[Cite as *Weber v. Ferrellgas, Inc.*, 2016-Ohio-4738.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

MISCHELL WEBER,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2015-T-0071**
- vs -	:	
FERRELLGAS, INC., et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2013 CV 01769.

Judgment: Affirmed.

Martin S. Hume, Martin S. Hume Co., L.P.A., 6 Federal Plaza Central, #905, Youngstown, OH 44503-1506 (For Plaintiff-Appellant).

Brent N. Coverdale and *Christopher C. Tillery,* Scharnhorst Ast & Kennard, P.C., 1100 Walnut, Suite 1950, Kansas City, MO 64106; and *Heidi N. Hartman* and *Lindsey K. Ohlman,* Eastman & Smith, Ltd., One Seagate, 24th Floor, P.O. Box 10032, Toledo, OH 43699-0032 (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, Mischell Weber ("Weber"), appeals from the Trumbull County Court of Common Pleas order entering summary judgment in favor of appellees, Ferrellgas Inc. ("Ferrellgas"), Frank Edwards ("Edwards"), and Robert Ragle ("Ragle"). We affirm.

{¶2} Weber was employed by Ferrellgas as a Customer Service Specialist ("CSS") for the company's Newton Falls, Ohio office. She was hired on April 20, 2009, by Ferrellgas' General Manager, Edwards. As a CSS, Weber was required to engage customers both in-person and via telephone. Weber's performance evaluations, conducted by Edwards, demonstrated she did very well in all facets of her job. From April 2009 to April 2012, Weber's employment performance was excellent and she had never been subject to discipline.

{¶3} In November 2011, Edwards opened a position for a Service Scheduler. According to Edwards, the position was not intended to be permanent; instead, Edwards noted the position would be temporary and filled by an employee while the company condensed its service centers. The position required an earlier start time, from 7:00 a.m. until 3:00 p.m.

{¶4} On November 29, 2011, Edwards visited the Newton Falls Office. During a conversation with Weber, he told her about the Service Scheduler position. According to Weber, Edwards advised her that he did not want her to apply for the position because "she is a single mother with kids and if [she] had to take time off work, it would jam [us] up for getting someone to cover the scheduling." Weber explained she felt she was qualified for the position, but Edwards stated it would be difficult for the company to obtain coverage for the position if Weber had to miss work because her kids were sick. Weber maintained that Edwards' concerns were misplaced because (1) she seldom missed work and (2) coverage for an absent employee, in her experience, was not a problem for the company. Edwards denied both discouraging appellant from applying and making the purported comments relating to her status as a single mother.

{¶5} After meeting with appellant, Edwards emailed the CSS employees he supervised, including Weber, about the position. He outlined the job responsibilities and noted it may be temporary. Edwards invited anyone included on the email who was interested in the position to contact him. Weber did not respond to the email and did not apply for the position.

{¶6} Michele Thomas, another Ferrellgas employee, was eventually hired for the Service Scheduler position. Thomas, a woman with children, had been with the company for over 10 years. Weber acknowledged that Thomas was a good employee who was qualified for the position.

{¶7} Weber discussed her meeting with Edwards, including his alleged instruction not to apply for the new position, with other employees of the company. She, however, did not take any formal action with the company's human resources department.

{¶8} In April 2012, nearly six months after the alleged incident, Ferrellgas' Regional Vice President, Rob Ragle, visited the Newton Falls Office. During his visit, Ragle asked Edwards "how she was doing." Weber responded: "I don't agree with the company not letting you succeed and move up." Ragle asked her to explain and Weber disclosed her discussion with Edwards the previous November, including Edwards' alleged comment that he did not want her to apply for the position because she was a "single mother with three children." Ragle advised Weber that he would look into it. Weber later reiterated her complaint to Ragle during "customer appreciation week" in late June 2012. Weber admitted she was hesitant to speak with Ragle because she had been advised by Gene Gailbreath, the Ferrellgas Operations Manager, that

"[Edwards] does not put up with people going over his head." Notwithstanding this concern, she felt the circumstances were unfair and required attention.

{¶9} On Saturday, June 23, 2012, the Newton Falls Office held "customer appreciation day." Edwards asked Weber to come into work early so she could pick up ice and supplies for the event. Rather than ask permission to work overtime, or clock out early due to her early arrival, Weber worked 1.75 hours of "unauthorized overtime." Ferrellgas required its employees to obtain formal approval for overtime before working the hours. Weber was aware of this policy, but did not seek authorization from Edwards because, according to Weber, she had previously worked over under similar circumstances and "there was never a problem." When Weber told Edwards she had worked over on Saturday, he was troubled. Edwards explained that he assumed Weber would have left early rather than continue working the unauthorized overtime. And, as a result, on June 25, 2012, Edwards emailed Weber a "verbal warning" regarding the unauthorized overtime.

{¶10} Weber contacted Edwards, claiming, under the circumstances, the warning was unfair. According to Weber, Edwards agreed, but advised her that he would not withdraw the reprimand. Weber subsequently emailed Ragle regarding the reprimand; Ragle called Weber and he agreed with Weber's explanation. According to Weber, Ragle indicated she should not be reprimanded because she was authorized to clock in early that day. Ragle requested Weber to send him a statement regarding the overtime issue as well as any other complaints. In her email, Weber detailed the circumstances surrounding the unauthorized overtime reprimand; Edwards' alleged comments regarding the Service Scheduler position; and an issue she had with a

female co-worker, Terri Randleman, the Lead CSS in the company's Norwalk Service Center.

{¶11} During the first week of July 2012, Weber took a scheduled vacation. While she was out of the office, the company determined that a certain amount of cash was missing from the Newton Falls branch. Weber was responsible for reconciling the Newton Falls office cash drawer, which included customer payment receipts and cash allowances based upon reimbursement requests and expense receipts. When Weber returned, she was told it was her responsibility to reconcile the shortage. Weber investigated the issue, but was unable to explain or determine the basis for the shortage. After speaking with the corporate office, however, it appeared that individuals other than Weber had access to the cash drawer while she was on vacation; and, in light of this, it was determined that the missing funds were likely connected to an expense receipt for doughnuts that was not properly submitted.

{¶12} On July 31, 2012, Ragle met with Edwards and Weber in order to resolve issues between the two individuals. Weber acknowledged that Ragle made an attempt to resolve any problems between her and Edwards; Weber's only criticism of Ragle's management of the situation was, in her view, Edwards should have been reprimanded due to his purported comment relating to the Service Scheduler position.

{¶13} Edwards admitted he was unhappy in the wake of the meeting and was upset that Weber went directly to Ragle to report the alleged discriminatory conduct. And, on August 5, 2012, Edwards sent an email to Mary Lentz ("Lentz"), who worked in the company's human resources department, noting: "We never truly resolved the issue of [Weber] lying and going over my head." Notwithstanding these points, there were no

further problems between the individuals after the meeting. In fact, in mid-August, 2012, Edwards visited the Newton Falls office and presented Weber with a gift card as a reward for high scores she received on a customer survey. During this meeting, Edwards asked Weber if they were "okay," and Weber replied "yes."

{¶14} On or about August 13, 2012, Jackie Markley, a part-time seasonal CSS employee of Ferrellgas contacted Weber to update information on a business customer with whom Weber had previously been in contact. Apparently the customer was owed a $1,300 credit on its account; according to Markley, Weber stated the business had recently closed after a police raid. Weber subsequently suggested that Markley transfer the customer credit to their personal accounts with Ferrellgas. Markley claimed the suggestion made her "uneasy" because Weber appeared serious. Markley nevertheless treated the exchange as a joke until, later that day, Weber contacted Markley again, inquiring whether Markley had found a way to transfer the credit. On August 18, 2012, Markley reported the conversation to Edwards who, in turn, informed Ragle.

{¶15} Ragle met with Markley and, finding her report credible, determined that Weber should be terminated. Ragle subsequently contacted Lentz in human resources. Lentz reviewed the factual allegations and Ragle's recommendations. Lentz agreed that Weber should be terminated and suggested Ragle's decision should be based upon a "violation of company policies and procedures," which cover violations of the company's ethical code, in particular "[d]irectly or indirectly engaging or participating in any business dealing that may profit the EE or the EE's spouse, friend or relative to the detriment of Ferrellgas."

{¶16} On August 27, 2012, Ragle informed Edwards of his decision and asked Edwards to inform Weber of her termination the next morning. To this end, Rangle met Weber at the Newton Falls office immediately after she arrived for work, terminated her employment, and explained she could contact Lentz for additional information.

{¶17} On August 28, 2013, Weber filed a complaint against the collective appellees alleging she was the victim of (1) gender discrimination based upon sexual stereotyping, in violation of R.C. 4112.02; (2) retaliation while engaging in a protected activity; and (3) defamation. Weber further alleged she was retaliated against for her complaints relating to the alleged discriminatory conduct when, inter alia, she was ultimately discharged from employment. On March 24, 2015, appellees filed a motion for summary judgment. Weber duly filed a memorandum in opposition. And, on June 9, 2015, the trial court entered summary judgment in appellees' favor.

{¶18} Weber now appeals and assigns four errors for this court's review. Because her first and second assignments of error are related, we shall address them together. They respectively provide:

{¶19} "[1.] The trial court erred in granting summary judgment in favor of the appellees on Weber's claim of gender discrimination when there was credible direct evidence of discrimination on the basis of Weber's status as a single mother with young children."

{¶20} "[2.] The trial court erred in granting summary judgment in favor of the appellees on Weber's claim of gender discrimination when Weber was able to establish a prima facie case of discrimination."

{¶21} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" 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 that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor." A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). De novo review requires the court of appeals to conduct an independent review of the evidence before the trial court, without deference to the trial court's ultimate judgment. *Zoldan v. Vill. of Lordstown*, 11th Dist. Trumbull No. 2014-T-0002, 2014-Ohio-5472, ¶19.

{¶22} Under R.C. 4112.02, it is an unlawful discriminatory practice:

> **{¶23}** (A) 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.

{¶24} When a plaintiff alleges gender discrimination in violation of R.C. 4112.02, she bears the initial burden of presenting either direct evidence of discrimination, or establishing discriminatory intent indirectly through the four-part test set forth in *Barker v. Scoville, Inc.*, 6 Ohio St.3d 146 (1983), adopted from the standards established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The analysis requires that the plaintiff-employee demonstrate that: (1) she is a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4)

she was replaced by an individual outside the protected class, or that a comparable (similarly-situated), non-protected person was treated more favorably. *See Poppy v. Willoughby Hills City Counsel*, 11th Dist. Lake No. 2004-L-015, 2005-Ohio-2071, ¶36.

{¶25} Preliminarily, appellant claims discrimination based upon a statement from her supervisor that he did not think she should apply for a new position because of her status as a single mother. Appellant's claim was brought pursuant to R.C. 4112.02(A). That subsection, and subsections (B) through (G), set forth unlawful discriminatory practices in employment. Nowhere in those sections is there a reference to discrimination based upon "familial status." While R.C. 4112.02(H) sets forth numerous circumstances that make it unlawful to discriminate based upon "familial status," that subsection addresses discrimination in the context of housing and lending. In effect, appellant's claim for employment discrimination based upon "familial status" is not cognizable under R.C. 4112.02(A).

{¶26} Allowing appellant to proceed under the "familial-status" theory is tantamount to judicially engrafting an additional protected class or status into R.C. 4112.02(A). Creating such a status is a matter within the exclusive province of the legislature, not the judiciary. Hence, even though appellant frames the issue in her appellate brief in terms of a "gender-discrimination" claim, given the facts and the manner in which the case was pleaded, appellant has failed to state a claim upon which relief can be granted.

{¶27} To the extent, however, we construe appellant's cause of action as a claim for gender discrimination, it still fails. Initially, Weber does not specifically or, perhaps consistently identify the precise adverse employment action to which she was allegedly

subject. In her complaint, she alleges her *discharge* from employment with Ferrellgas was premised upon discriminatory and retaliatory behavior. If the adverse employment action at issue was Weber's termination, the record is clear: she was not discharged as a result of Edwards' purportedly discriminatory statements. To the contrary, she kept her job as a CSS for an additional nine months after the incident.

{¶28} Alternatively, if Edwards' statements were the adverse employment action, Weber's claim would also fail. Assuming Edwards made the statements at issue, Weber nevertheless acknowledges she was given the opportunity to apply for the position. Weber cannot contend she was unlawfully denied a position for which she failed to apply. On these points alone, Weber has failed to establish a genuine issue of material fact for trial as to whether she experienced an adverse employment action. Despite this conclusion, we shall address appellant's substantive arguments.

{¶29} Direct evidence is that evidence which, if believed, would prove the existence of a fact without inference or presumption. *Mauzy v. Kelly Serv., Inc.,* 75 Ohio St.3d 578, 583 (1996). Weber claims Edwards discriminated against her when he advised her not to apply for the Service Scheduler position because she was a single mother. Weber, however, acknowledges Edwards did not want her to apply because, if she needed time off to care for her three children, the company would have difficulties covering the position in her absence. Regardless of these points, Edwards directly sent Weber an email that invited her to apply for the position or seek additional information about the position; actions she did not take. These circumstances, when viewed in their totality, provide no direct evidence of either gender discrimination or "sex-plus" discrimination, i.e., gender plus some other characteristic, such as family status.

{¶30} Edwards' statements, if true, merely reflect his concern for the efficiency with which the company operated. Although the statements may have been insensitive to Weber's relative position as a single mother, they do not, without some inferential leap or presumed ill intention, provide direct evidence of discrimination. This is especially so where, as here, Weber was offered the actual opportunity to apply for the position or, at the least, conduct further inquiry into the application process. We therefore hold the trial court did not err in concluding appellant failed to produce direct evidence of discriminatory intent.

{¶31} Next appellant asserts the trial court erred in concluding she could not establish a prima facie case for gender discrimination because she failed to advance evidence that she was replaced by someone outside the protected class or that a comparable, similarly situated, non-protected person was treated more favorably. Again, we do not agree.

{¶32} Appellant asserts that it was unnecessary for her to produce evidence that comparable male employees were treated differently or more favorably. Appellant is correct. The test set forth *McDonnell Douglas* does not *require* a plaintiff to establish the "comparables" requirement to set forth a prima facie case for gender discrimination. If, however, a female plaintiff does not produce evidence that comparable male employees were treated more favorably, she *must* produce evidence that she was replaced by a person outside the protected class. In this case, appellant did neither. To the contrary, she acknowledged the Service Scheduler position was given to a woman with children; moreover, Weber produced no evidence that, after her termination, she

was replaced by a male. We therefore hold the trial court did not err in concluding Weber, as a matter of law, failed to establish a prima facie case for discrimination.

{¶33} Weber's first and second assignments of error lack merit.

{¶34} Weber's third assignment of error provides:

{¶35} "The trial court erred in granting summary judgment in favor of appellees on Weber's claim of unlawful retaliation for engaging in protected activity when there was a genuine issue of material fact on the issue of whether her discharge was causally related to her protected activity."

{¶36} Under R.C. 4112.02(I), it is "an unlawful discriminatory practice * * * [f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code." 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, 327, 2007-Ohio-6442, citing *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir.1990).

{¶37} Weber asserts she produced sufficient evidence to overcome summary judgment on her retaliation claim because, in her view, there was a causal connection between her act of speaking with Ragle regarding Edwards' statements (the protected activity) and her eventual termination (the adverse action). Hence, she maintains the

trial court erred when it concluded there was no genuine issue of material fact to be litigated on the fourth element of the foregoing test. We hold the trial court did not err.

{¶38} The record demonstrates that Ragle, not Edwards, was responsible for the ultimate decision to terminate Weber. And Weber conceded that Ragle was not retaliating against her when she was terminated. Even though Edwards reported Markley's story regarding Weber's statements vis-à-vis the $1,300 customer credit to Ragle, nothing in the record indicates Edwards' act of reporting influenced Ragle's ultimate decision. Indeed, Edwards' email addressing the issue was purely informational, i.e., it related Markley's story and nothing more. With this in mind, Ragle's decision to terminate Weber was based upon his evaluation of Markley's report and his consultation with Lentz. Although there was some temporal proximity between Weber's termination and the July 31, 2012 meeting, about which Edwards was upset, Markley's intervening report effectively severed any connection between the two events. Because Weber produced no evidence indicating Edwards personally influenced Ragle's decision, she failed to establish a genuine issue of material fact for trial on her retaliation claim. The trial court did not err in awarding appellees summary judgment on this issue.

{¶39} Weber's third assignment of error lacks merit.

{¶40} Weber's fourth assignment of error provides:

{¶41} "The trial court erred in granting summary judgment in favor of appellees on Weber's defamation claim where appellees falsely accused Weber of trying to convert another customer's credit with Ferrellgas to her own personal account."

{¶42} The elements of the common-law action of defamation are (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Vaughn v. Lake Metro. Hous. Auth.*, 11th Dist. Lake No. 2009-L-153, 2010-Ohio-3686, ¶44.

{¶43} In this case, the trial court found Weber failed to adduce any evidence that appellees published a false statement to any third party. Weber, however, maintains Edwards' communication of Markley's allegation to Ragle is sufficient to establish the requisite publication element. Weber acknowledges communications between employees to employers and employees to other employees are usually subject to a qualified privilege, thereby barring recovery for otherwise defamatory statements. In this matter, however, she maintains there is a genuine issue of material fact regarding whether the communication was made with actual malice, which is an exception to qualifiedly privileged statements. We do not agree.

{¶44} In *McKenna v. Mansfield Leland Hotel Co.*, 55 Ohio App. 163, 167 (5th Dist.1936), the Fifth Appellate District summarized the concept of "qualified privilege" as follows:

> **{¶45}** "A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or where the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts, which he in good faith proceeds to do." 17 Ruling Case Law, 341.

> **{¶46}** "The preponderance of authority supports the view that communications between an employer and an employee, or between two *employees*, concerning the conduct of a third *employee* or former employee, are qualifiedly privileged, and thus, even though such a communication contain[s] matter defamatory to such other or former employee, he cannot recover in the absence of sufficient proof of actual malice to overcome the privilege of the occasion." 98 A.L.R., 1301, annotation.

{¶47} In this case, Markley had interactions with Weber in which Weber allegedly suggested she and Markley find a means to transfer a customer's $1,300 credit to their personal accounts. Markley found this suggestion disconcerting and believed Weber was serious about the transfer. Markley reported the exchange to Edwards, Ferrellgas' General Manager; Edwards, as General Manager, contacted his superior, Ragle, Ferrellgas' Regional Vice President, and explained Markley's report. Given the gravity of Markley's allegation, and the offices each individual held at the company, we discern nothing unusual about Edwards' decision to discuss the report with Ragle. In short, the circumstances provide no basis for an inference of actual malice.

{¶48} Moreover, the record of the reporting process demonstrates that Markley, of her own volition, contacted Edwards and summarized what she heard. Edwards *specifically* inquired whether Markley was sure Weber was not joking. Markley assured him Weber was not, primarily because Weber called her a second time, later in the day, and inquired whether Markley had "figured out how [they] could transfer that money without anyone finding out[.]"

{¶49} Actual malice involves publication "with knowledge that the statements were false or with reckless disregard of whether they were false or not." *Hahn v. Kotten*, 43 Ohio St.2d 237 (1975), paragraph two of the syllabus. Nothing in the documented

exchanges between Markley and Edwards suggests Edwards would have any reason to believe Markley's report was false. And Weber offers no evidence, other than her speculative and conclusory assertions that Edwards desired to punish her, that Edwards was acting with actual malice when he communicated Markley's report to Ragle. Because there was no evidence advanced that would permit the conclusion that Edwards entertained serious doubts about the truth of his publication to Ragle, we hold the communication was qualifiedly privileged as a matter of law. We accordingly conclude the trial court properly found that Weber failed to establish that Edwards and/or Ragle published a false statement to a third party.

{¶50} Appellant's fourth assignment of error lacks merit.

{¶51} Appellees allege the following cross-assignments of error:

{¶52} "[1.] The trial court erred in not granting summary judgment in favor of appellees on Weber's R.C. 4112.02(A) claim of gender discrimination when Weber was unable to establish a prima facie case of discrimination and lacked evidence of pretext."

{¶53} "[2.] The trial court erred in not granting summary judgment in favor of appellees on Weber's R.C. 4112.02(I) unlawful retaliation claim when Weber was unable to establish a prima facie case of retaliation and lacked evidence of pretext."

{¶54} "[3.] The trial court erred in not granting summary judgment in favor of appellees on Weber's defamation claim when her claim is based on internal communications that occurred outside the statute of limitations, were not false, and privileged."

{¶55} R.C. 2505.22 provides:

{¶56} In connection with an appeal of a final order, judgment, or decree of a court, assignments of error may be filed by an appellee who does not appeal, which assignments shall be passed upon by a reviewing court before the final order, judgment, or decree is reversed in whole or in part. The time within which assignments of error by an appellee may be filed shall be fixed by rule of court.

{¶57} Pursuant to the foregoing statute, a reviewing court must consider cross-assignments of error when the judgment on appeal is being reversed in whole or in part. *See Sullivan v. Westfield Ins. Co.*, 11th Dist. Lake No. 2012-L-004, 2013-Ohio-146, ¶39. Because we affirm the judgment of the trial court, we decline to consider appellee's cross-assignments of error.

{¶58} For the reasons discussed in this opinion, Weber's four assignments of error are without merit. Accordingly, the judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶59} The majority finds the trial court properly granted summary judgment in favor of appellees. For the reasons that follow, I disagree.

{¶60} "Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66 * * * (1993). Summary judgment is proper where (1) there is no genuine issue of

material fact remaining to be litigated; (2) the movant 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 the evidence in the non-moving party's favor, that conclusion favors the movant. *See e.g.,* Civ.R. 56(C).

{¶61} "When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co.,* 64 Ohio St.2d 116, 121 * * * (1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359 * * * (1992). Hence, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn. *Pierson v. Norfork Southern Corp*., 11th Dist. No. 2002-A-0061, 2003-Ohio-6682, ¶36. In short, the central issue on summary judgment is, 'whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-252 * * * (1986). On appeal, we review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105 * * * (1996)." *Meloy v. Circle K Store*, 11th Dist. Portage No. 2012-P-0158, 2013-Ohio-2837, ¶5-6. (Parallel citations omitted.)

{¶62} In this case, according to Weber, Edwards (her supervisor at Ferrellgas, Inc.) stated he did not want her to apply for the service scheduler position because she is a single mother with three children and that if she had to miss work because her kids were sick it would "jam up" the company because they would have to get someone else to cover the scheduling. Edwards, however, denied discouraging Weber from applying

for the position and denied making the purported statements relating to her status as a single mother. Weber alleged claims for gender discrimination based upon sexual stereotyping, retaliation, and defamation.

{¶63} The majority determines that "Edwards' statements, if true, merely reflect his concern for the efficiency with which the company operated." The majority goes on to state that "[a]lthough the statements may have been insensitive to Weber's relative position as a single mother, they do not, without some inferential leap or presumed ill intention, provide direct evidence of discrimination."

{¶64} In this writer's humble opinion, I disagree. I believe Edwards' statements to Weber that he did not want her to apply for the service scheduler position because she is a single mother, if true, constitutes direct evidence of unlawful sexual stereotyping. *See* Civil Rights Act of 1964, Title VII (employers cannot discriminate on the basis of, inter alia, "sex.")

{¶65} The trial court utilized summary judgment in this case. "Judges extensively utilize summary judgment to clear their dockets of cases they deem meritless. Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 Va.L.Rev. 139 (2007). Summary judgment is a 'very potent procedural tool' used by judges which circumvents a plaintiff's ability to proceed to trial. Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 Wake Forest L.Rev. 71 (1999). Summary judgment is cited as a cogent reason for the dramatic decline in the number of jury trials in civil cases. 93 Va.LRev. 139, *supra*.

{¶66} "Summary judgment prohibits a weighing of the evidence. *DiBlasi v. First Seventh-Day Adventist Community Church*, 11th Dist. Geauga No. 2013-G-3169, 2014-

Ohio-2702, ¶32. * * * In general, judges tend to be more conservative than juries. Judges who act as the finder of fact rather than of law, violate a plaintiff's right to a jury trial in civil cases which is guaranteed by the Seventh Amendment under the United States Constitution."

{¶67} ""Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."' *Metz v. American Elec. Power Co*., 172 Ohio App.3d 800, 2007-Ohio-3520, ¶21 * * * (10th Dist.), quoting *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133 * * * (2000)." *Vidovic v. Hoynes*, 11th Dist. Lake No. 2014-L-054, 2015-Ohio-712, ¶88-90 (O'Toole, J., dissenting).

{¶68} Here, the judge disposed of this case via summary judgment. Based on the facts presented, I believe the trial court erred in granting summary judgment in favor of appellees as Weber's issues should be resolved by a jury. This is a case of "he said, she said" which should not be resolved through summary judgment. *See, e.g., Teeter v. Teeter*, 7th Dist. Carroll No. 13 CA 887, 2014-Ohio-1471, ¶3; *Lucas v. Perciak*, 8th Dist. Cuyahoga No. 96962, 2012-Ohio-88, ¶28 (Gallagher, J., dissenting).

{¶69} Accordingly, because I believe the trial court erred in granting summary judgment in favor of appellees, I respectfully dissent.