ORIGINAL

No. 2011-0233

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NO. 2010 CA 25172

GILLIAN GIANNINI-BAUR,

Appellant,

v.

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

Appellees.

MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEES SCHWAB RETIREMENT PLAN SERVICES, INC. AND KEVIN BAGDON

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I. THIS APPEAL DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF PUBLIC OR GREAT GENERAL INTEREST.

The Ninth Appellate District correctly affirmed the judgment entered in favor of Appellees Schwab Retirement Plan Services, Inc. and Kevin Bagdon on a jury verdict rejecting Appellant Gillian Giannini-Baur's claim that she experienced pregnancy discrimination and harassment upon returning from a pregnancy leave of absence, prior to quitting her job. The jury heard evidence relating to the entirety of Giannini-Baur's complaints during this five-month period — except for highly inflammatory references to the sexual orientation of co-worker Bill Friel, which the Trial Court properly excluded as irrelevant and unfairly prejudicial. No issue of public or great general interest is presented by this appeal, and certainly no substantial constitutional question.

Bereft of citations to supporting legal authority, Giannini-Baur's Memorandum in Support of Jurisdiction is a misguided quest to correct perceived errors in the application of well-established law that do not exist. Her first three propositions of law address a narrow issue — the exclusion of evidence of Friel's sexual orientation — within the broad discretion of the Trial Court. While the Trial Court excluded evidence of Friel's sexual orientation, it allowed Giannini-Baur to introduce evidence of Friel's treatment as evidence supporting her own pregnancy-based hostile work environment claim. The Trial Court arguably went too far in permitting evidence of Friel's treatment, and certainly did not abuse its discretion in precluding references to his sexual orientation — none of which were even remotely relevant to alleged pregnancy discrimination.

Giannini-Baur's remaining propositions of law address the Ninth District's correct application of established principles of law concerning the scope of liability under R.C. Chapter 4112 and Ohio's common law claim for wrongful discharge in violation of public policy. Propositions of Law Nos. 4, 5, and 6 address Giannini-Baur's peculiarly pled and meritless claim that she was constructively discharged due to alleged retaliation for reporting complaints of sexual orientation and pregnancy discrimination — a claim dismissed by the Trial Court on summary judgment. The fourth proposition conflicts with settled law holding that R.C. 4112.02(I) does not cover alleged retaliation based on opposition to sexual orientation discrimination. R.C. 4112.02(I) is plainly limited to discrimination "against any other person because that person has opposed any unlawful discriminatory practice *defined in this section*," and the prohibited bases of discrimination "defined in this section" — i.e., R.C. 4112.02(A) — do not include sexual orientation. Thus, every court to consider the issue has squarely held that R.C. Chapter 4112 does not extend its protections to "discrimination based on sexual orientation." *Tenney v. Gen. Elec. Co.*, 11th Dist. No. 2001-T-0035, 2002-Ohio-2975, at ¶18.[1] The Ninth District's correct adoption of this settled rule does not warrant this Court's review.

The fifth and sixth propositions of law are equally meritless; the courts below did not err in holding that Giannini-Baur failed to establish that she experienced an adverse

[1] *Greenwood v. Taft, Stettinius & Hollister* (1995), 105 Ohio App.3d 295, 298-99 (explaining that "the Ohio civil rights statutes, R.C. Chapter 4112, do not include sexual orientation among their protections"); see, also, *Blackshear v. Interstate Brands Corp.* (S.D. Ohio May 21, 2010), 2:09-CV-06, 2010 WL 2045195, at *5 (explaining that "claims targeting sexual orientation discrimination or harassment * * * are beyond the reach of Title VII and its [Ohio] counterpart").

action — much less a constructive discharge — following her alleged complaints of sexual orientation discrimination (Friel) and/or pregnancy discrimination, made less than a month before her resignation. As the Ninth District correctly explained, Giannini-Baur's opposition to Schwab's summary judgment motion pointed only to testimony that: 1) Bagdon was not going to be removed as her supervisor; 2) she would not be given special treatment in terms of moving to a new position when no relevant openings existed; and 3) a conclusory and non-specific complaint that "the harassment escalated." (App. Op., ¶19.) Such evidence, even when combined with an alleged comment by a co-worker that "there's a rat on our team," does not rise above mere "personality conflicts at work that generate antipathy and snubbing by supervisors and co-workers," which "are not actionable[.]" *Burlington Northern & Santa Fe Ry. Co. v. White* (2006), 548 U.S. 53, 68. The Ninth District's correct application of this established legal principle does not warrant further review.

Nor does Giannini-Baur's seventh proposition of law warrant this Court's review. Giannini-Baur's claim that this Court should recognize a common law public policy prohibiting sexual orientation discrimination runs headlong into this Court's recent and repeated articulation of the "fundamental principle" that "the legislative branch is 'the ultimate arbiter of public policy.'" *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, at ¶21 (internal quotation omitted); *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, at ¶34 (same); *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, at ¶59 (same). Giannini-Baur's

acknowledgment that "sexual orientation has yet to attain protected status under R.C. [Chapter] 4112" (Mem. in Supp. at 2) is therefore fatal to her public policy claim.

Finally, Giannini-Baur's eighth proposition of law — which protests the Trial Court's directed verdict in favor of Schwab on her punitive damage claim — presents no issue of great public or general interest in light of the jury verdict in Schwab's favor. In all events, Giannini-Baur's conclusory assertions that her appeal presents issues of "great public or general interest" and/or "constitutional import" do not warrant this Court's acceptance of an appeal that seeks to correct non-existent errors in the application of well-established principles of law to the unique facts of her employment discrimination claim.

II. COUNTERSTATEMENT OF THE CASE AND FACTS

Giannini-Baur's Statement of the Case and Facts misrepresents both subjects. The Ninth Appellate District summarized the record at paragraphs 2-10 of its opinion below. The Counterstatement that follows borrows from that summary, and supplements it where necessary with additional facts established by the record.

In January 2007, while Giannini-Baur was a member of Schwab's Personal Choice Retirement Accounts team (the "PCRA Team"), she announced that she was pregnant. Bagdon, her supervisor, and his wife held a baby shower for Giannini-Baur at his house. She went on an extended leave at the end of July 2007, combining her 12-week pregnancy leave with a 4-week sabbatical. After she gave birth to her daughter, Bagdon sent her a congratulating email.

When Giannini-Baur returned to work in late November 2007, her old cubicle was occupied by Friel, a new employee who was being trained. Giannini-Baur's new cubicle was three rows away on the same floor and in the same quadrant, and she told Bagdon and a co-worker that she preferred to stay in the new cubicle. Giannini-Baur's computer was mistakenly not set up on her first day back, but Bagdon quickly rectified the situation.

After Giannini-Baur learned that her husband, a U.S. Army reservist, was being called up to active duty, she asked Bagdon for part-time employment. Bagdon took the request to his manager for approval; the manager denied it for business reasons. In light of her personal situation, however, Bagdon granted Giannini-Baur permission to work regularly from home.

While Giannini-Baur claims that Bagdon excluded her from team meetings following her pregnancy leave (Mem. in Supp. at 7), the record at trial established that Schwab's meeting structure changed from joint team meetings to separate meetings for Transfer of Assets employees and for PCRA employees. Giannini-Baur did not do Transfer of Assets work; she therefore was not included in those meetings. Giannini-Baur's teammates confirmed that she was not excluded from any team meetings she should have attended.

Giannini-Baur's claim that Bagdon denied her employment opportunities when she returned from leave is also belied by the record. (Mem. in Supp. at 7.) Although Bagdon and Giannini-Baur discussed that she probably would be cross-training on

Transfer of Assets when she returned from leave, business demands required a different employee to be trained before Giannini-Baur's extended leave ended. Giannini-Baur admits she never asked Bagdon for cross-training opportunities when she returned.

On March 26, 2008, Giannini-Baur approached Mark Craig ("Craig"), a Schwab Human Resources Manager, and asked about a transfer to a part-time position. After telling Craig that she wished to be transferred to a part-time position, Giannini-Baur complained for the first time about alleged sexual orientation discrimination against Friel by Bagdon.

Although Bagdon vehemently denied that the conversation took place, Giannini-Baur told Craig that she had a meeting with Bagdon in December 2007 where Bagdon told her that if she helped him "get the F*ing faggot off his team, he would try to get me part-time." Giannini-Baur admits she never heard Bagdon use the term "fag" before or after that meeting; she claims Bagdon's comment referred to Friel, who was openly gay. In response, Craig: 1) immediately began a formal investigation into Giannini-Baur's allegations concerning Bagdon's treatment of Friel; and 2) assisted Giannini-Baur in looking for part-time positions within Schwab.

While Schwab attempted to locate a part-time position for Giannini-Baur, no positions were available at that time. Instead of waiting a few months to see if a part-time position became available, Giannini-Baur announced her resignation on Friday, April 18, 2008, effective May 2, 2008. On April 24, 2008, Giannini-Baur sent an e-mail

to Schwab HR announcing that her resignation was effective immediately because she was being "retaliated against" and experiencing a "hostile work environment."

After Giannini-Baur resigned, she was contacted by the Vice President of Human Resources and agreed to go on a paid administrative leave while Schwab investigated her allegations. Schwab interviewed seven employees and ultimately "concluded that there was no violation of company policy," but nevertheless took "appropriate steps to ensure that [Giannini-Baur had] a professional environment in which to work," including requiring Bagdon to participate in additional coaching and training. Giannini-Baur refused to return to work.

She later filed this action asserting three claims against Schwab and Bagdon, including: 1) alleged sex/pregnancy harassment; 2) alleged retaliation for complaining about alleged sex/pregnancy discrimination and alleged sexual orientation discrimination against Friel; and 3) alleged wrongful constructive discharge in violation of public policy.

The Trial Court granted summary judgment in favor of Schwab and Bagdon on Giannini-Baur's retaliation and public policy claims, but denied summary judgment as to her sex/pregnancy harassment claim. Based on these rulings, Schwab and Bagdon filed a Motion in Limine to exclude irrelevant and unfairly prejudicial evidence regarding Friel, including references to prior complaints by Friel, the investigation of those complaints, and alleged use of the terms "fag" and "faggot." The Trial Court heard oral argument on Schwab and Bagdon's Motion in Limine and initially excluded all evidence regarding Friel, but later narrowed its ruling to only exclude references to Friel's sexual orientation.

The trial on Giannini-Baur's remaining hostile work environment claim lasted four days and included testimony from fourteen witnesses and nearly 100 exhibits. At the close of Giannini-Baur's case, the Trial Court granted a directed verdict in Schwab's and Bagdon's favor on Giannini-Baur's punitive damages claim. The jury then returned a verdict in favor of Schwab and Bagdon and, on December 11, 2009, the trial court entered judgment on that verdict in favor of Schwab and Bagdon.

The Ninth Appellate District unanimously affirmed the Trial Court's judgment. Judge Moore's opinion properly found no error in the Trial Court's summary judgment rulings, the in limine ruling on references to Friel's sexual orientation at trial, and the directed verdict on Giannini-Baur's punitive damages claim. Judge Dickinson's concurrence scrutinized the merits of Giannini-Baur's claim of error in the exclusion of evidence referring to Friel's sexual orientation, and correctly found that the Trial Court "exercised proper discretion in excluding the evidence regarding Mr. Friel." (App. Op. at ¶42.)

III. ARGUMENT

Proposition of Law No. 1

A trial court does not abuse its discretion when it excludes references to the sexual orientation of a co-worker from a trial on a claim of pregnancy discrimination. (*Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, applied; Evid.R. 403, applied.)

Giannini-Baur's first three propositions of law are more properly treated as one proposition addressing the Trial Court's correct decision to exclude evidence that referred

to Friel's sexual orientation on the basis that the probative value of such evidence was substantially outweighed by the danger of unfair prejudice to Schwab if the evidence was admitted.

This Court's precedents teach that instances of allegedly abusive conduct are relevant to a claim for sex/pregnancy discrimination if, and only if, "they are directed at an employee *because of his or her sex.*" *Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, 178. Even if Bagdon made the alleged derogatory comments relating to Friel's sexual orientation (which he denies), those comments were wholly irrelevant to her claim that she experienced a hostile work environment because of her pregnancy leave. Therefore, the Trial Court could have (and should have) precluded all evidence concerning conduct directed at Friel; its decision to only exclude references to Friel's sexual orientation out of an entirely proper concern that such references were unfairly prejudicial does not constitute an abuse of discretion.

Additionally, while the correctness of the Trial Court's ruling makes an analysis of the appropriate procedural vehicle to preserve error in the exclusion of evidence unnecessary, the distinction Giannini-Baur proposes to draw between a "definitive" and run-of-the-mill motion in limine is unworkable and would upset settled principles of Ohio evidentiary law. It has long been established that in limine rulings are tentative and preliminary such that an appellate court need not review the propriety of a ruling unless the claimed error is preserved by a proffer when the issue is actually reached at trial. E.g., *State v. Maurer* (1984), 15 Ohio St.3d 239, 259 n. 14. Drawing distinctions for

purposes of appellate review based on the perceived "definitive" nature of a trial court's ruling would upset the clarity of this settled rule by making appellate review turn on an after-the-fact interpretation of the trial court's pre-trial intent. It would also create a trap for the unwary litigant who wrongly believes that an in limine ruling is "definitive" in nature and fails to take the traditional steps necessary to preserve error in the exclusion of evidence.

Contrary to Giannini-Baur's assertions, litigants who are precluded from introducing evidence by an in limine ruling do not face a "no-win situation of forfeiting review on appeal by complying with the trial court's order." (Mem. in Supp. at 10.) Rather, the long-established practice enshrined in Ohio's Rules of Evidence is that a litigant must make an offer of proof outside the presence of the jury to preserve an alleged error in the exclusion of evidence. Evid.R. 103(A)(2); see, also, *Maurer*, 15 Ohio St.3d at 259 n. 14. Following this settled practice is the best course.

Proposition of Law No. 2

R.C. 4112.02(I) does not prohibit retaliation based on opposition to sexual orientation discrimination.

Giannini-Baur's fourth proposition of law wrongly elevates complaints of sexual orientation discrimination to a protected status that is inconsistent with the plain language of R.C. 4112.02. R.C. 4112.02(I) prohibits discrimination "against any other person because that person has opposed any unlawful discriminatory practice defined in this section." In turn, R.C. 4112.02(A) specifies unlawful discriminatory practices as including discrimination "because of the race, color, religion, sex, military status,

national origin, disability, age or ancestry of any person[.]" Since sexual orientation discrimination is not mentioned in R.C. 4112.02(A), it is not an "unlawful discriminatory practice defined in this section" and, as a result, opposing such discrimination cannot give rise to liability under R.C. 4112.02(I). See *Tenney v. Gen. Elec. Co.*, 11th Dist. No. 2001-T-0035, 2002-Ohio-2975, at ¶18.

Proposition of Law No. 3

> **An employee does not experience an adverse employment action where she remains in the same position she held prior to the alleged protected activity with no material change in her wage, benefits or other conditions of employment. (*Burlington Northern & Santa Fe Ry. Co. v. White* (2006), 548 U.S. 53, followed and applied.)**

Giannini-Baur's fifth proposition of law challenges the application of established law defining an adverse employment action to her retaliation claim. To establish an adverse employment action, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse[.]" *Burlington Northern & Santa Fe Ry. Co. v. White* (2006), 548 U.S. 53, 68. This materiality requirement "separate[s] significant from trivial harms," and does not "immunize [an] employee from those petty slights or minor annoyances that often take place at work and that all employees experience." Id. In this case, as the Ninth District correctly recognized, the petty slights and minor annoyances identified by Giannini-Baur in her opposition to Schwab's summary judgment failed to establish "an adverse action against her resulting from her March 26, 2008 complaint." (App. Op. at ¶20.)

Proposition of Law No. 4

A retaliatory-constructive discharge claim cannot be based on purported conduct occurring before the allegedly protected activity.

Giannini-Baur's sixth proposition of law attempts to use the same course of conduct that a jury has already concluded did not constitute unlawful harassment as evidence of a retaliatory-constructive discharge. Neither law nor logic supports this attempt. As explained above, R.C. 4112.02(I) imposes liability on retaliatory conduct that occurs "*because*" the plaintiff has opposed an unlawful discriminatory practice. Conduct occurring *before* an allegedly protected activity cannot possibly be deemed to have occurred *because* of that activity. See *Risch v. Friendly's Ice Cream Corp.* (1999), 136 Ohio App.3d 109, 113 n. 9. Accordingly, the Ninth Appellate District properly confined its analysis to whether Giannini-Baur proffered sufficient evidence to establish a constructive discharge stemming from her March 26, 2008 complaint, and correctly concluded that she did not.

Proposition of Law No. 5

Ohio common law does not recognize a claim for retaliatory constructive discharge based on opposition to sexual orientation discrimination.

Giannini-Baur's seventh proposition of law seeks to superimpose this Court's policy preferences on the framework established by the General Assembly in R.C. Chapter 4112. She concedes that "sexual orientation has yet to attain protected status under R.C. [Chapter] 4112" (Mem. in Supp. at 2), but nevertheless urges that an

Executive Order applicable only to *state employees* creates a sufficiently "clear" public policy to impose liability on *private employers* for sexual orientation discrimination under this Court's wrongful discharge in violation of public policy jurisprudence. No authority supports such an extension of that common law theory, and a decision by this Court to adopt a new classification of prohibited discriminatory conduct would conflict with the fundamental principle that "the legislative branch is 'the ultimate arbiter of public policy.'" *Arbino*, 2007-Ohio-6948, at ¶21. The Ninth Appellate District correctly rejected Giannini-Baur's attempted end-run around the prerogatives and policy choices of the General Assembly.

Proposition of Law No. 6

> **A claimed error in a trial court ruling granting a defendant's motion for directed verdict on punitive damages does not affect a substantial right of the plaintiff where the jury returns a verdict in favor of the defendant. (Civ.R. 61, applied.)**

Finally, Giannini-Baur's claim that the directed verdict in favor of Schwab on her claim for punitive damages is inconsistent with "substantial justice," is meritless. (Mem. in Supp. at 14.) Black letter law establishes that "compensable harm stemming from a cognizable cause of action must be shown before punitive damages can be considered." *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 650. Since the jury returned a verdict in Schwab's favor, it would have had no occasion to consider an award of punitive damages even if the motion for directed verdict had been denied. Accordingly, the Trial Court's proper decision to direct a verdict in Schwab's favor on the issue of

punitive damages did not affect any "substantial right" possessed by Giannini-Baur. See Civ.R. 61.

IV. CONCLUSION

The application of established principles of law to Giannini-Baur's claims is not a matter of public or great general interest, and certainly presents no substantial constitutional question. The Ninth Appellate District's decision was correct and does not conflict with any other appellate decision, or any decision of this Court. For all of the above reasons, this Court should not accept jurisdiction over this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum in Opposition to Jurisdiction of Appellees Schwab Retirement Plan Services, Inc. and Kevin Bagdon** has been served this 14th day of March, 2011, by U.S. Mail, postage prepaid, upon the following:

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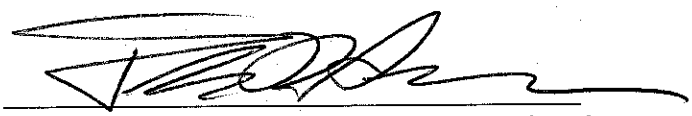

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