not present exceptional circumstances justifying the application of plain error. Giannini-Baur’s third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

“THE TRIAL COURT ERRED BY GRANTING [SCHWAB AND BAGDON’S] MOTION FOR DIRECTED VERDICT AS TO [GIANNINI-BAUR’S] CLAIM FOR PUNITIVE DAMAGES.”

{¶35} In her fourth assignment of error, Giannini-Baur contends that the trial court erred by granting Schwab and Bagdon’s motion for a directed verdict with regard to her claim for punitive damages and attorney’s fees. We do not agree.

{¶36} This Court need not determine whether the trial court erred in directing a verdict against Giannini-Baur with regard to punitive damages and attorney’s fees. Civ.R. 61 directs courts to “disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” On the lone claim submitted to the jury, it returned a verdict in favor of Schwab and Bagdon. Accordingly, it did not award Giannini-Baur compensatory damages. Punitive damages cannot exist independently of compensatory damages. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, at ¶13. In light of the verdict, the failure to submit the possibility of punitive damages and attorney’s fees to the jury was harmless error. *Burwell v. American Edwards Labs.* (1989), 62 Ohio App.3d 73, 78; Civ.R. 61. Giannini-Baur’s fourth assignment of error is overruled.

III.

{¶37} Giannini-Baur's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



CARLA MOORE
FOR THE COURT

DICKINSON, P. J.
CONCURS, SAYING:

{¶38} I concur in the majority's judgment and in all of its opinion except its discussion of Ms. Giannini-Baur's third assignment of error. As I explained in *State v. Echard*, 9th Dist. No. 24643, 2009-Ohio-6616 (Dickinson, J., dissenting), there are

different types of motions in limine. A trial court's ruling on a "prophylactic" or "preclusionary" motion in limine is not reviewable on appeal. *Id.* at ¶19. A trial court's ruling on a "definitive" or "exclusionary" motion in limine, on the other hand, is reviewable on appeal. *Id.* at ¶31.

{¶39} By their motion in limine, Schwab and Mr. Bagdon sought a definitive ruling that evidence regarding Mr. Friel was not admissible at trial: "[Defendants] request an Order excluding all testimony, evidence and exhibits regarding Bill Friel's sexual orientation, alleged derogatory comments about Friel's sexual orientation, his issues involving a former manager, his performance issues on the PCRA team, his alleged problems with Jason Jordano, allegations by Plaintiff that Kevin Bagdon used slurs and/or discriminated against or harassed Friel based on his sexual orientation, allegations that Friel was mistreated or retaliated against, Plaintiff's allegation that Bagdon said he would assist Plaintiff in getting part-time employment if she assisted in getting Friel terminated, and reference to complaints made by Plaintiff regarding any of the issues involving Friel, and Exhibits 8, 11, 14-17, 37, 39, 46-53, 59-65, 67, 71, 72, 74-83, 87, 90-95, 97-101, as well as those portions of Exhibits 18, 28, 29, 85, [and] 89 that reference Bill Friel." The bases for defendants' motion were that the listed evidence was not relevant and, to the extent it was relevant, "its probative value [was] substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Ohio Rule of Evidence 403(A).

{¶40} In ruling on Schwab and Mr. Bagdon's motion at the outset of trial, the court initially appeared to be treating it as a "prophylactic" or "preclusionary" motion in

limine: "We might have to deal with it just as we go through the trial. I mean, statements by the defendant of the nature that -- that we know occurred are highly prejudicial, unfairly prejudicial. . . . But there has to be good reason to get into that and you're going to have to establish this to get into that." "This is so prejudicial that if we get into it at all we're going to have to severely limit it. I mean, I'm not going to have all the colloquial names for someone who is homosexual come in, statements by the defendant. You can -- if you can introduce evidence to establish that she was drawn into -- into a scheme to get rid of this individual because of pregnancy discrimination, then you can go that far and introduce evidence that your client was enlisted in trying to get rid of an employee." As the court's discussion with the parties' lawyers continued, however, it became convinced that the evidence in question could not be introduced under any circumstances: "Well, I don't think that evidence of her relationship with this individual and the company with respect to this individual advance your discrimination claim and I just don't find it probative enough to overcome the prejudicial [effect], so I'm going to exclude any reference to the whole episode about -- that you're alleging, that the company tried to enlist her in -- tried to get rid of this individual."

{¶41} In view of the court's ultimate ruling, I would conclude that it granted a "definitive" or "exclusionary" motion in limine. Accordingly, I would review the merits of Ms. Giannini-Baur's third assignment of error.

{¶42} Appellate courts write too broadly when they say, as the majority has in paragraph 30, that "[a] decision to admit or exclude evidence will be upheld absent an abuse of discretion." It so happens, however, that abuse of discretion is the applicable

standard of review when a trial court has excluded evidence because its probative value is substantially outweighed by the danger of unfair prejudice. I would overrule Ms. Giannini-Baur's third assignment of error on its merits because the trial court exercised proper discretion in excluding the evidence regarding Mr. Friel.

CARR, J.

CONCURS IN JUDGMENT ONLY, SAYING:

{¶43} Although I believe that the employer's conduct in this case was reprehensible, I agree with the result. Ms. Giannini-Baur failed to meet her reciprocal burden of presenting evidence to establish her claim of retaliation. I am concerned, however, regarding the majority's analysis in regard to the first assignment of error.

{¶44} The majority links adverse employment actions relevant to a retaliation claim to the issue of the severity and pervasiveness of the hostile working environment relevant to a claim of constructive discharge. The overlapping of the two claims in the analysis is understandable given the inartful drafting of the second count. Although referring to her claim as one for retaliation, Ms. Giannini-Baur alleged in that count that she was constructively discharged because of the employer's retaliation against her. The two claims, however, are distinct and require an analysis independent of one another. Although she purported to allege a statutory claim for retaliation, the plaintiff only generically raised that issue. Under the circumstances of this case, the majority analyzes the second count as the plaintiff alleged it. Unfortunately, her confusion of distinct claims results in an analysis outside the norm for a claim of constructive discharge.

APPEARANCES:

KATHERINE C. HART SMITH, and LAUREN HART SMITH, Attorneys at Law, for Appellant.

THOMAS R. SIMMONS, BENJAMIN C. SASSE, and MARY H. STILES, Attorneys at Law, for Appellees.

DANIEL M. MORRIGAN

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

NOV-5 PM 3:04

SUMMIT COUNTY
COURT CLERK
CHRISTIAN CLANNON-BAUR

CASE NO.: CV2008-10-7280

Plaintiff,

JUDGE PAUL J. GALLAGHER

vs.

SCHWAB RETIREMENT PLAN
SERVICES, INC., et al.,

JUDGMENT ENTRY

Defendants.

This matter is before the Court upon Defendants' Motion for Summary Judgment. Plaintiff has responded in opposition.

LAW AND ANALYSIS

The summary judgment standard questions whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Price v. Matco Tools*, 9th Dist. App. No. 23583, 2007-Ohio-5116, at ¶23, citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829, 586 N.E.2d 1121. "In applying this standard, evidence is construed in favor of the nonmoving party, and summary judgment is appropriate if reasonable minds could only conclude that judgment should be entered in favor of the movant nonetheless." *Id.* citing *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686-87, 1995-Ohio-286, 653 N.E.2d 1196.

"The moving party 'bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.'" *Price v. Matco Tools*, 2007-Ohio-5116, ¶24, citing *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164. "The nonmoving party then has a reciprocal burden to set forth specific facts, by affidavit or as otherwise provided by Civ. R. 56(E) which demonstrate that there is a genuine issue for trial." *Id.* citing *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, at ¶10, 850 N.E.2d 47.

“A disputed fact is material if it is an essential element of the claim as determined by the applicable substantive law – one which might affect the outcome of the litigation.” *Price v. Matco Tools*, 2007-Ohio-5116, ¶25, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 106 S.Ct. 2505; *Burkes v. Stidham* (1995), 107 Ohio App.3d 363, 371, 668 N.E.2d 982. “A complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* “As a result a moving party is entitled to judgment as a matter of law where the nonmoving party failed to come forth with evidence of specific facts on an essential element of the case with respect to which they have the burden of proof.” *Id.* citing *Modzelewski v. Yellow Freight Systems, Inc.*, 151 Ohio App.3d 666, 2003-Ohio-827, at ¶11, 785 N.E.2d 501.

COUNT I: Hostile Work Environment

Count I of the complaint alleges that sex and / or pregnancy-based harassment created a hostile work environment at Schwab and lead to Plaintiff’s constructive discharge from employment.

R.C. §4112.02(A) prohibits discrimination because of sex with respect to hire, tenure, terms, conditions, or privileges of employment or any matter directly or indirectly related to employment. “Under Ohio statute and administrative regulation, pregnancy discrimination is a form of sexual discrimination.” *Cechowski v. The Goodwill Industries of Akron* (May 14, 1997), 9th Dist. App. No. 17944, 1997 Ohio App. LEXIS 2032; R.C. §4112.01(B).

Where the terms of the statutes are consistent Ohio courts apply federal case law interpreting Title VII of the Civil Rights Act of 1964 to claims arising under R.C Chapter 4112. *Price v. Matco Tools*, 2007-Ohio-5116, ¶29 citing *Genaro v. Cent. Transport, Inc.* (1999), 84 Ohio St.3d 293, 298, 1999 Ohio 353, 703 N.E.2d 782.

“A plaintiff may establish a violation [] by proving that []discrimination based on sex created a hostile or abusive work environment.” *Williams v. General Motors Corp.* (C.A.6 1999), 187 F.3d 553, 560; 42 U.S.C. 2000e-2(A)(1) citing *see Meritor Savings Bank v. Vinson* (1986), 477 U.S. 57, 66, 106 S.Ct. 2399; *Black v. Zaring Homes, Inc.* (C.A. 6 1997), 104 F.3d 822, 825. “Discrimination in this form occurs ‘when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’” *Id.* (citations omitted).

“In order to support a claim for hostile environment [sex / pregnancy-based] harassment, a party must prove the following:

(1) that the harassment was unwelcome; (2) that the harassment was based on [sex or pregnancy]; (3) that the harassing conduct was sufficiently severe or pervasive to affect the ‘terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment,’ and; (4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action.”

White v. Bay Mechanical & Electrical Corp., 9th Dist. App. No. 06CA008930, 2007-Ohio-1752, at ¶8, citing *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 176-77, 2000-Ohio-128, 729 N.E.2d 726.

Plaintiff worked for Schwab for several years and had received favorable performance reviews prior to January 2007. In early 2007, Plaintiff learned she was pregnant and she told her supervisor, Kevin Bagdon. Bagdon “reacted negatively” to the news of Plaintiff’s pregnancy; he was “a little short in his tone” and acted “a little shocked.” But, Bagdon did host a baby shower for Plaintiff.

During Plaintiff’s pregnancy Bagdon was “short,” less friendly, and he generally ignored Plaintiff, where before he had commented that she was his “right-hand.” Upon discussing maternity leave options, Bagdon allegedly lied to Plaintiff about the non-availability of combining sabbatical leave with maternity leave.

Plaintiff went on maternity leave at the end of July 2007. While Plaintiff was on maternity leave, Bagdon never returned her phone calls. But, Bagdon did send Plaintiff a congratulatory e-mail after the birth of her daughter.

Plaintiff returned to work from maternity leave in November 2007. Upon her return, her cubicle was occupied by another employee, Friel, and she did not have a desk nor computer to use. When Plaintiff was provided with another cubicle, she was isolated from the rest of her coworkers. Also, Bagdon began scrutinizing the hours Plaintiff worked, he did not assist her with re-acclimating to her job, did not provide assistance with her workload, and did not respond to Plaintiff’s e-mails when she asked for assistance from her other co-workers. Further, Bagdon did not go over Plaintiff’s year-end review with her, although he did so with her other co-workers.

Also during this period, Bagdon was allegedly openly hostile with Plaintiff's co-worker, Friel, reportedly because Friel is a homosexual. Plaintiff states Bagdon began pressuring her into assisting him with getting Friel fired. Plaintiff had previously requested part-time work hours and Bagdon told Plaintiff that if she could provide anything to get Friel fired he would let her work part-time. Plaintiff states she felt if she didn't participate in the harassment of Friel her own job was in jeopardy.

Schwab subsequently investigated Bagdon's mistreatment of Friel and during that investigation Plaintiff divulged Bagdon's comments to the Investigator and expressed that she was afraid she would lose her job if she volunteered additional information. Bagdon was ultimately vindicated from the allegations of harassment against Friel.

Plaintiff states after the investigation concluded Bagdon exhibited increased hostility towards Friel and he ignored Plaintiff with respect to workplace issues and performance of her job duties. Bagdon also reportedly instructed the rest of her co-workers to do the same. Plaintiff was no longer included in PCRA team meetings. Plaintiff's performance went from an exceptional rating to mediocre. Finally, Plaintiff was not selected to be on a special project and cross-trained as she was told she would be prior to her pregnancy leave; instead, Schwab chose a male worker for the project.

In April 2008 Plaintiff requested to be transferred to a part-time position and complained to Schwab Human Resources about Bagdon's treatment of Friel. The Human Resources Director, Mark Craig ("Craig"), told Plaintiff that nothing was going to happen to Bagdon and that, if he had time, he'd look into her complaint. Shortly after she complained to Craig a co-worker made the statement, "there's a rat on our team," and when Plaintiff learned this she went back to Craig and asked if she could be immediately moved to another team. Craig reportedly told Plaintiff that she would not get "special treatment" and if there was an open position she could apply. Plaintiff interviewed with another department but there were no jobs available.

Plaintiff states after she complained to Human Resources the harassing conduct escalated. Plaintiff worked for a few more weeks and then submitted her resignation on April 24, 2008. Plaintiff initially drafted an e-mail which indicated she was resigning because reduced hours or a part-time position was not available. However, the e-mail she sent to

Human Resources announcing her resignation expressed that she was resigning due to a hostile work environment.

The Vice President of Human Resources received Plaintiff's resignation, told her she was too valuable an employee to lose, and put her on administrative leave while he investigated her complaints. Plaintiff subsequently received a letter from Human Resources advising there was no violation of company policy and that she was welcome to return to her former position under Bagdon's supervision. Plaintiff did not return to her position at Schwab.

For purposes of summary judgment, the dispute concerns whether the alleged harassment was based on sex and / or pregnancy, and whether it was severe or pervasive enough to affect Plaintiff's employment with Schwab.

The alleged discriminatory conduct began after Plaintiff announced her pregnancy and continued after she returned from maternity leave. "To establish that the harm was based on sex [or pregnancy], Plaintiff 'must show that but for the fact of her sex [or pregnancy] she would not have been the object of harassment.'" *Williams v. General Motors Corp.*, 187 F.3d at 565, quoting *Henson v. City of Dundee* (C.A. 11 1982), 682 F.2d 897, 904. "[H]arassing behavior that is not sexually explicit but is directed at women and motivated by discriminatory animus against women satisfies the "based on sex" requirement." *Id.* (citations omitted).

The temporal evidence indicates a pregnancy-based animus. The totality of the circumstances demands that the work environment be viewed as a whole – based upon such a review, this Court finds a genuine issue of material fact as to whether the conduct involved was based on the fact of Plaintiff's pregnancy.

Next, "[a] hostile work environment occurs when the workplace is * * * permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *White v. Bay Mechanical & Electrical Corp.*, 2007-Ohio-1752 at ¶9 citing *Jarvis v. The Gertenslager Co.*, 9th Dist. App. Nos. 02CA00047, 02CA00048, 2003-Ohio-3165, at ¶39. "Factors that must be considered in determining whether a workplace is a [] hostile environment include 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Id.* citing *Harris v. Forklift Systems, Inc.* (1993), 510 U.S. 17, 23, 114 S.Ct. 367. "In order to determine whether the harassing conduct was 'severe or

pervasive' enough to affect the conditions of plaintiff's employment, the trier of fact, or the reviewing court, must view the work environment as a whole and consider the totality of all the facts and surrounding circumstances, including the cumulative effect of all episodes of sexual or other abusive treatment." *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 2000-Ohio-128, 729 N.E.2d 726, paragraph five of the syllabus.

Again, viewing the evidence most strongly in favor of Plaintiff, and considering the totality of the circumstances presented, this Court finds a genuine issue of material fact as to whether the harassment alleged was severe or pervasive enough to have affected the terms and conditions of Plaintiff's employment.

This Court finds Plaintiff's evidence sets forth genuine issues of material fact for trial on Count I of her Complaint. Thus, summary judgment is DENIED for Count I.

COUNT II: Retaliation

Count II of the Complaint alleges that, subsequent to Plaintiff's complaint to Human Resources about sex / pregnancy and sexual orientation harassment, Plaintiff was subjected to a retaliatory hostile work environment.

In order to establish a prima facie case of retaliation, a plaintiff must demonstrate (1) that she engaged in a protected activity; (2) that the employer knew of her exercise of protected rights; (3) that she was the subject of adverse employment action; and (4) that there is a causal link between the protected activity and the adverse employment action. *Price v. Matco Tools*, 2007-Ohio-5116, ¶38, citing *Balmer v. HCA, Inc.* (C.A. 6 2005), 423 F.3d 606, 614.

Plaintiff states she was engaged in a protected activity when she complained to Human Resources about sex / pregnancy-based harassment. Plaintiff further alleges that she had a reasonable belief that she was engaged in protected activity when she complained about the sexual orientation harassment of her co-worker, Friel.

Plaintiff was engaged in a protected activity when she complained about sex / pregnancy discrimination and harassment. However, homosexuality / sexual orientation is not a prohibited basis for discriminatory acts under R.C. Chapter 4112. *Greenwood v. Taft, Stettinius & Hollister* (1995), 105 Ohio App.3d 295, 663 N.E.2d 1030. Thus, Plaintiff was not engaged in a protected activity when she voiced her complaints about Bagdon's treatment of her co-worker Friel.

Next, adverse employment action is any action that is harmful to the point which might well dissuade a reasonable worker from making or supporting a charge of discrimination. *Burlington Northern & Santa Fe Ry. Co. v. White* (2006), 548 U.S. 53, 68, 126 S.Ct. 2405. "In considering whether an employment action was materially adverse, the court may consider the following factors: whether employment was terminated, whether the employee was demoted, received 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.'" *Eakin v. Lakeland Glass Co.*, 9th Dist. App. No. 04CA008492, 2005-Ohio-266 at ¶19 quoting *Crady v. Liberty Natl. Bank & Trust Co.* (C.A. 7, 1993), 993 F.2d 132, 136. "Changes in employment conditions that result merely in inconvenience or an alteration of job responsibilities are not disruptive enough to constitute adverse employment action." *Id.* citing *Kocsis v. Muti-Care Mgmt., Inc.* (C.A. 6 1997), 97 F.3d 876, 886.

The evidence is devoid of facts which constitute adverse employment action. Plaintiff alleges constructive discharge.

"The test for determining whether an employee was constructively discharged is whether the employer's actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign." *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 1996-Ohio-265, 664 N.E.2d 1272, paragraph four of the syllabus.

The evidence does not suggest intolerable conditions which would have caused a reasonable person to resign under the same circumstances. Perceived slights such as not being invited to meetings or not getting phone calls or e-mails returned simply are not severe enough to constitute harassment. *Bryant v. Martinez* (C.A. 6 2002), 46 Fed. Appx. 293, 296 citing *see Bowman v. Shawnee State Univ.* (C.A. 6 2000), 220 F.3d 456, 462. "Complaints about the manner in which the employer supervised or criticized an employee's job performance and assigned job duties are normally insufficient to establish a constructive discharge." *Fernandez v. City of Pataskala* (S.D. Ohio 2006), Case No.: 2:05-cv-75, 2006 U.S. Dist. LEXIS 82136, at *56 (citations omitted). Also, "[d]issatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign." *Id.* at *57, quoting *Carter v. Ball* (C.A. 4 1994), 33 F.3d 450, 459.

This Court finds that Plaintiff was not constructively discharged from Schwab and she is unable to satisfy the element of adverse employment action for Count II of her Complaint. It is therefore ordered, adjudged, and decreed that Defendants are entitled to judgment as a matter of law on Plaintiff's Count II.

COUNT III: Public Policy

Count III of the Complaint alleges that Plaintiff was constructively discharged in violation of public policy.

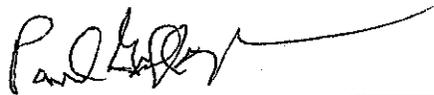
As discussed above, Plaintiff's evidence does not demonstrate that she was constructively discharged from her employment with Schwab.

It is therefore ordered, adjudged, and decreed that Defendants are entitled to judgment as a matter of law on Plaintiff's Count III.

CONCLUSION

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART. Defendants are entitled to judgment as a matter of law on Plaintiff's Counts II and III.

It is so Ordered.



JUDGE PAUL J. GALLAGHER

cc: Attorney Katherine C. Hart Smith
Attorney Benjamin C. Sasse