[Cite as *Giannini-Baur v. Schwab Retirement Plan Servs.*, 2010-Ohio-6453.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

GILLIAN GIANNINI-BAUR	C. A. No. 25172
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2008 10 7280
SCHWAB RETIREMENT PLAN SERVICES, INC., et al.	
Appellees	

DECISION AND JOURNAL ENTRY

Dated: December 29, 2010

MOORE, Judge.

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

I.

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

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

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

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

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

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

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

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

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

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

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

II.

ASSIGNMENT OF ERROR I

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

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

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

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

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

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

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

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

Retaliation

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

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

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

> "[i]n considering whether an employment action was materially adverse, the court may consider the following factors: whether employment was terminated, whether the employee was demoted, received a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." (Quotations and citations omitted.) *Eakin v. Lakeland Glass Co.*, 9th Dist. No. 04CA008492, 2005-Ohio-266, at ¶19.

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

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

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

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

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

Constructive Discharge

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

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

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

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

ASSIGNMENT OF ERROR II

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

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

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

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

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

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

> "1. That [a] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).
>
> "2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element).
>
> "3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element).
>
> "4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element)." (Emphasis, citations and quotations omitted). *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 69-70.

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

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

ASSIGNMENT OF ERROR III

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

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

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

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

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

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

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

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

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

ASSIGNMENT OF ERROR IV

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

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

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

III.

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

Judgment affirmed.

There were reasonable grounds for this appeal.

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

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

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

DICKINSON, P. J.
CONCURS, SAYING:

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

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

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

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

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

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

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

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

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

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

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

APPEARANCES:

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