[Cite as *Davenport v. Big Brothers & Big Sisters of Greater Miami Valley, Inc.*, 2010-Ohio-2503.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

GLORIA DAVENPORT	:	
	:	Appellate Case No. 23659
Plaintiff-Appellant	:	
	:	Trial Court Case Nos. 2008-CV-08270
v.	:	
		2008-CV-08370
	:	
BIG BROTHERS AND BIG SISTERS OF THE GREATER MIAMI VALLEY, Inc., et al.	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellees	:	

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O P I N I O N

Rendered on the 4th day of June, 2010.

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BROGAN, J.

{¶ 1} Gloria Davenport appeals from the trial court's entry of summary judgment in favor of appellees Michael Parks, Lisa Brown, and Big Brothers/Big Sisters of the Greater Miami Valley ("Big Brothers/Big Sisters") on her complaint

alleging wrongful discharge and retaliation.

{¶ 2} Davenport advances three assignments of error on appeal. First, she contends the trial court erred in dismissing her claims against Parks and Brown on statute-of-limitation grounds. Second, she claims the trial court erred in failing to give her a reasonable opportunity to supplement the record after declining to take judicial notice of evidentiary materials that had been filed in a different case. Third, she asserts that the trial court erred in entering summary judgment in favor of Big Brothers/Big Sisters.

{¶ 3} The record reflects that Davenport is a former employee of Big Brother/Big Sisters. She originally filed suit against the organization and other defendants in December 2003. That action was removed to federal court but eventually was remanded to Montgomery County Common Pleas Court. After Big Brothers/Big Sisters obtained a partial summary judgment in the 2003 case, Davenport voluntarily dismissed the action without prejudice in September 2007.

{¶ 4} Davenport re-filed the present case against Big Brothers/Big Sisters in 2008 and added two new defendants, Parks and Brown. Her complaint contained three counts. The first count alleged that Davenport had been subjected to "retaliation and reprisal in the workplace" in response to her complaint to the Department of Labor about a salary cut and in response to her informing Parks that she had consulted an attorney regarding potential legal action. Count two alleged wrongful discharge "in violation of Ohio public policy that protects a worker from retaliation and reprisal in the workplace[.]" Count three alleged wrongful discharge "in violation of a public policy in Ohio that permits the tape recording of a staff meeting

for the purpose of maintaining a record of the proceeding as an alternative to taking notes."

{¶ 5} In December 2008, Parks and Brown moved to dismiss the claims against them under Civ.R. 12(B)(6) on statute-of-limitation grounds. They argued that Davenport's complaint alleged only common law claims for wrongful discharge in violation of public policy. Parks and Brown asserted that a four-year statute of limitation applied to such claims and that the allegations in Davenport's complaint showed the claims were time barred. Parks and Brown further asserted that the claims against them did not relate back to Davenport's original complaint, which she voluntarily had dismissed. In response, Davenport maintained that her claims had been brought under R.C. Chapter 4112 and that a six-year statute of limitation applied. The trial court agreed with Parks and Brown, sustaining their motion to dismiss on March 11, 2009.

{¶ 6} Thereafter, in July 2009, Big Brothers/Big Sisters moved for summary judgment. The organization argued that there was no genuine issue of material fact as to whether Davenport had been wrongfully terminated or subjected to retaliation and reprisal. Big Brothers/Big Sisters insisted that she had been fired for legitimate, job-performance reasons. In a memorandum opposing summary judgment, Davenport asked the trial court to take judicial notice of evidentiary materials that had been filed in the 2003 case she voluntarily had dismissed. In a September 15, 2009 summary judgment ruling, the trial court found judicial notice improper and proceeded to resolve Big Brothers/Big Sisters' motion based on the evidence that had been filed in this case. In so doing, the trial court found the organization entitled

to summary judgment on the claims against it. Davenport filed her notice of appeal on September 25, 2009.

{¶ 7} Davenport's first assignment of error challenges the trial court's dismissal of her claims against Parks and Brown on statute-of-limitation grounds. Although her complaint does not mention R.C. 4112, she contends all three counts were brought under the statute rather than the common law. As a result, she insists that a six-year statute of limitation applies.[1]

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[1]Parenthetically, we note that the trial court dismissed Davenport's claims against Parks and Brown on March 11, 2009. The trial court's decision, order, and entry included the following language: "This is a final appealable order, and there is no just cause for delay for the purposes of Civ.R. 54. Pursuant to App.R. 4, the parties shall file a Notice of Appeal within thirty (30) days." (Doc. #18 at 11). Despite the Civ.R. 54(B) certification, Davenport did not appeal the trial court's dismissal of her claims against Parks and Brown until more than six months later, after the trial court found Big Brothers/Big Sisters entitled to summary judgment and entered final judgment in the case. Given that the trial court's statute-of-limitation ruling disposed of all claims against Parks and Brown and included Civ.R. 54(B) certification, the ruling ordinarily would be required to be appealed within thirty days. See App.R. 4(B)(5) ("If an appeal is permitted from a judgment or order entered in a case in which the trial court has not disposed of all claims as to all parties, *other than a judgment or order entered under Civ.R. 54(B)*, a party may file a notice of appeal within thirty days of entry of the judgment or order appealed or the judgment or order that disposes of the remaining claims. *Division (A) of this rule applies to a judgment or order entered under Civ.R. 54(B)*.") (Emphasis added); see, also, *EDP Consultants, Inc. v. Trigg Tech., Inc*., Lake App. No. 2001-L-067, 2003-Ohio-474, ¶50 (recognizing that "[p]ursuant to App.R. 4(B)(5), a judgment entered under Civ.R. 54(B) must be appealed within thirty days in accordance with App.R. 4(A)").

We note the existence of a defect, however, that saves Davenport from having a partially untimely appeal. At the conclusion of its entry dismissing the claims against Parks and Brown, the trial court properly included a notation directing the clerk of courts to serve each party, through counsel, with notice of the ruling and its date of entry upon the journal. See Civ.R. 58(B). In response, the clerk was required to serve the parties and to note service in the appearance docket. Id. The docket in the present case does not reflect service by the clerk of courts. In the absence of a notation in the docket, service is not complete. Id. Under such circumstances, the time for filing an appeal is tolled. This is true even when a party has actual notice of the judgment at issue. *J.P. Morgan Chase Bank, NA v. Brown*, Montgomery App. Nos. 21853, 22359,

{¶ 8} Upon review, we find Davenport's argument to be unpersuasive. In the trial court, Davenport insisted that her complaint identified three specific acts prohibited by R.C. 4112.02(I), to wit: (1) retaliation "for contacting the Department of Labor and a private attorney about a discriminatory salary reduction," (2) retaliation "by terminating her from her employment," and (3) retaliation "for tape recording a meeting." (Doc. #14 at 1-2). She further argued that claims brought under R.C. Chapter 4112 are subject to a six-year limitation period. See *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc*., 70 Ohio St.3d 281, 282, 1994-Ohio-295 (holding that the six-year limitation period in R.C. 2305.07 governs claims filed under R.C. 4112.99, which provides a right of action for violations of R.C. Chapter 4112 but does not itself contain an express limitation period).

{¶ 9} In response, Parks and Brown pointed out that R.C. 4112.02(I) prohibits retaliation for opposing any unlawful discriminatory practice defined elsewhere in R.C. 4112.02.[2] Such practices include employment discrimination on the basis of *race, color, religion, sex, military status, national origin, disability, age,* or *ancestry*. See, generally, R.C. 4112.02. Parks and Brown argued that Davenport's complaints

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2008-Ohio-200, ¶84; see, also, *In re B.M.R.*, Miami App. Nos. 2005 CA 1, 2005 CA 18, 2005-Ohio-5911, ¶4-6. Therefore, Davenport's appeal from the trial court's dismissal of her claims against Parks and Brown is timely despite the passage of more than six months.

[2]R.C. 4112.02(I) makes it unlawful for "any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code."

about being fired in retaliation for contacting the Department of Labor, speaking to an attorney, and tape recording a meeting did not constitute discrimination on the basis of race, color, religion, sex, military status, national origin, disability, age, or ancestry. Moreover, Parks and Brown pointed out that Davenport's complaint failed even to mention R.C. 4112.02. Therefore, they urged the trial court to read the complaint as alleging only common-law claims, which were subject to a four-year limitation period. See *Pytlinski v. Brocar Products, Inc*., 94 Ohio St.3d 77, 2002-Ohio-66 (holding that the limitation period for a common-law claim for wrongful discharge in violation of public policy is four years under R.C. 2305.09(D), which provides the general limitation period for tort actions not specifically covered by other statutory sections).

{¶ 10} In its ruling, the trial court agreed with Parks and Brown that Davenport's complaint did not allege retaliation for opposing one of the types of discrimination prohibited by the statute. The trial court further noted that the complaint did not allege retaliation against Davenport for participating in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code. The trial court read the complaint as alleging only common-law retaliation and wrongful-discharge claims, which it found were subject to a four-year statute of limitation. The trial court further determined that the allegations in Davenport's complaint established that the four-year limitation period had expired before she commenced her action against Parks and Brown. As a result, it sustained their Civ.R. 12(B)(6) motion to dismiss.

{¶ 11} We review a decision sustaining a Civ.R. 12(B)(6) motion de novo.

Smith v. Ohio Adult Parole Auth., Champaign App. No. 2009 CA 22, 2010-Ohio-1131, ¶35. "A motion to dismiss a complaint for failure to state a claim upon which relief can be granted, pursuant to Civ.R.12(B)(6), tests the sufficiency of a complaint. In order to prevail, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief. * * * The court must construe the complaint in the light most favorable to the plaintiff, presume all of the factual allegations in the complaint as true, and make all reasonable inferences in favor of the plaintiff." *Grover v. Bartsch,* 170 Ohio App.3d 188, 2006-Ohio-6115, ¶16 (citations omitted). "A statute of limitations defense is an affirmative defense, per Civ.R. 8(C), that ordinarily cannot be the basis of a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim on which relief may be granted. * * * An exception exists when the complaint demonstrates the statute of limitations violation." *Gessner v. Vore*, Montgomery App. No. 22297, 2008-Ohio-3870, ¶13 (citations omitted).

{¶ 12} In the present case, Davenport does not challenge the trial court's resolution of the statute-of-limitation issue in the context of a Civ.R. 12(B)(6) motion. Nor does she dispute the applicability of a four-year limitation period if her complaint is read to allege common-law claims. Davenport's only argument on appeal is that her complaint, broadly construed, alleges retaliation against her on the basis of religion, sex, or ancestry. Therefore, she argues that her causes of action fit within the scope of R.C. 4112.02(I) and are subject to a six-year statute of limitation. We disagree.

{¶ 13} Reviewing the complaint in a light most favorable to Davenport, we find no suggestion that she was retaliated against for opposing discrimination against her

on the basis of her religion, sex, or ancestry. The bulk of Davenport's complaint alleges that she experienced workplace retaliation—including a pay cut, a job transfer, poor performance reviews, and eventually termination—after, and as a result of, relaying an accusation made by one of her clients to Michael Parks, the executive director of Big Brothers/Big Sisters. The accusation involved a claim that Lisa Brown, who was Davenport's supervisor, improperly had enrolled her daughter in the Twin Valley school district. According to the complaint, Brown discovered that Davenport had reported the issue to Parks. The first eleven paragraphs of Davenport's complaint allege various forms of retaliation against her for having informed Parks about the issue involving Brown's daughter. This plainly does not qualify as retaliation for opposing discrimination on the basis of religion, sex, or ancestry.

{¶ 14} Paragraph twelve alleges that Davenport subsequently wrote Parks a letter and complained about being harassed by Brown. It further alleges that she told Parks she had consulted an attorney and had contacted the Department of Labor about her reduction in pay and job transfer. Paragraph thirteen states that Parks met with Davenport and "bull[ied]" her about her letter to him. Paragraph fourteen alleges that a Big Brothers/Big Sisters board member offered to investigate Davenport's complaints. Paragraph fifteen asserts that Davenport never heard from the board member and that Parks never addressed her reduced salary. Paragraph sixteen of the complaint alleges that Brown gave Davenport another notice regarding poor job performance. Paragraph seventeen asserts that Davenport was placed on "non-disciplinary probation." Nothing in any of these paragraphs suggests any

retaliation arising from discrimination on the basis of religion, sex, or ancestry. To the contrary, these paragraphs all still appear to be related to the workplace problems Davenport experienced as a result of informing Parks about the school-enrollment issue involving Brown's daughter.[3]

{¶ 15} Paragraph eighteen of the complaint states that Davenport once expressed "displeasure" to someone about Big Brothers/Big Sisters' alcohol-related fund raising events. Paragraph nineteen alleges that Davenport tape-recorded an organizational staff meeting in March 2003. Paragraph twenty asserts that Brown confiscated the tape, despite the absence of a company policy prohibiting the recording of meetings. Paragraph twenty-one alleges that Davenport was denied a raise due to her allegedly poor job performance and that she received another written performance warning. Nothing in any of these paragraphs supports even an inference of retaliation arising from discrimination on the basis of religion, sex, or ancestry. At best, they suggest retaliation for complaining about the fund raising events or tape recording a meeting.

{¶ 16} Paragraph twenty-two of the complaint describes an April 27, 2003 "sex-toy party" held by a Big Brothers/Big Sisters employee named Arlene Finch. It

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[3]We recognize that retaliation against an employee for complaining to the Department of Labor or contacting an attorney about a pay problem stemming from sex discrimination falls within the scope of R.C. 4112.02. Cf. *Chandler v. Empire Chemical, Inc*. (1994), 99 Ohio App.3d 396 (observing that retaliation for complaining about sex-based wage discrimination is covered by R.C. 4112.02). Davenport's complaint, however, does not suggest that her pay was reduced because of her sex. Nor does the complaint suggest that any other adverse actions were taken against her because of her religion, sex, or ancestry, or because she complained to anyone about discrimination on these grounds. To the contrary, the first seventeen paragraphs of Davenport's complaint indicate that she experienced workplace retaliation as a result of telling Parks about the issue involving Brown's daughter's school enrollment.

alleges that the party was advertised at work but held at Finch's home. It further alleges that Finch and another woman named Tina Welch organized the party, which Davenport did not attend. Paragraph twenty-three asserts that Brown "unceremoniously" fired Davenport on April 30, 2003 allegedly for, among other things, tape recording a meeting, using her personal automobile and seeking mileage reimbursement instead of using an agency van, and unintentionally deleting files from her computer. Finally, paragraph twenty-four of the complaint alleges that Davenport received unemployment compensation following her termination. Nothing in these paragraphs suggests retaliation against Davenport for opposing discrimination on the basis of religion, sex, or ancestry.

{¶ 17} In opposition to this conclusion, Davenport asserts on appeal that retaliation against her for opposing the sex-toy party is discrimination on the basis of her sex and religion, bringing her complaint within the scope of R.C. 4112.02. As an initial matter, we note that the private party was hosted by a woman, planned by two women and open to everyone, which militates against an inference of sex discrimination. But more importantly, retaliation against an employee for opposing a sex-toy party simply does not constitute retaliation for opposing unlawful discrimination on the basis of religion or sex. We fail to see how a woman holding a tawdry after-hours party constitutes religious or sexual discrimination against other female employees. In any event, Davenport's complaint does not allege that she did anything to "oppose" the party. She simply did not attend. "'[I]n order to engage in a protected opposition activity * * * a plaintiff must make an overt stand against suspected illegal discriminatory action.'" *Motley v. Ohio Civ. Rights Comm.*, Franklin

App. No. 07-AP-923, 2008-Ohio-2306, ¶10 (citations omitted). We cannot reasonably construe Davenport's failure to attend a sex-toy party as opposition to religious or sexual discrimination prohibited by R.C. 4112.02.

{¶ 18} Based on the foregoing reasoning, we reject Davenport's argument that the trial court should have construed her complaint, which did not even mention R.C. Chapter 4112, as alleging retaliation for opposing discrimination on the basis of religion, sex, or ancestry. Therefore, she has failed to demonstrate that the six-year statute of limitation applicable to claims brought under R.C. 4112.99 for violations of R.C. Chapter 4112.02(I) governs her claims against Parks and Brown.[4] The first assignment of error is overruled.

{¶ 19} In her second assignment of error, Davenport claims the trial court erred in failing to give her a reasonable opportunity to supplement the record after declining to take judicial notice of evidentiary materials that she had filed in her earlier case against Big Brothers/Big Sisters.

{¶ 20} As set forth above, Davenport initially sued Big Brothers/Big Sisters and

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[4]Shortly after oral argument in this case, Davenport filed a "Notice of Errata," arguing that her claim alleging retaliation for contacting the Department of Labor actually was brought under R.C. 4111.13, which is part of the Ohio Minimum Fair Wage Standards Act. Davenport suggests her briefs "may have left the erroneous impression" that the claim was brought under part of the Ohio Civil Rights Act, namely R.C. 4112.02 (incorrectly cited in the Notice of Errata as R.C. 4111.02).

As set forth above, Davenport explicitly argued in the trial court that all of her claims were brought under R.C. 4112.02. She repeated this argument in her appellate brief. Confronted with the realization that R.C. 4112.02 does not apply to her particular allegations, Davenport cannot now recast her argument and assert that her complaint actually included a claim brought under the Ohio Minimum Fair Wage Standards Act rather than the Ohio Civil Rights Act. Davenport did not present this argument to the trial court or, until after oral argument, to this court. Our function as an appellate court is to correct errors. Based on the reasoning set forth more fully above, the trial court did not err in finding that Davenport's claims fell outside the scope of R.C. 4112.02.

other defendants in 2003. She voluntarily dismissed that action under Civ.R. 41(A), however, after Big Brothers/Big Sisters obtained a partial summary judgment in its favor. She then filed the present action in 2008, naming Big Brothers/Big Sisters, Parks, and Brown as defendants. After the trial court dismissed the claims against Parks and Brown on statute-of-limitation grounds, Big Brothers/Big Sisters again moved for summary judgment. The organization supported its motion by filing and citing deposition testimony from Parks, Brown, and another employee, Arlene Finch, as well as various exhibits.

{¶ 21} In opposition to summary judgment, Davenport did not present any evidentiary materials. Instead, in her memorandum opposing summary judgment, she made the following argument: "Defendants have filed evidentiary materials all of which were filed with the court when Defendants' prior Motion for Summary Judgment in Case No. 2003 CV 08762 was determined. Since this court is authorized to take notice of its own record, Plaintiff requests this court take notice of all of the evidentiary materials which were filed and considered by the court in the disposition of the prior Motion for Summary Judgment." (Doc. #35 at 2). Davenport then block quoted extensively from the trial court's summary judgment ruling in the earlier case. (Id. at 3-8). Finally, she urged the trial court to "reiterate its prior ruling." (Id. at 11).

{¶ 22} In reply, Big Brothers/Big Sisters argued that the trial court could not take judicial notice of evidentiary materials Davenport had filed in the former action, which had been voluntarily dismissed and had become a nullity. The organization further argued, based on the evidentiary materials submitted in the present case, that

it was entitled to summary judgment on the claims against it.

{¶ 23} Following Big Brothers/Big Sisters' reply, the trial court filed an August 6, 2009 entry establishing a submission date for summary judgment. Among other things, the entry set dates for the parties to file their evidentiary materials in support of or in opposition to summary judgment. (Doc. #38). Despite knowing that Big Brothers/Big Sisters had taken the position that judicial notice was improper, Davenport did not file any evidentiary materials. Instead, on August 9, 2009 she filed a "rebuttal memorandum," in which she insisted that a trial court could take judicial notice of its records from a prior case. (Doc. #39). Thereafter, on September 15, 2009, the trial court entered summary judgment in favor of Big Brothers/Big Sisters. At the outset of its analysis, the trial court disagreed with Davenport and found that it could not take judicial notice of evidence filed in the earlier case.

{¶ 24} A court certainly may take judicial notice of the record and proceedings in the case before it. *Charles v. Conrad*, Franklin App. No. 05AP-410, 2005-Ohio-6106, ¶26. It may not take judicial notice of prior proceedings in another case, however, even one involving the same parties and subject matter. Id. This prohibition is particularly strong when a court attempts to review testimony from an earlier case. *Hutz v. Gray*, Trumbull App. No. 2008-T-0100, 2009-Ohio-3410, ¶36. As the Ohio Supreme Court recognized in *National Distillers & Chemical Corp. v. Limbach*, 71 Ohio St.3d 214, 217, 1994-Ohio-33, it is inappropriate to take judicial notice of the adjudicative facts from prior cases. In *National Distillers*, the court declined to take judicial notice of exhibits that had been entered into evidence in an earlier case between the same parties. Id. at 215. Similarly, the trial court in the

present case declined to take judicial notice of any evidence Davenport may have submitted in her prior action against Big Brothers/Big Sisters. The proper procedure would have been for her to re-file the evidence in the present action. Davenport does not argue otherwise on appeal. Instead, she contends only that the trial court was obligated to grant her leave to submit her evidence after declining to take judicial notice.

{¶ 25} We disagree. Prior to the trial court's entry of summary judgment, Big Brothers/Big Sisters filed a memorandum pointing out the inapplicability of judicial notice. Although Davenport still had time to submit her evidence, she responded by insisting, incorrectly, that judicial notice could be taken. The trial court was not obligated to delay the summary judgment proceedings to reiterate what Big Brothers/Big Sisters already had pointed out. Nor was the trial court obligated to act sua sponte to grant Davenport leave to file her evidence. Davenport never requested such leave. Instead, she proceeded on the assumption that filing her evidence was unnecessary. The trial court did not abuse its discretion in holding her to the consequences of her position.

{¶ 26} Davenport's citation to Evid.R. 201(E) fails to persuade us otherwise. That rule provides: "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after notice has been taken." In the present case, Davenport was the party requesting judicial notice. She was heard on the propriety of judicial notice through her written briefs. The trial court correctly concluded that judicial notice should not be taken. We see nothing in

Evid.R. 201(E) that is helpful to Davenport on appeal. Her second assignment of error is overruled.

{¶ 27} In her third assignment of error, Davenport contends the trial court erred in entering summary judgment in favor of Big Brothers/Big Sisters. Even without any competing evidence from her, Davenport claims Big Brothers/Big Sisters failed to meet its burden of demonstrating its entitlement to judgment as a matter of law.

{¶ 28} We review an appeal from summary judgment de novo. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10. Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law because it appears from the evidence, when viewed in favor of the non-moving party, that reasonable minds can come to but one conclusion, which is adverse to the nonmoving party. *State ex. rel. Duganitz v. Ohio Adult Parole Auth*., 77 Ohio St.3d 190, 191, 1996-Ohio-326.

{¶ 29} In the present case, Davenport advances two reasons why she believes summary judgment was inappropriate. First, she contends Big Brothers/Big Sisters failed to present any evidence establishing that she (1) did not complain to Parks about being harassed by Brown or (2) did not notify Parks that she had consulted and attorney and contacted the Department of Labor regarding her reduction in pay and job relocation. Therefore, Davenport claims Big Brothers/Big Sisters failed to meet its initial burden, under Civ.R. 56(C), to point to evidence demonstrating the absence of evidence to support her claims. Second, Davenport contends Big Brothers/Big Sisters' own evidence demonstrates a genuine issue of material fact as

to whether its proffered reasons for her termination were pretextual.

{¶ 30} Davenport's first argument requires little discussion. Even though Big Brothers/Big Sisters introduced no evidence to refute the allegation in her complaint that she complained to Parks and contacted an attorney and the Department of Labor, this alone does not preclude the entry of summary judgment against her. It means only that Big Brothers/Big Sisters did not dispute *one element* of her retaliation claims, to wit: that she engaged in protected activity or conduct that Ohio public policy supports. But there are other elements to a retaliation claim.

{¶ 31} "Claims that an employer has taken an adverse employment action against an employee for engaging in a protected activity may be based on existing statutes or a common-law cause of action." *Edwards v. Dubruiel*, Greene App. No. 2002-CA-50, 2002-Ohio-7093, ¶36. "To prove a claim of retaliation [under R.C. 4112.02], a plaintiff must establish three elements: (1) that she engaged in protected activity, (2) that she was subjected to an adverse employment action, and (3) that a causal link exists between a protected activity and the adverse action. Once a plaintiff successfully establishes a prima facie case, it is the defendant's burden to articulate a legitimate reason for its action. If the defendant meets its burden, the burden shifts back to the plaintiff to show that the articulated reason was a pretext." *Peterson v. Buckeye Steel Casings* (1999), 133 Ohio App.3d 715, 727.

{¶ 32} In our analysis above, however, we concluded that Davenport's complaint set forth common-law retaliation claims. "The Ohio Supreme Court has established a common-law cause of action for retaliation by an employer. *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 233-34, 551

N.E.2d 981. The *Greeley* common-law cause of action is available when an 'employee-at-will' has been terminated or subjected to employment discipline in violation of a 'clear public policy.' * * * The four elements of a *Greeley* common-law cause of action for retaliation against an 'employee-at-will' are: (1) 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) dismissing or disciplining employees under the circumstances at hand would jeopardize the public policy (the jeopardy element); (3) plaintiff's dismissal or discipline was motivated by conduct related to the public policy (the causation element); and (4) the employer lacked overriding legitimate business justification for the dismissal (the [overriding justification] element)." *Edwards*, supra, at ¶53-55 (citations omitted)

{¶ 33} The fact that Big Brothers/Big Sisters may not have disputed whether Davenport complained to Parks, spoke to an attorney, or contacted the Department of Labor does not mean summary judgment was inappropriate. The organization could have sought, and in fact did seek, summary judgment based on the state of the evidence as it related to other elements of her retaliation claims.

{¶ 34} This leads us to Davenport's second argument, which is that Big Brothers/Big Sisters' own evidence reveals a genuine issue of material fact over whether its proffered reasons for her termination were pretextual. In any retaliation case, a plaintiff must establish a causal connection between the protected activity she engaged in—whether that activity is explicitly protected by R.C. 4112.02 or by other public policy—and the adverse employment action taken against her. In her third assignment of error, Davenport confines her analysis to her termination and

suggests that a genuine issue of material fact exists as to whether Big Brothers/Big Sisters fired her for engaging in the allegedly protected activities of complaining to Parks about Brown's treatment of her, speaking with an attorney, or contacting the Department of Labor.[5] Not surprisingly, Big Brothers/Big Sisters argued below that it had other legitimate reasons for discharging Davenport.

{¶ 35} Upon review, we find no genuine issue of material fact as to whether Big Brothers/Big Sisters' proffered reasons for firing Davenport were a pretext for unlawful retaliation. The summary judgment evidence consists of deposition testimony from Parks, Brown, and Finch. Brown's deposition includes, as an exhibit, a copy of Davenport's termination letter. The April 30, 2003 letter, which was written by Brown, reads as follows:

{¶ 36} "Dear Gloria,

{¶ 37} "I'm sorry to inform you that, effective at the close of business today, you will be dismissed from Big Brothers Big Sisters for failure to meet the terms of your probation.

{¶ 38} "On February 3, after receiving CSDS training, your employment duties and job title were modified and you were placed on a 90-day probationary status, which concludes at the end of business today. Since then, your overall performance has not developed as expected. On March 14, 2003, you received a final written

[5]As set forth above, Davenport's complaint included allegations about other forms of reprisal against her before her termination. In the second argument under her third assignment of error, however, Davenport asserts only that a genuine issue of material fact exists as to whether Big Brothers/Big Sisters fired her in retaliation for engaging in the allegedly protected activities of complaining to Parks, speaking to an attorney, and contacting the Department of Labor. Therefore, we will confine our own

warning for your continued failure to follow the directive to utilize the Agency van for work related travel to and from the school programs that you oversee. The final written warning also included the continued violation of leaving the work site early, without authorization.

{¶ 39} "Additionally, during your probationary period, you were evaluated on your ability to spend your time and the time of others on what's important and also your role as a team member of the Agency. One such example of non-compliance was your unauthorized tape-recording of the March TEAM meeting and the subsequent actions and reactions that immediately followed. More recently was your prohibited tampering (copying files to a disk to take home and deleting files) with the computer located in your office. This action resulted in you having to use another co-worker's office and has created a need to again repair damages to the unit due to your actions.

{¶ 40} "The situations described above are just a few examples of your inability to meet expectations. Because you have not met the terms of your probation, we must terminate your employment. Enclosed you will find a check for wages through today. You will be receiving information from the Agency accountant of your COBRA rights and eligibility. I wish you well in your career."

{¶ 41} In their deposition testimony, Parks and Brown elaborated on the events that led to Davenport's termination. Brown's testimony reflects that Davenport's problems began before she was placed on probation. Brown became Davenport's supervisor in 2001. (Brown depo. at 184-186). Thereafter, Davenport

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analysis to that particular adverse employment action.

received a performance correction notice from Brown in October 2001 for refusal to transfer case files. (Id. at 174). Brown gave Davenport another performance notice in July 2002, primarily because all of her "match files" failed an audit. (Id. at 173 and depo. exhibit 8). The notice faulted Davenport for her "clear misunderstanding of the Agency goals and [her] job responsibilities." (Id.). Among other things, it criticized her for leaving early, arriving late, making false statements to co-workers, and making remarks about "the stupidity of having to document cases[.]" (Id.). The notice further cited Davenport for exhibiting "overwhelming negativity" and for wasting time arguing about unresolved concerns and for being unable to settle conflicts.[6]

{¶ 42} The record contains another performance correction notice from Brown to Davenport in October 2002. (Id. at 176, and depo. exhibit 9). This notice reflected that Davenport had received three prior warnings in the summer of 2002. It further noted that she had left work early, attended unauthorized training, failed to complete an assignment on time, modified a program in a way that cost the agency money, and failed to schedule required supervisory meetings. Finally, the notice criticized Davenport for six of her seven files failing an audit.

{¶ 43} Thereafter, in 2003, the national Big Brothers/Big Sisters organization

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[6]In her reply brief, Davenport argues that we may not consider her disciplinary records even though they were included in the record below as exhibits to Brown's deposition and relied on by Big Brothers/Big Sisters in its summary judgment motion. Davenport contends her disciplinary records were not properly authenticated and that there was an inadequate foundation for their consideration. We need not dwell on these objections, however, because Davenport waived them by failing to raise them in the trial court. See, e.g., *Darner v. Richard E. Jacobs Group, Inc*.,Cuyahoga App. No. 89611, 2008-Ohio-959, ¶15 ("Failure to move to strike or otherwise object to documentary evidence submitted by a party in support of, or in opposition to, a motion for summary judgment waives any error in considering that evidence under Civ.R. 56(C).").

adopted a new operational approach entitled Brand New Thinking ("BNT"). (Brown depo. at 87). Beginning in February 2003, Davenport and her co-workers were placed on ninety-day non-disciplinary probation as part of the new program. (Id. at 87-89). The purpose was to see whether they could adapt to the changes in the organization and their new role. (Id.). With regard to Davenport, implementation of BNT meant that her responsibilities became more focused. She became a "match support specialist," rather than a case manager, which meant that she was responsible for matching children with volunteers, supporting the matches, and making frequent contact with participants. (Id. at 118-119; Parks depo. at 56-57).

{¶ 44} Davenport received a final performance correction notice from Brown on March 14, 2003. (Id. at 178 and depo. exhibit 10). This notice cited her for substandard work performance and failure to follow departmental policies and procedures. In particular, it noted that Brown had directed Davenport several times to use the agency's van for work-related travel and that Davenport had continued not to do so. The notice also indicated that Davenport continued to leave the workplace early without authorization despite being warned against doing so.

{¶ 45} In March 2003, Brown also criticized Davenport for tape-recording a staff meeting without authorization and without informing anyone. Although the agency had no written policy prohibiting such conduct, Brown viewed it as an unethical invasion of privacy. (Id. at 178-180). She confiscated the tape. Davenport later sent Brown an e-mail about the incident. Brown responded with her own e-mail, stating in part:

{¶ 46} "I recommend that during your current probationary status, you

examine your willingness to continue your employment under the Customer Service Delivery System and under my supervision. Furthermore, this probationary period, I would like to remind you that in addition to your key tasks, you are also being evaluated on spending the time to write the e-mail, requesting a conference with the office manager to conduct an inquiry about 'what was so incriminating' that happened in the meeting [was] an incredible waste of time. Likewise, was your request that both Mike [Parks] and I reduce your confusion and provide clarification as to why it was inappropriate for you to tape record a TEAM meeting. Finally, I conclude that the time spent on dealing with your inappropriate behavior [is] detrimental to administrative staff's efforts in teamwork and to the growth of the Agency. Continued inappropriate behavior will not be tolerated." (Id. at depo. exhibit 11).

{¶ 47} Around the same time, an issue occurred involving Davenport's work computer. The incident involved Davenport deleting files. (Id. at 142-143). The files involved were not work files such as documents but operational files that make "a computer stop functioning." (Id. at 144). While Brown conceded that the deletion could have been an accident, what Davenport did "went beyond pushing a wrong button and deleting a file that you created." (Parks depo. at 87). Arlene Finch, who was responsible for repairing the computer, testified that she had been called to recover files several other times after Davenport had "crashed" the system. (Finch depo. at 35).

{¶ 48} Finch added that she was not surprised when Davenport was terminated. She recalled that Davenport "just complained about everything" and that "a lot of her performance was not what the agency expected." (Id. at 18-19). Finch

remembered conversations where Parks and Brown "were worried about [Davenport and another employee] not coming on board, not doing their job, not doing their work, bucking the system, they didn't want to do this, they didn't want to do that." (Id. at 50). For his part, Parks, who ultimately was responsible for all firing decisions, testified that he saw no positive change in Davenport's attitude and performance during her probationary period. (Parks depo. at 60-61). In his opinion, she refused to "get with the program." (Id. at 98). Instead, she "blatantly, blatantly attempted to row against" where the organization was heading. (Id. at 99). He characterized the totality of Davenport's behavior as "a blatant trying to undermine what we were doing." (Id.).

{¶ 49} On appeal, Davenport asserts that the proffered reasons for her termination were pretextual. Under her third assignment of error, Davenport contends she actually was fired because she complained to Parks about Brown, spoke to an attorney, and contacted the Department of Labor about a pay dispute. Even assuming, arguendo, that these acts constitute protected activities and that discharging Davenport for engaging in them would violate public policy, we see no genuine issue of material fact as to whether she was fired in retaliation for engaging in those acts.

{¶ 50} Confronted with evidence of legitimate, non-discriminatory reasons for her discharge, a plaintiff such as Davenport must show a triable issue of fact on the issue of pretext. She may meet this burden by presenting evidence that Big Brothers/Big Sisters' proffered reasons (1) had no basis in fact, (2) did not actually motivate her discharge, or (3) were insufficient to motivate her discharge. *Wysong v. Jo-Ann Stores*, Inc., Montgomery App. No. 21412, 2006-Ohio-4644, ¶13. In the

present case, Davenport suggests that other employees failed to use the agency van for work-related travel without being fired and that no policy prohibited doing so. She also asserts that other employees tape-recorded staff meetings and that no policy prohibited such conduct. Finally, with regard to the incident involving her computer, Davenport notes Brown's admission that her deletion of the files and resulting harm may have been an accident. Therefore, Davenport contends a genuine issue of material fact exists as to whether the reasons set forth in Brown's termination letter to her were a pretext for unlawful retaliation.

{¶ 51} Upon review, we find Davenport's argument to be without merit. As an initial matter, the uncontroverted summary judgment evidence, outlined above, reveals that the events leading to Davenport's termination were larger than those three incidents. Davenport's termination letter itself indicated that her "overall performance has not developed as expected." The letter stressed that the incidents involving the van, the tape recording, and her computer were merely "examples of [her] inability to meet expectations." Moreover, the termination letter reveals that the problem with the tape recording was not simply the act of recording itself but Davenport's "subsequent actions and reactions" to the incident, which Brown found to be a waste of time.

{¶ 52} Based on the deposition testimony cited above, we find no genuine issue of material fact on the issue of pretext. The evidence before us establishes that Davenport was fired for generally poor job performance over an extended period of time. Davenport's arguments about the van, the tape recording, and her computer fail to raise a genuine issue of material fact. Although Big Brothers/Big Sisters did not

have a written policy regarding use of the agency van, Parks and Brown testified that they personally had instructed Davenport not to drive her own car on agency business. (Parks depo. at 94). Parks acknowledged that this was not an absolute rule. Exceptions were made in case of emergencies, and other employees sometimes drove their own vehicles. (Id. at 93-94). Unlike other employees, however, Parks was particularly adamant about Davenport using the agency van because her work required her to transport children, which raised important risk-management and insurance concerns. (Id. at 93).

{¶ 53} At the time of the recording incident, the agency also lacked a policy prohibiting employees from tape recording staff meetings. One other employee had tape recorded meetings in the past, but she was a secretary who kept the organization's minutes. (Parks depo. at 82; Brown depo. at 123). This does not mean that Parks and Brown properly could not reprimand Davenport, who was not a secretary, once it was discovered that she had taped a meeting without informing anyone. Parks testified that the issue immediately raised confidentiality and privacy concerns. (Parks depo. at 84). He and Brown expressed those concerns to Davenport and instructed her that it was not her job to tape record meetings. (Parks depo. at 88; Brown depo. at 134). Parks then considered the matter closed. (Parks depo. at 88-89). As set forth in her termination letter to Davenport, Brown's biggest problem with the incident appears to have been Davenport's reaction, which included continuing to debate the matter through e-mail and requesting an inquiry into what was so incriminating about the staff meeting. Brown believed that Davenport's response to the incident represented "an incredible waste of time." (Brown depo. at

exhibit 11.). Her termination letter expressed this sentiment.

{¶ 54} Finally, with regard to the computer, Brown conceded that Davenport's deletion of operating files may have been an accident. This does not mean, however, that Davenport's impairment of the agency's computers legitimately could not factor into the termination decision. As set forth above, Finch testified that she had been called on before to repair computer "crashes" caused by Davenport. (Finch depo. at 35). Finch attributed Davenport's problems to a "lack of knowledge on the computer." We see no inference of pretext arising from the fact the agency took this deficiency, and the problems it created, into consideration when deciding to fire Davenport.

{¶ 55} At best, Davenport's lawsuit boils down to retaliation claims based solely on temporal proximity. She alleges in her complaint that she informed Parks about the school-enrollment issue involving Brown's daughter in the spring of 2002. The complaint further alleges that Davenport told Parks on July 28, 2002 that she had consulted an attorney and had contacted the Department of Labor regarding a reduction in her pay and a related job transfer from Preble County to Dayton.[7] The complaint also alleges that Davenport tape-recorded the staff meeting on March 10, 2003. Finally, the complaint alleges that she failed to attend the aforementioned sex-toy party on April 27, 2003. As set forth above, she was fired on April 30, 2003. Davenport suggests in her complaint that her poor performance reviews and ultimate termination were in retaliation for her complaint to Parks about the school-enrollment

[7]The record reflects that Davenport's pay was cut to reflect a reduction in her work schedule from thirty-seven hours per week to thirty-five hours. The agency reduced Davenport's work schedule two hours per week at her request. (Brown depo. at 169-172 and exhibit 13.)

issue and/or her act of contacting an attorney and the Department of Labor and/or her act of failing to attend the sex-toy party. But "[m]ere temporal proximity between an employee's protected activity and an adverse employment action typically is insufficient to support an inference of retaliation." *Wysong*, supra, at ¶26 (citation omitted). We find that to be the case here.[8] Accordingly, we overrule the third assignment of error.

{¶ 56} The judgment of the Montgomery County Common Pleas Court is affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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Hon. Timothy N. O'Connell

[8]Parenthetically, we harbor doubts about whether Davenport's acts of contacting Parks about the school-enrollment issue, tape recording a staff meeting, and failing to attend a sex-toy party qualify as "protected activities." That likely is why Davenport's third assignment of error focuses on her more conventional acts of contacting an attorney and the Department of Labor about the pay issue. Regardless of which activities are protected, however, Davenport's wrongful discharge and retaliation claims fail because there is no genuine issue of material fact on the issue of pretext.