ORIGINAL

IN THE SUPREME COURT OF OHIO

MATTHEW P. CAIAZZA Appellant, v MERCY MEDICAL CENTER, et al., Appellees.	: : : : : : : : : :	14-1160 On Appeal from the Stark County Court of Appeals, Fifth Appellate District Court of Appeals Case No: 2013CA00181

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT MATTHEW P. CAIAZZA

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EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This appeal to this Honorable Court presents several issues which are of public or great general interest. The Fifth Appellate District's decision: (1) amended, substantially changed, the rights afforded employees under R.C. Section 4112.02 (I) and (J), by substituting "employer" for "individual" with respect to those parties who may be held liable for the statutory claims of aiding and abetting discrimination and unlawful discrimination; (2) has redefined and limited this Court's definition of spoliation set forth *in Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 615 N.E.2d 1037 (1993), and in *Davis v. Wal-Mart Stores*, Inc., 93 Ohio State 3d 488, 756 N.E. 2d 657 (2001); and, (3) has severely eviscerated a litigant's right to effectively subpoena documents by condoning those who withhold or destroy evidence.

These holdings unconstitutionally reduce employees' rights in the workplace, deny litigants' rights to a fair trial and due process, and reward recalcitrant litigants who chose to conceal evidence and thereby obstruct justice. The Court of Appeals must be reversed. The rights of Ohio citizens will be severely and negatively impacted if this Honorable Court does not act.

1. The Appellate Court's Decision Amends Ohio Statutes for Aiding and Abetting Discrimination and Retaliation

The Court of Appeals improperly overturned Sections (I) and (J) of R.C. §4112.02. The Ohio Legislature has enacted many statutory provisions prohibiting discrimination. R.C. §4112.02(A) prohibits an "employer" from taking unlawful action against an employee. "Employer" is statutorily defined as any one acting directly or indirectly in the interests of the *Employer*. R.C. §4112.02(A)'s regulates *Employers*' conduct.

However, the legislative prohibitions against *aiding and abetting discrimination* and *unlawful retaliation* are not similarly limited. Rather, R.C. §4112.02(I) and (J), prohibit certain conduct by "individuals," not *employers.* Yet, the Appellate Court would prevent employees from suing "individuals" – abrogating §§ (I) and (J). The Court of Appeals edited R.C. §§4112.02 (I) and (J), immunizing *individuals* who are not *supervisors*.

If the Court of Appeals' decision stands, not only will non-supervisors be empowered to act with impunity, but the precedent will be established condoning Courts engaging in a legislative function. The Appellate Court's decision frustrates an Ohio legislative command. The Ohio legislature has chosen to eradicate workplace discrimination by making both supervisors as well as others who assist or instigate discriminatory acts liable for misconduct. The Fifth Appellate Court has invaded the Ohio legislature's prerogative. It is the Court's duty "to apply the statute as the General Assembly has drafted it; it is not Court's duty to rewrite it." *Doe v. Marlington Local Sch. Dist. Bd. of Edn.*, 2009-Ohio-1360, 122 Ohio St. 3d 12, 907 N.E.2d 706. It is not within the purview of the Appellate Court (or any Court) to unconstitutionally limit the scope of the aiding and abetting and retaliation statutes by restricting whom may be held accountable. The Appellate Court's decision unconstitutionally deprives Appellant and other Ohio workers of their statutory rights.

Of course, even if the Court of Appeals, did not agree with the public policy behind the Ohio Legislature's enactment of R.C. 4112.02 (I) and (J), this is still the law, and Constitutional separation of powers doctrine mandates the law be followed. This Court is urged to accept this case to clarify the proscriptive scope of the aiding and abetting and retaliation statutes, and to affirm the legislature's authority to establish laws as well as the Court's proper Constitutional role in giving effect to those laws.

2. The Appellate Court's Decision severely eviscerates a litigant's right to effectively subpoena documents by condoning those who withhold or destroy evidence

This Honorable Court is implored to accept jurisdiction of this appeal to safeguard the integrity of the judicial process. Spoliation and fraud are causes of action in Ohio. The Court of Appeals erred in law when the Court found *spoliation* only applies where there wilful destruction or alteration of evidence; and, can only be brought in the first forum it is practiced in. *Smith v. Howard Johnson Co.,* Inc. 67 Ohio St.3d 28, 615 N.E.2d 1037 (1993); *Davis, supra.* The Court erred in law when it found appellee MMC complied with subpoenas in question; that records were only withheld and not destroyed; spoliation only occurred in the criminal matter; that there was no intent to defraud; and no justifiable reliance by Appellant on Appellee MMC's sworn response. *Dresher v. Burt,* 75 Ohio St.3d 280, 293 (1996).

All litigants should be able to rely upon the procedure established by this Court for the issue of a subpoenas duces tecum. A litigant issuing a subpoena duces tecum should be able to rely that the person receiving the subpoena will comply, object. If the entity receiving a subpoena duces tecum submits documents without objecting, the litigant should be able to rely on the sworn response. The Appellate Court wrongly relied on MMC's implication that because a fellow employee, Adam Harsh, suggested to Appellant that Jennifer Jones had previously and falsely made claims about Adam Harsh, Appellant should have known that MMC had hidden a number of records both concerning this incident, as well as Jones' evaporated 2010 performance evaluation.

The Appellate Court had no Rule 56 evidence to base its conclusion that Plaintiff Appellant, at the time of his criminal trial was on notice of MMC intentional withholding of

its records. The conclusion by the Court is not based on undisputed facts. The Court wrongly relied on opposing counsel's impermissible colloquy to reach its conclusion rather than using the *Dresher* standard. The Appellate Court violated the requirements of this Court as set forth in *Dresher* because the moving party did not discharge its initial burden under this rule. The moving party did not specifically point to evidence of a type listed in Civ.R. 56(C) to affirmatively demonstrating that the nonmoving party has no evidence to support the nonmoving party's claims. *Vahila v. Hall*, 77 Ohio St.3d 421 (1997). The Court of Appeals also ignored rule 56 evidence in favor of the non-moving party in each instance. The Court of Appeals, rather, relied only on opposing counsel's colloquy to find for Appellee MMC. The actual subpoenas in the case, and the list of documents not provided by MMC, both those destroyed and those withheld, represent Rule 56 evidence that the Court of Appeals is not permitted to ignore when considering a Rule 56 motion. The Court also ignored Rule 56 evidence that MMC's human resources and security departments while claiming they were following policy, actually were not following MMC's over-riding corporate policy requiring due diligence in all matters, including in responding to subpoenas.

The Appellate Court found the lack of intent for fraud and the lack of justifiable reliance because Appellant already knew about the Harsh incident. The Appellate Court disregarded evidence that MMC acted with knowledge that their procedure would yield an incomplete response. The Court in its decision correctly notes the subpoena was for *all employee and personnel records* of Jones and Caiazza (¶ 7) The subpoena was not for some conveniently designated "official file."

Appellant was attempting to discover what records MMC had concerning Jennifer Jones for the use in his criminal defense. When a leading employer in Stark County, MMC

responded, under oath, without objection or qualification, Appellant relied to his detriment upon the sworn response that the documents did not exist. MMC, in intentionally withholding documents, undisputedly effected Appellant's constitutional right to have a fair criminal defense.

The danger of the Appellate Court's decision upon all litigants in Ohio is profound. First, it establishes a precedent that any recalcitrant entity responding to a subpoena or discovery request may ignore the actual wording of the legal demand. If the subpoena asks for "all records," the recalcitrant entity may safely respond with only what it self-servingly claims is contains is some "official file." The entity may escape a claim by fraud or spoliation by stating that underling employee handling the entity's response was only following official policy. This regardless of a the existence of a conflicting "official policy"

By sanctioning this conduct, the Appellate Court has created a cavernous exception to this Court's rules of discovery procedure. A party may avoid the requirements of a properly issued subpeona by simply proclaiming and following its selectively announced and followed internal policy, to the frustration of litigants everywhere and the degradation of the justice system.

In particular concern, if any hospital, like Appellee MMC is allowed to make such a disingenuous response to subpoena duces tecum for personnel records, the same hospital may make an equally disingenuous response to a subpoena duces tecum issued in a medical malpractice case. There is no incentive to provide all medical records in malpractice cases when the "official file" will do.

Every employer and business entity may establish an "official file pursuant to official policy" response to every subpoena issued, hoping that their incomplete response will never

be discovered; and if discovered, there will be no consequences. Such a result would erode necessary confidence in our system of justice. Litigants would quickly adapt to the new loose standards; subpoena power will be rendered moot. Confidence in judgments will be necessarily; and of course, Justice would be denied. Appellant asks the Court to accept this jurisdictional appeal to right this wrong.

STATEMENT OF THE CASE AND FACTS

This case arises from the events of August 28, 2010, when Appellant Matthew P. Caiazza a licensed practical nurse, working the day shift at Mercy Medical Center ("MMC"), went on a smoke break with Appellee Jennifer Jones ("Jones"), an employee in MMC's food services division. Previously that day, Jones complained to Appellant about pain, and solicited a Vicodin. Appellant refused her request, instead providing her with an over-the-counter Tylenol.

MMC is a smoke-free work environment, and requires its employees to clock-out and leave the hospital grounds to smoke. Appellant clocked out for the break; Jones did not. During the smoke break, Jones again solicited a Vicodin, offering Appellant the opportunity to touch her breasts in exchange for a Vicodin. Appellant reiterated he did not have any Vicodin, at which point Jones invited Appellant to touch her breasts anyway. Appellant accepted Jones's invitation and touched Jones's breast through her blouse. Afterwards, they returned together to MMC. Appellant clocked in, and both returned to work. Jones did not appear to be disheveled, wet, or harmed in any way. Jones did not immediately complain about Appellant. Some hours later, Appellant took a brief break and found Jones. Appellant told her that he loved his wife, that nothing was going to come of any further relationship, and that he could not even be her friend anymore. After Appellant rejected her advances, Jones told him: "Then I will keep you to that."

It is then Jones reported to her supervisor and MMC's Director of Security, Appellee Peter Christ, that Appellant had touched her breast without permission and that she was now afraid of Appellant and could not continue her job. Prior to August 28, 2010, Jones had several issues with reliability. Jones had accused a fellow employee, Adam Harsh, of sexual assault, informed her superiors that Harsh had "grabbed her butt and rub his hand across her stomach..." [and] "...had also touched her inappropriately before." Harsh denied her allegations. In response, Jones was told to keep her private "differences.... from the workplace."

Christ then indefinitely suspended Appellant. On Monday, August 30, 2010, Christ met with Appellees Lorraine Washington, then Vice President of Human Resources at MMC; Kathy Casler, Appellant's immediate supervisor; Allyson Kelly, Casler's supervisor. As a result, MMC demanded Appellant's resignation.

The Canton City Prosecutor filed charges against Appellant for gross sexual imposition. Defendant's criminal defense attorney issued a subpoenas duces tecum to MMC, requesting Appellant's Jones's employee and personnel records. MMC did not object to the subpoenas and produced only those records contained in the official "Personnel File," leaving out records revealing the prior unsubstantiated allegations against Harsh, MMC's investigation and resolution of the incident, and other records of Jones' actions indicating her issues with credibility and reliability, including Jones' 2010 performance appraisal (which was apparently destroyed by MMC) MMC did not search for all of the records in the personnel department or the rest of the hospital and did not advise Appellant it had not fully complied with the subpoena. Lacking the subpoenaed documents, Appellant accepted a plea deal to disorderly conduct.

Appellant initially filed his claims in Stark County Common Pleas Court Case No. 2011 CV 02682. Appellant took an interlocutory appeal on the matter of attorney client privilege,

2012 CA 00083. The Appellate Court remanded the matter, instructing the Trial Court to hold an evidentiary hearing. Following the hearing, Appellant voluntarily dismissed his claims.

On November 26, 2012, Appellant re-filed his claims, adding Defendants Sodexo, Inc. and Brian Colosimo. Appellant filed an amended complaint, and all Defendants excepting Jennifer Jones moved to dismiss the amended complaint pursuant Civ. R. 12 (B)(6). On February 14, 2013, the Court granted the motion in part. The Trial Court dismissed the individual defendants in respect to Appellant's claims for discrimination/harassment, retaliation, and negligent retention and supervision. The Trial Court dismissed Appellant's amended complaint regarding Breach of Duty and Aiding and Abetting under R.C. 4112.

Following discovery, all parties moved for summary judgment. Appellant dismissed his claims against Defendants Sodexo, Inc. and Colosimo. On August 9, 2013, the Trial Court ruled, granting summary judgment to the remaining Defendants on all remaining claims. Appellant instituted an appeal with the Fifth District Court of Appeals.

On May 27, 2014, the Appellate Court issued its decision. Pertinent to the present appeal are the claims of aiding and abetting discrimination, unlawful retaliation, fraud, and spoliation of evidence. In its decision, the Appellate reversed the Trial Court only in part. The Appellate Court found the Trial Court had erred in dismissing Appellee's Loraine Washington and MMC, but found that Appellant had not stated a claim of aiding and abetting against the other individual defendants. The Appellate Court found that the Trial Court had correctly dismissed the retaliation claim against all the individual defendants. Furthermore, the Appellate Court sustained the Trial Court's grant of summary judgment on the claims of fraud and spoliation of evidence. The Appellant has timely filed his notice of appeal and the instant memorandum in support of jurisdiction.

In rejecting Appellant's claims for spoliation of evidence and fraud, the Appellate Court made several misstatements of law. First, the Appellate Court stated that this Court's precedent required that any spoliation claim must the brought within the original case where spoliation occurred. Appellant submits that the Appellate Court did not act consistent with the intent of this Court's precedent, or the requirements of procedural integrity.

ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

I. The Appellate Court erred in dismissing pursuant to Civ.R 12 individual defendants upon the claim of aiding and abetting discrimination.

Ohio Revised Code Section 4112.02 (J) makes it an unlawful discriminatory act:

> "For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice."

In reviewing the factual allegations of the complaint, the Appellate Court superimposed a higher standard than called for by the statute. In effect, the Appellate Court unconstitutionally rewrote the statute. More specifically, the Appellate Court found that there were no allegations that Appellees Christ, Kelly, and Casler participated along with Ms. Washington in the actual decision to terminate Appellant nor allegations that they were totally involved in the overall investigation. The Appellate Court found that the complaint stated that Appellee Washington had direct decision making authority as Director of Human Resources and actually made the decision to terminate Appellant, and reversed the Trial Court's decision in regards to Ms. Washington and MMC.

The Appellate Court's decision is in error because it requires a claimant to make allegations that the defendant has direct decision making authority in order to set forth a claim for aiding and abetting discrimination. Accordingly, in this manner the Court of Appeals changes the statute to require defendants to be plaintiff's *employer*. The plain language of R.C. 4112.02 (J) prohibits "any person" from aiding and abetting discrimination.

The Appellate Court's reasoning does not follow the statute. Any person who directly causes discrimination has "compelled" or "coerced," the doing of a discriminatory act. R.C. 4112.02 (J) prohibits "aiding," "abetting," "incite" or attempting to "indirectly" commit a discriminatory act. These terms separately forbid causing or encouraging another (an employer) to violate Chapter 4112.

The Appellate Court decision impermissibly re-writes the statute. The Constitutional delegation of authority and the separation of powers doctrine confine the judicial branch to interpreting a statute, not rewriting the statute.

If the Appellate Court's decision is permitted to stand, then fellow employees may instigate, cause, cooperate, or collaborate in the discrimination of their fellow employees. Simply, employees may aid, abet, incite, compel, coerce discrimination through their employer's decision to take an adverse action, through the creation of a hostile work environment, or through retaliation for complaining about discrimination.

The Ohio legislature has chosen to eradicate workplace discrimination by making anyone who assists in discrimination fully liable for their contributory actions. The Court of Appeal's decision nullifies the Legislature's prerogative, and must be reversed

II. The Appellate Court erred in dismissing pursuant to Civ.R 12 individual defendants upon the claim of unlawful retaliation.

Ohio Revised Code Section 4112.02 (I) establishes that it shall be an 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."

The Appellate Court found that Appellant had only alleged a retaliation claim against MMC. It did not recognize that Appellant had alleged retaliation claims against the individual defendant Kathy Casler, who provided and then repudiated the reference. In so doing, the Appellate Court ignored the language of the statue that "any person" may be found liable for retaliatory conduct.

In effect, the Appellate Court impermissibly re-wrote the statute. To properly construe this statute, we must first look at the express wording of the statute. *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 65 O.O.2d 296, 304 N.E.2d 378. Courts must give effect to the words of a statute and may not modify an unambiguous statute by deleting words used or inserting words not used. *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 218, 574 N.E.2d 457, 461. Simply stated, "an unambiguous statute means what it says." *Hakim v. Kosydar* (1977), 49 Ohio St.2d 161, 164, 3 O.O.3d 211, 213, 359 N.E.2d 1371, 1373, citing *Chope v. Collins* (1976), 48 Ohio St.2d 297, 300, 2 O.O.3d 442, 444, 358 N.E.2d 573, 575, fn. 2.

Appellant set forth an allegation of retaliation against Casler. The Appellate Court erred in granting Casler's motion to dismiss

III. The Appellate Court erred in granting summary judgment upon the claim of fraud.

Under the rules of both civil and criminal procedure, a recipient of a subpoena duces tecum must either comply with subpoena or object. Appellant submits that this imposes upon the recipient a duty to speak if it is not complying with the subpoena. And when that duty to speak is

not honored, and the issuer of that subpoena relies to his detriment on the false response that subpoenaed documents do not exist, then the issuer of the subpoena may recover damages in fraud.

Appellant set forth a claim for fraud after his criminal defense attorney issued two subpoena duces tecums for MMC's employee and personnel records for himself and Jennifer Jones. MMC did not provide all the requested records. Instead, MMC provided only those records in its self-servingly described "official" Human Resources file. MMC knew other records fitting the request existed in other departments in the hospital, and in the H.R, department. MMC simultaneously had a policy requiring due diligence when responding to subpoenas. MMC did not object or inform Appellant that it was not providing all the requested documents, and did not use due diligence. Appellant detrimentally relied upon MMC's incomplete representations that the desired documents did not exist to his harm.

The Appellate Court incorrectly granted summary judgment against Appellant. The Appellate Court stated MMC's response conformed to the language of the subpoenas. This contradicts the Appellate Court's own description of the underlying facts where it states Appellant did not receive all the requested documents. See Appellate Decsion, ¶7.

Next, the Appellate Court found the lack of intent to defraud and the lack of justifiable reliance because Appellant "knew" of the 2009 incident with Adam Harsh. The Appellate Court's reasoning is in error. Harsh's prior communication to Appellant's only demonstrates a non-frivolous reason for Appellate to issue a subpoena for MMC's records about Jones' and its knowledge of her credibility issues.

There is no evidence Appellant knew what documents MMC had withheld or destroyed. about the Harsh incident before issuing the subpoenas in the criminal litigation. MMC continued

to deny the existence of these documents well after the commencement of the civil litigation. Appellant was looking for independent documentation and corroboration of the incident. Appellant relied upon MMC's representation that documentation did not exist because it was not provided it what otherwise appeared to be a complete response to the subpeonas. As the result, Appellant decided he could not contest the criminal charges pending against him, and instead accepted a plea deal. Simply, Appellant relied upon this representation to his detriment.

Appellant also incorporates by reference the arguments above, that the Court did not require MMC to meet its *Dresher* burden to demonstrate the absence of Rule 56 evidence before dismissing Appellant's claim. Further, from the mere fact that there was Rule 56 evidence disputing MMC's claim that it was following policy in presenting "its official file" rather than following the required policy of using due diligence to satisfy a subpoena, summary judgment in the area of fraud should be denied.

The Appellate Court erred in sustaining the Trial Court's grant of summary judgment. This decision has grave public policy consequences. The rule cannot be: if you know enough to subpoena documents, then you have no right to rely on a party's sworn claim the documents do not exist. An incentive to fraudulently misrepresent compliance with a subpoena should not be permitted. The Court must reverse the decision of the Appellate Court.

III. The Appellate Court erred in granting summary judgment upon the claim of spoliation of evidence.

The Appellate Court found that this Court's precedent requires a claim for spoliation must be brought in the original case, and that Appellant's spoliation claim should have been brought in the criminal litigation. The Appellate Court did not cite the specific authority for this proposition; it is not correct. This Court has examined whether a spoliation claim is a mandatory

counterclaim to a *civil* action or a permissive counterclaim that may also be asserted in a subsequent civil action. *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St.3d 488, 756 N.E.2d 657 (2001). This Court has not decided that a claimant must assert an unknown civil claim inside criminal litigation. The Appellate Court erred and must be reversed.

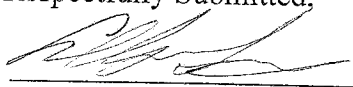
Moreover, the Appellate Court erred in ignoring Rule 56 evidence of the destroyed evidence, as well as by finding that spoliation of evidence may not be founded on the concealment of evidence. Instead, the Fifth District Court of Appeals re-iterated its prior incorrect holding that a claim for spoliation requires actual destruction of evidence. This is contrary to the facts in the case, as well as to the Court's authority. It conflicts with the Eleventh District case of *Drawl v. Coricelli,* 124 Ohio App.3d 562, 706 N.E.2d 849 (1997). *Drawl* properly applies *Smith v. Howard Johnson Co., Inc.* 67 Ohio St.3d 28, 615 N.E.2d 1037 (1993), that a claim of spoliation exists for *interference* or destruction of evidence.

The Court must reverse the Appellate Court to preserve the legal system in Ohio. The Court must send a strong signal that spoliation of evidence is a serious matter and that the aggrieved party will be able to achieve redress in Ohio Courts.

CONCLUSION

For the reasons set forth above, Appellant asks the Court to accept jurisdiction over the present appeal.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail on July 10, 2014 to the following:

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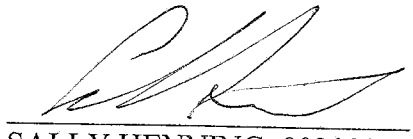

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STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MATTHEW P. CAIAZZA	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
MERCY MEDICAL CENTER, ET AL.	:	Case No. 2013CA00181
	:	
Defendants-Appellees	:	OPINION

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2012CV03652

JUDGMENT: Affirmed/Reversed in Part & Remanded

DATE OF JUDGMENT:

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7

APPX 1

Farmer, J.

{¶1} In 1999, appellant, Matthew Caiazza, began employment with appellee, Mercy Medical Center, Inc. In 2010, appellant worked as an LPN on 9 Main.

{¶2} In 2006, appellee, Jennifer Jones, began employment with appellee Mercy, working in the food services department.

{¶3} Appellant and appellee Jones would frequently take "smoking breaks" together, outside, off the hospital's property.

{¶4} On August 28, 2010, appellee Jones reported to her night supervisor, Terrance Bowman, that during one of the smoke breaks, appellant had inappropriately touched her breast outside of her clothing. The police were called and an investigation ensued.

{¶5} Appellant explained that during the smoke break, appellee Jones offered him the opportunity to touch her breast in exchange for the narcotic pain reliever, Vicodin. He informed her that he could not give her any Vicodin, whereupon she invited appellant to touch her breast anyway and he did so. A couple hours later, appellant spoke to appellee Jones and informed her that he loved his wife and they could not engage in a relationship. Thereafter, appellee Jones reported the incident.

{¶6} On August 30, 2010, appellant "forcibly" resigned his position at the request of Lorraine Washington, appellee Mercy's then Director of Human Resources.

{¶7} Appellant was subsequently charged with gross sexual imposition. His defense counsel subpoenaed appellee Mercy for employee and personnel records for both appellant and appellee Jones. Appellant did not receive all of the requested

documents and as a result, pled no contest to a reduced charge of disorderly conduct in November 2010.

{¶8} On November 26, and December 3, 2012, appellant filed a complaint and an amended complaint, respectively, against appellees Mercy and Jones, and also several individuals associated with appellee Mercy in a supervisory position, to wit: Thomas Cecconi, Peter Christ, Jeffrey Smith, Allyson Kelly, Kathy Casler, Patti Bresnahan, and Lorraine Washington. Appellant also named SODEXO, Inc., the company that provided food services to appellee Mercy, and Brian Colosimo, an employee thereof and appellee Jones's supervisor. Appellant made claims of breach of contract, sexual harassment and aiding and abetting discrimination under R.C. Chapter 4112, spoliation, fraud, unlawful retaliation, civil conspiracy, and negligent retention/supervision.

{¶9} All defendants save for appellee Jones filed a motion to dismiss the complaint. By judgment entry filed February 14, 2013, the trial court granted the motion in part, dismissing appellant's claims for breach of contract and aiding and abetting discrimination, and dismissing the individual defendants on appellant's claims for sexual harassment, unlawful retaliation, and negligent retention/supervision.

{¶10} All parties moved for summary judgment on the remaining claims. Thereafter, appellant voluntarily dismissed defendants SODEXO and Colosimo on July 8, 2013. By judgment entry filed August 9, 2013, the trial court granted summary judgment in favor of appellees Mercy, its individual named employees, and Jones.

{¶11} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶12} "THE TRIAL COURT ERRED IN LAW BY DISMISSING APPELLANT'S CLAIMS FOR BREACH OF DUTY AND AIDING AND ABETTING, AND DISCRIMINATION, HARASSMENT AND RETAILIATION CLAIMS AGAINST INDIVIDUAL DEFENDANTS."

II

{¶13} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE REMAINING COUNTS."

I

{¶14} Appellant claims the trial court erred in granting the Civ.R. 12(B)(6) motion to dismiss on his claims for breach of contract and aiding and abetting discrimination, and dismissing the individual defendants on his claims for sexual harassment/discrimination and unlawful retaliation. We agree in limited part regarding the claims for aiding and abetting discrimination and sexual discrimination.

{¶15} Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St.3d 228 (1990). A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey County Board of Commissioners*, 65 Ohio St.3d 545, 1992-Ohio-73. Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd. v. Faber*, 57 Ohio St.3d 56 (1991).

BREACH OF DUTY CLAIM

{¶16} In his amended complaint, appellant references "The Employee Information Booklet," a compilation of personnel policies, practices, and procedures for appellee Mercy, including a Code of Conduct and Ethical Behavior. Appellant claimed appellee Mercy violated these policies and procedures by not fully complying with subpoenas issued by him in conjunction with his criminal case (¶ 74), failing to fully investigate his allegations against appellee Jones (¶ 75), and failing to properly handle the respective complaints of himself and appellee Jones (¶ 76).

{¶17} The facts as alleged in the amended complaint that we are required to accept as true under a Civ.R. 12(B)(6) standard are: (1) appellee Mercy's Employee Handbook and Code of Conduct and Ethical Behavior bound all the parties (¶ 15); (2) appellee Mercy knew of a prior incident in 2009 involving appellee Jones and another co-worker (Adam Harsh) because of appellee Jones's fiancé's actions during the incident (¶ 30); (3) no report was made to the police regarding the 2009 incident (¶ 37); (4) no investigation was conducted as to why appellee Jones delayed reporting the incident sub judice (¶ 38); (5) its employees accepted appellee Jones's allegations as true, and made no inquiry into appellant's allegations against appellee Jones (¶ 41-43, 58); (6) not all documents were disclosed when subpoenaed in conjunction with appellant's criminal trial, including documents regarding appellee Jones's veracity (¶ 60-63); (7) no one investigated if the touching of appellee Jones's breast was consensual (¶ 46); (8) without interviewing appellee Jones, Lorraine Washington decided to terminate appellant (¶ 54-56); and (9) appellee Jones was not disciplined for violating appellee Mercy's policies (¶ 59).

{¶18} It is appellant's position that the Employee Handbook and Code of Conduct and Ethical Behavior are sufficient to overcome Ohio's employment at-will doctrine. In *Mers v. Dispatch Printing Co.,* 19 Ohio St.3d 100 (1985), paragraph one of the syllabus, the Supreme Court of Ohio held: "Unless otherwise agreed, either party to an oral employment-at-will employment agreement may terminate the employment relationship for any reason which is not contrary to law." The *Mers* court also held the following at 105:

> We therefore hold that where appropriate, the doctrine of promissory estoppel is applicable and binding to oral employment-at-will agreements when a promise which the employer should reasonably expect to induce action or forbearance on the part of the employee does induce such action or forbearance, if injustice can be avoided only by enforcement of the promise.
>
> The test in such cases is whether the employer should have reasonably expected its representation to be relied upon by its employee and, if so, whether the expected action or forbearance actually resulted and was detrimental to the employee.

{¶19} Ohio has not abandoned its public policy of employment at-will, as illustrated by the breadth of cases distinguishing *Mers*. In *Bartlett v. Daniel Drake Memorial Hospital,* 75 Ohio App.3d 334, 338 (1st Dist.1991), our brethren from the First District set forth the exceptions commonly accepted:

It is undisputed that Gwen was classified as an employee at will where, unless otherwise agreed, either party may terminate the employment relationship for any reason not contrary to law. *Fawcett v. C.G. Murphy & Co.* (1976), 46 Ohio St.2d 245, 75 O.O.2d 291, 348 N.E.2d 144. In *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 19 OBR 261, 483 N.E.2d 150, the Ohio Supreme Court established two narrow exceptions to an employer's ability to discharge employees freely under employment-at-will contracts. These two exceptions involve the doctrine of promissory estoppel and the creation of an implied contract. Undisturbed by the holding in *Mers* is the generally accepted conclusion that items such as employer handbooks, company policy or oral representations do not create employee rights which alter the "termination for any reason" terms for discharge under the at-will situation unless the parties have a "meeting of the minds" indicating that such items are to be considered valid contracts altering the terms for discharge. *Turner v. SPS Technologies, Inc.* (June 4, 1987), Cuyahoga App. No. 51945, unreported, 1987 WL 11967. While personnel manuals may be important in establishing the terms and conditions of employment, absent the necessary mutual assent or meeting of the minds by the employer and employee to establish employment-termination rights, handbooks or other supplementary manuals or materials merely constitute unilateral statements of company rules and regulations. *Turner v. SPS*

Technologies Inc., supra; Isgro v. Deaconness Hosp. (Oct. 30, 1980), Cuyahoga App. No. 41966, unreported.

In the case *sub judice,* we conclude that no contractual intent existed between the parties to modify the original at-will contract of employment. Appellants' reliance on Drake Hospital's "Employee Discipline" and "Predisciplinary Conference and Appeal Procedure" materials is misplaced. These policies are but mere unilateral statements of the hospital's procedure for the invocation of disciplinary action against an employee, and do not create an implied employment agreement between the parties. Therefore, appellants did not possess a cause of action against the appellees for breach of contract predicated upon the provisions of Drake Hospital's personnel manual. Consequently, there was no breach of contract or constructive discharge as alleged by appellants, and the trial court properly granted summary judgment to appellees on this claim.

{¶20} Therefore, as to the claims of inadequate investigation and bias one-sidedness that are accepted as true, the Employee Handbook and Code of Conduct and Ethical Behavior did not modify the employment-at-will agreement and guarantee employment. As in *Bartlett,* mere assertions that a more thorough investigation was warranted are not sufficient to quash Ohio's employment at-will doctrine.

{¶21} As for appellant's argument regarding a breach of duty to respond appropriately and completely to a duly issued subpoena, we find such claim not to be supported by any legal extension of Ohio's employment at-will doctrine.

{¶22} The trial court did not err in dismissing the breach of duty claim.

AIDING AND ABETTING DISCRIMINATION CLAIM

{¶23} In his complaint at ¶ 87-88, appellant claimed the defendants, individually and collectively, violated R.C. 4112.02, unlawful discriminatory practices, specifically, subsection (J) in light of subsection (A) which state the following:

> It shall be an unlawful discriminatory practice:
>
> (A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, 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 matter directly or indirectly related to employment.
>
> (J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

{¶24} Appellant claimed he was constructively discharged, while appellee Jones "was not issued a notice that she had violated any policy" (¶ 57, 59). Appellant claimed he was discriminated against for being a male, as appellee Mercy and its employees failed to fully investigate the allegations in violation of hospital policy and "undertaken on behalf of women who made complaints" (¶ 64). In addition, appellee Mercy was aware of the 2009 incident and knew or should have known that appellee Jones "acted in an unreliable manner" (¶ 30, 49).

{¶25} The individual named defendants associated with appellee Mercy included Thomas Cecconi (President and Chief Executive Officer), Peter Christ (Director of Security), Jeffrey Smith (Chief Operations Officer, Vice-President, and Chief Compliance Officer), Allyson Kelly (Administrative Director), Kathy Casler (Clinical Manager), Patti Bresnahan (Human Resources Manager or Interim Director/Director of Human Resources), and Lorraine Washington (Director of Human Resources, January 1, 2009 to January 1, 2011).

{¶26} In *Genaro v. Central Transport, Inc.*, 84 Ohio St.3d 293, 300 (1999), the Supreme Court of Ohio held the following:

> Based on the foregoing, we believe that the clear and unambiguous language of R.C. 4112.01(A)(1) and (A)(2), as well as the salutary antidiscrimination purposes of R.C. Chapter 4112, and this court's pronouncements in cases involving workplace discrimination, all evidence that individual supervisors and managers are accountable for their own discriminatory conduct occurring in the workplace environment.

> Accordingly, we answer the certified question in the affirmative and hold that for purposes of R.C. Chapter 4112, a supervisor/manager may be held jointly and/or severally liable with her/his employer for discriminatory conduct of the supervisor/manager in violation of R.C. Chapter 4112.

{¶27} From our review of the amended complaint and facts alleged in ¶ 15-64, there are no allegations of any participation in the decision to terminate appellant by Mr. Cecconi, Mr. Smith, and Ms. Bresnahan. Therefore, the amended complaint fails to state a claim for aiding and abetting discrimination against these defendants.

{¶28} Apart from the presence of Mr. Christ, Ms. Kelly, and Ms. Casler at meetings (¶ 54, 56), there are no allegations of them making the actual decision to terminate appellant save for their agreement with Ms. Washington's decision to so terminate (¶ 56) or of them being involved totally in the overall investigation. Therefore, the amended complaint fails to state a claim for aiding and abetting discrimination against these defendants.

{¶29} The amended complaint claims the decision to terminate appellant was made by Ms. Washington, the Director of Human Resources at the time for appellee Mercy (¶ 56). Therefore, we conclude it was error to dismiss the claim against Ms. Washington and appellee Mercy under the Civ.R. 12(B)(6) standard.

{¶30} The trial court erred in dismissing the aiding and abetting discrimination claim against Ms. Washington and appellee Mercy.

SEXUAL HARASSMENT/DISCRIMINATION AND

UNLAWFUL RETALIATION CLAIMS

{¶31} Appellant argues the trial court erred in dismissing the individual named defendants.

{¶32} R.C. 4112.02(I) states it shall be an unlawful discriminatory practice:

> 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.

{¶33} R.C. 4112.01(A)(2) states the term "employer" as used in R.C. Chapter 4112 "includes the state, any political subdivision of the state, any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer."

{¶34} Appellant argues the individual named defendants were acting on behalf of and in the interest of appellee Mercy and therefore, they meet the definition of "employer" under R.C. 4112.01(A)(2).

{¶35} Based upon the facts in the amended complaint, the only "employer" who made the decision to terminate appellant was Ms. Washington, Director of Human Resources at the time. Although it was alleged that Mr. Christ, Ms. Kelly, and Ms.

Casler were aware of appellee Jones's complaint and were involved in meetings, the decision to terminate appellant as averred in the amended complaint was Ms. Washington's alone.

{¶36} The unlawful retaliation claim centered on appellee Mercy's refusal to provide him with a reference. The only allegation of retaliation was against appellee Mercy.

{¶37} The trial court did not err in dismissing the sexual harassment/discrimination claim against the individual named defendants with the exception of Ms. Washington. The trial court did not err in dismissing the unlawful retaliation claim against the individual named defendants.

{¶38} Assignment of Error I is granted in part and denied in part. Claims of aiding and abetting discrimination against appellee Mercy and Ms. Washington are reinstated, along with the claim of sexual discrimination against Ms. Washington.

II

{¶39} Appellant claims the trial court erred in granting summary judgment to appellees Mercy, its individual named employees, and Jones on the remaining claims: aiding and abetting (Jones), sexual harassment (Jones/Mercy), spoliation (all), fraud (all), unlawful retaliation (Jones/Mercy), civil conspiracy (all), and negligent retention/supervision (Jones/Mercy).[1]

{¶40} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

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[1]As stated in the facts above, appellee Jones did not participate in the motion to dismiss.

> Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.

{¶41} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35 (1987).

SEXUAL HARASSMENT/DISCRIMINATION CLAIM

{¶42} Appellant argues there existed genuine issues of material fact regarding his claim for sexual harassment/discrimination. In his amended complaint, appellant alleged a direct violation of an unlawful discriminatory practice under R.C. 4112.01(A), cited above. Appellant claimed disparate treatment because of his gender (¶ 80), the reasons for his termination were pretextual and a sham (¶ 81), and the lack of

cooperation in complying with his subpoena vis-á-vis compliance with subpoena requests "on behalf of current or former female employees" (¶ 82-83).

{¶43} Appellant claimed he was discriminated against because he is a male and was involved in sexual contact and terminated from employment, while appellee Jones, a female, was involved in the same sexual contact, but was not terminated.

{¶44} There appears to be two R.C. 4112.02 claims: (1) sexual harassment in the creation of a hostile work environment, and (2) sexual discrimination.

{¶45} As stated by this court in *Jackson v. Saturn of Chapel Hill, Inc.*, 5th Dist. Stark No. 2005 CA 00067, 2005-Ohio-5302, ¶ 17, in order to maintain a claim for sexual harassment, a plaintiff must demonstrate:

> (1) that the employee was a member of a protected class, (2) that the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors, (3) that the harassment complained of was based on gender, and (4) that the employee's submission to the unwelcome advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment. (Citations omitted.)

{¶46} Appellant admitted to freely touching appellee Jones's breast, and appellee Mercy acknowledged the sexual contact was consensual. A non-supervisory employee such as appellee Jones lacked any ability to control appellant's employment.

The sexual harassment claim clearly fails. We find no genuine issue of material fact to exist on a quid pro quo harassment claim against appellee Jones or other employees/supervisors.

{¶47} As stated by this court in *Thompson v. Dover Elks,* 5th Dist. Tuscarawas No. 2002 AP 02 0016, 2002-Ohio-5610, ¶ 16, in order to establish a discrimination claim under R.C. 4112.02(A), a plaintiff must prove:

> ***(1) that he was a member in a protected class; (2) that he was discharged from his job by the employer; (3) that he was qualified for the position; and (4) that he was replaced by a person who did not belong to the protected class. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668. However, in cases involving reverse gender discrimination, courts have modified the *McDonnell* standard to enable plaintiffs who are members of a dominant group to prove a prima facie case of discrimination. To show reverse discrimination and to avoid a summary judgment, the plaintiff must establish a prima facie case by showing: (1) background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against the majority; and (2) that the employer treated employees who were similarly situated, but not members of the protected group, more favorably. *Murray v. Thistledown Racing Club, Inc.* (C.A.6, 1985), 770 F.2d 63, 67.

{¶48} Appellee Mercy argues appellant has not established that any female employee who engaged in sexual contact with another employee was not terminated, thereby failing to establish the second prong above. To establish "similarly situated," a plaintiff must show "that the comparable employee is similar 'in all of the relevant aspects.' " *Barry v. Noble Metal Processing, Inc.*, 276 Fed.Appx. 477, 480 (6th Cir.2008), citing *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir.1998). As explained by appellee Mercy in its brief at 18:

> In *Barry,* the court went on to state, "[w]hile the precise aspects of employment that are relevant to determining whether the similarly situated requirement has been satisfied depend on the facts and circumstances of each case, this court has generally focused on whether the plaintiff and the comparable employee: (1) share the same supervisor; (2) are subject to the same standards; and (3) have engaged in the same conduct 'without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.' " *Id.* at 480-481, quoting *Ercegovich* at 352 (internal quote marks omitted).

{¶49} In her deposition at 68-69, 75, and 76-77, respectively, Ms. Washington explained her decision to terminate appellant:

> Q. What else do you remember was said at the time?

A. ***I remember Pete saying that the police were called, that Matt initially denied that he had done this to the police, and that he did eventually admit that he did it, that he did touch her breasts. And at that point I virtually called a halt to the meeting and said, We're done here.

***

Q. And that he later said to the police that he did touch her, her breasts, correct?

A. Yes.

Q. And that Matt further said he was invited to do so, correct?

A. Yes.

Q. And Matt also told - - Christ also told you that Matt had said she had been seeking Vicoden (sic), did he not?

A. I do remember that, yes.

***

Q. Okay. So you're having this conversation. Did you ask if Matt had been asked to give a written statement?

A. No. After - - after Pete told me that he admitted to touching her breasts, albeit by invitation, I did not - - my statement was, Well, we're done here. The employee has admitted that what they did - - what they did, that's inappropriate in our environment. We're done.

***

Q. Okay. And you also - - I've been told by other eyewitness that consensual sexual activity that's off campus is not forbidden by the hospital; is that correct?

***

A. Consensual sexual activity.

Q. Between employees is not forbidden by the hospital.

A. We would not be in a position to forbid that unless it impacts the hospital in some type of way. If it happens that it be - - I think when employees bring their personal problems into the workplace then whether it's on campus or off campus that makes - - they make it part of the hospital's problem by bringing it to the hospital administration.

{¶50} Ms. Washington admitted that both appellant and appellee Jones had drawn the hospital into their sexual contact encounter (depo. at 79), no action was taken against the female employee, appellee Jones (depo. at 80), and a subsequent investigation was not done (depo. at 81-82). Ms. Washington also admitted appellant's termination occurred with the knowledge that appellant had admitted to consensual touching (depo. at 87-89). She characterized the reason for the termination to appellant's lack of good judgment (depo. at 92-94) and "bringing it into the workplace" (depo. at 94-95). "Bringing it into the workplace" appears to equate to lodging a complaint and "they have made their relationship my problem" (depo. at 94-95).

{¶51} Also admitted in Ms. Washington's deposition are two facts that have peripheral bearing on this issue. First, appellant had clocked out for the smoke break

and appellee Jones had not; and secondly, the activity occurred off the property of appellee Mercy (depo. at 75-76, 105-106).

{¶52} Appellant argues his discrimination claim should survive because he proved disparate treatment of a similarly situated employee. The similarly situated employee is Julie Ann Findley, a housekeeping employee who as of result of a traffic stop, was arrested on drug related charges and was subsequently found guilty of disorderly conduct. *See,* Appellant's June 25, 2013 Motion for Summary Judgment at pages 28-30. Appellee Mercy was notified of the drug arrest by the Perry Police Department because the drugs involved "marijuana, percocet, and nyproxin, without a legal prescription" *Id.* at 28-29. Like appellant, Ms. Findley was charged with a criminal offense, and appellee Mercy was concerned because of her access to drugs. So in Ms. Washington's words, Ms. Findley's actions "brought it into the workplace." Ms. Findley's criminal case, as appellant's, was resolved with a disorderly conduct plea, a non-status criminal offense. Ms. Findley was never disciplined or terminated at the beginning or end of her criminal case. In fact, a February 17, 2010 email sent by Mr. Christ to Ms. Bresnahan, cited in appellant's motion at 29, indicated a disorderly conduct charge was not a reason for termination:

> I was updating files we keep on reports we prepare. For info, she was charged on 7/16/2009. One count drug paraphernalia offense was reduced to disorderly conduct and was found guilty. One count possession of drugs and that charge was dismissed. One count of driving on suspended operator license and that was dismissed.* * * We do not

> have employees that have been convicted of disorderly conduct. I checked Kronos and she still works for us. We need to make note in her file that Security has case number 09-0359 in which she was arrested on drug charges in the event we have another problem with her.

{¶53} Under de novo review, we find a genuine issue of material fact to exist on the issue of discrimination under R.C. 4112.02(A), and the trial court erred in granting summary judgment to appellee Mercy and dismissing the claim against Ms. Washington as discussed above. However, there are no genuine issues of material fact on this issue regarding appellee Jones and any other hospital employees, or on the issue of aiding and abetting against appellee Jones.

{¶54} Given appellee Mercy's concession that the sexual contact during appellant's smoke break off property was consensual, there is a clear disparity of treatment between appellant and appellee Jones. One can argue that the facts on their own establish disparate treatment.

{¶55} The trial court erred in granting summary judgment to appellee Mercy and dismissing the claim against Ms. Washington on the discrimination claim.

SPOLIATION CLAIM

{¶56} The tort of spoliation was first recognized by the Supreme Court of Ohio in *Smith v. Howard Johnson Company, Inc.*, 67 Ohio St.3d 28, 29, 1993-Ohio-229:

> (1) A cause of action exists in tort for interference with or destruction of evidence; (2a) the elements of a claim for interference with

or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts; (2b) such a claim should be recognized between the parties to the primary action and against third parties; and (3) such a claim may be brought at the same time as the primary action.

{¶57} In *Allstate Insurance v. QED Consultants, Inc.,* 5th Dist. Knox No. 09CA14, 2009-Ohio-4896, ¶ 19, this court stated, "[t]he Ohio Supreme Court has not extended its holding in *Smith v. Howard Johnson,* supra, to cases where the spoliation claim asserted does not involve the willful destruction or alteration of physical evidence." (Citations omitted.)

{¶58} Appellant argues the spoliation occurred in relation to his criminal case.

{¶59} Appellant argues appellee Mercy, incorrectly, intentionally or not, responded to the criminal subpoena for "personnel and employment records." It is undisputed that appellee Mercy did not send several documents concerning the 2009 incident involving appellee Jones and another coworker (Adam Harsh): MMC 00047, MMC 00048, MMC 000212, MMC 000619, MMC 000227, MMC 000229, MMC 000231, MMC 000232, MMC 000233, MMC 000239, MMC 000269, and MMC 000275 (Admission Nos. 9, 10, 16-22). *See,* Appellant's June 25, 2013 Motion for Summary Judgment at page 32.

{¶60} The gravamen of appellant's claim is not that the documents were destroyed (the very argument itself specifies names and the contents of the documents), but that appellee Mercy did not properly respond to the criminal subpoenas. Appellant pled no contest to disorderly conduct, and does not cite to any damages as a result of the negligence to answer the subpoenas. As indicated by the Supreme Court of Ohio, any spoliation claim must be brought in the original case i.e., the criminal case.

{¶61} Appellant also claims there are "obfuscated" documents that he was unable to obtain: an email from Mr. Colosimo to Ms. Washington that she refers to in a December 13, 2010 email to Mr. Colosimo, and a drafted reference letter by Ms. Casler that was faxed to appellant on August 31, 2010. *See,* Appellant's June 25, 2013 Motion for Summary Judgment at pages 41-42.

{¶62} Ms. Casler now cannot recall the letter. Casler depo. at 22, 31. In his motion for summary judgment on page 43, appellant argued the items were not destroyed, but were found save the credibility issue raised by Ms. Casler's denial of the reference letter:

> Had all of the documentation referenced in this section on spoliation been tendered instead of Defendants' repeated defiance and interference, Plaintiff would not have had to resort to extraordinary measures in the instant case or other means to secure such evidence in this case. It would not have been necessary for Plaintiff to incur the expense of taking Adam Harsh's deposition. Additionally, the mere fact

that Plaintiff had to expend any time in any part of any deposition to explore details of how any of the Defendants, both individual and corporate, maintained, culled, retained, and assembled documents, meant that Plaintiff incurred added expense that he otherwise should not have had to incur had these Defendants complied with their respective obligations under the subpoenas and/or discovery requests.

{¶63} The trial court did not err in granting summary judgment to appellees on the spoliation claim.

FRAUD CLAIM

{¶64} In *Burr v. Stark County Board of Commissioners,* 23 Ohio St.3d 69 (1986), paragraph two of the syllabus, the Supreme Court of Ohio found the elements of fraud to be as follows:

> (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

{¶65} The fraud claim centers on the responsiveness or non-responsiveness of appellee Mercy and Ms. Washington to the criminal subpoenas. In his amended complaint, appellant alleged the following:

> 126. When responding to the subpoena, MMC made a representation of compliance with the subpoena. MMC's representation was false, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it was true or false that MMC's knowledge may be inferred.
>
> 128. Washington and MMC violated the duty to comply with the Subpoena under Ohio Law as well as under MMC Compliance Policy.
>
> 129. Defendant Washington and MMC knew or should have known that responsive documents were located in the Personnel department, and failed to secure and produce them.
>
> 130. Defendant Washington and MMC knew or should have known that responsive documents were located elsewhere at MMC, or in the custody of SODEXO, and failed to secure and produce them in response to the Subpoena.
>
> 131. By failing to inform the parties in the criminal action that documents were being withheld or destroyed, MMC concealed factual information when MMC had a duty to speak.

{¶66} Appellant argues appellee Mercy had a duty to disclose that the responses to the subpoenas were deficient or qualified. As a result, the subpoenas could have been reissued. Appellant's claimed harm is that he would have gone to trial but instead, chose a good plea deal.

{¶67} Appellant further alleges that Ms. Washington and Ms. Bresnahan, Human Resources Manager or Interim Director/Director of Human Resources, only turned over the "official file." We fail to see how conforming to the language of the subpoenas was in any way fraudulent.

{¶68} Appellant argues in response to a video request, investigation documents were incomplete because no investigation reports, witness statements, security logs or "any other" such documentation was provided. The investigation report was done by the Canton Police Department and as the report indicates, "that material" was evaluated by the Canton Police Prosecutor.

{¶69} Appellant challenges the trial court's determination of "intent to defraud" by citing the fact that the subpoenas were responded to according to the normal operational procedures as testified to by Amy Heuer. The center of appellant's claim is that appellee Mercy failed to disclose the 2009 incident involving appellee Jones and Mr. Harsh. However, appellant knew about the previous sexual harassment complaint made by appellee Jones.

{¶70} Not only did there not exist genuine issues of material fact on intent, but by appellant's own admission, he knew of the previous 2009 incident and therefore, there was no justifiable reliance.

{¶71} The subpoenas were only directed to appellee Mercy therefore, any fraud claimed against any other named defendants was not warranted.

{¶72} The trial court did not err in granting summary judgment to appellees on the fraud claim.

UNLAWFUL RETALIATION CLAIM

{¶73} As explained by our brethren from the Tenth District in *Peterson v. Buckeye Steel Casings,* 133 Ohio App.3d 715, 727 (10th Dist.1999):

> To prove a claim of retaliation, 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.

{¶74} Appellant argues as a result of his discrimination claims under R.C. Chapter 4112, appellee Mercy refused to give him a reference. Appellant was officially terminated via his "forced" resignation on August 30, 2010. No action pursuant to R.C. 4112.02 was commenced prior to this date.

{¶75} Appellant argues because appellee Mercy knew the complaint was about sexual contact, it could immediately determine appellant was engaged in a "protected

Company, 32 Ohio St.3d 121, 126 (1987), citing *Minarik v. Nagy,* 8 Ohio App.2d 194, 196 (1963).

{¶81} On July 8, 2013, appellant voluntarily dismissed SODEXO as a party. Therefore, there can be no claim for conspiracy or "conspiring together" when only one defendant remains.

{¶82} The trial court did not err in granting summary judgment to appellees on the civil conspiracy claim.

NEGLIGENT RETENTION/SUPERVISION CLAIM

{¶83} The amended complaint claims appellee Mercy negligently retained appellee Jones and failed to prudently investigate, discipline or discharge her (¶ 147-150). No allegations were made against appellee Jones.

{¶84} The elements of a negligent retention/supervision claim are: "(1) the existence of an employment relationship; (2) the fellow employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission which caused the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as a proximate cause of the injury." *Zieber v. Heffelfinger,* 5th Dist. Richland No. 08CA0042, 2009-Ohio-1227, ¶ 31; *Browning v. Ohio State Highway Patrol,* 151 Ohio App.3d 798, 2003-Ohio-1108 (10th Dist.).

{¶85} The trial court's decision to grant summary judgment to appellee Mercy on this claim centered around a finding of no proximate cause to appellant's injuries. The gravamen of appellant's claim is that appellee Mercy took no action in disciplining appellee Jones, accepted her allegations, and through gender stereotype, chose only to

terminate him. Further, appellee Mercy knew or should have known appellee Jones's propensity for falsification based upon her previous 2009 incident and various anecdotal reports as to appellee Jones's attitude.

{¶86} In truth, Ms. Washington determined because appellant exhibited poor judgment and the consensual sexual contact incident had been brought into workplace, appellant should be terminated. It is also clear that appellee Mercy and Ms. Washington have taken the position that appellant's version is the truth.

{¶87} What factors leading to appellee Mercy's failure to terminate appellee Jones is unclear. However, a December 13, 2010 email between Ms. Washington and Mr. Colosimo leads to the conclusion that because appellee Jones did not clock out for her smoke break, she would be disciplined.

{¶88} We find the facts argued in support of this claim are in fact viable in appellant's R.C. 4112.02(A) discrimination claim. The crux of the lawsuit is appellant's termination leading to a violation of R.C. 4112.02(A) and not that appellee Jones was negligently supervised or retained.

{¶89} Appellant argues appellee Mercy should have had 20/20 hindsight. However, the pivotal point was that appellee Jones had initiated a criminal complaint, not that she still had a job.

{¶90} We conclude that although there can be more than one proximate cause of appellant's injury, the supervision and retention of appellee Jones after the fact is not one of them.

{¶91} The trial court did not err in granting summary judgment to appellees Mercy and Jones on the negligent retention/supervision claim.

{¶92} Lastly, because appellee Jones was not involved in the motion to dismiss, the trial court granted summary judgment to appellee Jones on the breach of contract claim. There does not appear to be any allegations against appellee Jones on this claim. We find the trial court did not err in granting summary judgment to appellee Jones on the breach of contract claim.

{¶93} Assignment of Error II is granted in part and denied in part. The trial court erred in granting summary judgment to appellee Mercy on appellant's claim for sexual discrimination.

{¶94} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed in part and reversed in part.

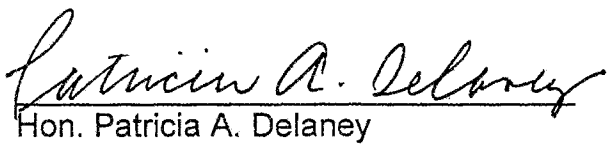
By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

Hon. Sheila G. Farmer

Hon. W. Scott Gwin



Hon. Patricia A. Delaney

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

NANCY S. REINBOLD
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STARK COUNTY, OHIO
14 MAY 27 PM 2:33

MATTHEW P. CAIAZZA	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
MERCY MEDICAL CENTER, ET AL.	:	
Defendants-Appellees	:	CASE NO. 2013CA00181

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed in part and reversed in part. The matter is remanded to said court for further proceedings consistent with this opinion. The claims of sexual discrimination and aiding and abetting discrimination against appellee Mercy and Ms. Washington are reinstated. Costs to be divided equally between appellant and appellee Mercy.

Hon. Sheila G. Farmer

Hon. W. Scott Gwin

Hon. Patricia A. Delaney