

IN THE SUPREME COURT OF OHIO

SRIDHARAN PARANTHAMAN

Plaintiff-Appellant,

v.

STATE AUTO PROPERTY &
CASUALTY INSURANCE
COMPANY, et al.

Defendants-Appellees.

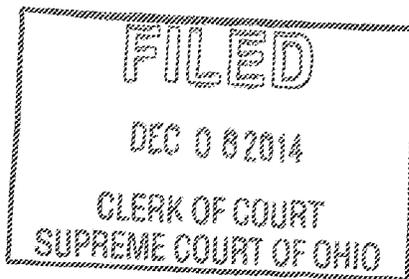
Case No. 14-2098

On Appeal from the Franklin County
Court of Appeals

10th Appellate District,
Case No. 14-AP-00221

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
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I. EXPLANATION OF WHY THIS CASE PRESENTS ISSUES OF PUBLIC AND GREAT GENERAL INTEREST

This case of Discrimination and Retaliation based National Origin on has five issues that are important to all such cases filed in Ohio. This case is of public and great general interest because the following five issues affect all national origin discrimination and retaliation cases with the first issue critically important to all national origin discrimination cases. 1) Whether employers are allowed to withhold pertinent information preventing a plaintiff from proving his claims of Discrimination and Retaliation based on National Origin. 2) Whether the second prong of discrimination based on National Origin discrimination claim is automatically defeated even when an employer demotes an employee, allocates no work for the complaining employee and terminates the employee. 3) Whether the fourth prong of discrimination based on national origin discrimination claim is not satisfied even when comparable non-protected persons received more favorable treatment. 4) Whether the fourth prong of a prima facie retaliation claim is automatically defeated even if causal link exists between the protected activity and adverse employment action. 5) Whether the determination that an initial case of discrimination and retaliation can be established and that the proffered reason for discharge offered by the employer was a pretext.

The first issue is whether employers are allowed to withhold information that is relevant to a plaintiff's claim of discrimination and retaliation based on national origin under O.R.C. 4112. Mr.Paranthaman requested the defendants to produce the personnel files and employment-related records of similarly-situated co-workers since the basic theory of Mr.Paranthaman's discrimination claim is that he was unlawfully treated differently than similarly-situated employees on the basis of his national origin. In order to establish his claim he must provide evidence that would indicate such differential treatment. Mr.Paranthaman stated that such

evidence would be illustrated and discovered by comparing his personnel file to the personnel files and employment-related records of similarly-situated employees' personnel files. These documents contain information that is highly relevant to his claims as they would show how he was treated differently than similarly-situated Caucasian employees. After defendant failed to produce the requested documents citing privacy concerns and the trial court's previous protective order¹ on the previously dismissed case, the plaintiff filed a Motion to Compel quoting Ohio Civil Rule 26(B)(1) that defines the scope of discovery to include "any matter not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any party seeking discovery, or to the claim or defense of the other party...".

The plaintiff's Motion to Compel Discovery was partially approved by the trial court and a protective order was signed off (Attached as Appendix D) since the court ordered the parties to execute a protective order within two weeks of its decision. The defendants produced the personnel file of plaintiff's manager but not Plaintiff's co-workers because they were "non-parties". The reason they were not named as a parties to the suit is because they were not supervisors with control over the plaintiff. Moreover discovery tools like protective order exist in order to mitigate any privacy concerns. In addition, courts have held that civil rights takes precedence over privacy issues in discrimination cases. So without access to the personnel files of co-workers, the plaintiff was denied the ability to prove his case.

¹ The court asked both parties to submit a protective order for consideration in a telephone status conference with Judge Sheward on May 31, 2012. Before plaintiff's attorney submitted his proposed protective order on June 5, 2012, the trial court erroneously entered a protective order on June 1, 2012 that was narrowly construed to defendant's benefit (Attached as Appendix C). After plaintiff's counsel discussed this issue with the Judge's staff attorney, the court scheduled an in-person status conference on June 26, 2012 in which the request for personnel files of co-workers was denied again.

The defendants produced a one page document of partial requested information for 2009. But the information for 2008 and 2010 and the employment-related records and other pertinent documents requested were not produced. The appeals court erred when it agreed with the defendant's claim that they had produced a "summary" of the requested information. The importance of this issue transcends beyond Mr. Paranthaman's case since an employee is divested of their due process when an employer withholds relevant documents and plaintiff is forced to prove his claims without access to those documents.

The second issue of public interest is whether the second prong of discrimination in a national origin discrimination claim is not satisfied even when an employer demotes an employee, allocates no work for the complaining employee while allocating work to Caucasian coworkers and terminates the employee that engaged in protected activities. The Court of Appeals stated that the work chart shown to appellant with no work assigned to him meant that he was available for new assignments and that the chart was a mere "planning tool". The plaintiff argued with facts on the record that this was a retaliatory discriminatory action that threatened his job. It also did not inquire into why this chart was blank for plaintiff at that particular time even though Caucasian co-workers were allocated work and why the chart was shown to the plaintiff after he filed an EEOC charge. Instead the court agreed with the positive theory proposed by the defendants.

At the summary judgment phase the evidence presented with the motion must be examined in the light most favorable to the non-moving party. That did not occur in this case.

With respect to the demotion, where the plaintiff was demoted from Business Analyst to Business Analyst 1 (BA 1), the plaintiff argued that this was a demotion since it pushed him down to a salary range that was two levels below and had lesser responsibilities. In addition, it

was a less desirable title than Business Analyst 3 which was assigned to similarly-situated Caucasian Business Analysts. The plaintiff questioned the reasons for this demotion and yet again the defendants failed to provide a clear answer. The Court of Appeals agreed with the reason proposed by the defendants that it was due to a companywide "re-classification" of titles and that the plaintiff failed to show that the BA1 title was a "less distinguished" title. This demotion occurred around the same time the plaintiff filed his EEOC complaints.

The next adverse employment action was termination. The plaintiff was repeatedly harassed in meetings with Human Resources (HR) Manager present. His request for audio-recording of meetings and the presence of a third party of his choosing was denied twice. These harassments and the hostile work environment created by the defendants adversely affected his health causing diagnosed Depression. When plaintiff wanted to protect his health and waited to seek the advice of legal counsel he was terminated for "insubordination" and "job abandonment". This termination came subsequent to plaintiff's EEOC and internal complaints and after the defendant learned that the plaintiff had retained an attorney.

The third issue presented is whether comparable, non-protected co-workers received more favorable treatment. Even without access to relevant documents of co-workers, the plaintiff established that his Caucasian co-workers received more favorable treatment in the form of pay raises, promotions and work allocations. For example, with regards to the denial of pay raises in 2009 and 2010 the defendants stated the reason was that the plaintiff already had a high salary and his job performance was poor. The plaintiff challenged his incorrect performance reviews for both 2009 and 2010 years and the defendants' based their denial of raise on the disputed reviews. The plaintiff is unable to compare and establish if similarly-situated Caucasian co-workers had high salaries or not due to the lack of documentation that should have been

provided. It was also established that similarly-situated Caucasian coworkers received promotions while the plaintiff was demoted as mentioned in the second issue. This issue is of great public interest because plaintiffs would be unable to satisfy this prong of a discrimination claim without access to pertinent documents.

The fourth identified issue is the whether the fourth prong of a prima facie retaliation claim is automatically defeated even if causal link exists between the protected activity and adverse employment action. There are strong causal relationships between plaintiff's protected activity and the defendant's retaliatory conduct. The appeals court stated "Additionally, appellant does not identify anything in the record demonstrating a causal link between the alleged adverse employment actions and the protected activity of appellant's internal complaints and his EEOC claims." Paranthaman, Court of Appeals Opinion, at ¶ 17. But a causal link exists because the plaintiff engaged in numerous protected activities before he was terminated on December 22, 2010. Specifically the plaintiff engaged in the following protected activities: 1)Made a complaint to Mr.Sullivan on April 1, 2008 about write-ups given by Mr.Hopkins, 2)Challenged his 2009 annual performance given by Mr.Hopkins in early 2009, 3)Filed a 7-page written complaint with Mr.Sullivan in June, 2009, 4)Filed a complaint to the 1-800-Ethics Hotline July 29, 2009 and another one thereafter, 5)Filed a first EEOC complaint on October, 2009, 6)Filed a second EEOC complaint on December, 2009, 7)Filed a third EEOC complaint on April 4, 2010, 8)Filed a retaliation complaint by USPS mail to Human Resources on Dec 7, 2009, 9)Complained in writing to Vice President Mr.Nordman and Chief Operating Officer Mr.Blackburn about the denial of pay raise and the inaccurate 2010 annual performance review, 10)Filed a complaint by email to Mr.Sullivan and Ms.Lindsey on December 16, 2010, 11)Informed Mr.Sullivan on Dec 19, 2010 that he had retained an attorney. For example, the demotion to BA1 on January 21,

2010 occurred after plaintiff filed his second charge of discrimination with the EEOC in December 2009 and the very next day after the EEOC mediation meeting. Mr.Hopkins showed the work chart to the plaintiff on October 2009 after the plaintiff filed his discrimination in early October 2009. The 2010 annual performance review where plaintiff received the “Meets” rating but was downgraded to “Somewhat Meets” came after his second charge to the EEOC in December 2009. Plaintiff was terminated on December 22, 2010 which came subsequent to filing of a complaint with the defendants about their discriminatory and retaliatory conduct on December 16, 2010 and informed them that he has sought legal counsel on December 19, 2010.

The fifth issue presented is whether the determination that an initial case of discrimination and retaliation under the McDonnell-Douglas shifting burden framework can be established and that the proffered reason for discharge offered by the employer was a pretext. The plaintiff filed multiple complaints starting from 2008 until his termination. After taking the adverse employment actions identified above against the plaintiff, the defendant simply waited for an opportune moment and terminated him in 2010 for alleged “insubordination” and “job abandonment”. Ms.Lindsey gave glowing performance reviews but then proceeded to schedule meetings to discuss alleged performance issues. The plaintiff denied that he was insubordinate. In addition, the plaintiff did not abandon his job as he had asked earlier to reschedule the meeting to protect his health and seek legal counsel. The reasons offered by the defendant are pretext to hide the unlawful reasons for the termination

II. STATEMENT OF THE CASE AND FACTS

A. Statement of Facts

Mr.Paranthaman is a naturalized citizen born in Cuddalore, India. He earned a Bachelor’s Degree in Computer Science in India, Masters in Business Administration (MBA) from Wright

State University and the CPCU certification considered as the “Masters” degree in the insurance industry while working at State Auto.

From September 2006 thru his termination in December 2010 Mr.Paranthaman’s work performance was meeting expectations. In his annual review in 2009 he received a “Meets” performance rating and in 2010 he received a “Meets” performance rating again based on the ratings chart but Mr. Hopkins downgraded it to “Somewhat Meets”. Mr.Paranthaman challenged both these ratings as they were inaccurate and subjectively evaluated. State Auto never resolved the issues. More importantly, Mr.Hopkins admitted during deposition that he could not recollect if he had downgraded the performance rating of any of plaintiff’s coworkers. During his tenure, Mr.Paranthaman filed many complaints of discrimination and retaliation with the HR department starting in early 2008 and filed three EEOC complaints with the final charge in April 2010. State Auto ignored all the internal complaints and no investigation reports were produced in discovery despite Mr.Paranthaman’s request for production.

After filing his second EEOC charge, in December 2009, State Auto demoted him from Business Analyst to Business Analyst 1 using a third-party while promoting similarly-situated Caucasian coworkers. When plaintiff questioned the reason for his demotion the record shows that he was not given a clear answer. In addition to this third-party, Mr.Hopkins and Ms.Lindsey admitted that they were aware of Mr.Paranthaman’s EEOC complaints.

The two reasons that State Auto claimed for Mr.Paranthaman's termination are in dispute and are suspect. By 2010, both the parties were engaged in a fight for a long time. On or around September 2010, Ms.Lindsey gave Mr.Paranthaman a warning letter stating that he was insubordinate in a meeting. Mr.Paranthaman gave a written reply in which he denied that he was insubordinate. On October 14, 2010, in a meeting Ms.Lindsey and Mr.Sullivan of HR again

accused Mr.Paranthaman that he was insubordinate. When Mr.Paranthaman was asked to leave the building immediately he went back to work since it was not his normal quitting time. After that when Mr.Sullivan threatened to call security Mr.Paranthaman left the building. On the same day, State Auto terminated his email and network access making it impossible to perform any work for State Auto. The foregoing events caused Mr.Paranthaman to fall ill and he was on Short-term Disability from Oct 16 thru Dec 16, 2010.

In a meeting on December 17,2010 Mr.Paranthaman was questioned about his alleged performance issues again and when he mentioned that could not answer instantly, Ms.Lindsey gave him a pre-written warning letter and suspended him .It was established that this pre-written letter was prepared by HR's Mr.Sullivan and signed by Ms.Lindsey before the meeting. On the same day Mr.Sullivan scheduled another meeting for December 20, 2010. Mr.Paranthaman stated he had retained an attorney and since these meetings were hurtful to his emotional and mental health he could not attend these meetings without first speaking to his attorney. His request was denied. When Mr.Paranthaman did not attend the meeting on December 20, 2010, he was terminated, again, on December 22, 2010 for "insubordination" and "job abandonment".

B. Procedural History

The Complaint was filed with the Franklin County Court of Common Pleas on October 10, 2011 and voluntarily dismissed. The Complaint was re-filed with the Franklin County Court of Common Pleas on February 4, 2013. The defendant filed a Motion for Summary Judgment on December 12, 2013. The plaintiff filed his opposition to the motion for summary judgment on December 30, 2013. On February 8, 2014 the Trial Court granted the Motion for Summary Judgment.

Appellant filed a timely appeal with the Tenth District Court of Appeals on May 12, 2014. The appellee filed their reply on June 9, 2014. The majority affirmed the Trial's court's decision on November 6, 2014. The Appellant Sridharan Paranthaman is filing his Notice of Appeal along with this Memorandum in Support of Jurisdiction.

III. ARGUMENT

FIRST PROPOSITION OF LAW: Employers must not be allowed to withhold pertinent information preventing a plaintiff from proving his claims of Discrimination and Retaliation based on National Origin.

In *Manning v. General Motors*, 247 F.R.D. 646 (D.Kan. 2007), the plaintiff sought discovery of the personnel records of other employees. The Court stated: "Defendant also objects to production of the documents requested on grounds that the documents are confidential. This objection will be overruled because, as this Court previously has held, 'a concern for protecting confidentiality does not equate to privilege.'" Because a protective order would safeguard the potential harm from disclosure of the documents, the Court overruled the employer's objection. In discrimination cases, courts have ordered defendants to produce relevant parts of personnel files since unequal treatment is the key issue in dispute. In *Ragge v. MCA/Universal Studios* 165 F.R.D. 601 (C.D. Cal. 1995), the court held that "The importance of the information to plaintiff's claims outweighs any privacy interest defendants may have. Plaintiff's narrowing of the documents in the personnel files satisfactorily decreases the severity of the invasion of defendants' right to privacy. By narrowing her request to specific documents in the defendants' personnel files, rather than the complete personnel files, a balance has, in fact, been achieved between plaintiff's need to discover the information and the privacy rights of the defendants."

The Court of Appeals erred when it stated that appellees had already provided the summary of pertinent information. The pertinent information was not provided for all the years requested and only partial information was provided in a single page. Appellant clearly articulated in his Motion to Compel asking for only certain highly relevant information within the personnel files. While lower courts have broad discretion in discovery matters, the appellant is asking for only certain information to prove his claims and not the whole personnel file.

In *Ward v. Summa Health System* the Supreme Court of Ohio determined that “{¶ 9} Parties have a right to liberal discovery of information under the Rules of Civil Procedure. See *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661-662, 635 N.E.2d 331. The court quoted in *Ward v. Summa Health System*, 128 Ohio St.3d 212, 2010-Ohio-6275. (Ohio 2010) “{¶ 10} The scope of the information that a party may discover is governed by Civ.R. 26(B)(1), which provides:

{¶ 11} "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." (Emphasis added.)". This court must overrule the Court of Appeals decision and ensure that all parties are treated fairly by clarifying its position on this critical issue.

SECOND PROPOSITION OF LAW: The second prong of discrimination based on National Origin discrimination claim is not automatically defeated even when an

employer demotes an employee, allocates no work for the complaining employee and terminates the employee.

Adverse employment actions can be proven in many ways. In *Wills v. Pennyrile Rural Elec. Coop. Corp.*, 259 F. App'x. 780, 783 (6th Cir. 2008) citing *Crady v. Liberty Nat'l Bank and Trust Co.*, 993 F.2d 132, 136 (7th Cir.1993) the court held that “[A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.”

Mr.Paranthaman's stated on the record that BA1 was the second lowest in salary and title. Documentary evidence showed that BA1 is a junior level position and BA 3 is a senior level position. It also led to a lower-pay range which State Auto used to deny him a pay raise later. This is because at the time he was demoted to BA1 in January 2010, defendant already knew that the pay range for BA1 was significantly lower than the plaintiff's \$80,000 salary. So the defendant's "favorable treatment" of not reducing plaintiff's salary is to insulate itself from a retaliatory charge that would surely later. In fact, in this case the plaintiff had reported the demotion to the EEOC as another retaliatory act in January, 2010. So the pushing of appellant to BA1 with the lower pay range had the same adverse effect as reducing his pay. Mr.Hopkins poisoned the well when the final determination regarding the assignment of BA1 title to Mr.Paranthaman was made by Mr.Hopkins and Ms.Gwyenne. Interestingly though Mr.Hopkins gave plaintiff a "Meets" performance rating for 2008-09 which contradicts the reason to assign him the BA1 title, the second lowest title. This is one of many contradictions that Mr.Hopkins

has done before. For example, he hired the plaintiff as a full-time employee because of good performance but then gave him a write-up in Jan 2010 due to alleged performance issues and a second write-up in March 2010 for the same reason. But confirmed plaintiff as a State Auto employee when his second probationary period ended. Termination is an adverse employment action. In *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575-76 (6th Cir. 2004), the court stated that common “[e]xamples of adverse employment actions include firing, failing to promote, reassignment with significantly different responsibilities, a material loss of benefits, suspensions, and other indices unique to a particular situation.”

THIRD PROPOSITION OF LAW: The fourth prong of discrimination based on national origin discrimination claim is not automatically defeated even when comparable non-protected co-workers received more favorable treatment.

The fourth prong of a nation origin discrimination case requires a plaintiff to show that comparable non-protected co-workers received more favorable treatment than the plaintiff. “A plaintiff may prove allegations of disparate treatment by demonstrating that he was treated less favorably than similarly situated employees outside the plaintiff’s protected class.” *E.E.O.C. v. Kohler Co.*, 335 F.3d 766, 776 (8th Cir.2003). (Quoting *Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 259-60 (8th Cir.1996); *Johnson v. Legal Servs. of Arkansas, Inc.*, 813 F.2d 893, 896 (8th Cir.1987)).

Here the plaintiff could not compare himself to non-protected co-workers and completely show that they received more favorable treatment because the pertinent information to do this comparison were not provided by the defendant as identified above. Even without the complete information identified in issue one, the plaintiff demonstrated that comparable non-protected co-workers received more favorable treatment when they were promoted to higher levels such as

BA 3 and supervisor while he was demoted to BA 1, they had readily available work assignments for 2010 and received pay raises in at least one year.

FOURTH PROPOSITION OF LAW: The fourth prong of a prima facie retaliation claim is not automatically defeated even if causal link exists between the protected activity and adverse employment action.

When the proximity of the protected activity activities and the adverse employment actions that the plaintiff experienced are closely examined it is evident that retaliatory actions came as a result of plaintiff's complaints. In some cases temporal proximity may be sufficient to establish causation. See *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 523-26 (6th Cir. 2008). In *Mickey*, the court also held that "[w]here an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events insignificant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation."

In addition to temporal proximity, the defendant in this case increased scrutiny of plaintiff's work, demoted him to BA1, allocated him no work assignments for 2010, downgraded his performance review after he filed EEOC charges, denied him pay raises and terminated him after they learned that he had retained an attorney. In *Hamilton v. General Electric Company* (No. 08-5023, 6th Cir. 2007) the defendant increased scrutiny of plaintiff's work after he filed complaints. The court agreed that Hamilton established the causal link requirement and stated "The combination of this increased scrutiny with the temporal proximity of his termination occurring less than three months after his EEOC filing is sufficient to establish the causal nexus needed to establish a prima facie case."

The Ohio Constitution, the Code of Professional Responsibility (CPR) as adopted by the Ohio Supreme Court and common law encourage employees to consult an attorney about possible claims that would affect the employer's business interests. Section 16, Article I of the Ohio Constitution provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law * * *." In addition, EC 1-1 CPR as adopted by the Supreme Court states "'every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence." See *Chapman et al., v. Adia Services, Inc.* 116 Ohio App.3d 534, 1997. There is ample evidence to show that a causal link exists between plaintiff's protected activities and adverse employment actions taken against him by the defendants. The appellate court erred when it decided that because two prongs of discrimination claim could not be satisfied by the plaintiff the retaliation claim under the same McDonnell Douglas framework also failed.

FIFTH PROPOSITION OF LAW: An initial case of discrimination and retaliation can be established and that the proffered reason for discharge offered by the employer was a pretext.

The defendant contended that the reason for plaintiff's termination was "insubordination" and "job abandonment". The plaintiff disputed these reasons and argued that the real reason was retaliation for exercising his legal rights. After plaintiff engaged in protected activities starting from early 2008, the defendant took adverse employment actions as identified in the second issue. Then the defendant terminated the plaintiff when an opportunity presented itself in late 2010. In *Hamilton v. General Electric Company* (No. 08-5023, 6th Cir. 2007) the court held that when an "employer . . . waits for a legal, legitimate reason to fortuitously materialize, and then uses it to cover up his true, longstanding motivations for firing the employee," the employer's actions constitute "the very definition of pretext." Quoting *Jones v. Potter*, 488 F.3d (6th Cir.

2007). This is exactly the same thing that happened to the plaintiff. In *Hamilton* the court also noted “a reasonable fact-finder could determine that ... waited for, and ultimately contrived, a reason to terminate .. to cloak its true, retaliatory motive for firing him.” As in *Hamilton*, in this case a reasonable fact-finder could see that the preferred reasons offered for termination were pretext.

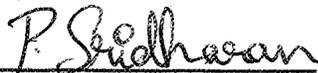
IV. CONCLUSION

In the hundreds of prima facie discrimination and retaliation cases litigated in Ohio everyday plaintiffs are required to prove their claims based on evidences. The Court of Appeals ruled that the defendant need not produce the highly relevant information from the personnel files of his similarly-situated Caucasian workers despite the obvious need for these documents. The court’s requirement that the plaintiff must prove his case without access to pertinent information is unfair.

To retaliate is human nature especially when an employee alleges his employer is discriminatory. In this case, the defendant took adverse employment actions such as a demotion, denial of pay raises, assigning no work allocations and termination after the plaintiff filed internal and external charges of discrimination and retaliation. The motivation to retaliate was established when the defendant Hopkins decided to deny pay raises to Plaintiff in two years while giving raises to Caucasian co-workers with similar performance ratings. The Court of Appeals majority erred when it failed to take into consideration the totality of circumstances unique to this case. The majority's rulings must be overturned.

For the foregoing reasons Mr.Paranthaman respectfully requests this court to accept jurisdiction over this case and rule on the issues presented.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Sridharan Paranthaman was served via ordinary U.S. mail and electronic mail on this 8th day of December 2014 upon the following:

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APPENDICES

APPENDIX A

**Decision of the Tenth District Court of Appeals
(November 6, 2014)**

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Sridharan Paranthaman,	:	
	:	
Plaintiff-Appellant,	:	No. 14AP-221
	:	(C.P.C. No. 13CV-1324)
v.	:	
	:	(REGULAR CALENDAR)
State Auto Property &	:	
Casualty Insurance Company et al.,	:	
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on November 6, 2014

Redman Law Offices, LLC, and Jamaal R. Redman, for appellant.

Baker & Hostetler, LLP, Matthew W. Hoyt and Margaret K. Reid, for appellees.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Plaintiff-appellant, Sridharan Paranthaman, appeals from a decision and entry of the Franklin County Court of Common Pleas granting the motion for summary judgment of defendants-appellees State Auto Property & Casualty Insurance Company ("State Auto") and Richard Hopkins. Because the trial court did not err in granting appellees' motion for summary judgment and did not abuse its discretion in denying in part appellant's motion to compel, we affirm.

I. Facts and Procedural History

{¶ 2} Appellant, a naturalized United States citizen born in India, began his employment relationship with State Auto in 2006 as an independent contractor business analyst. During his time as an independent contractor, appellant reported to Hopkins, an

employee of State Auto. In December 2007, Hopkins hired appellant as a full-time staff employee of State Auto in the position of business analyst. Hopkins acted as appellant's immediate supervisor. The starting salary range for staff business analysts at State Auto was \$49,730 to \$82,883. State Auto agreed to a starting salary of \$80,000 for appellant.

{¶ 3} The change in appellant's status from independent contractor to employee brought with it a probationary period of employment. In January 2008, shortly after he became an employee, appellant received a written memorandum from Hopkins stating appellant needed to improve in the areas of teamwork and business requirements documentation. Appellant responded with a written letter stating he "agree[d]" with Hopkins' assessment of his teamwork and communication skills, but "believe[d] this is a cultural challenge." (R. 80, Appellant's Affidavit, exhibit A.) Appellant further conceded in the letter that Hopkins' concerns regarding appellant's business requirements documentation were "accurate." (R. 80, exhibit A.)

{¶ 4} On March 26, 2008, Hopkins issued appellant a second memorandum again detailing Hopkins' concerns regarding appellant's job performance. Hopkins addressed appellant's concerns that the communication and teamwork issues were culturally related and reminded appellant that Hopkins had offered to review drafts of appellant's e-mails to ameliorate any perceived cultural challenges. Hopkins also suggested appellant consult with two other employees to help appellant with teamwork and communication issues but noted that appellant had not followed up with either one of them, a fact that "disappoint[ed]" Hopkins. (R. 65, Appendix to Defendants' Motion for Summary Judgment Vol. I, exhibit No. 7, at 1.) Due to Hopkins' ongoing concerns regarding appellant's job performance, he extended appellant's initial probationary employment period for an additional 90 days.

{¶ 5} Hopkins' concerns about appellant's job performance continued and he noted those concerns in appellant's annual performance reviews. State Auto ranks overall performance on a five-tiered scale: "Does Not Meet," "Somewhat Meets," "Meets," "Somewhat Exceeds," and "Exceeds" expectations for performance of the position. (R. 65, exhibit No. 10, at 2.) For his 2008 performance review, appellant received a "meets" expectations score and did not receive a pay raise. (R. 65, exhibit No. 10, at 3.) Dissatisfied with his performance review, appellant filed a complaint with State Auto's

Human Resources Officer, Mark Sullivan, in April 2009, arguing Hopkins' performance review of appellant was unfair. Additionally, appellant complained to Hopkins' supervisor and to State Auto's internal ethics hotline on July 28, 2009. These complaints made no reference to perceived national origin discrimination.

{¶ 6} In December 2009, State Auto split the Business Analyst job description into five skill levels: Business Associate, Business Analyst I, Business Analyst II, Business Analyst III, and Business Architect. All State Auto business analysts were assigned to one of the five newly-created titles through a four-step process which included an employee self-evaluation, an interview with the business analysis practice lead, opinion of the employee's supervisor, and a final discussion with the employee. Appellant completed the four steps of the reclassification process and was assigned a classification of Business Analyst I. Appellant's salary, benefits, and work assignments did not change as a result of the new classification. The salary range for Business Analyst I was \$47,347 to \$73,388 per year, thus appellant's annual salary was \$6,612 more than the top end salary for his newly classified position.

{¶ 7} In his 2009 performance review, appellant's score slipped to "somewhat meets" expectations. (R. 65, exhibit No. 20, at 4.) Once again, appellant did not receive a pay raise in 2010 following his 2009 performance review.

{¶ 8} Appellant filed two charges of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC"), one on November 17, 2009 and one on February 27, 2010. Both charges concerned appellant's complaints about Hopkins' treatment of him. The EEOC dismissed both of appellant's charges on the grounds that, "[b]ased upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes." (R. 68, Appendix to Defendants' Motion for Summary Judgment Vol. IV, exhibit No. 7.)

{¶ 9} Sometime in 2010, State Auto assigned Natalie Lindsey (nka Natalie Lightfoot) to be appellant's supervisor rather than Hopkins. Part of Lindsey's responsibilities as appellant's supervisor was to meet with appellant to jointly complete a mid-year performance evaluation. Lindsey scheduled a meeting with appellant for September 13, 2010 to review appellant's performance objectives and his current work assignments. Lindsey, appellant, and Sullivan all attended the meeting. Lindsey offered

help to appellant on ways to improve his time management skills in response to appellant stating he felt overloaded with his work assignments. According to the meeting minutes, appellant "became agitated" when Lindsey tried to understand his concerns about his workload and he then read from a pre-written statement: "I do not feel comfortable continuing this meeting now this way. I would like to have an impartial observer in this meeting on my side. Since last year [Hopkins] confirmed that we cannot audio record these meetings let's reconvene on another day this discussion." (R. 68, exhibit No. 8, at 3.) Lindsey stated Sullivan was the impartial human resources representative at the meeting, but appellant would not agree to that and "raised his voice a couple times." (R. 68, exhibit No. 8, at 3.) After convincing appellant to stay, Lindsey informed appellant she had received a complaint about appellant raising his voice to another co-worker. Appellant immediately stopped the discussion, refused to discuss his performance issues, and ended the meeting.

{¶ 10} Following the September 13, 2010 meeting, Lindsey sent appellant a lengthy e-mail to discuss his conduct and to set guidelines for appellant's behavior in future meetings. Lindsey stated in her e-mail that, going forward, she would "consider any refusal by [appellant] to participate in our meetings – which includes, but is not limited to, a refusal to respond to questions that I ask – to be insubordination and you will be disciplined accordingly." (R. 65, exhibit No. 24, at 1.) Lindsey also expressly stated that in future meetings, she "will no longer tolerate a lack of respect or courtesy and will consider any future lack of respect or courtesy to be insubordination." (R. 65, exhibit No. 24, at 1.) Appellant stated in his deposition that, after receiving this e-mail from Lindsey, he understood what was expected of him at future meetings.

{¶ 11} On October 14, 2010, Lindsey met with appellant to resume their discussions that ended abruptly on September 13, 2010. Once again, Sullivan was present at the meeting. When Lindsey asked appellant about his teamwork skills, appellant refused to answer and stated he would write down her questions and respond at a later date. Lindsey informed appellant it was important that they have an open dialogue about his job performance, but appellant read from another pre-written statement that he was not comfortable and said he was going to leave the meeting. Lindsey and Sullivan told appellant he needed to stay to discuss his job performance, but appellant ignored them

and stood up to leave. Sullivan reminded appellant that his conduct was insubordination and that if he left the meeting, he would be required to leave the building for the rest of the day. Sullivan also informed appellant that if he left the meeting, he would be expected to return to the same room the following day to finish the meeting.

{¶ 12} Appellant left the meeting but did not exit the building; instead, he returned to his cubicle. Sullivan and Lindsey went to his desk approximately 10 or 15 minutes later and told appellant he needed to leave the building in the next 5 minutes or they would have security escort him off the property. Appellant then left the premises on his own.

{¶ 13} That same day, Lindsey prepared a memorandum serving as a written warning to appellant, stating his conduct "both during and after the meeting was insubordinate and unacceptable." (R. 69, Appendix to Defendants' Motion for Summary Judgment Vol. V, exhibit No. 11, at 3.) The memorandum expressly warned that "[f]urther instances of insubordination will not be tolerated, and will be met with discipline up to and including unpaid suspension from work or termination of your employment." (R. 69, exhibit No. 11, at 3.) Lindsey dated the warning for October 15, 2010 to coincide with when the meeting was to resume. Appellant did not come to work on October 15, 2010 but called in sick. Before Lindsey could deliver the written warning, appellant requested and received approval for short-term disability leave through December 16, 2010. Lindsey and Sullivan rescheduled the follow-up meeting for December 17, 2010 at 8:00 a.m. to coincide with appellant's return to work.

{¶ 14} On December 16, 2010, the day before appellant was to return to work and meet with Lindsey and Sullivan, appellant e-mailed Lindsey a list of allegedly discriminatory practices appellant stated he had observed at State Auto, including the discrimination and retaliation charges he had filed with the EEOC.

{¶ 15} Appellant returned to work as scheduled on December 17, 2010 and attended the meeting with Lindsey and Sullivan. At the beginning of the meeting, Lindsey handed appellant the written warning that had been originally prepared for the October 15, 2010 meeting. Lindsey and Sullivan then attempted to address concerns with appellant's job performance, but appellant once again read from a pre-written statement indicating he would not provide immediate answers to questions during the meeting but would take notes and respond at a later date.

{¶ 16} Lindsey reminded appellant that his refusal to answer her questions was insubordination and she reminded him that he had already been disciplined once for similar insubordinate conduct on October 14, 2010. Lindsey asked appellant to read the written warning, which he did; she then asked appellant again to discuss his performance issues with her but appellant once again responded only by reading his pre-written statement. Sullivan then informed appellant his conduct constituted insubordination, and appellant once again read aloud his pre-written statement. At that point, Sullivan informed appellant he was suspended from work, his system access would be turned off, and that Sullivan and Lindsey would contact appellant to let him know the duration and details of the suspension. Appellant acknowledged he understood and left the premises.

{¶ 17} On the afternoon of December 17, 2010, Sullivan sent an e-mail to appellant instructing him to return to work on December 20, 2010 at 2:00 p.m. to complete the meeting regarding appellant's job performance and to come prepared to actually discuss his job performance concerns "that have now been raised * * * on three prior occasions." (R. 69, exhibit No. 13, at 2.) Appellant responded in a December 19, 2010 e-mail that he did not feel comfortable attending any meetings without his lawyer present and asked to reschedule the meeting for a later date. On December 20, 2010, Sullivan responded by e-mail that "it is not appropriate for [your] lawyer to be present" at the meeting. (R. 69, exhibit No. 13, at 1.) Sullivan expressly warned in the e-mail that if appellant did not show up at 2:00 p.m. that day as scheduled, the company "will consider that a further act of insubordination and [your] employment will be terminated." (R. 69, exhibit No. 13, at 1.) Additionally, Sullivan stated that if appellant is unable to attend the meeting for medical reasons, he must provide the appropriate documentation required by State Auto's policies.

{¶ 18} Appellant did not attend the December 20, 2010 meeting, and he did not provide State Auto with any explanation or medical excuse for his absence. Appellant did not show up to work on December 20, 21, or 22, 2010, and he did not notify anyone at State Auto of his absence. On December 22, 2010, Sullivan sent appellant an e-mail informing him that State Auto had terminated his employment based on appellant's insubordination and his "apparent job abandonment." (R. 65, exhibit No. 27, at 1.)

{¶ 19} On October 12, 2011, appellant filed a complaint ("the first complaint") against appellees alleging they discriminated against him on the basis of his national origin and retaliated against him. During the discovery phase, the trial court issued a protective order to deny appellant's request for the personnel files of other employees other than Hopkins. Appellant voluntarily dismissed the first complaint. On February 4, 2013, appellant refiled an identical complaint, again asserting claims for national origin discrimination and retaliation.

{¶ 20} On August 28, 2013, appellant filed a motion to compel discovery seeking an order from the trial court requiring appellees to produce the personnel files of Hopkins as well as those of other similarly situated employees of State Auto and any information regarding any EEOC or Ohio Civil Rights Commission ("OCRC") complaints lodged against State Auto in the past ten years. In an October 7, 2013 decision and entry, the trial court granted appellant's motion to compel in part, provided that the case is subject to the same protective order issued in the discovery phase of the litigation of the first complaint, and that the parties execute an agreed protective order for the pendency of the current litigation. The trial court denied appellant's motion to the extent he sought information related to any charges of discrimination filed with the EEOC or OCRC against State Auto in the past ten years.

{¶ 21} On October 18, 2013, the parties filed a mutually agreed stipulation and protective order stating appellant is not "entitled to discovery of any personnel files, personnel documents or personnel information for any non-party employee of State Auto." (R. 45, Agreed Stipulation and Protective Order, at 2.) Appellees did, however, provide appellant with a chart listing the names of all other business analysts along with their ethnicity, annual salary, performance review rating, and any pay raise given in the form of percentage change.

{¶ 22} On December 2, 2013, appellees filed a motion for summary judgment arguing there were no genuine issues of material fact related to any of appellant's claims and appellees were therefore entitled to judgment as a matter of law. Appellant responded with a memorandum in opposition to appellees' motion for summary judgment filed December 30, 2013. Appellant did not request more time to conduct

additional discovery under Civ.R. 56(F) before responding to appellees' motion for summary judgment.

{¶ 23} In a February 18, 2014 decision and entry, the trial court granted appellees' motion for summary judgment, concluding there remained no genuine issue of material fact related to any of appellant's claims. Appellant timely appeals.

II. Assignments of Error

{¶ 24} Appellant assigns two assignments of error for our review:

1. The trial court erred in granting Defendant-Appellees' Motion for Summary Judgment regarding Appellant's claims for discrimination based on national origin and hostile work environment harassment which includes retaliation; thus genuine issues of material fact remain to be litigated.
2. The trial court erred in its decision to grant Appellant's Motion to Compel in Part Only, which prevented Appellant from obtaining personnel files of similarly situated non-party business analysts and EEOC and OCRC complaints against the Defendant-Appellees, which are relevant to Appellant's claims of discrimination and retaliation.

III. First Assignment of Error – Summary Judgment

{¶ 25} In his first assignment of error, appellant argues the trial court erred when it granted appellees' motion for summary judgment. More specifically, appellant argues there remain genuine issues of material fact as to whether appellees discriminated against him based on his national origin and whether appellees retaliated against him for exercising his protected right to complain about discrimination.

{¶ 26} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is appropriate only when the moving party demonstrates (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could 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 most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 27} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). However, the moving party cannot discharge its initial burden under this rule with a conclusory assertion that the nonmoving party has no evidence to prove its case; the moving party must specifically point to evidence of the type listed in Civ.R. 56(C) affirmatively demonstrating that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421, 429 (1997). Once the moving party discharges its initial burden, summary judgment is appropriate if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E).

A. National Origin Discrimination

{¶ 28} Appellant's complaint asserts a claim for national origin discrimination based on R.C. Chapter 4112. R.C. 4112.02(A) states:

It shall be an unlawful discriminatory practice * * * [f]or any employer, because of the race, * * * religion, * * * [or] national origin * * * 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.

Additionally, R.C. 4112.99 authorizes civil actions for relief for violations of R.C. Chapter 4112. Ohio courts look to the guidance of federal case law interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., to examine state employment discrimination claims. *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723, ¶ 15. Title VII jurisprudence places the burden on the plaintiff to establish discrimination.

{¶ 29} To prevail in an employment discrimination case, the plaintiff must prove discriminatory intent which may be proven to be either direct or indirect evidence. *Dalton v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 13AP-827, 2014-Ohio-2658, ¶ 26, citing *Gismond v. M&T Mtge. Corp.*, 10th Dist. No. 98AP-584 (Apr. 13, 1999). " [A] plaintiff may establish a prima facie case of * * * discrimination directly by presenting

evidence, of any nature, to show that an employer more likely than not was motivated by discriminatory intent.' " *Refaei v. Ohio State Univ. Hosp.*, 10th Dist. No. 10AP-1193, 2011-Ohio-6727, ¶ 12, quoting *Mauzy v. Kelly Servs., Inc.* 75 Ohio St.3d 578 (1996), paragraph one of the syllabus. "Alternatively, a plaintiff may establish a prima facie case of discrimination indirectly through the first part of the *McDonnell Douglas* three-part, burden-shifting approach, to create an inference of discriminatory intent." *Id.*, citing *Mauzy; Bucher v. Sibcy Cline, Inc.*, 137 Ohio App.3d 230, 239 (1st Dist.2000), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under the latter approach, a plaintiff must demonstrate by a preponderance of the evidence that (1) he was a member of a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) comparable, non-protected persons received more favorable treatment. *Refaei* at ¶ 12, citing *Saha v. The Ohio State Univ.*, 10th Dist. No. 10AP-1139, 2011-Ohio-3824, ¶ 47, citing *Clark v. City of Dublin*, 10th Dist. No. 01AP-458 (Mar. 28, 2002).

{¶ 30} Once a plaintiff establishes a prima facie case of discrimination, a rebuttable presumption shifts the burden to the defendant to "articulate clearly a legitimate, nondiscriminatory reason for the adverse action" to support a finding that unlawful discrimination was not the cause of the challenged employment action. *Id.* at ¶ 13, citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993). The burden on appellees here is one of production, as a " 'defendant need not prove a nondiscriminatory reason' " for the adverse employment action, " 'but need merely articulate a valid rationale.' " *Id.*, quoting *Williams v. Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, ¶ 14.

{¶ 31} If the employer carries its burden, the burden shifts back to the plaintiff to demonstrate that the reason the employer articulated for taking the adverse employment action is mere pretext for discrimination. *Id.* at ¶ 14, citing *Boyd v. Ohio Dept. of Mental Health*, 10th Dist. No. 10AP-906, 2011-Ohio-3596, ¶ 28, citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

{¶ 32} It is undisputed that appellant is a member of a protected class and was qualified for the position. Appellant contends he suffered four distinct adverse employment actions: (1) when Hopkins created a work chart in October 2009 for the business analysts he supervised; (2) when State Auto reclassified appellant from Business

Analyst to Business Analyst I; (3) when Hopkins did not award appellant a raise in 2009 and 2010; and (4) when State Auto terminated appellant's employment. Appellees assert all of appellant's claims fail because some of these actions are not sufficient to constitute adverse employment actions, because appellant is unable to identify any comparable, non-protected employees who received better treatment, or because appellees articulated a valid, nondiscriminatory rationale for each of these actions.

1. The October 2009 Work Chart

{¶ 33} Appellant first argues the 2009 work chart Hopkins prepared indicated appellant would not be assigned any new projects in 2010 and that this work chart constituted an adverse employment action. The parties agree Hopkins created the work chart in 2009 and that the chart indicated a 0 percent value for appellant in each month of 2010. Appellees argue, however, that appellant mischaracterizes the work chart and that it did not constitute an adverse employment action.

{¶ 34} In general, an adverse employment action "is a materially adverse change in the terms and conditions of the plaintiff's employment." *Canady v. Rekau & Rekau, Inc.*, 10th Dist. No. 09AP-32, 2009-Ohio-4974, ¶ 25, citing *Michael v. Caterpillar Financial Servs. Corp.*, 496 F.3d 584, 593 (6th Cir.2007). An adverse employment action includes any " 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' " *Id.*, quoting *Tepper v. Potter*, 505 F.3d 508, 515 (6th Cir.2007), quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). An employee's unhappiness or resentment about an employment action does not necessarily render the occurrence an actionable adverse action. *Id.*, citing *Primes v. Reno*, 190 F.3d 765, 767 (6th Cir.1999). "Employment actions that result in mere inconvenience or an alteration of job responsibilities are not disruptive enough to constitute adverse employment actions." *Id.*, citing *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 182 (6th Cir.2004).

{¶ 35} The undisputed evidence in the record indicates the work chart was a projection of the anticipated future availability of the business analysts under Hopkins' supervision to take on new projects in 2010, not an indication that any given business analyst would or would not be assigned a new project. Hopkins intended the work chart

be used as a planning tool, not a schedule of assigned work. The "zero-percent" values were intended to indicate that appellant did not have any work assignments projected to continue into 2010, meaning appellant would be available for new assignments. Appellant agreed in his deposition that the work chart did not have any material affect on the terms and conditions of his employment, and he agreed that he consistently had work assigned to him throughout 2010. Thus, the creation of the work chart was not significant enough to constitute a materially adverse change in the terms and conditions of appellant's employment because, as appellant admitted in his deposition testimony, it had no bearing on appellant's actual work assignments in 2010. *See Canady* at ¶ 25 (noting "[n]ot everything that makes an employee unhappy or resentful is an actionable adverse action"). Reasonable minds could only come to one conclusion, that the creation of the work chart was not an actionable adverse employment action.

2. Reclassification of Position

{¶ 36} Appellant next argues his reclassification to the position of Business Analyst I was an adverse employment action. Appellees respond that the reclassification was merely a title clarification. The evidence in the record indicates appellant's reclassification occurred as part of a company-wide change to the business analyst position. It is undisputed that appellant did not suffer any change in salary, benefits, work hours, or project assignments as a result of this reclassification. Though the assignment of "a less distinguished title" can constitute an adverse employment action, the undisputed facts here do not support such a conclusion. *Dautartas v. Abbott Laboratories*, 10th Dist. No. 11AP-706, 2012-Ohio-1709, ¶ 52, citing *Peterson v. Buckeye Steel Casings*, 133 Ohio App.3d 715, 727 (10th Dist.1999).

{¶ 37} Appellant points to no evidence that Business Analyst I is a less-distinguished title than his pre-classification title of generic business analyst. Appellant suffered no significant change in his employment status as a result of the reclassification. A reassignment unaccompanied by significantly different responsibilities does not rise to the level of an adverse employment action. *Refaei* at ¶ 38, citing *Burlington Industries, Inc.* (noting a "bruised ego" is not enough, and "demotion without change in pay, benefits, duties, or prestige" is "insufficient" to constitute a significant change in employment

status). Thus, reasonable minds could only conclude that appellant's job title clarification did not amount to an actionable adverse employment action.

3. Denial of Pay Raise

{¶ 38} Next, appellant asserts Hopkins' failure to award appellant a raise in both 2009 and 2010 were discriminatory adverse employment actions. Generally, the denial of a pay raise qualifies as an adverse employment action. *Canady* at ¶ 27. Appellees respond that this argument fails because appellant was unable to identify any similarly situated employees who received better treatment than appellant. However, we need not definitively determine whether appellant was able to identify other comparable employees because even if appellant successfully proved the existence of other similarly situated employees, appellees offered a legitimate, nondiscriminatory reason for appellant's treatment.

{¶ 39} Appellees explained that appellant did not receive a raise due to his mediocre job performance and the fact that his salary was already near the top end of the salary range for business analysts at State Auto. According to appellees' undisputed evidence, appellant negotiated a high starting salary of \$80,000 per year when he joined State Auto as a staff business analyst in 2007. At the time he began his staff position, the upper limit of the salary range for a business analyst was \$82,883. When appellant first became eligible for a raise, his salary was already 14 percent above the mid-point for all business analysts, while his performance review for 2008 reflected his performance only "meets" expectations rather than "somewhat exceeds" or "exceeds" expectations.

{¶ 40} Appellant again did not receive a raise in 2010, but appellees again responded that appellant did not receive a raise due to poor performance and an already high salary. Appellant's performance evaluation for the 2009 year fell from "meets" expectations to only "somewhat meets" expectations. Additionally, State Auto reclassified its business analysts in 2010, and appellant was designated a Business Analyst I. The top end of the salary range for Business Analyst I was \$73,388. Despite appellant's reclassification, State Auto did not reduce appellant's salary to fall within this range. Both because appellant's performance evaluation indicated a drop in State Auto's satisfaction with appellant and appellant's salary was already \$6,612 above the top end for his reclassified position, appellees did not award appellant a raise in 2010.

{¶ 41} Appellees' articulated reasons for denying appellant a raise in 2009 and 2010 because of an already high salary and poor job performance are sufficient, nondiscriminatory reasons to carry appellees' burden in the second step of the *McDonnell Douglas* test. See *Canady* at ¶ 27 (employer's stated reason that employee did not receive a pay raise because of a poor rating on a performance review is sufficient evidence to carry the employer's burden to articulate a legitimate, nondiscriminatory reason for the adverse employment action).

{¶ 42} Because appellees carried their burden of articulating a legitimate, nondiscriminatory explanation for denying appellant a raise, the burden then shifts back to appellant to demonstrate appellees' stated reasons were mere pretext. Though appellant argued the denial of his pay raise must be motivated by national origin discrimination, he does not support that assertion with any specific evidence in the record. Appellant "cannot satisfy this burden by merely denying the existence of a legitimate, nondiscriminatory reason when, in fact, the record contains such a reason." *Canady* at ¶ 28. Thus, based on the evidence in the record, reasonable minds could only conclude that appellant failed to demonstrate appellees' reasons for denying appellant a raise were mere pretext. *Id.*

4. Termination

{¶ 43} Lastly, under his national origin discrimination argument, appellant asserts his termination was an adverse employment action motivated by discrimination against him based on his national origin. In general, termination from employment qualifies as an adverse employment action. *Canady* at ¶ 25, citing *Tepper* at 515. Similar to appellant's pay raise argument, we need not determine whether appellant was able to establish that other similarly situated employees were not terminated because appellees offered a legitimate, nondiscriminatory reason for appellant's termination.

{¶ 44} Here, appellees offered a legitimate, nondiscriminatory reason for appellant's termination: appellant's repeated acts of insubordination and job abandonment. Appellant stated in his deposition that he understood he was expected to attend the meetings and answer questions about his job performance. He further stated he understood he was going to be disciplined for his insubordination. Appellees expressly warned appellant that his failure to attend the December 20, 2010 meeting would be

deemed insubordination and grounds for termination. Appellant did not attend the meeting, nor did he provide an excuse or explanation for his failure to come to work. Appellant's undisputed insubordination and job abandonment are valid, nondiscriminatory reasons for appellant's termination.

{¶ 45} Since appellees carried their burden to show appellant's termination was not intentional discrimination, the burden then shifts back to appellant to show pretext. Appellant does not point to any Civ.R. 56 evidence creating an issue of fact as to whether his termination was mere pretext for discrimination. Because appellant is unable to prove any of his stated grounds amount to employment discrimination on the basis of national origin, the trial court did not err in granting appellees summary judgment on that claim.

B. Retaliation

{¶ 46} Appellant next argues the trial court erred when it granted appellees' motion for summary judgment as to his claim for retaliation. Appellees urge this court to not address appellant's argument related to his retaliation claim because appellant failed to brief the issue and instead attempted to "incorporate by reference" the arguments he made in the trial court.

{¶ 47} We agree with appellees that appellant's arguments regarding retaliation and hostile work environment are not properly before this court. App.R. 16(A)(7) states an appellant shall include "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary." Pursuant to App.R. 12(A)(2), a reviewing court may disregard an assignment of error when a party "fails to argue the assignment separately in the brief."

{¶ 48} Though appellant argues the facts he alleged in support of his national origin discrimination claim would also support his retaliation claim, he provides no legal argument related to his retaliation claim. Instead, appellant's brief only states that appellant incorporates by reference the arguments made in his memorandum in opposition to appellees' motion for summary judgment made in the trial court below "should these arguments become necessary." (Appellant's Brief, 27.) "The Rules of Appellate Procedure do not permit parties to "incorporate by reference" arguments from

other sources.' " *McNeilan v. The Ohio Univ. Med. Ctr.*, 10th Dist. No. 10AP-472, 2011-Ohio-678, ¶ 7, quoting *Cutin v. Mabin*, 8th Dist. No. 89993, 2008-Ohio-2040, ¶ 9, quoting *Kulikowski v. State Farm Mut. Auto. Ins. Co.*, 8th Dist. No. 80102, 2002-Ohio-5460, ¶ 55. An appellate court may reject an argument on appeal when the appellant fails to cite any legal authority in support of that argument. *Legacy Academy for Leaders v. Mt. Calvary Pentecostal Church*, 10th Dist. No. 13AP-203, 2013-Ohio-4214, ¶ 20, citing *State ex rel. Capretta v. Zamiska*, 135 Ohio St.3d 177, 2013-Ohio-69, ¶ 12, citing *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, ¶ 14.

{¶ 49} Moreover, even if the court considered appellant's retaliation claim, it would fail.

{¶ 50} R.C. 4112.02(I) provides it is an unlawful discriminatory practice "[f]or 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, * * * or participated in any manner in any" R.C. Chapter 4112 "investigation, proceeding, or hearing." A plaintiff may prove a retaliation claim through either direct or circumstantial evidence that an unlawful retaliation motivated the employer's adverse employment action. *Nebozuk v. Abercrombie & Fitch Co.*, 10th Dist. No. 13AP-591, 2014-Ohio-1600, ¶ 39, citing *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 543 (6th Cir.2008); *Reid v. Plainsboro Partners, III*, 10th Dist. No. 09AP-442, 2010-Ohio-4373, ¶ 55.

{¶ 51} The burden-shifting framework set forth in *McDonnell Douglas* applied above to the discrimination claim also applies to the retaliation claim. *Imwalle* at 544. Under that framework, the plaintiff bears the burden of establishing (1) he engaged in protected activity, (2) the employer knew of his participation in protected activity, (3) the employer engaged in retaliatory conduct, and (4) a causal link exists between the protected activity and the adverse employment action. *Nebozuk* at ¶ 40, citing *Imwalle* at 544.

{¶ 52} If the plaintiff successfully establishes a prima facie case, the burden shifts to the employer to " 'articulate some legitimate nondiscriminatory reason for' " its employment action. *Id.* at ¶ 41, quoting *Carney v. Cleveland Hts.-Univ. Hts. City School Dist.*, 143 Ohio App.3d 415, 429 (8th Dist.2001), citing *Burdine* at 252-53. If the

employer carries its burden, the burden shifts back to the plaintiff to prove the employer's articulated reason is mere pretext for discrimination. *Id.*, citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000).

{¶ 53} As we noted above, appellant fails to articulate a clear argument in support of his retaliation claim. From what we can discern from his brief, appellant points to the same four allegedly adverse employment actions he argued in support of his national origin discrimination claim to support his retaliation claim. For reasons similar to those we articulated above, summary judgment was appropriate on appellant's retaliation claim as well. Appellant was either unable to demonstrate those actions were significant enough to constitute adverse employment actions, or here retaliatory conduct, or appellant was unable to carry his burden to demonstrate that appellees' articulated reasons for the actions were mere pretext. Additionally, appellant does not identify anything in the record demonstrating a causal link between the alleged adverse employment actions and the protected activity of appellant's internal complaints and his EEOC claims. Based on our review of the entire record, the trial court did not err in concluding summary judgment was appropriate in favor of appellees on appellant's retaliation claim.

{¶ 54} Thus, because the trial court did not err in granting appellees' motion for summary judgment for all of appellant's stated claims, we overrule appellant's first assignment of error.

IV. Second Assignment of Error – Motion to Compel

{¶ 55} In his second assignment of error, appellant asserts the trial court erred when it denied in part appellant's motion to compel. More specifically, appellant argues the trial court erred when it denied appellant's request to compel production of (1) information related to charges of discrimination filed by employees other than appellant, and (2) the personnel files of employees of State Auto not a party to this action.

{¶ 56} An appellate court reviews a trial court's resolution of discovery matters under an abuse of discretion standard. *Jacobs v. Jones*, 10th Dist. No. 10AP-930, 2011-Ohio-3313, ¶ 55, citing *State ex rel. Keller v. Columbus*, 164 Ohio App.3d 648, 2005-Ohio-6500, ¶ 39 (10th Dist.), citing *State ex rel. The V. Cos. v. Marshall*, 81 Ohio St.3d 467, 469 (1998). An abuse of discretion implies the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

A. Other Charges of Discrimination

{¶ 57} Appellant first argues the trial court abused its discretion when it denied his motion to compel to the extent he sought information about any charges of discrimination filed with the EEOC or OCRC against State Auto in the past ten years.

{¶ 58} Pursuant to Civ.R. 26(B)(1), parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." The party seeking the discovery of certain information "must demonstrate relevance to the underlying subject matter in order for discovery to be permissible." *Dehlendorf v. Ritchey*, 10th Dist. No. 12AP-87, 2012-Ohio-5193, ¶ 20. While the scope of relevancy in discovery is broad, it is not without limits. *Id.*, citing *Freeman v. Cleveland Clinic Found.*, 127 Ohio App.3d 378, 388 (8th Dist.1998). Where the information sought will not reasonably lead to the discovery of admissible evidence, the documents are not relevant. *Id.*, citing *Tschantz v. Ferguson*, 97 Ohio App.3d 693, 715 (8th Dist.1994).

{¶ 59} Appellant argues that he needed the information regarding other possible claims of discrimination filed by other employees because these documents are "reasonably calculated to [lead] to the discovery of admissible evidence in this case." (Appellant's Brief, 36.) However, appellant's claims of national origin discrimination and retaliation do not require proof of other claims of discrimination filed by other employees of State Auto, even if any such other claims existed. Appellant needed only to prove he personally received disparate treatment because of his protected class, not that State Auto may have also discriminated against other employees. Thus, because appellant did not establish the relevance of the other potential EEOC or OCRC claims, the trial court did not abuse its discretion in denying appellant's motion to compel with respect to those documents.

B. Personnel Files of Non-Party Employees

{¶ 60} Appellant also argues the trial court erred when it denied his motion to compel the personnel files of non-party employees of State Auto.

{¶ 61} Appellant argues he needed the personnel files in part to help him identify other similarly situated employees who were treated differently than him. However, appellees had already provided appellant with a summary of the pertinent information regarding other State Auto employees, including ethnicity, position, salary information,

raise information, and performance review scores. Appellant does not articulate what other information he hoped to obtain were he granted access to the complete personnel files. *See State ex rel. Doe v. Register*, 12th Dist. No. CA2008-08-081, 2009-Ohio-2448, ¶ 41 (finding trial court did not abuse its discretion in denying motion to compel duplicate discovery requests where the information sought was documentation and information the other party had previously provided). Thus, we do not agree with appellant that it was error for the trial court to deny discovery of the personnel files in favor of the privacy interests of non-party employees of State Auto.

{¶ 62} Because the trial court did not abuse its discretion in denying appellant's motion to compel documents related to other EEOC or OCRC claims against State Auto or in denying appellant's request for other personnel files, we overrule appellant's second assignment of error.

V. Disposition

{¶ 63} Based on the forgoing reasons, the trial court did not err in granting appellees' motion for summary judgment, and the trial court did not abuse its discretion in denying in part appellant's motion to compel discovery. Having overruled appellant's two assignments of error, we affirm the decision and entry of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and BROWN, JJ., concur.

APPENDIX B

Decision of the Franklin County

Court of Common Pleas (February 18, 2014)

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

Sridharan Paranthaman,

Plaintiff,

vs.

Case No. 13CVH-1324 (Sheward, J.)

State Auto Property & Casualty Insurance, et al.,

Defendants.

**DECISION AND ENTRY GRANTING DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT FILED DECEMBER 2, 2013**

This matter comes before the Court upon Defendants' Motion for Summary Judgment filed December 2, 2013; Plaintiff's Memorandum in Opposition filed December 30, 2013; and Defendants' Reply filed January 13, 2014.

Plaintiff's complaint asserts three (3) causes of action: (1) discrimination based on national origin; (2) hostile work environment because of national origin, and (3) retaliation.

Plaintiff was hired as a full time employee of Defendant in December 2007. In January 2008, a very short time after Plaintiff was hired as a full-time employee, Plaintiff demonstrated performance problems. Plaintiff's employment was terminated for insubordination and job abandonment on December 22, 2010.

Plaintiff is a naturalized U.S. citizen of Indian national origin. All of Plaintiff's claims are based on his national origin.

From his hire date, January 2008, until his termination date of December 22, 2010, there were constant problems with Plaintiff as he was never satisfied with his employment. Plaintiff refused to participate in company meetings regarding his poor

performance on the job. He walked out of a meeting with supervisors about his work performance without permission and refused to comply with company directions. Plaintiff was suspended as a result of these actions then directed to return to work, but Plaintiff failed to return and was terminated.

During the period of nearly three (3) years, Plaintiff was a constant problem, but there is no evidence that any action by Defendants were related in any way to Plaintiff's national origin.

Plaintiff has not established that any non-Indian employee was treated any better than he. Plaintiff admitted that Defendants' assessment of his deficient work was accurate. Although, Plaintiff complained about his supervisor, Hopkins, treating him unfairly, national origin or discrimination was not mentioned by Plaintiff.

On November 17, 2009, for the first time, Plaintiff raised allegations of discrimination and retaliation by filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). On February 24, 2010, Plaintiff filed a second charge with EEOC. Both charges were dismissed by the EEOC for lack of probable cause.

Plaintiff complains about everything but presents no evidentiary support for discrimination on the basis of national origin, hostile working environment, or retaliation based on national origin.

Plaintiff's own testimony at deposition does not establish any of his claims. Defendants' Motion for Summary Judgment is GRANTED.

So Ordered.

Copies electronically to:

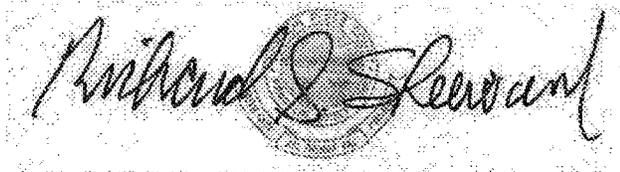
Jamaal Redman
(Via e-filing notification)
Counsel for Plaintiff

Margaret Reid
Matthew Hoyt
(Via e-filing notification)
Counsel for Defendant

Franklin County Court of Common Pleas

Date: 02-18-2014
Case Title: SRIDHARAN PARANTHAMAN -VS- STATE AUTO PROPERTY & CASUALTY INSURANCE ET AL
Case Number: 13CV001324
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink, reading "Richard S. Sheward", is written over a circular, textured stamp. The signature is cursive and slanted to the right.

Judge Richard S. Sheward

Court Disposition

Case Number: 13CV001324

Case Style: SRIDHARAN PARANTHAMAN -VS- STATE AUTO
PROPERTY & CASUALTY INSURANCE ET AL

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 13CV0013242013-12-0299960000
Document Title: 12-02-2013-MOTION FOR SUMMARY
JUDGMENT
Disposition: MOTION GRANTED

APPENDIX C

Protective Order Entered by the Franklin County

Court of Common Pleas (June 1, 2012)

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Sridharan Paranthaman,

Plaintiff,

v.

State Auto Property & Casualty
Insurance Company., et al.,

Defendants.

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Case No. 11CVH-10-12706

Judge Sheward

PROTECTIVE ORDER

In accordance with the Status Conference held on May 31, 2012, IT IS HEREBY
ORDERED as follows:

- (1) Neither Plaintiff nor his counsel are entitled to discovery of any documents, testimony, correspondence or information discussing, describing or otherwise referring or relating to the QUEST project.
- (2) Neither Plaintiff nor his counsel are entitled to discovery of any personnel files, personnel documents or personnel information for any non-party employee of State Auto Property & Casualty Insurance Company.

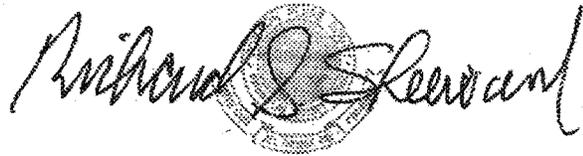
IT IS SO ORDERED.

Judge Sheward

Franklin County Court of Common Pleas

Date: 06-01-2012
Case Title: SRIDHARAN PARANTHAMAN -VS- STATE AUTO INSURANCE
INC
Case Number: 11CV012706
Type: ORDER

It Is So Ordered.

A handwritten signature in black ink, reading "Richard S. Sheward", is written over a circular, embossed seal. The seal is partially obscured by the signature but appears to be the official seal of the court.

Judge Richard S. Sheward

APPENDIX D

**Protective Order Filed in the Franklin County
Court of Common Pleas (October 18, 2013)**

current or former employees of State Auto other than Plaintiff, any non-public material of a sensitive or proprietary nature, and any medical, psychological, psychiatric, rehabilitation, or counseling records of all parties and non-parties. All documents and information produced in this action by any party and designated as Confidential by any party shall be subject to the provisions of the Order. Any party also may designate certain documents that contain information not previously known to the party, medical information and personal financial information as CONFIDENTIAL – ATTORNEYS EYES ONLY. Such documents may be viewed only by counsel until such time as the parties agree or the Court orders otherwise. Upon the designation of any document as Confidential, all copies of such document then or at any time thereafter in the possession or control of any party to this Order, from whatever source received shall be subject to the provisions of this Order.

2. Neither Plaintiff nor his counsel are entitled to discovery of any documents, testimony, correspondence or information discussing, describing or otherwise referring or relating to the QUEST project.

3. Neither Plaintiff nor his counsel are entitled to discovery of any personnel files, personnel documents or personnel information for any non-party employee of State Auto Property & Casualty Insurance Company.

4. All depositions, including any document marked as an exhibit or otherwise appended to the deposition, if designated as ‘Confidential’ by either party at the deposition or at any time prior to the expiration of the seven days after receipt of a deposition transcript, shall be treated as Confidential under the terms of this Protective Order. During the seven-day period, all transcripts and the information contained therein will be deemed to be Confidential in their entirety under the terms of this Protective Order. Where practical, the party making such a

designation will indicate the pages or sections of the transcript that are to be treated as Confidential. A party seeking to file with the Court a deposition with Confidential information shall file the complete original transcript and be labeled "Confidential". All other copies of the deposition transcript and the appended documents shall be treated in all respects as any other Confidential document under this Order for the portions which are designated as Confidential.

5. All pleadings or other court filings which incorporate or disclose material marked as "CONFIDENTIAL - ATTORNEYS EYES ONLY" shall be filed with or received by the Court pursuant to the Court's e-filing Rules for Documents Filed Under Seal in a sealed envelope or other container marked on the outside with the title of the action, identification of each item within, the date of this protective Order and a statement as follows:

CONFIDENTIAL INFORMATION - SUBJECT TO STATE COURT PROTECTIVE ORDER. This package contains documents, transcript or other material which are subject to a Protective Order entered by the Court. This package shall not be opened or the contents thereof displayed or revealed except by the Court, the plaintiff, the defendant, counsel for the parties, by specific further order of the Court or as allowed by the Protective Order entered in this action. Violation of this prohibition shall be treated as contempt of court.

6. All interrogatory answers, or other responses to pretrial discovery requests, designated by either party as "Confidential" shall be delivered to the counsel for the party propounding said request without being filed with this Court unless said filing is subsequently ordered by this Court if desired by a party.

7. Documents and information designated as Confidential in accordance with this Order shall be used solely for the purpose of this action or appeal, and, unless the Court rules otherwise, such documents or information shall not be disclosed to any person other than (a) counsel of record to any party to this Order; (b) the legal, clerical, paralegal staff, or other staff

of such counsel to this action during the preparation for and trial of this action; (c) the parties to this action and the principals, officers, agents, or employees of a party; (d) persons retained by either party to this Order to furnish expert services or advice or to give expert testimony in this action (and their employees); (e) deponents and court reporters in this action; (f) any other person to whom the parties agree in writing; and (g) the Court, Court personnel and jurors. Confidential documents or information disclosed to any such person shall not be disclosed by him/her to any other person not included within the foregoing subparagraphs (a) through (g) of this paragraph. No such documents or information designated as Confidential pursuant to this Order shall be used by any such person for any purpose other than for the preparation, trial, appeal, and/or settlement of this action. In no event shall any documents or information designated as Confidential be disclosed to any employee, agent, representative or anyone closely affiliated with a known competitor of a party. A party may designate its known competitors by providing a reasonable list to opposing counsel.

8. Any person who is to obtain access to Confidential documents or information pursuant to paragraph 7, except for the Court, Court personnel, their staffs and actual parties, shall, prior to receipt of such Confidential documents or information, (a) be informed by the party providing access to such Confidential documents or information of the terms of this Order; (b) agree in writing to be bound by the terms of this Order by executing the Agreement attached hereto as Exhibit A; and (c) submit to the authority of this Court for enforcement of this Order. Such agreement and the identity of those to whom confidential documents or information have been disclosed on demand to any party after the litigation is concluded, but shall otherwise only be disclosed by order of the Court.

9. If counsel for a party herein shall hereafter desire to make Confidential documents or information available to any person other than those referred to in paragraph 7 above, such counsel shall designate the material involved, identify the person to whom he/she wishes to make disclosure and inform counsel for the opposing party of their desire. If counsel is subsequently unable to agree on the terms and conditions of disclosure to persons not enumerated in paragraph 7, disclosure may be only on such terms as the Court may order.

10. If a party objects to the designation of any document or information as Confidential, counsel for the objecting party shall notify all counsel of record of the objection. If disputes regarding the objection cannot be resolved by agreement, counsel may move this Court for any order denying Confidential treatment to the documents or information in question. If such a motion is filed, the document or information shall be kept Confidential pending ruling on the motion. The party seeking to have information treated as confidential or Confidential – Attorneys Eyes Only shall have the burden of establishing for the Court the basis or need for confidentiality.

11. In the event that any document marked “Confidential – Attorney Eyes Only” is included with or in any way disclosed by any pleading, motion, or paper filed with the Court, such document shall be filed and kept under seal by the Clerk until further order of the Court. Any use of such document or any testimony associated with it shall be held under seal unless the Court orders otherwise.

12. At the conclusion of trial, or any appeals or other termination of this litigation, all Confidential material received under the protection of this Order (and all copies) shall be retained by counsel in their legal files, be destroyed or returned to the producing party. Counsel will not have to dismantle his or her own work product to return or destroy Confidential material;

however, all such Confidential material shall be retained by counsel on a Confidential basis until discarded. The provisions of this Protective Order insofar as they restrict the communication and use of Confidential material and Confidential information shall, without written permission of the producing party or further order of this Court, continue to be binding on all parties and individuals receiving Confidential materials after the conclusion of this litigation.

13. At trial or any evidentiary hearing, a party may use, subject to the discretion of the Court, any document or discoverable evidence, which is otherwise deemed admissible, but which has been marked pursuant to this Order as "Confidential" or "Confidential – Attorney Eyes Only." The party seeking to use the Confidential exhibit shall notify the other party of its intended use pursuant to the Case Scheduling Order providing for the parties' pretrial briefs or schedule set forth in an evidentiary hearing with the exception of any rebuttal or impeachment exhibits. It is not the intent of this Stipulation and Protective Order to inhibit a party from using a document marked as "Confidential" at trial or during any evidentiary hearing if not identified in advance to the opposing party, but the parties should attempt to provide good faith notice that they might use the documents marked "Confidential." If a party seeks to maintain the Confidentiality of the Confidential exhibit during the trial or evidentiary hearing, with the exception of rebuttal or impeachment exhibits, the party shall so move the Court for appropriate protection. The party seeking such protection shall have the burden of proving that the Confidential exhibit is entitled to the protection sought. Prior acquiescence of a party to a making of "Confidential" or "Confidential – Attorneys Eyes Only" for the exhibit shall not be construed against the party in the Court's determination of whether the Confidential exhibit is entitled to any special treatment at trial or during the evidentiary hearing. The provisions of this

Stipulation and Protective Order shall continue to apply to all Confidential information, except as directed by the Court for Confidential exhibits to be used at a hearing or at trial.

14. Nothing contained in this Order, nor any action taken in compliance with it, shall (a) operate as an admission or assertion by any witness, person or entity producing documents that any particular document of information is, or is not, Confidential or (b) prejudice in any way the right of any party to seek a Court determination of whether or not it should remain Confidential and subject to the terms of this Order. Any party to this order may request the Court to grant relief from any provision of this Order.

15. Nothing herein constitutes or may be interpreted as a waiver by any party of the attorney-client privilege, attorney work product protection or any other privilege. No party shall be deemed to have waived any other objection to discovery or the use of Confidential material in this litigation.

16. In the event a party inadvertently produces a document(s) that would otherwise be covered by the attorney-client privilege, the work product protection doctrine, or a comparable privilege or protection, that party may, within seven (7) days after discovering the inadvertent disclosure, request that the protected document(s) be returned. Upon such a request, there is a presumption that the applicable privilege or protection has not been waived. The notified party shall make no further use of the protected document(s) and shall return the purportedly privileged document(s) within ten (10) working days. If the notified party wishes to challenge the applicability of the privilege or assert that the privilege has been waived, then, the other party shall, within ten (10) working days from the request for the return of the document(s), make a written submission to the Court. The party asserting the privilege shall respond within five (5) working days. The notified party shall promptly return or sequester and not use or disclose the

document(s) until the claim of privilege is resolved by the Court. The parties agree that inadvertent disclosure of an otherwise privileged document(s) wherein the parties follow the above procedure does not operate as a waiver in this action or in other Federal or State proceedings. To the extent that other issues regarding privilege, confidentiality, or attorney work product arise, the parties agree that they will in good faith try and resolve the dispute.

17. It is recognized by the parties of this Order that, due to the exigencies of providing numerous documents and the taking of testimony, certain documents or testimony may be designated erroneously as Confidential, or documents of information that are entitled to Confidential treatment may be erroneously not designated as Confidential. The parties to this Order may correct their Confidentiality designations, or lack thereof, and shall, at their own expense, furnish to all counsel copies of the documents for which there is a change in designation. This Stipulation and Protective Order shall be fully applicable to all documents or information previously produced voluntarily prior to the institution of this lawsuit. Such documents shall be treated as Confidential material if that same document or information is produced hereafter and is designated as Confidential material.

18. Documents or information produced by any party prior to the entry of this Order by the Court shall be subject to the provisions of this Order to the same extent as if such Order had been entered by the Court as of the date such documents of information was produced. This Stipulation and Protective Order shall be submitted to the Court, with a request that it be executed and filed with the Court, immediately upon execution by the parties. Prior to approval by the Court, this Stipulation and Protective Order shall be binding on the parties as a stipulation or enforceable agreement. If the Court refuses to execute the Protective Order or alters the

Protective Order, the Stipulation and Protective Order will be automatically amended or nullified to reflect the Court's decision.

IT IS SO ORDERED.

AGREED:

/s/ Jamaal R. Redman (per e-mail authority)

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*Attorneys for Defendants State Auto Property
and Casualty Insurance Company and Richard
Hopkins*

Dated: _____

Print Name

Print Address