[Cite as *Tod v. Cincinnati State Technical & Community College*, 2011-Ohio-2743.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bethany Tod,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
	:	No. 10AP-656
v.		(C.C. No. 2006-07732)
	:	
Cincinnati State Technical and Community College,	:	(REGULAR CALENDAR)
Defendant-Appellant/ Cross-Appellee.	:	
	:	

D E C I S I O N

Rendered on June 7, 2011

Barron Peck Bennie & Schlemmer, *LPA*, and *Peter A. Burr*, for appellee.

Michael DeWine, Attorney General, *Eric A. Walker*, and *Jennifer A. Adair*, for appellant.

APPEAL from the Court of Claims of Ohio.

FRENCH, J.

{¶1} Defendant-appellant, Cincinnati State Technical and Community College, appeals the judgment of the Court of Claims of Ohio in favor of plaintiff-appellee, Bethany Tod, on her claim for hostile work environment sexual harassment. Appellee has filed a

cross-appeal from the trial court's decision denying her claim for unpaid overtime compensation. For the following reasons, we affirm.

{¶2} On December 13, 2006, appellee filed a five-count complaint against appellant setting forth claims for unpaid overtime compensation, unlawful Uniform Services Employment and Reemployment Rights Act ("USERRA") retaliation, sexual harassment based upon a hostile work environment, Family and Medical Leave Act ("FMLA") violations, and promissory estoppel. Appellant filed a motion for partial summary judgment on the claims for FMLA violations, unpaid overtime compensation, and promissory estoppel. Appellee dismissed her FMLA claim in her response to the motion for summary judgment. The trial court granted summary judgment to appellant on the promissory estoppel claim, but denied the motion for summary judgment on the unpaid overtime compensation claim.

{¶3} The trial court bifurcated the issues of liability and damages on the sexual harassment, USERRA retaliation, and unpaid overtime compensation claims. The liability portion of the trial commenced on June 30, 2008. By decision and separate judgment entry filed June 12, 2009, the trial court concluded the following: (1) appellee proved her case for sexual harassment based upon a hostile work environment; (2) appellee failed to prove she was entitled to unpaid overtime compensation; and (3) the court lacked subject-matter jurisdiction to entertain the merits of the USERRA retaliation claim. Following a December 2009 trial on damages attributable to the sexual harassment claim, the trial court, on June 9, 2010, filed a decision awarding appellee $105,000. The trial court journalized its decision by entry filed the same day.

{¶4} Appellant asserts two assignments of error on appeal:

> [I.] The trial court erred as a matter of law by holding that Appellee proved her claim for sexual harassment based upon a hostile work environment.
>
> [II.] The trial court's findings that Appellee proved her case for liability and damages are against the manifest weight of the evidence.

{¶5} The facts giving rise to this appeal are as follows. On March 21, 2005, appellee began working as a business manager for appellant's Workforce Development Center ("WDC"). The WDC provided training to businesses in the greater Cincinnati area. Appellee was responsible for marketing training to potential clients and coordinating the programs she sold. Sherry Marshall served as Executive Dean of the WDC and supervised several employees, including appellee and three other business managers, Jane Dunigan, Brian Canteel, and Larry Cherveny. During appellee's tenure, Dr. Ronald Wright was appellant's President, and Eugene Breyer, Jr. served as its Director of Human Resources.

{¶6} Appellee testified that soon after she began her employment with appellant, Marshall began making what appellee considered inappropriate comments to her. According to appellee, Marshall often called her a "fucking bitch." (Tr. Vol. I, 58.) Marshall also referred repeatedly to the size of appellee's breasts. Appellee testified that on one occasion, Marshall asked her if she "was a milk drinker growing up, because cows have steroids and hormones now, and apparently girls have large breasts because of that." Marshall also commented that appellee was a "cute young thing" and had a "Barbie Doll figure." Appellee further testified that Marshall commented more than once that "if she had [appellee's] figure and her brains she could rule the world." (Tr. Vol. I, 61.) Appellee also testified that Marshall made "numerous comments" that because appellee

was such a "cute young thing" she should be able to get her clients to pay for her business meals. According to appellee, Marshall once rejected appellee's meal reimbursement submission, stating that because appellee was a "cute young thing," she should have been able to entice her dining companion to pay for her lunch. (Tr. Vol. I, 62.)

{¶7} Appellee testified that Marshall made inappropriate comments so frequently that appellee began noting the occurrences in her personal calendar. At trial, appellee produced her personal calendar, which contains appellee's handwritten entries regarding Marshall's remarks, and testified about each entry. Appellee's June 15, 2005 entry indicates that Marshall stated that she "always wanted large breasts like [appellee's]." On October 26, 2005, appellee noted the word "boobs," indicating that Marshall had referred to appellee's chest size. On November 29, 2005, appellee noted the phrase "cute young thing," indicating that Marshall told her she was "a cute young thing and should have no trouble having [her] lunches paid for." On December 14, 2005, appellee noted "Barbie Doll," referencing Marshall's comments about appellee's "Barbie Doll figure." On February 2, 2006, appellee noted that Marshall had commented "I wish I had your [B]arbie [D]oll figure." On March 16, 2006, appellee noted that Marshall stated that she "likes my figure." On April 20, 2006, appellee noted that Marshall commented on her chest size. On May 12, 2006, appellee noted that Marshall told her she was "stupid" and a "bitch." On May 18, 2006, appellee noted that Marshall commented that appellee was a "cute young thing" and that "if she had my figure and her brains she could conquer the world." On May 25, 2006, appellee noted that Marshall commented during a group business managers meeting that appellee "must be * * * pregnant" because she was

nauseated that morning. (Tr. Vol. I, 105-110, Plaintiff's Exhibit 5.) Appellee testified that all of Marshall's comments offended her.

{¶8} Appellee further testified that, during an April 24, 2006 meeting of the business managers, appellee inquired about the need for one of Marshall's incentive awards. According to appellee, Marshall became "very, very angry," clenched her fists, pushed herself away from the table "pretty aggressively," and said that she needed to take a break from the meeting before she "whammed" appellee. (Tr. Vol. I, 52.) Appellee testified that she was "[s]cared to death" that Marshall might physically assault her. (Tr. Vol. I, 66.)

{¶9} Approximately two weeks after the April 24, 2006 incident, appellee met with Breyer to report Marshall's conduct. During this meeting, appellee shared her "concerns about feeling physically threatened as well as some of the other things that were going on." (Tr. Vol. I, 75.) According to appellee, she "expressed concern that [Marshall] referred constantly to [her] body parts, to being a cute young thing, to having a Barbie Doll figure, and the foul language" Marshall directed at her. (Tr. Vol. I, 79.)

{¶10} Appellee testified that she did not notice any change in Marshall's conduct or language following the meeting with Breyer. According to appellee, Marshall continued to use foul language and refer inappropriately to appellee's body. Appellee sent Breyer several emails in May 2006 documenting that the "problems were still ongoing." (Tr. Vol. I, 80.) In an email dated May 19, 2006, appellee advised Breyer that "[t]he environment is becoming increasingly hostile and threatening, and comments have been made about the non-renewal of specific individual's contracts, mine included." Appellee further stated: "I believe this to be a result of my conversations with you and Dean Marshall's suspicion

that something is going on." Appellee further advised Breyer that Marshall's restrictions on appellee's contacts with other employees and clients, her refusal to reimburse expenses appellee incurred in the course of doing business, and her repeated comments that appellee was " 'a cute young thing who should have no trouble getting [her] lunches paid for by clients,' " prevented appellee from performing her job to the best of her ability. Appellee asserted that she believed Marshall's actions were "a continuing overt attempt by Dean Marshall for [her] to either submit without question to [Marshall's] inappropriate and very unprofessional behavior and actions which have repeatedly crossed the ethical, moral, and legal boundaries or to quit the College." (Plaintiff's Exhibit 22.)

{¶11} Appellee sent Breyer another email on May 19, 2006 "[t]o let him know that at this time the problems were indeed continuing and that additional things had occurred since he and [appellee] had last spoken." (Tr. Vol. I, 81.) Appellee advised Breyer that "within the past week" Marshall called her a "bitch," told her she "should be able to have [her] lunches with business clients and prospect[s] paid for by the client/prospect for being 'a cute young thing,' " and "[s]ubjected [her] to a constant and overt barrage of sexual comments regarding [her] appearance and specific anatomy." In the email, appellee sought guidance from Breyer as to how to respond to "the continual threats, harassments, overt and aggressive sexual comments" and expressed concern about the timing of her performance evaluation scheduled for the next week. (Plaintiff's Exhibit 24.)

{¶12} Appellee emailed Breyer on July 7 and 18, 2006, advising him that "the hostilities and the problems were continuing." (Tr. Vol. I, 83-84.) Appellee testified that "[t]he hostilities" to which she referred in the emails included Marshall's inappropriate language. (Plaintiff's Exhibit 32.) In an August 21, 2006 email, appellee advised Breyer

that Marshall "continues to promote a sexually hostile work environment, again using foul language at our Business Manager meeting on August 16." (Plaintiff's Exhibit 34.) Appellee testified that Breyer did not respond to any of her emails.

{¶13} Appellee testified that she and the other business managers met with Breyer and Wright on September 1, 2006. According to appellee, Wright acknowledged that he had received numerous complaints about Marshall. He averred, however, that he would not entertain any future complaints. Wright told the business managers that he could terminate them and reorganize the division if he so chose. He admonished the staff that they should "just work together, get it done and go out and make money." Breyer similarly stated that "Dean Marshall was in charge and that she had the right to run things and do things the way she chose to and * * * [the staff was] not to complain further." (Tr. Vol. I, 83.)

{¶14} Appellee broke her leg in October 2006 and worked from home until December 2006, when she was granted a leave of absence. According to appellee, she requested the leave of absence due both to her broken leg and anxiety over the situation with Marshall.

{¶15} In January 2007, appellee accepted a sales position with Citigroup, but intended to continue working for appellant as well. Appellee did not, however, return to work following the expiration of her leave time. As a result, appellant notified appellee by letter dated March 30, 2007 that it considered her to have resigned from her position because she had not returned to work.

{¶16} Brian Canteel generally corroborated appellee's testimony regarding Marshall's conduct toward appellee. Specifically, Canteel testified that Marshall "[f]airly

frequently" used foul language when speaking to appellee. (Tr. Vol. I, 160.) Canteel further testified that Marshall made comments about appellee's "chest, her behind, her Barbie Doll figure," and she suggested that appellee "could get free lunches from clients if she just simply projected more of that type of image." (Tr. Vol. I, 161.) Canteel stated that Marshall never commented on his appearance or body parts.

{¶17} Canteel also corroborated appellee's testimony regarding the April 24, 2006 business managers' meeting. According to Canteel, Marshall became "extremely aggravated" and "verbally abusive" with appellee, told her to "shut up or I'm going to wham you," and stormed out of the meeting, nearly running into appellee on the way out. Canteel said that appellee appeared to be "[d]umbstruck" by Marshall's behavior. (Tr. Vol. I, 162.)

{¶18} Canteel also corroborated appellee's testimony regarding the September 1, 2006 meeting with Wright and Breyer. Canteel agreed that both Wright and Breyer said that they would not entertain further complaints about Marshall.

{¶19} Jane Dunigan confirmed the testimony of both appellee and Canteel. According to Dunigan, Marshall used foul language directed at appellee, calling her a "bitch" on at least one occasion. (Tr. Vol. I, 191.) Dunigan further testified that she overheard Marshall tell appellee that if she (Marshall) had appellee's "beautiful long blonde hair" and "great big breasts" she "could rule the world." (Tr. Vol. I, 197.) Dunigan also testified that during a meeting in which appellee asked about paying for client meals, Marshall responded that, "with your Barbie Doll figure, you shouldn't have to pay for any meals with clients." (Tr. Vol. I, 198.)

{¶20} Regarding the April 24, 2006 business managers' meeting, Dunigan said that Marshall became angry with appellee, walked toward her, and told her that if she (Marshall) did not leave the room she was going to "wham" appellee. Dunigan testified that she thought Marshall was going to physically assault appellee, and that appellee appeared "ashen" and "in shock" following the incident. (Tr. Vol. I, 200.)

{¶21} Dunigan also testified that Breyer stated at the September 1, 2006 meeting that neither he nor Wright wanted to hear any further complaints about Marshall.

{¶22} Larry Cherveny testified on behalf of appellant. Cherveny said that he never heard Marshall make inappropriate or sexual remarks about appellee's appearance, never heard her call appellee a "bitch," never saw Marshall touch appellee in a sexual or inappropriate manner, and never saw Marshall act in a physically aggressive manner toward appellee. Cherveny said that he once heard Marshall call appellee "a cute young thing," but that appellee reacted to the comment with "sort of a smile" and did not appear to be offended. (Tr. Vol. II, 164.)

{¶23} Breyer also testified on appellant's behalf. According to Breyer, on April 28, 2006, Canteel presented him with a list of complaints about Marshall's conduct, including her use of foul language and aggressive management tactics. Canteel suggested that Breyer meet with appellee and Dunigan, as both would confirm Canteel's complaints. Upon Canteel's advice, Breyer met with appellee on May 5, 2006. According to Breyer, appellee recounted Marshall's behavior at the April 24, 2006 meeting and reported that Marshall frequently used foul language in the workplace.

{¶24} Breyer met with Marshall on May 25, 2006, to discuss the issues raised by Canteel and appellee in their respective meetings and by appellee in her May 2006

emails to Breyer. Breyer admonished Marshall to cease utilizing foul language and intimidation tactics in the workplace. Breyer also discussed Marshall's allegedly inappropriate sexual references to appellee's body. According to Breyer, Marshall denied making improper sexual references about appellee. She agreed, however, to curtail her use of foul and aggressive language.

{¶25} Breyer acknowledged that he received several emails from appellee and others in the WDC during the summer of 2006 regarding complaints about Marshall. He conceded that due to the sheer volume of the emails, he oftentimes did not read them, and accordingly, did not respond to them or otherwise take any action with regard to them. Breyer noted that appellee's July and August emails did not contain specific complaints about Marshall calling appellee a "bitch" or referring to her breast size.

{¶26} Breyer acknowledged that he met with appellee and the other business managers on September 1, 2006, to discuss Marshall's behavior. He denied, however, that he cautioned the staff to stop complaining to him about Marshall.

{¶27} Breyer testified that he again met with Marshall on November 1, 2006. Breyer advised Marshall that he had received a letter from appellee's attorney in mid-October 2006, outlining numerous allegations against Marshall, including complaints about Marshall's alleged sexual harassment of appellee. Breyer instructed Marshall to provide him a written response to the allegations. In her written response, Marshall denied all the allegations asserted by appellee. Following an investigation into the matters raised in appellee's letter, Breyer formally reprimanded Marshall, in writing, on November 28, 2006. In the reprimand, Breyer noted that many of appellee's allegations

had been resolved at the May 25, 2006 meeting, at which appellant was counseled that foul language and sexual references were not appropriate in the workplace.

{¶28} Marshall testified on appellant's behalf by video deposition. Marshall testified that she never called appellee a "bitch," nor did she ever suggest to appellee that she should use her body or looks to obtain business for appellant. (Marshall deposition 77.) Marshall admitted that she once told appellee she looked like a "Barbie doll" because she was wearing a brightly colored sweater and had blonde hair. (Marshall deposition 78.) According to Marshall, appellee did not seem offended by the comment and never complained to her about it. Indeed, Marshall testified that appellee never complained to her about anything Marshall said to her, nor did appellee ever accuse Marshall of sexually harassing her. According to Marshall, she was first apprised of appellee's allegations of sexual harassment during the May 25, 2006 meeting with Breyer.

{¶29} Upon this evidence, the trial court concluded that appellee had established her claim for hostile work environment sexual harassment by a preponderance of the evidence. Appellant's first assignment of error challenges this determination as a matter of law.

{¶30} R.C. 4112.02(A) provides that it is an unlawful discriminatory practice for any employer "because of the * * * sex * * * 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." "R.C. 4112.02(A)'s comprehensive prohibition against employment discrimination has been interpreted to include proscriptions against sexual

harassment." *Malloy v. Cleveland* (Mar. 4, 1999), 8th Dist. No. 73789, citing *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131, 135.

{¶31} Under Ohio law, "[i]n order to establish a claim of hostile-environment sexual harassment, the plaintiff must show (1) that the harassment was unwelcome, (2) that the harassment was based on sex, (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." *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 2000-Ohio-128, paragraph two of the syllabus. The plaintiff must prove each of these elements by a preponderance of the evidence.

{¶32} As appellant disputes the trial court's conclusions on each of the four elements of appellee's hostile work environment sexual harassment claim, we consider each element in turn.

{¶33} Appellant first contends the trial court erred as a matter of law in concluding that appellant proved that the alleged instances of sexual harassment were unwelcome. In *Bell v. Berryman,* 10th Dist. No. 03AP-500, 2004-Ohio-4708, ¶57, this court addressed the "unwelcome" facet of a hostile work environment sexual harassment claim, stating:

> The conduct at issue must be "unwelcome" in that the plaintiff neither solicited it nor invited it and regarded the conduct as undesirable or offensive. See *Meritor Sav. Bank, FSB v. Vinson* (1996), 477 U.S. 57, 68, 106 S.Ct. 2399 * * *. "The proper inquiry is whether [appellant] indicated by [her] conduct that the alleged harassment was unwelcome." *Quick v. Donaldson Co.* (C.A.8, 1996), 90 F.3d 1372, 1378, citing *Meritor,* supra, at 68. * * *

{¶34} "Such cases require the trier of fact to decide whether, considering the record as a whole, the conduct was unwelcome." *Ripley v. Ohio Bur. of Emp. Servs.,* 10th Dist. No. 04AP-313, 2004-Ohio-5577, ¶16, citing *Meritor Sav. Bank, FSB v. Vinson* (1986), 477 U.S. 57, 69, 106 S.Ct. 2399. "Evidence regarding the plaintiff's own conduct is generally admissible, and may, in fact, be relevant to this determination." *Ripley,* citing *Cline v. Electronic Data Sys. Corp.* (Sept. 18, 2000), 4th Dist. No. 99CA14.

{¶35} In concluding that appellee established that Marshall's sexual harassment was unwelcome, the trial court relied upon appellee's testimony that Marshall's conduct offended her and that no evidence suggested that appellee invited or solicited Marshall's actions. The trial court further found that, from May through October 2006, appellee repeatedly informed appellant's administrators of Marshall's offensive conduct and requested corrective action.

{¶36} Appellant challenges the trial court's determination in two respects. Appellant first contends that appellant's failure to report the offending conduct (which appellee alleges to have begun soon after she began her employment in March 2005), until May 2006, militates against a finding that the offending conduct was unwelcome. Appellant maintains that this court should determine as a matter of law that appellee's lengthy delay in reporting Marshall's behavior proved that she did not view Marshall's behavior as unwelcome. In support, appellant cites *Cerett v. Timken Co.*, 5th Dist. No. 2006CA0056, 2006-Ohio-5892, and *Hinkle v. Ohio Dept. of Trans.*, 10th Dist. No. 02AP-742, 2003-Ohio-2478. Both cases are distinguishable. In both *Cerett* and *Hinkle,* the plaintiffs' co-workers committed the alleged sexual harassment. Here, the offending party was appellee's supervisor. Under the circumstances here, appellee's reluctance to

complain about her supervisor does not demonstrate that appellee welcomed Marshall's harassment. Indeed, appellee's hesitation in immediately reporting Marshall's conduct is reasonable and understandable, given that appellee had just begun her employment when the harassment began. Furthermore, the plaintiffs in *Cerett* and *Hinkle* waited three years and 13 years, respectively, to report the offending conduct. Here, appellee reported Marshall's conduct approximately 14 months after it began.

{¶37} Moreover, appellant's argument overlooks the trial court's primary basis for concluding that the sexual harassment was unwelcome, that is, appellee's testimony that Marshall's conduct offended her and the lack of evidence that appellee either invited or solicited it. In *Ripley,* this court determined that the plaintiff failed to establish the unwelcome nature of the alleged harassment was because the evidence proved that the plaintiff kept a file of sexual jokes, freely exchanged jokes and stories of a sexual nature, made her sex life and her physical attributes a subject of general conversation, wore inappropriate clothing, and failed to rebuff the sexual advances of at least one male co-worker. Id. at ¶17. We concluded that the plaintiff's own actions tended to negate her claim that attention and comments from her male co-workers were unwelcome. Id. at ¶18.

{¶38} Appellant's actions in the instant case do not negate her claim that Marshall's comments were unwelcome. Appellant testified that she was offended by Marshall's conduct. She further testified that Marshall's inappropriate comments were so frequent that she began documenting the statements in her personal calendar. Appellee's personal calendar illustrates Marshall's offensive comments beginning in June 2005, shortly after appellant began her employment with appellant, through

May 2006. Appellee's documentation of Marshall's comments bolsters her claim that she regarded the conduct as undesirable or offensive.

{¶39} Furthermore, the record contains no evidence that appellee invited or solicited Marshall's comments. No evidence suggests that appellee ever engaged in sexual banter with Marshall, openly discussed her sex life or physical attributes, or wore inappropriate clothing.

{¶40} Appellant next contends that appellee's vague and unspecified complaints that hostilities continued after her May 5, 2006 meeting with Breyer do not establish unwelcome sexual harassment. Appellant asserts that appellee had to report specific instances of Marshall's conduct in order to prove that she viewed such conduct as unwelcome.

{¶41} Considering the record as a whole, however, we conclude that appellee's post-May 5, 2006 protests that hostilities were continuing sufficiently indicated that Marshall continued to sexually harass appellee and that appellee viewed such conduct as unwelcome. At the May 5, 2006 meeting, appellee apprised Breyer that Marshall repeatedly commented about appellee's physical attributes and called her a "bitch." Since appellee had already reported Marshall's offensive behavior to Breyer, any general statements about continuing hostilities can reasonably be construed to mean that the behavior appellee complained about at the May 5, 2006 meeting was ongoing.

{¶42} We further note that appellee referred specifically to Marshall's offending behavior in her post-May 5, 2006 emails to Breyer. In her first May 19, 2006 email, appellee reported that Marshall repeatedly commented that appellee should be able to get her clients to pay for her meals because she was a "cute young thing." In her second

May 19, 2006 email, appellee reported, among other things, that Marshall had recently called her a "bitch" and had made sexually suggestive comments about her appearance. In her August 21, 2006 email, appellee apprised Breyer that Marshall continued to "promote a sexually hostile work environment." (Plaintiff's Exhibit 34.) Moreover, appellee testified that Marshall continued to use foul language and make inappropriate comments to her after the May 5, 2006 meeting. We agree with the trial court that appellee's consistent reporting of Marshall's ongoing harassment after May 5, 2006 established that appellee viewed that behavior as unwelcome.

{¶43} For all these reasons, we conclude that the trial court did not err as a matter of law in concluding that appellee established that Marshall's conduct was unwelcome.

{¶44} Appellant next contends the trial court erred as a matter of law in concluding that appellant proved that the alleged instances of sexual harassment were based upon sex. We disagree.

{¶45} In *Hampel,* the Supreme Court of Ohio observed, at 178-79:

> Harassment "because of * * * sex" is the *sine qua non* for any sexual harassment case. "But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Oncale [v. Sundowner Offshore Serv., Inc.* (1988),] 523 U.S. [75] at 80, 118 S.Ct. [998] at 1002, * * *. As Professor Larson points out, the term "sexual," as used to modify harassment, "can refer both to sex as the immutable gender characteristic and to sex as describing a range of behaviors associated with libidinal gratification." 3 Larson, Employment Discrimination (2 Ed.2000) 46-34, Section 46.03[4]. Thus, actions that are simply abusive, with no sexual element, can support a claim for sexual harassment if they are directed at an employee because of his or her sex. Simply put, "[h]arassment alleged to be because of sex need not be explicitly sexual in nature." *Carter v. Chrysler Corp.* (C.A.8, 1999), 173 F.3d 693, 701.

{¶46} In concluding that appellee established that Marshall's sexual harassment claim was based on sex, the trial court found that much of the offending conduct was inherently gender-specific. The trial court noted that Marshall's remarks went beyond the merely unprofessional behavior she often exhibited toward other employees of both sexes. The court concluded that because Marshall's harassment of appellee was infused with gender-specific, derogatory remarks that she did not make to other employees, Marshall's harassment of appellee would not have occurred but for her gender.

{¶47} Appellant argues that Marshall's comments, while vulgar and derogatory, were not necessarily directed at appellee because of her gender. Appellee cites *Kriss v. Spring Communications Co.* (C.A.8, 1995), 58 F.3d 1276, for the proposition that the term "bitch" is not gender-specific. In *Kriss,* the plaintiff sued her employer for gender discrimination arising from her employer's failure to transfer her to a new position. The plaintiff alleged that her supervisor's decision not to transfer her was motivated by a discriminatory animus toward women. The district court agreed, concluding that the supervisor contributed to a "male-dominated atmosphere" in the workplace because, among other things, he made certain "evaluative comments" about the physical appearance of women in the office. The "evaluative comments" included calling one of the women in the office a "bitch." The appellate court stated that while the word "bitch" did not indicate a general misogynist attitude, it was a "crude, *gender-specific* vulgarity." Id. at 1281. (Emphasis added.) Contrary to appellant's assertion, the *Kriss* court in fact stated that the term "bitch" was gender-specific.

{¶48} But even if we were to conclude that the term "bitch" is not gender-specific, appellee's sexual harassment claim is not exclusively based upon Marshall's calling her a

"bitch." Marshall made several comments to appellee that can only be construed as being directed at her because of her gender. As noted above, Marshall commented on appellee's physical appearance, including the size of her breasts, told her she resembled a Barbie doll, and suggested that she use her physical attributes in her business dealings. No evidence suggests that Marshall made degrading comments of a sexual nature to appellee's male peers in the workplace, nor is there evidence that she ever commented on the physical appearance or anatomy of appellant's male colleagues. Indeed, appellant testified that she never heard Marshall comment about Canteel's or Cherveny's physical appearance or anatomy. Canteel testified that Marshall never commented on his physical appearance or anatomy. And Cherveny stated that Marshall never made any type of inappropriate sexual remark to him.

{¶49} Finally, we reject appellant's argument that appellee is essentially estopped from claiming that Marshall's sexual harassment was due to appellee's gender because appellee claimed that Marshall also sexually harassed Cherveny. The evidence established that Marshall massaged Cherveny's neck while the two were riding together in a car during a business trip. Cherveny admitted the incident, but explained that Marshall was only trying to aid in relieving the pain he experienced from a muscle spasm. Cherveny expressly stated that he did not find Marshall's behavior to be sexual or inappropriate in any way. Thus, Cherveny's testimony negates any claim by appellee that he was sexually harassed.

{¶50} Because the evidence establishes that Marshall's comments to appellee were gender-specific, and there is no evidence that Marshall made corresponding comments to appellee's male colleagues, we conclude that the trial court did not err as a

matter of law in concluding that appellee established that Marshall's conduct was based upon appellee's sex.

{¶51} Appellant next contends the trial court erred as a matter of law in concluding that appellant proved that the alleged instances of sexual harassment were sufficiently severe and pervasive as to alter the terms and conditions of her employment. We disagree.

{¶52} "To be actionable under Title VII, conduct must be severe or pervasive enough to create both an objectively hostile or abusive work environment–one that a reasonable person would find hostile or abusive–and a subjectively hostile work environment–one that the victim perceived to be hostile or abusive." *Peterson v. Buckeye Steel Casings* (1999), 133 Ohio App.3d 715, 723. In assessing whether the conduct complained of is sufficiently severe or pervasive to constitute a hostile or abusive work environment, courts "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* at paragraph five of the syllabus. The circumstances we must consider 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. at 180, quoting *Harris v. Forklift Sys., Inc.* (1993), 510 U.S. 17, 23, 114 S.Ct. 367, 371.

{¶53} This "totality-of-the-circumstances" standard "precludes the kind of analysis that carves the work environment into distinct harassing incidents to be judged each on its own merits. Instead, it is essential that the work environment be viewed as a whole,

'keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes.' " *Hampel* at 181, quoting *Robinson v. Jacksonville Shipyards, Inc.* (M.D.Fla.1991), 760 F.Supp. 1486, 1524. Accordingly, "the 'severe or pervasive' requirement does not present two mutually exclusive evidentiary choices, but reflects a unitary concept where deficiencies in the strength of one factor may be made up by the strength in the other." *Hampel* at 181.

{¶54} In concluding that appellee established that Marshall's sexual harassment of appellee was severe and pervasive enough to alter the terms and conditions of her employment, the trial court noted that (1) the harassment was ongoing throughout most or all of appellee's employment with appellant, (2) the harassment occurred in the presence of appellee's colleagues, causing her embarrassment and humiliation, and (3) the harassment went so far as to include a physical threat against appellee. The court further noted that appellee's repeated efforts to report Marshall's conduct to appellant's administrators, along with appellee's testimony that Marshall's harassment ultimately caused her to suffer a diagnosed anxiety disorder that was severe enough by late 2006 that she could no longer work, conclusively established that Marshall's harassment impeded appellee's ability to perform her job duties, thus negatively affecting the terms and conditions of her employment.

{¶55} Appellant contends that Marshall's comments to appellee were sporadic and isolated, suggesting that Marshall's conduct occurred too infrequently to be considered pervasive. Appellant notes that appellee recorded in her personal calendar only 13 incidents of offending behavior. However, appellee testified that she would be

"hard pressed" to estimate the number of times Marshall called her a 'bitch." She further testified that Marshall's offending comments occurred so frequently that she began recording "some of the more outstanding" of them in her personal calendar. (Tr. Vol. I, 60.) Appellee's testimony reasonably suggests that Marshall made more than just the 13 offending comments appellee recorded in her personal calendar.

{¶56} With regard to the severity of the harassment, we note that appellee, Canteel, and Dunigan all testified that Marshall commented upon the size of appellee's breasts, referred to her "Barbie doll figure," and suggested to her that she utilize her physical appearance to garner free meals from her clients. We conclude that the recurrent and public nature of Marshall's commentary about appellee's physical appearance, coupled with the suggestion that she utilize her physical appearance to enhance her job performance, establishes that the sexual harassment was severe.

{¶57} Marshall's behavior toward appellee also was, in one instance, physically threatening. Appellee, Canteel, and Dunigan all testified that Marshall became very angry with appellee during a business meeting and asserted that she had to leave the meeting before she "whammed" appellee. Appellee testified that during the incident she was "[s]cared to death" that Marshall would physically assault her. Canteel described the incident as "witnessing a possible assault," and stated that had it been up to him, he would have filed a police report. (Tr. Vol. I, 162-63.) Dunigan testified that she thought Marshall was going to "hit" appellee during the incident. (Tr. Vol. I, 200).

{¶58} With regard to the last *Hampel* factor, the evidence establishes that Marshall's behavior unreasonably interfered with appellee's work performance. Appellee testified that she informed Breyer that Marshall's actions prevented her from performing

her job to the best of her ability, and she believed Marshall was trying to coerce her into either submitting to Marshall's inappropriate behavior or resigning from her position. She further informed Breyer that she was concerned about what effect Marshall's behavior would have on her performance evaluation, and she feared retribution from Marshall as a result of reporting her offensive behavior. Finally, appellee testified that she requested a leave of absence in December 2006, in part due to anxiety over the situation with Marshall.

{¶59} Appellant cites a number of cases in which courts have held that evidence of alleged sexual harassment was insufficient as a matter of law to be severe or pervasive enough to have affected the terms and conditions of employment. We note initially that none of these cases originates from the Supreme Court of Ohio or this judicial district; accordingly, they are not binding on this court. We note further that three of the cases are readily distinguishable because they concern allegations of sexual harassment committed by a co-worker, not a supervisor. See, e.g., *Powers v. Ferro Corp.*, 8th Dist. No. 79383, 2002-Ohio-2612; *DeArment v. Timken Co.,* 5th Dist. No. 2002CA00409, 2003-Ohio-1792; *Shepherd v. Comptroller of Pub. Accounts* (C.A.5, 1999), 168 F.3d 871; *Hockman v. Westward Communications, LLC* (C.A.5, 2004), 407 F.3d 317. The remaining cases address allegations of sexual harassment perpetrated by a supervisor and, as such, warrant discussion.

{¶60} In *Black v. Zaring Homes, Inc.* (C.A.6, 1997), 104 F.3d 822, the court reversed a jury verdict finding that the plaintiff was subjected to a hostile work environment while she was employed by defendant. The plaintiff alleged that she was subjected to various discriminatory comments made at bi-weekly meetings from July to

October 1993. The first incident occurred during a July meeting when a colleague reached for a pastry, looked suggestively at the plaintiff, and said, "Nothing I like more in the morning than sticky buns." Id. at 823. Thereafter, during an August meeting, participants joked that a parcel of land located adjacent to a Hooters Restaurant should be named "Hootersville," "Titsville," or "Twin Peaks." Id. at 823-24.

{¶61} Also in August, while discussing her job performance and bonus structure with her immediate supervisor, the plaintiff was told that she was "paid great money for a woman." Id. at 824. At a September meeting, the plaintiff allegedly felt uncomfortable when the meeting participants joked about her pronunciation of the name "Busam," which was apparently pronounced "bosom." Id. During an October meeting, when plaintiff asked about the location of a particular property, defendant's president responded that it was near a biker bar and joked, "Say, weren't you there Saturday night dancing on the tables?" Finally, later in October, the plaintiff overheard her supervisor refer to a female county official as a "broad." Id.

{¶62} The court held that the defendant was entitled to judgment as a matter of law under the *Harris* test because, viewing the totality of the circumstances, the comments were "merely offensive" and insufficient to support the jury's verdict. *Black* at 826. The court deemed particularly important the fact that "most of the comments were not directed at plaintiff." Id.

{¶63} *Black* does not aid appellant's case. There, plaintiff's colleagues, not her supervisor, made most of the comments. Furthermore, the vast majority of the comments, including one of the two remarks attributed to her supervisor, were not

directed at the plaintiff. Here, appellee's supervisor made all the offensive comments and directed them specifically at appellee.

{¶64} In *Baskerville v. Culligan Internatl. Co.* (C.A.7, 1995), 50 F.3d 428, the court overturned a jury verdict in favor of the plaintiff because it found that the evidence was insufficient to support a finding of hostile work environment. The plaintiff testified that from August 1991 to February 1992, her supervisor made the following allegedly unlawful comments: (1) called her a "pretty girl," (2) once made a grunting sound when the plaintiff wore a leather skirt, (3) once said "Not until you stepped your foot in here" in response to the plaintiff's comment that it was hot in the office, (4) once, when an announcement "May I have your attention, please," was broadcast over the public address system, commented to the plaintiff, "You know what that means, don't you? All pretty girls run around naked," (5) once called the plaintiff a "tilly," explaining that he used that term for all women, (6) once told the plaintiff his wife warned him that he "better clean up [his] act" and "better think of [the plaintiff] as Ms. Anita Hill," (7) once, when asked by the plaintiff why he had left the office holiday party early, replied that there were so many pretty girls there that he "didn't want to lose control, so [he] thought [he'd] better leave," (8) once replied, after the plaintiff commented that his office was smoky from cigarette smoke, "Oh really? Were we dancing, like in a nightclub?," and (9) once made a movement suggesting masturbation in response to the plaintiff's question regarding whether he had bought his wife a Valentine's Day card. Id. at 430.

{¶65} The court found that these nine incidents, spread over seven months, could not reasonably be thought to constitute sexual harassment actionable under Title VII. The court found the comments themselves to be "innocuous or merely mildly offensive,"

made by a man "whose sense of humor took final shape in adolescence." Id. The court concluded that "[a] handful of comments spread over months is unlikely to have so great an emotional impact as a concentrated or incessant barrage." Id. The court further found that even if the supervisor's remarks could be thought to constitute harassment, the defendant employer had taken all reasonable steps to rectify the situation after the plaintiff reported the offending conduct to the human resources department as required by the employer's sexual harassment policy. The supervisor immediately ceased the offensive behavior after being directed by the employer to do so.

{¶66} *Baskerville* is distinguishable in several respects. The supervisor's comments, while undoubtedly inappropriate, did not involve specific references to the plaintiff's physical attributes, did not include calling the plaintiff a derogatory name, and did not involve suggestions that the plaintiff use her physical appearance to augment her job performance. Furthermore, there is no suggestion in *Baskerville* that the supervisor physically threatened the plaintiff or that the supervisor's harassment impeded the plaintiff's ability to perform her job duties. In addition, the *Baskerville* court's alternative basis for its decision--that the employer promptly and effectively rectified the situation--is of no significance here. Here, the evidence establishes that Marshall continued to promote a sexually hostile work environment after she was admonished by her superiors to cease doing so.

{¶67} In *Burnett v. Tyco Corp.* (C.A.6, 2000), 203 F.3d 980, the plaintiff alleged three instances of sexual harassment by her supervisor. The first incident occurred in July 1994 during a departmental meeting. The supervisor placed a pack of cigarettes containing a lighter inside the plaintiff's tank top and bra strap. At another meeting two

weeks later, when the plaintiff coughed, the supervisor handed her a cough drop while stating, "Since you have lost your cherry, here's one to replace the one you lost." Id. at 981. The final incident occurred in late December 1994. The plaintiff was wearing a Christmas sweater that read "Deck the Malls." As the supervisor walked by the plaintiff, he allegedly remarked, "Dick the malls, dick the malls, I almost got aroused." Id.

{¶68} After reviewing the evidence, the court characterized the supervisor's comments as "merely offensive remarks," but acknowledged that the cigarette pack incident was fairly severe and could perhaps constitute a battery. Id. at 985. The court concluded, however, that under the totality of the circumstances, "a single battery coupled with two merely offensive remarks over a six-month period" did not "create an issue of material fact as to whether the conduct alleged was sufficiently severe to create a hostile work environment." Id.

{¶69} In *Stacy v. Shoney's, Inc.* (C.A.6, 1998), 142 F.3d 436, the plaintiff, a restaurant dining room manager, alleged that her supervisor harassed her with sexually suggestive comments and leering looks. The plaintiff reported the conduct to her supervisor's superior, who assured the plaintiff that her job was secure and promptly reported her complaints in accordance with the defendant employer's sexual harassment policy. Following an investigation, that superior prepared a report stating that, while he found no evidence supporting the allegations of sexual harassment, he reprimanded the supervisor and warned him he could be terminated if further allegations surfaced. The plaintiff reviewed the report and agreed with the action taken.

{¶70} Upon this evidence, the court found the supervisor's comments to be "offensive," but "not sufficiently frequent, severe, physically threatening, or humiliating to

unreasonably interfere with Plaintiff's work performance to constitute actionable work place harassment." Id. The court also determined that the defendant employer had adequately responded to stop the harassment by investigating the complaints and confronting the supervisor.

{¶71} In *Willauer v. Riley Sales, Inc.*, (E.D.Pa.2009), No. 08-5258, the plaintiff raised four allegations of sexual harassment against her female supervisor: (1) that the supervisor complimented the plaintiff on her shirts and stared at her breasts between ten and 15 times over the course of a year, (2) that the plaintiff found a piece of paper in the supervisor's office on which the supervisor had written plaintiff's name numerous times, (3) that in response to the plaintiff's comment that she and the supervisor would be working late together at a trade show, the supervisor suggested that they might get a hotel room together, and (4) that the supervisor once watched the plaintiff change into a bathing suit while the plaintiff was visiting the supervisor's home.

{¶72} The court determined that the supervisor's conduct was "isolated" and "not pervasive." The court further found that the only conduct that occurred with any frequency--the staring at plaintiff's breasts--was not severe. In so finding, the court noted that the plaintiff had not alleged that the supervisor made any comments about the plaintiff's breasts or attempted to touch the plaintiff in any way. In addition, the court found the piece of paper with the plaintiff's name on it to be innocuous, and that the suggestion of sharing a hotel room was not forceful nor repeated once the plaintiff declined. The court further noted that nothing in the record suggested that the supervisor's conduct was physically threatening or humiliating or that it unreasonably interfered with the plaintiff's work performance.

{¶73} For reasons similar to those discussed in distinguishing the *Baskerville* case, we conclude that appellant's reliance on *Burnett*, *Stacy*, and *Willauer* is misplaced. In none of these cases did the supervisor make specific comments about the plaintiffs' breast size or other physical attributes, did not call the plaintiffs derogatory names, and did not suggest that the plaintiffs use their physical appearance to improve their job performance. Indeed, in *Willauer,* the court found significant the fact that the plaintiff had not alleged that the supervisor made comments about the plaintiff's breasts. Furthermore, there is no suggestion in any of the cases that the supervisor physically threatened the plaintiffs or that the supervisors' harassment impeded the plaintiffs' job performance.

{¶74} We agree with the trial court that, considering both the cumulative effect of Marshall's harassment of appellee and the professional office atmosphere in which it occurred, the harassment was sufficiently severe and pervasive to create both an objectively and subjectively hostile work environment such that it altered the terms and conditions of appellee's employment.

{¶75} Finally, appellant contends that the trial court erroneously held that appellee established the fourth element of her sexual harassment claim simply by proving that Marshall was her supervisor. Appellant contends that appellee was required, but failed, to prove that Marshall's conduct culminated in an adverse tangible employment action against her.

{¶76} This court discussed this issue in *Brentlinger v. Highlights for Children* (2001), 142 Ohio App.3d 25, 33:

> Employer liability for hostile work environment harassment varies depending upon whether the alleged harasser is a

> supervisor or a co-worker. When the alleged harasser is a supervisor, the employer may be vicariously liable. *Burlington* [*Industries, Inc. v. Ellerth* (1998)], 524 U.S. [742], 763-765, 118 S.Ct. [2257,] 2270, * * *. Under this scenario, when harassment by a supervisor with authority over the employee culminates in a tangible employment action against the plaintiff, the employer is subject to vicarious liability and the analysis ends. *Id.* Where no tangible employment action was taken, but a hostile work environment was created, the employer may avail itself of an affirmative defense to liability. To successfully raise this affirmative defense, an employer must establish two elements by a preponderance of the evidence: first, that the employer exercised reasonable care to prevent and correct properly any sexually harassing behavior, and second, that the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

{¶77} Appellee did not allege, nor did the evidence establish, that Marshall's conduct resulted in an adverse employment action against her. Where, as here, no tangible employment action was taken, but a hostile work environment was created, appellant could avail itself of an affirmative defense to liability. Assuming, arguendo, that appellant properly asserted this affirmative defense, we conclude that appellant failed to establish it by a preponderance of the evidence. Appellant did not demonstrate that it exercised reasonable care to prevent and correct any sexually harassing behavior. Appellant did not demonstrate that it promulgated a sexual harassment policy with a complaint procedure. "While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense." *Starner v. Guardian Industries* (2001), 143 Ohio App.3d 461, 478. Moreover, appellant did not establish that it acted reasonably in responding to appellee's complaints. As noted, the

evidence established that Marshall's harassment of appellee continued well after appellee reported it, and that Breyer admitted he did not respond to appellee's email complaints about Marshall during the summer of 2006.

{¶78} For the foregoing reasons, we conclude that the trial court did not err as a matter of law in determining that appellee established the fourth element of her sexual harassment claim.

{¶79} Having concluded that the trial court properly found that appellee established each of the elements of her hostile work environment sexual harassment claim by a preponderance of the evidence, we overrule appellant's first assignment of error.

{¶80} Appellant's second assignment of error contends the trial court's decision finding appellant liable for hostile work environment sexual harassment and awarding damages based upon such liability is against the manifest weight of the evidence. We will not reverse a judgment as being against the manifest weight of the evidence if some competent, credible evidence supports that judgment. *Ripley* at ¶10, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280.

{¶81} Appellant alleges that appellee's testimony was not credible and thus cannot form the basis for a judgment in her favor. Appellant first contends that appellee's testimony was not credible because she lied about whether Marshall ever touched her on the buttocks. During the liability phase of the trial, appellee was asked on cross-examination, "[w]hile you were employed [with appellant], isn't it true that Sherry Marshall did not touch you in an inappropriate manner?" Appellee responded "No, that's not true." (Tr. Vol. II, 69.) However, appellee later conceded that she testified at her deposition that

Marshall "did not touch [her]." (Tr. Vol. II, 70.) During the damages portion of the trial, appellee testified that during a counseling session with her psychologist, she reported that Marshall touched her on the buttocks. The same trial judge presided at both the liability and damage phases of the trial and had the opportunity to hear appellee's testimony and evaluate her credibility. The judge apparently concluded that the inconsistencies in appellee's testimony did not diminish her credibility.

{¶82} Appellant further challenges appellee's credibility on grounds that she failed to disclose on the Citigroup employment application she completed in November 2006 that she was currently employed by appellant. Appellee admitted that she did not list appellant as her current employer on the Citigroup employment application. However, she testified that prior to obtaining the position with Citigroup, she disclosed her employment with appellant to the seven individuals with whom she interviewed.

{¶83} John Turner, Citigroup's Director of Human Resources, testified at the damages hearing by deposition. As a result of an internal investigation, Turner concluded that appellee had been appellant's employee, not a consultant, and had failed to disclose that information on her Citigroup employment application. Turner terminated appellee's employment for falsifying her employment application.

{¶84} In its damages decision, the trial court stated that "plaintiff credibly asserts that she elected to omit defendant [appellant] from the employment application out of fear that a prospective employer might contact Marshall as a reference. Furthermore, plaintiff testified that she informed all of the Citigroup employees with whom she interviewed, none of whom were called to testify, of both her employment with defendant and her reason for omitting it from the application."

{¶85} Appellant contends the trial court's reasoning is "internally inconsistent and illogical." Appellant first argues that if, as appellee claimed, she reported her employment with appellant to the individuals with whom she interviewed, Citigroup would not have terminated her employment. Appellant also argues that Turner's testimony proved appellee's version of what transpired to be false. Finally, appellant argues that appellee's answers to interrogatories omitted the information about her employment with Citigroup. As to each of these contentions, however, we conclude that the issue was one of credibility for the trial court to resolve. Appellee offered an explanation, which the trial court specifically found to be credible. This court may not substitute its judgment on credibility issues for that of the trial court.

{¶86} For the foregoing reasons, we conclude that appellant has failed to establish that the trial court's decision finding appellant liable for hostile work environment sexual harassment and awarding damages based upon such liability is against the manifest weight of the evidence. Accordingly, we overrule appellant's second assignment of error.

{¶87} Appellee filed a notice of cross-appeal and sets forth the following assignment of error:

> The trial court erred as a matter of law by holding that Appellant proved Appellee was exempt from the overtime wage requirements of the Fair Labor Standards Act and O.R.C. §4111.03 as an employee in a "bona fide administrative capacity."

{¶88} Before addressing the merits of this assignment of error, we first consider appellant's motion to dismiss the cross-appeal. Appellant asserts that this court lacks

jurisdiction to consider appellee's argument because she failed to timely file her notice of cross-appeal. We agree.

{¶89} App.R. 3(C)(1) provides, in part that, "[a] person who intends to defend a judgment or order against an appeal taken by an appellant and who also seeks to change the judgment or order * * * shall file a notice of cross-appeal within the time allowed by App.R. 4." Pursuant to App.R. 4(A), "[a] party shall file [a] notice of appeal * * * within thirty days of the * * * entry of the judgment or order appealed." App.R. 4(B)(1) provides that "[i]f a notice of appeal is timely filed by a party, another party may file a notice of appeal within the appeal time period otherwise prescribed by this rule or within ten days of the filing of the first notice of appeal."

{¶90} On June 9, 2010, the trial court entered final judgment in this matter. On July 2, 2010, appellant filed its notice of appeal. On July 12, 2010, appellee faxed a copy of her notice of cross-appeal to the trial court. The faxed copy contains a stamp indicating that it was "Received" on July 12, 2010. Appellee filed an original notice of cross-appeal on July 13, 2010. The original notice contains a stamp indicating that it was "Filed" on July 13, 2010.

{¶91} Appellee contends that her notice of cross-appeal was timely filed pursuant to App.R. 4(B) when it was faxed to the trial court on July 12, 2010. Appellee does not direct this court to a local rule of the Court of Claims permitting the filing of documents by facsimile. Rather, appellee cites R.C. 2743.20, which provides that "[a]ppeals from orders and judgments of the court of claims lie to the same courts under the same circumstances, as appeals from the court of common pleas of Franklin county, and the same rules of law govern their determination," along with Loc.R. 109.01 of the Franklin

County Court of Common Pleas, which permits the facsimile filing of documents, for the proposition that the Court of Claims accepts facsimile filings. We do not construe R.C. 2743.20 to mean that the local rules promulgated by the Franklin County Court of Common Pleas govern filing procedures in the Court of Claims of Ohio.

{¶92} Moreover, assuming arguendo that the Franklin County Local Rules apply to the Court of Claims, Loc.R. 109.06 of the Franklin County Court of Common Pleas provides that facsimile filings received by the clerk's office after 5:00 p.m. "shall be filed as if received at 8:00 A.M. on the next regular workday." In this case, the time printed by the court of claims clerk's facsimile machine indicates that appellee's facsimile was received at 5:21 p.m. on July 12, 2010. Thus, applying Loc.R. 109.06 of the Franklin County Court of Common Pleas, appellee's notice of cross-appeal was filed as if received at 8:00 a.m. on July 13, 2010, one day out of rule.

{¶93} Appellee further claims that even if there were a "technical defect" in her July 12, 2010 facsimile filing, such defect was "cured" the next day when the original notice was delivered to the court of claims. Appellee admits that she "posted" the notice of cross-appeal on July 12, 2010 for overnight delivery on July 13, 2010. App.R. 4 does not contemplate the "posting" of notices of appeal and cross-appeal. Rather, the rule contemplates only the "filing" of such notices. By her own admission, appellant "filed" her notice of cross-appeal on July 13, 2010, one day out of rule.

{¶94} Finally, appellee urges this court to excuse her late filing, arguing that her failure to comply with App.R. 4 caused no delay or prejudice to appellant. The time requirements for filing a cross-appeal pursuant to App.R. 4 are mandatory and jurisdictional. *Donahue v. Silberstein* (1990), 10th Dist. No. 90AP-588, citing *Kaplysh v.*

Takieddine (1988), 35 Ohio St.3d 170, paragraph one of the syllabus. An appellate court may not enlarge the time for filing a notice of appeal. App.R. 14. Because appellee failed to comply with the time requirements of App.R. 4 in filing her notice of cross-appeal, we are without jurisdiction to consider the merits of her assignment of error.

{¶95} Accordingly, having overruled appellant's assignments of error, we affirm the judgment of the Court of Claims of Ohio. We grant appellant's motion to dismiss appellee's cross-appeal.

Judgment affirmed.
Motion to dismiss cross-appeal granted.

BROWN and DORRIAN, JJ., concur.