[Cite as *Camp v. Star Leasing Co.*, 2012-Ohio-3650.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Susan E. Camp,	:	
Plaintiff-Appellant,	:	
		No. 11AP-977
v.	:	(C.P.C. No. 09CVH-06-9689)
Star Leasing Co. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on August 14, 2012

Adams & Liming LLC, Roxi A. Liming and *Sharon Cason-Adams*, for appellant.

McNees Wallace & Nurick LLC, Samuel N. Lillard and *Anthony D. Dick*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Plaintiff-appellant, Susan E. Camp, appeals a judgment of the Franklin County Court of Common Pleas that granted summary judgment to defendants-appellees, Star Leasing Company ("Star") and Bryan Birt. For the following reasons, we reverse in part, affirm in part, and remand this case for further proceedings.

{¶ 2} Star sells, leases, and rents semi-truck trailers and provides maintenance and repair services for semi-truck trailers. Star operates nine branches, including one in Columbus and one in Marysville. In February 1996, Camp began working for Star at the Columbus branch. Camp transferred to the Marysville branch in 2001. In 2002, Star named Camp the office manager for the Marysville branch. Camp became the operations manager for the Marysville branch in March 2005. Camp worked in that position until December 2007. As operations manager, Camp was responsible for directing and coordinating the day-to-day operations of the Marysville branch.

{¶ 3} In March 2002, Star designated Birt the manager for the Marysville branch. As branch manager, Birt supervised Camp. According to Camp, Birt treated her in a degrading and humiliating manner throughout the time he acted as her supervisor. Camp testified to multiple examples of this treatment. First, Camp stated that Birt required her to stop whatever she was doing, turn her chair around to face him, put her hands in her lap, and look him in the eye whenever he spoke to her. One time, when Camp did not respond fast enough to Birt's presence, Birt twirled her chair around and yelled, "I want eye contact. I want eye contact. Right here. Right here. Look me in the eyes." (Camp affidavit, at ¶ 17.) While yelling, Birt pointed at Camp's face and then at his eyes. Birt did not require male employees to stop what they were doing, put their hands in their laps, and look him in the eye when he spoke with them.

{¶ 4} Birt also spoke to Camp in a condescending manner. On an almost daily basis, Birt would speak to Camp very slowly and exaggerate the pronunciation of words. Camp never heard Birt speak that way to male employees.

{¶ 5} Approximately twice a month, Birt would try to prevent Camp from speaking by putting his hand in her face and yelling "stop." Camp never observed Birt employing this silencing technique with male employees.

{¶ 6} On a regular basis, Birt would make faces and noises like "ugh" or "geez" when Camp spoke to him. Camp did not see Birt making faces or hear Birt emitting sounds of disgust when male employees spoke with him.

{¶ 7} At least once a week, Birt used offensive language when he spoke with Camp. Birt would say things such as, "What the [f]**k are you doing?" or "That's bulls**t!" (Camp affidavit, at ¶ 31.) Camp did not hear Birt use such language when speaking with male employees.

{¶ 8} Camp also found other aspects of Birt's behavior disagreeable. According to Camp, Birt acted as if it was beneath him to meet with female sales representatives who visited the Marysville branch. Although Birt met with the male sales representatives, he directed Camp to meet with the female sales representatives. After female sales representatives left the branch, Birt would say things like, "[S]he is hot. I'd like to bang her in the back locker room." (Camp affidavit, at ¶ 36.)

{¶ 9} Even though Star held training classes for managers that operations managers from other branches attended, Birt refused to allow Camp to attend the

manager training classes. When Camp asked to attend an outside training class to develop her management skills, Birt registered her for a seminar entitled "communications for women."

{¶ 10} Camp requested that Birt permit her to visit other Star branches so that she could learn from her peers. Although Birt initially expressed approval, he later put up roadblocks to prevent her from going to other branches.

{¶ 11} Birt allowed male employees to bring Playboy-type magazines to work. When Camp complained, Birt instructed the male employees to move the magazines to the men's restroom. Because Camp cleaned the men's restroom, she continued to see the magazines.

{¶ 12} Finally, Birt interfered with Camp's work. He would assign tasks to her, but then change his mind and decide to do the work himself after she had spent time on the project. On the day that Camp was to make a presentation to Star's safety committee, Birt decided that he would make the presentation instead.

{¶ 13} From August 2002 through December 2007, Camp made repeated complaints to Star's management about Birt's treatment of her. Camp complained to: Thomas Copeland, chief executive officer; Michael Hensley, vice president of operations; Patrick Miller, vice president of major account sales; Michelle Shinew, then the director of human resources; and Brian Kesler, then the assistant manager of the Marysville branch. Camp told Hensley, Miller, Shinew, and Kesler that she believed that Birt treated her poorly because she was a woman. Camp does not recall if she also told Copeland of that belief.

{¶ 14} When Star's management did not appear to take Camp's complaints seriously, her morale suffered. In the fall of 2007, she was more anxious than normal, cried more, and became more easily upset. By December 2007, Camp felt on the verge of a nervous breakdown. On January 2, 2008, Camp visited Dr. Lori Sullivan, who had been Camp's physician for over 20 years. Based on the signs of extreme anxiety and stress that Camp was exhibiting, Sullivan recommended that Camp take some time off work.

{¶ 15} When Camp informed Star of Sullivan's recommendation, Star granted her leave under the Family and Medical Leave Act, 29 U.S.C. 2601 et seq. In a letter dated January 30, 2008, Shinew informed Camp that Star had approved a leave of absence for the period between January 3 and March 28, 2008. The letter also stated that "unless you

are able to return to work prior to March 28, 2008, you will have exhausted your available leave benefits and will be administratively terminated from Star Leasing Company." In two subsequent letters, Shinew reminded Camp that Star would terminate her employment if she did not return to work on March 28, 2008.

{¶ 16} Over the next few months, Sullivan continued to treat Camp and diagnosed her with major depression with anxiety features. Sullivan prescribed anti-depression medication, but Camp's symptoms worsened. Because her depression and anxiety continued, Camp requested additional leave from Star. Camp supported her request with a letter from Sullivan that explained Camp's medical condition and stated that Camp would be able to return to work within four months.

{¶ 17} On April 9, 2008, Shinew, Birt, Kesler, and Robert Beaver, then the manager of Star's Columbus branch, met to discuss Camp's request for additional leave. Beaver was included in the meeting because he had provided an employee from his branch to assist Birt and Kesler with completing Camp's job duties. Shinew, Birt, Kesler, and Beaver decided that Star could not accommodate Camp's request.

{¶ 18} Shinew informed Camp in a letter dated April 23, 2008 that Star would not extend her any further leave, and that it had terminated her employment. In part, the letter stated:

> [T]he position of Operations Manager plays a vital role in the Marysville operation and is a management function. The duties performed by that position are specialized and cannot be assigned to a temporary employee. As this is the start of the company's busier season, holding this position open for four additional months for a total of over seven, would create a significant disruption to our Company's operations.

{¶ 19} On June 29, 2009, Camp filed suit against Star and Birt, alleging claims for sexual harassment, sex discrimination, disability discrimination, and retaliation in violation of R.C. Chapter 4112. After completing discovery, defendants moved for summary judgment. Camp opposed that motion. The trial court issued a judgment on October 13, 2011 that granted defendants' motion.

{¶ 20} Camp appeals the October 13, 2011 judgment, and she assigns the following errors:

> 1. The trial court erred in finding that there were no genuine issues of material fact regarding Plaintiff-Appellant's hostile work environment claim against both Defendants-Appellees.

> 2. The trial court erred in finding that there were no genuine issues of material fact regarding Plaintiff-Appellant's disability discrimination claim.
>
> 3. The trial court erred in finding that there were no genuine issues of material fact regarding Plaintiff-Appellant's retaliation claims.

{¶ 21} Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 22} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.* If the moving party meets its burden, then the nonmoving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); *Dresher* at 293. If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

{¶ 23} By her first assignment of error, Camp argues that the trial court erred in granting defendants summary judgment on her claim for hostile-environment sexual harassment. We agree.

{¶ 24} R.C. 4112.02(A) prohibits two types of sexual harassment: (1) quid pro quo harassment, i.e., harassment linked to the grant or denial of a tangible economic benefit, and (2) hostile environment harassment, i.e., harassment that, while not affecting tangible economic benefits, has the purpose or effect of creating a hostile or abusive working environment. *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 176 (2000). To establish a claim of hostile-environment sexual harassment, a plaintiff must demonstrate that: (1) the harassment was unwelcome, (2) the harassment was based on sex, (3) 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) 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. *Id.* at 176-77.

{¶ 25} In the case at bar, defendants assert that Camp cannot prove either that the alleged harassment was based on sex or that the alleged harassing conduct was severe or pervasive. Our analysis, therefore, will address only those two elements.

{¶ 26} "Harassment 'because of * * * sex' is the sine qua non for any sexual harassment case." *Id.* at 178, quoting R.C. 4112.02(A). However, harassing conduct is not limited to sexual advances or incidents with clear sexual motivation. *Id.* "Harassing conduct that is simply abusive, with no sexual element, can support a claim for hostile-environment sexual harassment if it is directed at the plaintiff because of his or her sex." *Id.* at paragraph four of the syllabus. The critical issue " 'is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.' " *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998), quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring); *see also Hampel* at 179 (holding that a plaintiff may establish a claim for hostile-environment sexual harassment by showing " 'a continuing pattern of behavior that differentiates a particular employee or group of employees because of sex' ").[1]

[1] Case law interpreting Title VII of the Civil Rights Act of 1964 is generally applicable to cases involving alleged violations of R.C. Chapter 4112. *Id.* at 175; *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 573 (1998). Thus, we rely on federal case law to assist us in our analysis of Camp's claims for hostile-environment sexual harassment and disability discrimination.

{¶ 27} Here, Camp testified repeatedly that Birt did not treat male employees in the same humiliating and demeaning ways that he treated her. Camp also introduced the affidavit testimony of Susan Winiger, a former Star employee who worked at the Marysville branch under Birt's supervision, to support her averments that Birt treated female employees differently from male employees. Winiger, who worked for Star from December 2001 to September 2002, testified that Birt daily spoke to her and Camp as if he were speaking to a two-year-old child or someone who was mentally impaired. Winiger did not hear Birt speak to male employees in the same way. Winiger also testified that Birt made her and Camp face him directly when he spoke to them, and that she did not observe Birt require male employees to act similarly. Like Camp, Winiger stated that Birt would put his hand in her face and tell her to stop speaking. Winiger did not see Birt engage in such behavior with male employees.

{¶ 28} Defendants attempt to negate this evidence by pointing to testimony that Birt treated all employees, not just female employees, in the same rude manner. Considering the totality of the evidence, we conclude that a question of fact remains whether Birt treated Camp poorly because of her sex, or whether Birt treated all employees poorly, regardless of gender. Based on the evidence that Camp relies on, a reasonable finder of fact could determine Birt would not have harassed Camp but for her sex. Accordingly, we conclude that the trial court erred in granting summary judgment on the ground that Camp did not set forth any evidence to prove the second element necessary to establish a claim for hostile-environment sexual harassment.

{¶ 29} We next consider whether the harassing conduct that Camp alleged was severe or pervasive. Hostile-environment sexual harassment exists when a workplace is permeated with discriminatory intimidation, ridicule, or insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Harris* at 21. To be actionable, the environment engendered by sexual harassment "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so." *Faragher v. Boca Raton*, 524 U.S. 775, 787 (1998); *see also Tod v. Cincinnati State Technical & Community College*, 10th Dist. No. 10AP-656, 2011-Ohio-2743, ¶ 52. Whether the workplace environment is hostile or abusive must be determined by looking at the totality of the circumstances, including the frequency of the

discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance; and the psychological effect of the conduct on the employee. *Hampel* at 181; *Ballard v. Community Support Network*, 10th Dist. No. 10AP-104, 2010-Ohio-4742, ¶ 10. "[I]t 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.*, 760 F.Supp. 1486, 1524 (M.D.Fla.1991). Moreover, the requirement that the harassing conduct be "severe or pervasive" reflects a unitary concept where deficiencies in the strength of one factor may be made up by the strength in the other factor. *Id.*

{¶ 30} Properly applied, the severe and pervasive standard "filter[s] out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.' " *Faragher* at 788, quoting Lindemann & Kadue, *Sexual Harassment in Employment Law* 175 (1992). Anti-discrimination legislation is not intended to operate as a "general civility code." *Id.*

{¶ 31} Defendants characterize Camp's allegations of harassment as "[o]ccasional instances of less favorable treatment involving ordinary daily workplace decisions [that] are not sufficient to establish a hostile work environment." *Bell v. Gonzales*, 398 F.Supp.2d 78, 92 (D.D.C.2005). We agree that some of Camp's allegations fall within this category. Birt's appropriation of work initially assigned to Camp amounts to nothing more than a normal workplace tribulation for Camp. Likewise, Birt's decisions about what training seminars Camp could attend constitute ordinary employment decisions, albeit decisions that Camp did not like. Finally, Birt's failure to facilitate opportunities for Camp to visit other branches, while disappointing to Camp, does not establish a hostile work environment.

{¶ 32} We cannot, however, assign the majority of Camp's allegations to the category of ordinary workplace decisions. Camp testified that Birt imposed a standing order throughout her employment that she had to face him quickly, put her hands in her lap, and give him her full attention whenever he spoke to her. About twice a month, Birt would put his hand in Camp's face and say "stop" to get her to stop talking. Birt also spoke to Camp in a condescending manner almost daily. Several times a week he would

make sounds of disgust or facial contortions while Camp spoke. Approximately once a week, Birt would use profanities when speaking with Camp. A reasonable finder of fact could find that all of these allegations demonstrate hostility, not normal workplace interaction.

{¶ 33} Defendants also argue that the incidents Camp alleged were "temporally diffuse[d]" and, thus, not pervasive. Defendants cite *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745 (4th Cir.1996), to support their argument. In that case, the harassing incidents the plaintiff recounted occurred intermittently over a seven-year period, with gaps between incidents as great as a year. *Id.* at 753. Unlike the plaintiff in *Hopkins,* Camp testified to harassing conduct that occurred on a daily, weekly, or monthly basis. Moreover, Camp testified that the harassing conduct continued "throughout all the years, throughout the whole time. * * * It was an on-going thing." (Camp deposition, at 131-32.) A plaintiff's assertion that harassing acts are ongoing, commonplace, or continual is sufficient to survive summary judgment under the severe or pervasive standard. *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 333-34 (6th Cir.2008), citing *Abeita v. TransAm. Mailings, Inc.*, 159 F.3d 246, 252 (6th Cir.1998).

{¶ 34} Next, defendants point out that there is no evidence that Birt physically threatened Camp. While we agree, our analysis must also take into account whether Birt engaged in conduct that humiliated Camp. Camp testified to numerous instances where Birt treated her as a child. A reasonable finder of fact could conclude that that conduct belittled and humiliated Camp.

{¶ 35} Defendants also argue that Birt's behavior did not interfere with Camp's work performance, as she received positive performance reviews, promotions, and pay raises during the time Birt was her superior. Camp, however, testified that:

> Mr. Birt's constantly degrading and humiliating treatment of me made it more difficult for me to do my job. I avoided approaching him. I did not want to deal with him. I did not want to ask him questions. When I was forced to deal with him, I tried to keep the contact as short as possible.

(Camp affidavit, at ¶ 48.)

{¶ 36} Moreover, Camp testified that dealing with Birt's conduct exacted an emotional toll on her. According to Camp, Birt's treatment of her resulted first in emotional distress, and later in depression and anxiety. Camp's emotional state became

so fragile that her physician recommended months of leave from work so that she could recover.

{¶ 37} Based on the totality of the circumstances, we conclude that reasonable minds could disagree regarding whether the alleged harassing conduct was objectively severe or pervasive. Camp has presented sufficient evidence to create a question of fact as to whether a reasonable person would find that Star's Marysville branch was a hostile and abusive place to work.

{¶ 38} We thus turn to whether Camp produced evidence demonstrating that she, herself, found Birt's conduct hostile and abusive. In her deposition, Camp stated that she found her work situation unbearable. She perceived Birt's treatment of her as degrading and humiliating, and it often brought her to tears. In December 2007, Camp sent an email to Shinew stating:

> The hostel [sic] environment here in Marysville will never change and I am no longer able to tolerate Bryan Birt's mood swings, outbursts, temper tantrums, slanderous comments, and manipulation any longer.
>
> I struggle with my self worth because of this but no longer feel as though I can remain silent for fear of reprisal or loosing [sic] my job!
>
> This is a direct reflection on the corporate office for enabling him to continue with this dictatorship.

Camp also testified that Birt's behavior caused her depression and anxiety. Given all of this evidence, a reasonable finder of fact could conclude that Camp subjectively felt that Birt created a hostile and abusive working environment.

{¶ 39} In granting summary judgment, the trial court identified evidence that suggests that Camp did not personally find the Marysville branch hostile and abusive. Apparently, Camp did not find her working environment so deleterious that she prohibited her teenaged daughter from also working there. We find that this evidence creates a question of fact, not a reason to grant summary judgment.

{¶ 40} Before moving on, we must address defendants' assertion that Camp "should have no complaints about the trial court's analysis of her harassment claim" because the trial court considered the entirety of Camp's affidavit testimony. (Appellees'

brief, at 12.) Defendants contend that the trial court could have disregarded some of that testimony because it contradicted her deposition testimony.

{¶ 41} An affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat the motion for summary judgment. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, paragraph three of the syllabus. Thus, if an unexplained conflict exists between a nonmoving party's affidavit and deposition testimony, a trial court must disregard the conflicting statements in the party's affidavit when deciding a motion for summary judgment. *Zitron v. Sweep-A-Lot*, 10th Dist. No. 09AP-1110, 2010-Ohio-2733, ¶ 27.

{¶ 42} Here, the trial court did not find a conflict between Camp's affidavit and deposition testimony. Consequently, it considered all of Camp's affidavit testimony in determining whether questions of fact precluded summary judgment on her sexual harassment claim.[2] Defendants do not assert that the trial court erred in its determination, nor do they ask this court to ignore the portions of Camp's affidavit that supposedly conflict with her deposition testimony. Accordingly, like the trial court, we have considered the entirety of Camp's affidavit testimony in our analysis of her claim for sexual harassment.

{¶ 43} Star next argues that, even if Camp presented evidence demonstrating the elements of her claim of hostile-environment sexual harassment, it is entitled to summary judgment based on the affirmative defense established in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher*. According to those cases:

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence * * *. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of

[2] To be fair, we must acknowledge that the trial court found that Camp's deposition testimony "causes evidentiary problems." (Decision Granting Defendants' Motion for Summary Judgment, at 7.) However, the trial court did not disregard those portions of Camp's affidavit that defendants claim are inconsistent with her deposition testimony. The trial court listed the harassing incidents just as Camp recounted them in her affidavit—without removing the alleged contradictory details—before holding that "a reasonable person would not find that Plaintiff's enumerated claims, collectively, created a hostile environment." (Decision, at 6.)

> any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth at 765; *Faragher* at 807. Thus, if an employer establishes that no tangible employment action occurred, then the employer must prove that it acted reasonably in preventing and correcting harassment, and that the employee unreasonably failed to act by not utilizing complaint opportunities. The employer will lose the defense if it fails to prove either prong. *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349 (6th Cir.2005). The affirmative defense is not available when a supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.[3] *Ellerth* at 765; *Faragher* at 808.

{¶ 44} Initially, we emphasize that whether an employer has taken a tangible employment action is a part of the *Ellerth/Faragher* defense, not an element of the claim for hostile-environment sexual harassment. The trial court granted summary judgment to Birt on Camp's sexual harassment claim because it found no evidence of a tangible employment action. This ruling constituted error. The lack of a tangible employment action only opens the door for a defendant to pursue the *Ellerth/Faragher* defense; it does not prevent the plaintiff from proving his or her claim for hostile-environment sexual harassment. Hostile-environment sexual harassment is a cause of action for a plaintiff who has been sexually harassed, but has not suffered the loss of a tangible employment benefit. *Ellerth* at 753-54 (holding that a plaintiff has a quid pro quo claim if a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, while any sexual harassment preceding the employment decision, if severe or pervasive, establishes a hostile-environment claim). Thus, a plaintiff may prove a hostile-environment sexual harassment claim without demonstrating a tangible employment action. *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 462 (6th Cir.2000).

{¶ 45} Here, the record contains no evidence that Star took any tangible employment action against Camp. Thus, we must consider whether the evidence conclusively establishes the *Ellerth/Faragher* affirmative defense.

{¶ 46} With regard to the first prong of the *Ellerth/Faragher* defense, evidence that an employer has promulgated an anti-harassment policy will assist an employer in

---

[3] A "tangible employment action" is also known as an "adverse employment action." *Steward v. New Chrysler*, 415 Fed.Appx. 632, 640 (6th Cir.2011). Because the *Ellerth* and *Faragher* cases use the term "tangible employment action," we will also use that term.

demonstrating that it exercised reasonable care to prevent and correct sexual harassment. However, an employer must also establish that, in practice, its policy reasonably curtailed harassing behavior. *Edwards v. Ohio Inst. of Cardiac Care,* 170 Ohio App.3d 619, 2007-Ohio-1333, ¶ 39 (2d Dist.); *Starner v. Guardian Industries,* 143 Ohio App.3d 461, 478 (10th Dist.2001). With regard to the second prong, a showing that the employee failed to use any complaint procedure set forth in an anti-harassment policy will normally suffice to satisfy the employer's burden. *Ellerth* at 765; *Faragher* at 807-08.

{¶ 47} In the case at bar, defendants introduced into evidence a copy of Star's "Harassment Prevention Employee Policy," which Camp signed to acknowledge that she had read and understood the policy. The policy, which is dated May 7, 2003, directs Star employees who feel that they have been harassed to report it immediately to one or more of the listed representatives. The representatives include Denise Hensley, then the director of human resources; Thomas Copeland, the president and chief executive officer; R. Steven Jackson, then a senior vice president; and Jeff Rosen, vice president.

{¶ 48} Camp repeatedly complained about how Birt was treating her to Copeland and Shinew, Hensley's successor as director of human resources, among others. Camp testified that she told Shinew that she believed Birt was treating her differently because of her sex. Although Shinew "wondered about" whether Camp was complaining about sexual harassment, she did not initiate a formal investigation into Camp's complaints. (Shinew deposition, at 37.) Apparently, because Camp did not use the word "harassment" when describing Birt's behavior, Shinew did not perceive Camp's complaint as one for harassment. Nevertheless, Shinew spoke with other employees at the Marysville branch who Birt supervised. Shinew asked those employees whether they had seen Birt treating Camp in the manner she alleged and whether they, too, had similar complaints about Birt's conduct. Ultimately, Shinew concluded that Camp did not like Birt and that the situation did not warrant formal investigation or other action.

{¶ 49} Given this evidence, we conclude that a question of fact exists regarding whether Camp unreasonably failed to utilize Star's complaint procedure. Camp complained about Birt to two of the individuals listed in the anti-harassment policy, as well as three other individuals who held positions superior to her own. Star asserts that these complaints are inconsequential because Camp only criticized Birt's management style, and she did not allege sexual harassment. Camp, however, alleged that she told

Shinew and others that Birt was treating her differently because she was a woman. A reasonable finder of fact could conclude that such statements should have alerted Star management that sexual harassment may have occurred.

{¶ 50} Star also asserts that Camp deviated from the complaint procedure in Star's anti-harassment policy because she did submit a written complaint. Our review of the anti-harassment policy attached to Star's summary judgment motion reveals that it does not contain any requirement that a complaint be in writing.

{¶ 51} If a reasonable finder of fact finds that Camp complained about sexual harassment, it could also find that Star failed to implement its anti-harassment policy to reasonably correct that harassment. Although the policy calls for a prompt investigation of all complaints, Shinew admits that she did not launch a formal investigation into Camp's complaints. As the record contains conflicting evidence as to both prongs of the *Ellerth/Faragher* affirmative defense, we conclude that the trial court erred in granting summary judgment on it.

{¶ 52} In sum, we conclude that genuine issues of material fact remain as to the elements of Camp's hostile-environment sexual harassment claim and Star's *Ellerth/Faragher* affirmative defense. Defendants, therefore, are not entitled to summary judgment. Accordingly, we sustain Camp's first assignment of error.

{¶ 53} By her second assignment of error, Camp argues that the trial court erred in granting Star summary judgment on her claim for disability discrimination. Camp contends that the evidence establishes that Star failed to reasonably accommodate her disability, major depression with anxiety features. We disagree.

{¶ 54} "An employer must make reasonable accommodation to the disability of an employee * * *, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business." Ohio Adm.Code 4112-5-08(E)(1). To prevail on a failure to accommodate claim, a plaintiff must first demonstrate that he or she is disabled for the purposes of R.C. Chapter 4112. *Shaver v. Wolske & Blue*, 138 Ohio App.3d 653, 663 (10th Dist.2000). In R.C. 4112.01(A)(13), a "disability" is defined as:

> [A] physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a

> record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

{¶ 55} An impairment "substantially limits" a major life activity if a person is unable to perform the major life activity, or if a person is significantly restricted in his or her ability to perform the major life activity, as compared to the average person in the general population. *Slane v. Metamateria Partners, L.L.C.*, 176 Ohio App.3d 459, 2008-Ohio-2426, ¶ 16 (10th Dist.); former 29 C.F.R. 1630.2(j)(1), 56 Fed.Reg. 35726-01, 35734, effective July 26, 1992.[4] The determination of whether a particular plaintiff's impairment substantially limits a major life activity is an individualized inquiry. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198-99 (2002); *see also Hood v. Diamond Prods., Inc.*, 74 Ohio St.3d 298, 303 (1996) (the determination of whether a particular medical condition is a disability should be made on a case-by-case basis). That inquiry focuses on: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact, or the expected permanent or long-term impact, of or resulting from the impairment. *Canady* at ¶ 33, citing former 29 C.F.R. 1630.2(j)(2).

{¶ 56} In order for an impairment to be substantially limiting, "[t]he impairment's impact must [ ] be permanent or long term." *Williams* at 198. "Generally, short-term, temporary restrictions are not substantially limiting." *Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir.1996). Thus, intermittent, episodic impairments such as broken limbs, sprained joints, concussions, appendicitis, and influenza are not disabilities, nor are isolated bouts of depression. *Ogborn v. United Food & Commercial Workers Union, Local No. 881*, 305 F.3d 763, 767 (7th Cir.2002); former 29 C.F.R. App. 1630.2(j), 56 Fed.Reg. 35726-01, 35741, effective July 26, 1992; *see also Canady* at ¶ 33-34 (holding that a lumbosacral strain and sprain was not a substantially limiting physical impairment); *Jurczak v. J & R Schugel Trucking Co.*, 10th Dist. No. 03AP-451, 2003-

---

[4] The ADA Amendments Act of 2008, Pub.L. No. 110-325, sec. 2, 122 Stat. 3553, expanded the definition of "disability," and the Equal Employment Opportunity Commission has revised the relevant regulations to reflect that change. The ADA Amendments Act, however, does not apply retroactively to govern conduct that occurred prior to January 1, 2009, the date the Act became effective. *Canady v. Rekau & Rekau, Inc.*, 10th Dist. No. 09AP-32, 2009-Ohio-4974, ¶ 33, fn. 2. Because the discriminatory conduct alleged in this case occurred prior to January 1, 2009, neither the Act nor the revised regulations influence our interpretation of the discrimination law that applies in this case.

Ohio-7039, ¶ 23-25 (holding that an upper respiratory infection was not a substantially limiting physical impairment).

{¶ 57} Courts have long struggled with whether chronic conditions characterized by episodic flares-ups of symptoms have a long-term or short-term impact. Chronic conditions persist for a long time, but many only limit the afflicted individual's ability to perform major life activities during a short-term flare-up. Ultimately, courts have determined that chronic conditions that cause periodic flare-ups "may constitute a disability if [the flare-ups] occur with sufficient frequency and are of sufficient duration and severity to substantially limit a major life activity." *Brown v. BKW Drywall Supply, Inc.*, 305 F.Supp.2d 814, 826-27 (S.D.Ohio 2004); *see also E.E.O.C. v. AutoZone, Inc.*, 630 F.3d 635, 643 (7th Cir.2010), quoting *E.E.O.C. v. Sears, Roebuck & Co.*, 233 F.3d 432, 440 (7th Cir.2000) (holding that evidence of " 'a predictable yet intermittent' pattern of impairment was sufficient to survive a motion for summary judgment"); *E.E.O.C. v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 618 (5th Cir.2009) ("Many courts have recognized that relapsing-remitting conditions like multiple sclerosis, epilepsy, or colitis can constitute ADA disabilities depending on the nature of each individual case.").

{¶ 58} In the case at bar, Sullivan, Camp's physician, testified in her affidavit that she diagnosed Camp with major depression with anxiety features. Sullivan also testified that this condition is permanent and impairs the major life activity of thinking. However, Sullivan acknowledged that Camp's thinking is only impaired "[d]uring a major depressive episode." (Sullivan affidavit, at ¶ 11.) Camp experienced such an episode from January 3 to May 22, 2008. According to Sullivan, Camp will "likely have additional depressive episodes in the future," but Sullivan cannot "predict the frequency or severity of the depressive episodes." *Id.* at ¶ 22. Since May 22, 2008, Camp has been able to control her depression with medication.

{¶ 59} We conclude that Camp's depression has not manifested itself with sufficient frequency or in sufficient duration to qualify as a substantially limiting impairment. Camp's depression interfered with her ability to think for an extended period of time on only one occasion. That period lasted only about four and one-half months. Since then, Camp's medical condition has not hampered her ability to lead an ordinary life.

{¶ 60} Because the evidence demonstrates that Camp's impairment does not substantially limit her ability to think, Camp has not established that she has a disability. *See Ashton v. Am. Tel. & Tel. Co.*, 225 Fed.Appx. 61, 66 (3rd Cir.2007) (even assuming that the impact from plaintiff's acute stress disorder and anxiety lasted seven months, the plaintiff could not "show that her ability to think was substantially limited on a long-term basis rather than being of limited duration"); *Walsh v. AT & T Corp.*, N.D.Ohio No. 1:05 CV 00769 (July 11, 2007), *aff'd*, 310 Fed.Appx. 8 (6th Cir.2009) (medical condition that prevented the plaintiff from working for three months, but thereafter was in remission, was not a disability). Accordingly, we conclude that the trial court appropriately granted Star summary judgment on Camp's disability discrimination claim, and we overrule Camp's second assignment of error.

{¶ 61} By Camp's third assignment of error, she argues that the trial court erred in granting Star summary judgment on her retaliation claim. We disagree.

{¶ 62} To establish a claim for retaliation, a plaintiff must prove that: (1) she engaged in a protected activity, (2) the defending party was aware that she had engaged in that activity, (3) the defending party took an adverse employment action against the employee, and (4) there is a casual connection between the protected activity and the adverse action. *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶ 13. If a plaintiff establishes a prima facie case, then the burden shifts to the employer to articulate some legitimate, non-retaliatory reason for its action. *Id.* at ¶ 14. If the employer satisfies this burden, then the plaintiff must demonstrate that the proffered reason for the adverse employment action was not the true reason. *Id.*

{¶ 63} In the case at bar, Camp claims that she instigated two protected activities. First, in a letter dated February 25, 2008, her attorney informed Copeland that she had been subjected to a sexually hostile work environment. Second, in a letter dated March 28, 2008, Sullivan supported Camp's request for an extended leave to accommodate her medical condition. Camp contends that Star terminated her employment because of the two letters.

{¶ 64} The trial court granted Star summary judgment on Camp's retaliation claim because it found that Star had presented a legitimate, non-retaliatory reason for firing Camp. According to Star, it discharged Camp because granting Camp an additional four months of leave would have caused an undue hardship on its business operations. Star

supported its reason with Shinew's April 23, 2008 letter, in which Shinew stated that holding Camp's position open during the company's busier season would create a significant disruption in Star's operations. Star also relied on affidavit testimony of Todd Musgrove, Star's current director of human resources, who stated:

> It is necessary to have the Operations Manager position at the Marysville branch filled during Star's busy season so that the Operations Manager can properly supervise and direct staff[;] customer requests for trailer rental and leasing opportunities, its main source of revenue, can be fielded and responded to[;] the Branch Manager will have a point of contact to aid in the operation of the business[;] and so that the Operations Manager can serve a whole host of other tasks outlined in the job description for the position.

(Musgrove affidavit, at ¶ 6.)

{¶ 65} Additionally, Star pointed to the depositions of Kesler and Birt, who testified that they worked numerous overtime hours to fulfill the duties that Camp normally performed. Although the Marysville branch was able to operate without Camp, doing so was wearing on both Kesler and Birt. Moreover, the level of customer service decreased and some customers were upset that their normal contact person was absent. When Shinew asked Kesler and Birt if they could continue to cover for Camp for an additional four months, Kesler's and Birt's "shoulders fell to the floor and [they said], " 'No.' " (Birt deposition, at 78.)

{¶ 66} Once Star articulated its legitimate, non-retaliatory reason for discharging Camp, the burden shifted to Camp to prove the reason was a pretext. *Greer-Burger* at ¶ 14. Camp, however, never made any pretext argument before the trial court. Generally, a party waives the right to raise on appeal an argument it could have raised, but did not, in earlier proceedings. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, ¶ 34. Because Camp failed to argue that Star's proffered reason did not justify her discharge in the trial court, she cannot now assert that argument on appeal.

{¶ 67} Moreover, even if we were inclined to consider the pretext issue, Camp offers no real argument for us to address. Although Camp cites various facts that she claims prove pretext, she does not explain how those facts actually show pretext. An appellant bears the burden of affirmatively demonstrating error on appeal. App.R. 16(A)(7). It is not the duty of this court to construct legal arguments in support of an appellant's appeal. *Proctor v. Ohio Civ. Rights Comm.*, 169 Ohio App.3d 527, 2006-Ohio-

6007, ¶ 16 (9th Dist.); *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶ 94 (10th Dist.).

{¶ 68} Because Star's legitimate, non-retaliatory reason stands unchallenged, Star is entitled to summary judgment on Camp's claim for retaliation. Accordingly, we overrule Camp's third assignment of error.

{¶ 69} As a final matter, we note that Camp argues in the last section of her brief that the trial court erred in failing to rule on pending motions before granting defendants summary judgment. Pursuant to App.R. 12(A)(1)(b), appellate courts must "[d]etermine [an] appeal on its merits on the assignments of error set forth in the briefs under App.R. 16." Thus, generally, appellate courts will rule only on assignments of error, not mere arguments. *Thompson v. Thompson*, 196 Ohio App.3d 764, 2011-Ohio-6286, ¶ 65 (10th Dist.). Because Camp's argument does not correlate with any of her assignments of error, we decline to consider it.

{¶ 70} For the foregoing reasons, we sustain Camp's first assignment of error, and we overrule her second and third assignments of error. We affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, and we remand this matter to that court for further proceedings consistent with law and this decision.

Judgment affirmed in part and reversed in part; cause remanded.

BROWN, P.J., and CONNOR, J., concur.