[Cite as *West v. Ohio State Univ.*, 2024-Ohio-1484.]

IN THE COURT OF CLAIMS OF OHIO

EMILY WEST Plaintiff v. THE OHIO STATE UNIVERSITY Defendant	Case No. 2022-00588JD Judge Lisa L. Sadler Magistrate Gary Peterson DECISION

{¶1} On August 25, 2023, Defendant filed a Motion for Summary Judgment, which has been fully briefed and is now before the Court for review. Plaintiff alleges that Defendant interfered with her rights under the Family and Medical Leave Act and created a hostile work environment based on Plaintiff's sexual orientation. Plaintiff also claims that Defendant discriminated against her and retaliated against her on the basis of a disability when Defendant terminated her while she was sick with COVID-19.

{¶2} In its Motion for Summary Judgment, Defendant argues that it terminated Plaintiff's employment because she balked at the expectations of Defendant's women's ice hockey program and sought to lower the bar on her duties. Defendant further argues that it did not know that Plaintiff was sick with COVID-19 when the decision was made to terminate her employment. Defendant's Motion for Summary Judgment is now before the Court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4. For the reasons that follow, Defendant's motion will be GRANTED.

Standard of Review

{¶3} Civ.R. 56(C) states, in part, as follows:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and

> that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶4} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). A "movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C)." *Id.* at 292. "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Keaton v. Gordon Biersch Brewery Rest. Group*, 10th Dist. Franklin No. 05AP-110, 2006-Ohio-2438, ¶ 15.

{¶5} When a moving party makes a properly supported motion for summary judgment, the adverse party may not rest upon the mere allegations or denials in the pleadings but "by affidavit or as otherwise provided in [Civ.R. 56] must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." Civ.R. 56(E). In seeking and opposing summary judgment, parties must rely on admissible evidence and evidentiary material as provided in Civ.R. 56(E). *Keaton* at ¶ 18. The court must resolve all doubts and construe the evidence in favor of the nonmoving party. *Pilz v. Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 04AP-240, 2004-Ohio-4040, ¶ 8.

Facts

{¶6} The parties filed various depositions, affidavits, and exhibits in support of and in opposition to Defendant's Motion for Summary Judgment. The evidence submitted, viewed in a light most favorable to Plaintiff, shows the following:

{¶7} Plaintiff began working as an assistant coach for Defendant's women's ice hockey team on August 1, 2019. (West Depo., Exh. A.) Plaintiff is a lesbian, which Defendant's head coach Nadine Muzerall knew when she hired Plaintiff. (Muzerall Aff., ¶ 4.) Plaintiff referred to herself as a republican lesbian on at least two occasions.[1] (West Depo., Exhs. C, D.) Plaintiff's job duties included recruiting in addition to coaching. (West Depo., 319:1-8.) According to Plaintiff, another assistant coach was the main recruiter, but recruiting was still part of Plaintiff's duties. (West Depo., 33:13-24.)

{¶8} After the COVID-19 pandemic interrupted the 2020 hockey season in March 2020, Plaintiff lived in Colorado for several months. (Muzerall Aff., ¶ 8; West Depo., 309:4-9.) While there, Plaintiff began dating Sherry Hoover. (West Depo., 309:10-12; 86:1-19.) Plaintiff moved back to Columbus in the Fall of 2020 to prepare for the resumption of hockey. (West Depo., 309:13-310:17.)

{¶9} Due to the COVID-19 pandemic, the team's ability to travel and recruit was limited during the 2020/2021 hockey season. (West Depo., 319:9-17.) However, travel for recruiting was able to resume during the following season. (West Depo., 319:9-17.) According to Plaintiff, when recruiting resumed, Muzerall "wanted to make sure that OSU was the first thing anybody and everybody saw" at tournaments. (West Depo., 324:11-21.) On July 2, 2021, Plaintiff asked Muzerall if she could miss a meeting at 6:30 p.m., after a recruiting trip, in order to meet with Hoover, who would be returning around that time. (West Depo., 320:9-321:4; West Depo., Exh. BB.) After reviewing a subsequent text in which Plaintiff thanked Muzerall the next day for "last night," Plaintiff said she believed that Muzerall let her meet with Hoover after the trip. (West Depo., 321:14-22; Defendant's Exh. BB.)

{¶10} In early 2021, Muzerall requested Plaintiff's help in writing a letter seeking a religious exemption from the COVID-19 vaccine. (West Aff., ¶ 6.) When writing the letter, Muzerall asked Plaintiff to refer to Muzerall's husband as her partner in an effort to make Muzerall appear to be a "'gay liberal instead of a straight conservative.'" (West Aff., ¶ 7.)

[1] Defendant appears to allege another instance in which Plaintiff referred to herself this way, but Defendant cites to page 125 of Plaintiff's deposition, and that page was not submitted to the Court.

Muzerall was granted an exception and, as a result, was not able to travel to Canada or other countries for recruiting. (West Aff., ¶ 9-10.)

{¶11} In July 2021, Plaintiff reported to HR that Muzerall was discriminating against her based on her sexual orientation and LGBTQ status. (West Aff., ¶ 11-12.) Plaintiff also spoke to HR because, although assistant coaches were supposed to take five or ten furlough days, they were still pressured to work on those days. (West Depo., 230:8-231:9.) The amount of travel and phone calls at all hours further contributed to her decision to speak with human resources (HR). (West Depo., 231:10-15.) Additionally, she wanted to protect herself from being fired by Muzerall. (West Depo., 239:3-5.)

{¶12} In August 2021, while they were both at lunch with assistant coach Zoe Hickel, Muzerall told Plaintiff, "'Well you two can't have children[,]' in reference to" Plaintiff's and her former fiancée's inability to have children together. (West Aff., ¶ 18.) However, in her deposition, Plaintiff said that the comment was made to both her and Zoe. (West Depo., 142:22-24.) Plaintiff also alleges that, throughout her relationship with Hoover, Muzerall did not offer Hoover the same perks, such as access to events or apparel, that were offered to the spouses or family members of other coaching staff. (West Depo., 174-177.) However, Plaintiff did not ask for apparel for Hoover. (West Depo., 174.) Hickel denied ever receiving apparel from Muzerall but acknowledged that an equipment manager may have given her a couple of items. (Hickel Depo., 11:5-12:9).

{¶13} On October 23, 2021, Plaintiff, Muzerall, and several other staff members went to a bar to celebrate Muzerall's birthday. (West Aff., ¶ 22.) When Muzerall learned that some other people in the bar "were part of the LGBTQ community, she loudly exclaimed to [Plaintiff], 'Look, Emily, it's your people! Come talk to your people!'" (West Aff., ¶ 24.) Muzerall then suggested, "'They're your people, why don't you come to the game tomorrow.'" (West Aff., ¶ 26.)

{¶14} On November 4, 2021, Plaintiff texted Muzerall regarding the tournament on the next weekend, which both Plaintiff and the other assistant coach, Zoe, were scheduled to attend. (West Depo., Exh. CC.) Plaintiff asked if they could both come back on Sunday night instead of Monday morning, but Muzerall denied the request because the last game on Sunday started at 5:00 p.m. (West Depo., Exh. CC.)

{¶15} In December 2021, Plaintiff was diagnosed with severe anxiety by both her therapist and her family physician. (West Aff., ¶ 28.) Plaintiff also believes that she "developed stress hives as a result of the additional stress from Ms. Muzerall's discriminatory conduct." (West Aff., ¶ 30.)

{¶16} In January 2022, Muzerall discussed with her supervisor, Janine Oman, that she was thinking of terminating Plaintiff's employment at the end of the season. (Muzerall Aff., ¶ 14; Oman Aff., ¶ 8.)

{¶17} On March 18, 2022, while the women's hockey team was playing in the semi-final game, Plaintiff argued with a referee and incurred a two-minute bench penalty against the team during a crucial part of the game. (West Depo., 348:11-22; Muzerall Depo., 41:14-43:24.) To Muzerall, that penalty was a "fireable" offense. (Muzerall Depo., 43:14-18.) Plaintiff bought Muzerall a pack of beer to thank her for not "murdering [her] in cold blood on tv" for the penalty. (West Depo., 353:4-21; West Depo., Exh. GG.)

{¶18} On March 20, 2022, a Sunday, Defendant's women's ice hockey team won the national championship. (West Aff., ¶ 31.) The coaching staff was given the next day, a Monday, off work. (West Depo., 354:1-2.) However, Plaintiff did not show up to work for the rest of the week and was unaccounted for on Tuesday, Wednesday, and Thursday. (West Depo., 354:1-8; Muzerall Depo., 45:22-47:7.) Plaintiff stayed home because she felt sick. (West Depo., 354:3-8.) However, she did not inform Muzerall that she was sick until March 25, 2022, when she informed Muzerall that she was going to take an at-home COVID-19 test. (West Depo., 354:3-359:22; West Depo., Exh. HH.) That test was negative. (West Depo., Exh. HH.) However, on March 27, 2022, Plaintiff tested positive for COVID-19. (West Aff., ¶ 33.) She notified Muzerall and an athletic trainer that day. (West Aff., ¶ 34.)

{¶19} Plaintiff's symptoms were exhaustion, "very head rushy and body," lightheaded and dizzy, she felt pressure in her chest, weakness, coughing, and hot and cold flashes. (West Depo., 355:21, 360:20-361:4.) She did not see a doctor, but rested at home and took over-the-counter medications such as Theraflu, Tylenol, and NyQuil. (West Depo., 364:4-13.)

{¶20} OSU's COVID-19 policy at that time required a five-day quarantine. (West Aff., ¶ 36.) Because she was quarantining, Plaintiff was not able to attend a major youth

tournament from March 30, 2022, through April 4, 2022. (West Aff., ¶ 37.) Plaintiff offered to attend the tournament after her mandatory quarantine period, but Muzerall told her to stay home and rest. (West Aff., ¶ 39.) Plaintiff returned to work on April 5, 2022. (West Aff., ¶ 41.) When she returned to work, her cough was subdued, with some irritation, but her fatigue and lightheadedness remained. (West Depo., 361:5-18.)

{¶21} Muzerall decided to terminate Plaintiff's employment no later than March 23, 2022. (Muzerall Aff., ¶ 15.) Muzerall sent a text to her supervisor, Oman, on that day to set up a meeting to discuss the future of the program. (Muzerall Aff., ¶ 15.) On March 24, 2022, Muzerall and Oman met and discussed terminating Plaintiff's employment. (Muzerall Aff., ¶ 15; Oman Aff., ¶ 10.) Oman had no reservation about the decision to terminate Plaintiff's employment. (Oman Aff., ¶ 10.) On March 28, 2022, Muzerall and Oman met with Krissy Mullins in human resources to discuss the termination. (Muzerall Aff., ¶ 16; Oman Aff., ¶ 10.)

{¶22} On April 6, 2022, Plaintiff's employment was terminated for "neglect of duty and unreliability." (West Aff., ¶ 43, 45.; Plaintiff's Exh. A.) Plaintiff also avers that she was told by Oman and Mullins that her "inability to assist Ms. Muzerall with preparation for the national championship tournament and attend the recruiting trip was a neglect of my duties as Assistant Coach." (West Aff, ¶ 46.) Muzerall testified in her deposition that the following reasons contributed to the decision to fire Plaintiff: she allegedly drank alcohol before a game in January 2022; she was late to recruiting games while on the road; poor bench management, meaning the penalty Plaintiff incurred in the semi-final game; Plaintiff's continued pushback on recruiting duties; Plaintiff's personal life distracted her from her duties during practice when she and her fiancée were on the verge of breaking up; and not reporting to work the week after the national championship game. (Muzerall Depo., 38:18-39:11, 40:13-41:13, 41:14-22, 44:7-45:7, 45:8-19; 45:22-46:3.) Despite some of these issues occurring throughout the season, Muzerall waited until the end of the season to terminate Plaintiff's employment in order for it to have a minimal impact on the student athletes. (Muzerall Depo., 49:24-50:15.)

{¶23} Because the other assistant coach voluntarily left at the end of the same season, Defendant hired two assistant coaches. (Muzerall Depo., 51:20-52:1.) Kelsey Cline moved from operations to being an assistant coach and Peter Elander, who had

previously worked for Defendant but had to leave due to health issues, was also hired. (Muzerall Depo., 52:4-18.)

Law and Analysis

{¶24} Plaintiff brings the following claims in her Complaint: (1) interference with Plaintiff's rights under the Family and Medical Leave Act (FMLA); (2) Title VII hostile work environment based on sexual orientation; (3) R.C. 4112 hostile work environment based on sexual orientation; (4) Americans with Disabilities Act (ADA) disability discrimination; (5) R.C. 4112 disability discrimination; (6) ADA retaliation; and (7) R.C. 4112 retaliation. In its Motion for Summary Judgment, Defendant argues that it is entitled to summary judgment on all of Plaintiff's claims. The Court will consider whether Defendant is entitled to summary judgment on each of Plaintiff's claims out of order for ease of consideration.

Count 1: Interference with FMLA Rights

{¶25} Plaintiff asserts that Defendant interfered with her FMLA rights because she was eligible for FMLA leave when she was diagnosed with a serious health condition (COVID-19) and Defendant failed to designate or notify Plaintiff of her rights under the FMLA as it related to her mandatory COVID-19 quarantine period. (Complaint, ¶ 56-59.) Defendant argues that it is entitled to summary judgment on this count because Plaintiff cannot establish both that she was entitled to FMLA leave and that she gave Defendant notice of her entitlement to and intent to take leave. (Motion, p. 19.)

{¶26} An employee can prove FMLA interference or retaliation circumstantially, using the indirect method of proof established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). *Ressler v. Attorney General of the State of Ohio*, 10th Dist. Franklin No. 14AP-519, 2015-Ohio-777, ¶ 14. If plaintiff establishes a prima facie case, the burden of production shifts to defendant to "articulate some legitimate, nondiscriminatory reason for [its action]." *McDonnell Douglas* at 802. If defendant succeeds in doing so, then the burden shifts back to plaintiff to demonstrate that defendant's proffered reason was not the true reason for the employment decision. *Id*. at 804.

{¶27} In order to establish a prima facie case of an FMLA interference claim, a plaintiff must establish that: "(1) he was an eligible employee, (2) defendant was a covered employer, (3) he was entitled to leave under the FMLA, (4) he gave defendant notice of his intent to take leave, and (5) the defendant denied him FMLA benefits or interfered with FMLA rights to which he was entitled." *Harris v. Metro. Govt. of Nashville & Davidson Cty.*, 594 F.3d 476, 482 (6th Cir.2010), citing *Hoge v. Honda of Am. Mfg., Inc*., 384 F.3d 238, 244 (6th Cir.2004); *see also Niles v. Natl. Vendor Servs.*, 10th Dist. Franklin No. 10AP-128, 2010-Ohio-4610, ¶ 14 (applying the standard used by the Sixth Circuit).

{¶28} There is no dispute that Plaintiff was an eligible employee and that Defendant is a covered employer. Defendant, however, argues that Plaintiff was not entitled to take FMLA leave and that Plaintiff did not give notice of her intent to take leave. 29 C.F.R. 825.112(a) delineates when an employee is entitled to take FMLA leave:

> Employers covered by FMLA are required to grant leave to eligible employees:
>
> * * *
>
> (4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job.

29 C.F.R. 825.112(a)(4).

> For purposes of FMLA, serious health condition entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115.

29 C.F.R. 825.113(a).

{¶29} Plaintiff cites 29 C.F.R. 825.115(a) in support of her argument that her COVID-19 illness qualifies as a serious health condition. That regulation delineates when an illness that is being treated *by a health care provider* amounts to a serious health condition. ("A serious health condition involving continuing treatment by a health care provider includes any one or more of the following * * *."). 29 C.F.R. 825.115. However, Plaintiff does not argue—and has not submitted any evidence indicating—that she was under the care of a health care provider or received inpatient care. In her deposition, she testified that she did not see a doctor regarding her illness. (West Depo., 364:4-7.)

Instead, she stayed at home, rested, and took over-the-counter medications such as Theraflu, Tylenol, and NyQuil. (West Depo., 364:7-13.)

{¶30} Furthermore, even if Plaintiff were under the treatment of a health care provider, "[a] regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave." 29 C.F.R. 825.113(c). *See also Gray v. Winco Foods, LLC*, E.D.Tex. No. 4:20-cv-791-SDJ-KPJ, 2022 U.S. Dist. LEXIS 133891, 57-59 (June 6, 2022) (A mild case of COVID-19, for which a physician was seen but only over-the-counter medications and drinking fluids were recommended, did not amount to a serious health condition for purposes of FMLA. Quarantining pursuant to a COVID-19 policy does not constitute a regiment of continuing treatment.).

{¶31} Therefore, Plaintiff did not have a serious health condition entitling her to FMLA leave, and she thus cannot establish a prima facie case of interference with her FMLA rights. Accordingly, summary judgment will be granted to Defendant on Count 1 of Plaintiff's Complaint.

Counts 4 and 5: Disability Discrimination—ADA and R.C. 4112

{¶32} Plaintiff asserts in Counts 4 and 5 of her Complaint that Defendant discriminated against her on the basis of a disability in violation of the ADA and R.C. 4112. Plaintiff asserts that her COVID-19 diagnosis rendered her disabled because Defendant's mandatory quarantine policy prevented her from working.

{¶33} Revised Code 4112.02 provides, in pertinent part, that: "It shall be an unlawful discriminatory practice [f]or any employer, because of * * * disability * * * to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any other

matter directly or indirectly related to employment." Similarly, "[t]he ADA prohibits employment discrimination against a 'qualified individual on the basis of disability.'" *Gearhart v. E.I. DuPont de Nemours & Co.*, 833 Fed.Appx. 416, 421 (6th Cir.2020), quoting 42 U.S.C. 12112(a). "Given the similarity between the ADA and Ohio disability discrimination law, Ohio courts look to regulations and cases interpreting the federal act when deciding cases including both federal and state disability discrimination claims." *Canady v. Rekau & Rekau, Inc.*, 10th Dist. Franklin No. 09AP-32, 2009-Ohio-4974, ¶ 32.

{¶34} Plaintiff seeks to prove discrimination through the indirect method of proof. (Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, p. 13.) The *McDonnell Douglas* framework, described above, is used to analyze indirect disability discrimination claims. *Ressler*, 10th Dist. Franklin No. 14AP-519, 2015-Ohio-777, at ¶ 16. In order to establish a prima facie case of disability discrimination, plaintiff must demonstrate that: 1) she was disabled, 2) an adverse employment action was taken by an employer, at least in part, because of her disability, and 3) although disabled, plaintiff can safely and substantially perform the essential functions of the job in question. *Id.*, citing *Debolt v. Eastman Kodak Co*., 146 Ohio App.3d 474, ¶ 39, 2001-Ohio-3996 (10th Dist.2001); *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 571, 1998-Ohio-410 (1998). "Because an employee must prove all three elements in order to establish a prima facie case of disability discrimination, the failure to establish any single element is fatal to a discrimination claim." *Taylor v. Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 11AP-385, 2011-Ohio-6060, ¶ 20.

{¶35} "A disability is 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.'" *Hilbert v. Ohio Dept. of Transp.*, 2017-Ohio-488, 84 N.E.3d 301, ¶ 49 (10th Dist.), quoting R.C. 4112.01(A)(13). The ADA defines disability thus:

> (1) Disability. The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or

> (C) being regarded as having such an impairment (as described in paragraph (3)).

42 U.S.C. 12102(1).

{¶36} Defendant argues that it is entitled to summary judgment on Plaintiff's disability discrimination claims because her testimony proves that her COVID-19 infection was not a disability. Plaintiff argues that Defendant's mandatory quarantine policy means that her COVID-19 diagnosis was regarded as a disability by Defendant because it prevented her from working.

{¶37} The ADA further defines and qualifies "being regarded as having such an impairment":

> (3) Regarded as having such an impairment. For purposes of paragraph (1)(C):
>
> * * *
>
> (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

42 U.S.C. 12102(3)(B).

{¶38} Plaintiff's testimony in her deposition establishes that she became ill around March 21 or 22, 2022. She had symptoms of exhaustion, lightheadedness, pressure in her chest, coughing, and hot and cold flashes. On March 27, 2022, Plaintiff tested positive for COVID-19. When she returned to work on April 5, 2022, she still had lingering fatigue and lightheadedness. OSU's quarantine policy required her to stay home for five days following a positive test for COVID-19.

{¶39} In *Southhall v. Ford Motor Co.*, 645 F.Supp.3d 826 (S.D.Ohio 2022), a court determined that an ordinary case of COVID-19 was not a disability for purposes of the ADA without facts indicating that it substantially limited one or more of the employee's major life activities. *Southhall* at 834, citing *Champion v. Mannington Mills, Inc.*, 538 F.Supp.3d 1344, 1349 (M.D.Ga.2021). The court in *Southhall* also determined that, because an ordinary case of COVID-19 does not last for more than six months, it is only a transitory impairment, and, therefore, cannot meet the standard for being regarded as having a disability. *Southhall* at 834.

{¶40} In this case, Plaintiff alleges that Defendant's mandatory quarantine policy means that her COVID-19 diagnosis was regarded as a disability, but her deposition testimony shows that her symptoms lasted for less than six months. Accordingly, her illness was transitory, and—like the plaintiff in *Southhall*—she cannot qualify as disabled due to being regarded as having a disability. Furthermore, although Plaintiff does not argue that her COVID-19 illness was a physical or mental impairment that substantially limits one or more major life activity, her illness does not qualify as a disability under that category. *Southhall* at 834; *see also Drepaul v. Wells Fargo Bank, N.A.*, D.Conn. No. 3:23-CV-00123-MPS, 2024 U.S. Dist. LEXIS 5851, 11-12 (Based on guidance from the EEOC, a mild case of COVID-19 that lasted about one month is not a disability for purposes of the ADA; merely telling her employer that she had COVID-19 and experienced COVID-19-like symptoms for four weeks — especially when she also told her employer her symptoms had resolved and her employer cleared her to return to work — is not a sufficient basis to find that she was regarded as disabled.); *McKnight v. Renasant Bank*, N.D.Miss. No. 1:21-CV-00139-GHD-DAS, 2022 U.S. Dist. LEXIS 80835, 8 (reaching the same conclusion).

{¶41} Therefore, Plaintiff cannot establish a prima facie case of disability discrimination. Accordingly, summary judgment will be granted to Defendant on Counts 4 and 5 of Plaintiff's Complaint.

Counts 6 and 7: Disability Retaliation—ADA and R.C. 4112

{¶42} Plaintiff asserts in Counts 6 and 7 of her Complaint that Defendant retaliated against her in violation of the ADA and R.C. 4112. In her Response in Opposition to Defendant's Motion for Summary Judgment, Plaintiff argues that she engaged in a protected activity when she informed Muzerall and the athletic trainer of her positive COVID-19 test.

{¶43} "Absent direct evidence of retaliatory intent, Ohio courts analyze retaliation claims using the evidentiary framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 * * *." *Veal v. Upreach LLC*, 10th Dist. Franklin No. 11AP-192, 2011-Ohio-5406, at ¶ 16. Indirect proof of retaliation is thus examined via a similar burden-shifting analysis

to discrimination. In order to establish a prima facie case of retaliation, Plaintiff "must establish that (1) she engaged in a protected activity, (2) the defending party was aware that the claimant had engaged in that activity, (3) the defending party took an adverse employment action against the employee, and (4) there is a causal connection between the protected activity and adverse action." *Id.* at ¶ 16. As noted above, due to the similarity between the ADA and Ohio disability discrimination law, Ohio courts look to federal regulations and cases when deciding both federal and state discrimination claims. *Canady*, 2009-Ohio-4974, at ¶ 32.

{¶44} "Prohibited discrimination under the ADA includes retaliation against an employee for requesting an accommodation." *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 188 (3d Cir.2010). "[U]nlike a general ADA discrimination claim, an ADA retaliation claim does not require that the plaintiff demonstrate a disability within the meaning of the ADA, but only that the plaintiff has a 'reasonable, good faith belief that [he] was entitled to request the reasonable accommodation [he] requested.'" *Id.*, quoting *Williams v. Philadelphia Hous. Authority Police Dept.*, 380 F.3d, 751, 759 (2004), fn. 2. However, a plaintiff does not have a reasonable, good faith belief if she knows that her condition is temporary. *Sulima* at 188-189.

{¶45} In this case, Plaintiff never requested an accommodation and thus never engaged in a protected activity. Even if Plaintiff informing Muzerall and the athletic trainer of her positive test were construed as a request for an accommodation, Plaintiff knew that her COVID-19 infection was temporary. Therefore, Plaintiff cannot establish a prima facie case of disability retaliation.

{¶46} Moreover, even if the Court were to conclude that Plaintiff established a prima facie case of discrimination or retaliation, Plaintiff failed to create a genuine issue of material fact regarding whether the reasons given for the termination of her employment, among other things, incurring a penalty during a critical game and pushing back on recruiting expectations, were pretextual. There is no dispute that Plaintiff incurred a penalty at a critical time during a critical game and that Muzerall considered

that action alone to merit termination of Plaintiff's employment.[2] Accordingly, summary judgment will be granted to Defendant on Counts 6 and 7 of Plaintiff's Complaint.

Counts 2 and 3: Hostile Work Environment Based on Sexual Orientation—Title VII and R.C. 4112

{¶47} Plaintiff asserts in Counts 2 and 3 of her Complaint that Defendant created a hostile work environment based on sexual orientation in violation of Title VII of the Civil Rights Act of 1964 and R.C. 4112. In Ohio, "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.*, 66 Ohio St.2d 192, 196 (1981).

{¶48} In order to establish a hostile work environment claim created by harassment based on sexual orientation, a "plaintiff must establish: (1) the employee was a member of the protected class; (2) the harassment of the employee was unwelcome; (3) the harassment complained of was based on [sexual orientation]; (4) the harassment had the effect or purpose of unreasonably interfering with the employee's work performance or of creating an intimidating, hostile, or offensive work environment; and (5) respondeat superior (employer) liability." *Chapa v. Genpak, LLC*, 10th Dist. Franklin No. 12AP-466, 2014-Ohio-897, ¶ 33, citing *Zachaeus v. Mt. Carmel Health Sys.*, 10th Dist. Franklin No. 01AP-683, 2002 Ohio App. LEXIS 398. In order for conduct to be unwelcome, the plaintiff must not have "solicited it nor invited it and regarded the conduct as undesirable and offensive." *Ripley v. Ohio Bureau of Emp. Servs.*, 10th Dist. Franklin No. 04AP-313, 2004-Ohio-5577, ¶ 15, quoting *Bell v. Berryman*, 10th Dist. Franklin No. 03AP-500, 2004-Ohio-4708, ¶ 57.

[2] "Once a plaintiff demonstrates a prima facie case, the employer is required to set forth some legitimate, non-discriminatory basis for its action. If the employer meets its burden, a plaintiff must be afforded an opportunity to prove by a preponderance of the evidence that the legitimate reasons the employer offered were not its true reasons for its actions but were a pretext for discrimination." *Hall v. Ohio State Univ. College of Med.,* 10th Dist. Franklin No. 11AP-1068, 2012-Ohio-5036, ¶ 15. To prevail, Plaintiff must show that Defendant's "proffered reason (1) had no basis in fact, (2) did not actually motivate the employer's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Hall* at ¶ 27.

{¶49} In determining whether a work environment is sufficiently hostile, the court must "look at all of the circumstances, including: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with the employee's work performance." *Chapa* at ¶ 34, (citations omitted). "The standards for judging hostility are sufficiently demanding in order to ensure that Title VII does not become a 'general civility code.'" *Id.* (citation omitted).

{¶50} Defendant does not dispute whether Plaintiff was a member of a protected class.[3] Instead, Defendant argues that the conduct that Plaintiff alleges is not sufficiently severe or pervasive to constitute a hostile work environment. Defendant also argues that Plaintiff's testimony shows that the alleged conduct was not based on her sexual orientation or was not unwelcome. In response, Plaintiff argues that Muzerall's comments were unwelcome, related to her sexual orientation, and were sufficiently severe or pervasive to alter the conditions of Plaintiff's employment.

{¶51} Plaintiff has identified the following instances of discriminatory conduct or comments by Muzerall: (1) calling Plaintiff a republican lesbian, (2) referring to several LGBTQ individuals as "your people", (3) referring to Plaintiff's and her former fiancée's inability to have children together, (4) withholding perks to Plaintiff's fiancée compared to the spouses of other coaching staff, and (5) Muzerall referring to her husband as her partner when Plaintiff was helping Muzerall draft a letter seeking an exemption from the COVID-19 vaccine in order to appear more liberal.

{¶52} Looking at the first alleged instance of discrimination, the Court concludes that it was not unwelcome. The evidence contains two instances of Plaintiff referring to herself as a republican lesbian or "lesbo" in texts to Muzerall. (West Depo., Exhs. C, D.) Additionally, Hickel deponed that Muzerall referred to Plaintiff as a republican lesbian only after Plaintiff first referred to herself as such. (Hickel Depo., 12:12-16.) By calling herself

[3] The United States Supreme Court has stated "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cty*. 140 S.Ct. 1731, 1741, 207 L.Ed.2d 218 (2020). *See also Nance v. Lima Auto Mall, Inc*., 3rd Dist. Allen No. 1-19-54, 2020-Ohio-3419, ¶ 113. *But see Sullivan v. Ikea*, 12th Dist. Butler No. CA2019-09-150, 2020-Ohio-6661, ¶ 30; *Bolby Burns v. Ohio State Univ. College of Veterinary Med*., 10th Dist. Franklin No. 13AP-633, 2014-Ohio-1190, ¶ 8.

a republican lesbian, Plaintiff invited others, including Muzerall, to do the same. *Ripley*, 2004-Ohio-5577, at ¶ 15. Put another way, Plaintiff cannot be offended by her own words.

{¶53} Most of the other allegedly discriminatory conduct were single instances or events. The exception is Plaintiff's allegation that Muzerall did not grant her then-fiancée, Hoover, the same perks, such as apparel and access to events, that were given to the spouses or family members of other coaching staff. However, Plaintiff admits that she did not ask Muzerall for women's hockey apparel for Hoover. Additionally, Plaintiff and Hoover were not married or family members, unlike all of the people who allegedly received free apparel or access to events. Plaintiff has not shown that someone else's fiancée or non-married romantic partner received apparel or access to events.

{¶54} Moreover, Plaintiff does not allege that she asked Muzerall for access to a certain event or that Hoover join her for travel and Muzerall denied the request. Because Plaintiff did not ask for a perk, it cannot be shown that any denial of perks was due to Plaintiff's sexual orientation. Instead, it is possible that Plaintiff did not receive extra perks because she did not ask for them.

{¶55} The other alleged instances of conduct are all separate occurrences that took place over the two years and eight months that Plaintiff was employed. They were not frequent occurrences. *See Hampel v. Food Ingredients Specialties*, 89 Ohio St.3d 169, 181, 2000-Ohio-128, 729 N.E.2d 726 ("[I]t is generally understood that the 'severe or pervasive' requirement does not present two mutually exclusive evidentiary choices, but reflects a unitary concept where deficiencies in the strength of one factor may be made up by the strength in the other.") Muzerall's comment that she found Plaintiff's people may have been inelegant or even humiliating, but it was just words—not slur words or threats—and the conduct appears to have only lasted for a few moments. So although it was embarrassing to Plaintiff, the Court cannot conclude that it was either severe or

pervasive harassment. *See Chapa*, 2014-Ohio-897, at ¶ 34, 41 (Factors in determining hostility include frequency of discriminatory conduct, severity, and whether it is physically threatening or humiliating, or merely an offensive utterance. Frequent non-severe racist comments did not on their own create a hostile work environment.). The same analysis applies to Muzerall's behavior when Plaintiff helped her draft the exemption letter. It may have been tactless, but it did not rise to the level of severe harassment.

{¶56} Muzerall's comment to Plaintiff that she was not able to have children, viewed in a light most favorable to Plaintiff, was offensive. However, it was only a one-off utterance, which given the infrequency of the other alleged harassment, was not sufficient to create a hostile work environment. "A recurring point in these opinions is that 'simple teasing' * * *, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher v. Boca Raton*, 524 U.S. 775, 788 118 S.Ct. 2275, 141 L.Ed.2d. 662 (1998), quoting *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); *see also Hampel, supra*. Although Muzerall's comment regarding children may have been offensive, it was not "extremely serious." Therefore, the comment cannot create a hostile work environment on its own or merely in the presence of infrequent other comments, such as is the case here.

{¶57} In conclusion, taking all of the comments and conduct together, viewing the facts in a light most favorable to Plaintiff, the Court cannot conclude that the comments and conduct were sufficiently severe, frequent, or affected Plaintiff's work performance sufficiently to create a hostile work environment. Therefore, summary judgment will be granted to Defendant on Counts 2 and 3 of Plaintiff's Complaint.

Conclusion

{¶58} Construing the evidence most strongly in Plaintiff's favor, the Court finds that there are no genuine issues as to any material fact and Defendant is entitled to summary judgment on all of Plaintiff's claims. Therefore, Defendant's Motion for Summary Judgment is GRANTED.

LISA L. SADLER
Judge

[Cite as *West v. Ohio State Univ.*, 2024-Ohio-1484.]

EMILY WEST Plaintiff v. THE OHIO STATE UNIVERSITY Defendant	Case No. 2022-00588JD Judge Lisa L. Sadler Magistrate Gary Peterson JUDGMENT ENTRY

IN THE COURT OF CLAIMS OF OHIO

{¶59} A non-oral hearing was conducted in this case upon Defendant's Motion for Summary Judgment. For the reasons set forth in the Decision filed concurrently herewith, Defendant's Motion for Summary Judgment is GRANTED. Judgment is rendered in favor of Defendant. All previously scheduled events are VACATED. Court costs are assessed against Plaintiff. The Clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

LISA L. SADLER
Judge

Filed March 6, 2024
Sent to S.C. Reporter 4/18/24