APPENDIX A - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MAY 4, 2020

United States Court of Appeals for the Sixth Circuit

UKPAI I. UKPAI, Plaintiff-Appellant,

v.

CONTINENTAL AUTOMOTIVE SYSTEMS US, INC.,

Defendant- Appellee

No. 19-1463

May 4, 2020

UKPAI I. UKPAI, Plaintiff - Appellant, Pro se.

Steven Z. Cohen, Kevin B. Hirsch, Cohen, Lerner & Rabinovitz, Royal Oak, MI for Defendant – Appellee.

Petition for rehearing en banc at the United States Court of Appeals for the Sixth Circuit.

Before: COOK and THAPAR, Circuit Judges; HOOD, District Judge*

The court received a petition for rehearing en

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* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation

banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/Deborah S. Hunt, Clerk

APPENDIX B – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED FEBRUARY 18, 2020

United States Court of Appeals for the Sixth Circuit

UKPAI I. UKPAI, Plaintiff-Appellant,

v.

CONTINENTAL AUTOMOTIVE SYSTEMS US, INC.,

Defendant- Appellee

No. 19-1463

February 18, 2020

UKPAI I. UKPAI, Plaintiff - Appellant, Pro se.

Steven Z. Cohen, Kevin B. Hirsch, Cohen, Lerner & Rabinovitz, Royal Oak, MI for Defendant – Appellee.

Appeal from the United States District Court for the Eastern District of Michigan.

Before: COOK and THAPAR, Circuit Judges; HOOD, District Judge†

Ukpai I. Ukpai, a Michigan resident proceeding

† The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation

pro se, appeals the district court's grant of summary judgment in favor of Continental Automotive Systems US, Inc. ("Continental") in his employment discrimination case, filed pursuant to *Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.* This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a).*

In July 2017, Ukpai filed a complaint against Continental. He later filed a second amended complaint, which superseded all previously filed complaints. In his second amended complaint, Ukpai alleged that he worked for Continental in Auburn Hills, Michigan for approximately two years, until Continental terminated his employment in January 2016. In October 2015, Continental had assigned him to work on a temporary project inspecting pumps at "KCAP," a Ford Motor Company assembly plant in Kansas City, Missouri. The project was expected to last through December 2015 or January 2016. Ukpai alleged that Dawayne Gilley, Continental's resident staff member at KCAP and Ukpai's temporary supervisor, harassed and discriminated against him. Ukpai alleged that he informed his managers of Gilley's behavior, but they did nothing. According to Ukpai, Continental terminated his employment on January 6, 2016. His supervisor, Andrew Bayley, and Human Resources Manager Jaime Fisk told him that he was being fired because members of the United Automobile,

Aerospace, and Agricultural Implement Workers of America ("UAW") had filed multiple grievances against him at KCAP and he had been banned from the plant. Ukpai stated that he was never told who filed the grievances or why they were filed. Based on these facts, Ukpai set forth seven claims for relief: (1) wrongful termination of employment (discrimination); (2) "unequal terms and conditions of employment" (disparate treatment); (3) retaliation; (4) harassment (hostile work environment); (5) negligence; (6) breach of an implied employment contract; and (7) denial of due process. Ukpai sought lost income, wages, and benefits; the reinstatement of his employment; and punitive damages. Continental filed a motion for summary judgment, which the district court granted.

On appeal, Ukpai argues that the district court erred by granting summary judgment on his discrimination, disparate treatment, hostile-work-environment, and retaliation claims. Because Ukpai's appellate brief does not address his negligence, breach-of-contract, and due-process claims, Ukpai has abandoned those claims. *See United States v. Johnson, 440 F.3d 832, 845-46 (6th Cir. 2006).* Ukpai also argues that the district court abused its discretion by denying his motion to compel discovery from Ford, allowing him to conduct only four additional depositions when it extended the discovery cut-off date, and denying his motion to reopen discovery for ninety days and

amend his response to Continental's motion for summary judgment.

We review de novo a district court's grant of summary judgment. *Latits v. Phillips, 878 F.3d 541, 547 (6th Cir. 2017).* "Summary judgment is appropriate if the materials in the record," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Id.*

I. Discrimination and Disparate Treatment

Although none of Ukpai's seven claims expressly alleged a violation of *Title VII,* his "wrongful-termination" claim is construed as a *Title VII* discrimination claim. Ukpai cited *Title VII* as the basis for the district court's jurisdiction, and when asked during his deposition about the basis for his first claim, Ukpai responded that "[w]rongful termination is part of the discrimination claim" and that Continental discriminated against him on the basis of his race and national origin. He also cited *Title VII* as the basis for this claim when responding to Continental's motion for summary judgment.[1]

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[1] Ukpai also cited Michigan's Elliot-Larsen Act, *Mich. Comp. Laws § 37.2101, et seq.*, in his response to Continental's motion for summary judgment, but that Act requires plaintiffs to make the same initial prima facie showing that is required of *Title VII* plaintiffs, *see Jones v. Ciba-Geigy, Inc., No. 96-1573, 1997 U.S. App. LEXIS 27074, 1997 WL 595083,*

Title VII prohibits an employer from discriminating against an individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *42 U.S.C. § 2000e-2(a)(1).* To establish a *Title VII* violation, a plaintiff may rely on direct or circumstantial evidence. *See Chattman v. Toho Tenax Am., Inc., 686 F.3d 339, 346 (6th Cir. 2012).* Where the plaintiff does not base his claim on direct evidence, his circumstantial evidence is analyzed under the *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973),* burden-shifting framework. *See Chattman, 686 F.3d at 346-47.* Under that framework: (1) the plaintiff must first establish a prima facie case of discrimination; (2) the burden shifts to the defendant to offer a legitimate, non-discriminatory basis for its actions; and (3) if the defendant does so, the burden returns to the plaintiff to establish that the employer's proffered reason is a pretext. *Id. at 347.*

To establish a prima facie case of discrimination on the basis of race or national origin, Ukpai had to show that "(1) he was a member of a protected class, (2) he suffered an adverse employment action, (3) he was otherwise qualified for the position, and (4) he was replaced by someone outside the protected class or treated differently than a similarly situated, non-protected

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*at *3 (6th Cir. Sept. 25, 1997)* (per curiam).

employee." *Deleon v. Kalamazoo Cty. Rd. Comm'n, 739 F.3d 914, 918 (6th Cir. 2014).* Ukpai, who is black and a native of Nigeria, is a member of a protected class. *See id.; 42 U.S.C. § 2000e-2(a)(1).* The termination of his employment is an adverse employment action. *See Adair v. Charter Cty. of Wayne, 452 F.3d 482, 490 (6th Cir. 2006).* There was also evidence in the record showing that Ukpai was qualified for the senior-software-engineer position that he held—he was hired into that position less than three years before his firing, and he had received satisfactory job performance reviews in 2013 and 2014. However, for reasons discussed below, Ukpai failed to satisfy the fourth prong of the prima facie analysis.

Ukpai made no showing—nor did he even allege—that he was replaced by someone of a different race or national origin. Ukpai alternatively could have satisfied the fourth prong by showing that he was treated differently than a similarly situated, non-protected employee. *See Deleon, 739 F.3d at 918.* In his response to Continental's motion for summary judgment, Ukpai alleged that Gilley, Radim Urban, and Brandon White were similarly situated. Employees are similarly situated if they are "similar in all relevant respects, and [they] . . . engaged in acts of comparable seriousness." *Bobo v. UPS, 665 F.3d 741, 751 (6th Cir. 2012)* (citation omitted). Whether other employees report to a different supervisor than the plaintiff may be relevant, but that should

be determined on a case-by-case basis. *See id.* Gilley was not similarly situated to Ukpai because he was Ukpai's supervisor at KCAP, he did not perform the pump inspections that Ukpai was tasked with performing, and the UAW did not file two grievances based on Gilley's conduct.

Urban and White admittedly present a closer question, because both were Continental employees, both were supervised by Gilley while at KCAP, and both were tasked with performing the same pump inspections that Ukpai was expected to perform. However, there are also significant differences. First, Urban's permanent place of employment was a Continental facility in the Czech Republic, whereas White was based at a Continental facility in Newport News, Virginia. The supervisors in Auburn Hills who ultimately terminated Ukpai's employment did not supervise Urban or White. While the supervisor issue might not be determinative, it is still relevant, particularly where Urban and White worked at entirely different facilities. Second, Urban left KCAP after the first UAW grievance was filed, and Gilley noted that the first grievance was directed at Ukpai, who had aggravated "hi lo" drivers. Urban was not present when the second grievance was filed and was not "thrown out" of the facility. Third, White was not present when the first UAW grievance was filed, and the second grievance was based on Ukpai's performing night-shift inspections without two UAW workers. Ukpai also produced no

evidence that White was dismissed from the KCAP facility. Finally, Fisk noted that, during her investigation of the KCAP incidents, Ukpai appeared disinterested and untruthful. She also noted that communication and a confrontational attitude had been ongoing problems with Ukpai. Under these circumstances, Ukpai failed to identify a similarly situated employee who was treated more favorably. Because Ukpai did not make the requisite prima facie showing, the district court properly granted summary judgment in Continental's favor on the discrimination claim.

In addition to his wrongful-termination claim, Ukpai alleged that he was subjected to unequal terms and conditions of employment based on his race and national origin. Specifically, he alleged that Gilley assigned him to perform pump inspections during the night shift while allowing Urban and White to perform inspections during the day. To make a prima facie showing of disparate treatment, Ukpai had to show "that (1) he belonged to a protected class, (2) suffered an adverse employment action, (3) met the qualifications for his position, and (4) was treated differently from a similar employee who does not belong to his protected class." *Hudson v. City of Highland Park, 943 F.3d 792, 802 (6th Cir. 2019).* As discussed previously, Ukpai showed that he belonged to a protected class and that he was qualified for his position. But the assignment to the night shift does not constitute an adverse employment action.

Ukpai was on a temporary assignment at KCAP, and he admitted that he worked only two night shifts. "[C]ases where the employment action, while perhaps being materially adverse if permanent, is very temporary . . . do not constitute materially adverse employment actions." *Bowman v. Shawnee State Univ., 220 F.3d 456, 462 (6th Cir. 2000).* And "[a] 'mere inconvenience . . .' is not enough to constitute an adverse employment action." *Deleon, 739 F.3d at 918* (quoting *White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 797 (6th Cir. 2004)* (en banc)).

II. Hostile Work Environment

In his fourth claim for relief, Ukpai alleged that he was harassed. He alleged that Gilley told him that he should have rented a Ford vehicle, complained when he parked in the visitor parking lot, and shouted that he was "doing everything wrong" when he did not have a safety vest or goggles. Ukpai also alleged that Gilley took Urban's and Ukpai's lunch orders one day and, despite getting Urban what he had requested, purchased food that Ukpai had not ordered and did not like. Finally, Ukpai alleged that Gilley made false statements to Ukpai's managers, which led to the termination of his employment.

To prevail on a hostile-work-environment claim, "the plaintiff must show that the work environment was so pervaded by discrimination that the terms and conditions of employment were

altered." *Vance v. Ball State Univ., 570 U.S. 421, 427, 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013); see Barrett v. Whirlpool Corp., 556 F.3d 502, 514 (6th Cir. 2009).* Where, as here, a plaintiff relies on circumstantial evidence to prove his case, "the *McDonnell Douglas* burden-shifting framework applies." *Barrett, 556 F.3d at 515.*

> To establish a prima facie case of a racially hostile work environment, a plaintiff must demonstrate that (1) []he was a member of a protected class; (2) []he was subjected to unwelcome racial harassment; (3) the harassment was based on race; (4) the harassment unreasonably interfered with h[is] work performance by creating an intimidating, hostile, or offensive work environment; and (5) the employer is liable.

Id.

The district court did not err in finding that Ukpai failed to make the requisite prima facie showing because there is no evidence in the record to suggest that any of the alleged harassment was based on Ukpai's race or national origin. Other employees who were of different races and national origins were required to rent Ford vehicles and bring vests and safety goggles to the plant. There is also nothing to suggest that Gilley intentionally brought Ukpai food that he disliked, let alone that he did so because of Ukpai's race or national origin. Finally, there is no evidence that Gilley provided false information to Ukpai's supervisors; to the

contrary, Ford employee Michael Bayer testified during his deposition that two union grievances had been filed and that he instructed Gilley to remove the offending employee from the plant.

III. Retaliation

In count three, Ukpai alleged that Continental retaliated against him by sending him to KCAP, where he was subjected to a hostile work environment. He also alleged that, on the morning of January 6, 2016, one of his supervisors in Auburn Hills, Leon Koua, told him to begin work on a new project but instructed him not to contact the customer for any reason. According to Ukpai, Koua told him that if he needed information from the customer, he should contact another Continental employee, who would obtain the information and relay it to him. According to Ukpai, this was done in retaliation for his reporting to human resources the disparate treatment and harassment that he had faced at KCAP.

> To establish a prima facie case of retaliation, a plaintiff must demonstrate that (1) []he engaged in activity protected by *Title VII*; (2) the defendant knew of h[is] exercise of h[is] protected rights; (3) the defendant subsequently took an adverse employment action against the plaintiff or subjected the plaintiff to severe or pervasive **[*12]** retaliatory harassment; and (4) there was a causal connection between the plaintiff's protected activity and the adverse

employment action.

Id. at 516.

Ukpai testified during his deposition that he informed his supervisors and Fisk about harassment that he experienced at KCAP. Although Fisk and Ukpai's supervisors contradicted this testimony, the evidence must be viewed in the light most favorable to Ukpai. Nevertheless, Ukpai failed to make a prima facie showing of retaliation. First, sending him to KCAP could not have been done in retaliation for his later complaints about harassment that he experienced at KCAP. Second, Koua's instruction to avoid contacting a customer directly does not rise to the level of "severe or pervasive . . . harassment." *Id.*

IV. Discovery

Finally, Ukpai argues that the district court abused its discretion by (1) denying his motion to compel discovery from Ford; (2) limiting him to conducting only four additional depositions when it extended the discovery cut-off date; and (3) denying his motion to re-open discovery for ninety days and his motion to amend his response to Continental's motion for summary judgment.

We review the district court's discovery decisions for an abuse of discretion. *Hohman v. Eadie, 894 F.3d 776, 781 (6th Cir. 2018).* "A district court abuses its discretion when it applies the incorrect legal standard, misapplies the correct

legal standard, or relies upon clearly erroneous findings of fact." *United States v. Ray, 803 F.3d 244, 273 (6th Cir. 2015).*

The district court did not abuse its discretion by denying Ukpai's motion to compel Ford to produce discovery documents. Ukpai complained that Ford had not produced the two written UAW grievances that were filed against him. But, after holding a hearing, the district court concluded that no written grievances existed. This finding of fact was not clearly erroneous. Ford's attorney explained that Ford had searched for any written grievances and informed Ukpai in April 2018 that it "could not locate any written grievance on this issue." During a deposition, Bayer testified that the complaints that he received about Ukpai from the UAW were verbal. Ford's attorney also noted that he sent Ukpai a copy of Ford's collective-bargaining agreement with the UAW, which stated that first-step grievances are oral. He also sent Ukpai over 1200 pages of e-mails and attachments sent between three Ford employees between September 2015 and February 2016—the entire duration of the Continental pump-inspection project—to show that there was no mention of written grievances.

Ukpai also moved to extend the discovery deadline ten days before it expired, stating that he wished to conduct six or seven additional depositions. Ukpai contended that he had not received complete discovery responses and that Continental's attorney had "put a lot of constraints

on these depositions." Continental, on the other hand, argued that Ukpai had cancelled Urban's and Gilley's depositions and that his reasons for cancelling were not supported by the record. Ultimately, after weighing the importance of the witnesses against the prejudice to Continental, the district court granted Ukpai four additional depositions and extended the discovery deadline. Doing so was not an abuse of discretion.

Finally, on March 14, 2019, Ukpai filed a motion to re-open discovery for ninety days and to amend his response to Continental's motion for summary judgment. The motion was based solely upon the fact that Ukpai had only recently been able to retain counsel and, until that point, had been forced to pursue his case pro se. But Ukpai had no right to an attorney in this civil case, *see Lavado v. Keohane, 992 F.2d 601, 605-06 (6th Cir. 1993)*, and he had completed numerous depositions and discovery requests on his own behalf. The mere fact that Ukpai retained counsel a year and a half after filing his lawsuit did not justify re-opening discovery and allowing Ukpai to file a new response to Continental's motion for summary judgment. The district court did not abuse its discretion in denying this motion.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt, Clerk

APPENDIX C - ORDER AND OPINION OF THE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION, FILED MARCH 26, 2019

United States District Court Eastern District of Michigan Southern Division

UKPAI I. UKPAI, Plaintiff-Appellant,

v.

CONTINENTAL AUTOMOTIVE SYSTEMS US, INC.,

Defendant

Case No. 17-cv-12428

March 26, 2019

UKPAI I. UKPAI, Plaintiff, Pro se.

Steven Z. Cohen, Kevin B. Hirsch, Cohen, Lerner & Rabinovitz, Royal Oak, MI for Defendant

Appeal from the United States District Court for the Eastern District of Michigan.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [#104]

GERSHWIN A. DRAIN, District Judge

I. INTRODUCTION

This case involves an employment discrimination dispute. Plaintiff Ukpai I.Ukpai alleges that Defendant terminated his employment due to racial and national origin discrimination. Before the Court is Defendant Continental Automotive Systems US, Inc.'s ("Continental") Motion for Summary Judgment. Dkt. No. 104. For the reasons discussed below, this Court will grant Defendant's Motion.

II. FACTUAL BACKGROUND

Plaintiff Ukpai I. Ukpai is an engineer who was born in Nigeria. Dkt. No. 120, pg. 8 (Pg. ID 5583). He moved to the United States in 1995 and has obtained American citizenship while in the United States. *Id.* Plaintiff began working for Defendant Continental in 2013. Dkt. No. 35-1, pg. 11 (Pg. ID 301). In October 2015, Defendant sent Plaintiff to work at the Kansas City Assembly Plant ("KCAP"). *Id.* at pg. 12 (Pg. ID 302). KCAP is an assembly plant belonging to the Ford Motor Company. *Id.* Plaintiff's job involved work on a project in which he was required to carry out inspections on hardware that Continental supplied to Ford. *Id.* Plaintiff alleges that he was discriminated against, harassed, and treated disparately during his time at KCAP. *Id.* Plaintiff alleges that he promptly reported these incidents to management but management neglected to take action. *Id.*

In December of 2015, Plaintiff's supervisor

Andrew Bayler and Human Resources Manager Jaime Fisk informed him that he was banned from the KCAP plant due to multiple grievances that had been filed against him. Dkt. No. 35-1, pg. 12 (Pg. ID 302). Defendant terminated Plaintiff on January 6, 2016. *Id.* at pg. 13 (Pg. ID 303). Plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC") on July 21, 2016. *Id.* at pg. 32 (Pg. ID 322). The EEOC issued Plaintiff a Dismissal and Notice of Rights on April 26, 2017, giving Plaintiff 90 days to file suit in federal court. *Id.* at pg. 31 (Pg. ID 321).

Plaintiff filed his complaint in this Court on July 25, 2017. Dkt. No. 1. Plaintiff filed an amended complaint on December 1, 2017. Dkt. No. 24. On February 1, 2018, Plaintiff moved to file a second amended complaint. Dkt. No. 35. This Court referred the motion to Magistrate Judge R. Steven Whalen on February 13, 2018. Dkt. No. 43. Magistrate Judge Whalen granted Plaintiff's motion to file a second amended complaint on February 15, 2018. Dkt. No. 44. Defendant filed its Motion for Summary Judgment on October 15, 2018. Dkt. No. 104. Plaintiff filed his initial response on November 15, 2018. Dkt. No. 108. Plaintiff then filed a corrected response on December 29, 2018. Dkt. No. 120. Plaintiff has filed numerous exhibits in support of his response, as well as declarations. Dkt. Nos. 111, 112, 113, 114, 115, 116, 117, 118. Defendant replied on November 27, 2018. Dkt. No. 119. On February 4, 2019, Plaintiff retained counsel. Dkt. No. 121. On March

14, 2019, Plaintiff, through counsel, moved to adjourn the hearing on Defendant's Summary Judgment Motion and to reopen discovery for 90 days. Dkt. No. 122. Defendant opposed Plaintiff's motion to adjourn on March 15, 2019, asserting that it was a delay tactic. Dkt. No. 123. This Court held oral argument on Defendant's Motion for Summary Judgment on March 18, 2019.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 56(c) governs summary judgment. The Rule states, "summary judgment shall be granted if 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 779 (6th Cir. 1998). "All factual inferences 'must be viewed in the light most favorable to the party opposing the motion.'" *Id.* (quoting *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Ultimately, the court evaluates "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52.

IV. DISCUSSION

1. Wrongful Termination of Employment

The first count of Plaintiff's complaint alleges wrongful termination. Dkt. No. 35-1, pg. 13 (Pg. ID 303). The complaint states that on January 6, 2016, Jaime Fisk informed Plaintiff of his termination due to multiple grievances filed against him. *Id.* at pg. 14 (Pg. ID 304). The allegation in Count I does not allege or state anything further. *See id.*

Plaintiff states in his response to Defendant's Motion that inspections were suspended in November 2016 because the United Auto Workers ("UAW") filed a grievance based on violations of plant rules. Dkt. No. 120, pg. 12 (Pg. ID 5587). Plaintiff further states that the narrative of him being responsible for the first grievance is false. *Id.* at pg. 13 (Pg. ID 5588). However, Defendant acknowledges that both Plaintiff and Radim Urban, Plaintiff's inspection partner, did not follow all of the UAW rules. Dkt. No. 104, pg. 21 (Pg. ID 2255). After the initial grievance, rules at the KCAP plant became stricter. *Id.* at pg. 22 (Pg. ID 2256). Two UAW members were required to be present during the inspections with Plaintiff. *Id.* Dawayne Gilley, Plaintiff's manager, told Plaintiff not to conduct inspections if no one showed up to do the inspections with him. *Id.*; Dkt. No. 104- 2, pg. 32 (Pg. ID 2365). However, Plaintiff had already conducted the inspections without two union members present. *Id.* Mike Bayer, a Ford

representative, was informed of Plaintiff's second violation. *Id.* Gilley spoke with Bayer and Bayer informed Gilley that Plaintiff needed to be terminated. *Id.* at pg. 33 (Pg. ID 2366). Gilley was obligated to follow Ford's wishes because Ford was Defendant's customer. Dkt. No. 104, pg. 23 (Pg. ID 2257).

The record presents testimony that Ford decided to terminate Plaintiff due to his multiple violations of the inspection policy. No evidence in the record refutes this testimony, except for Plaintiff's subjective allegations. Further, for the reasons discussed *infra*, the record does not support Plaintiff's allegations of discriminatory treatment as the motivation for his termination. This Court will therefore grant summary judgment in favor of Defendant on Count I.

2. Unequal Terms and Conditions of Plaintiff's

Employment Count Two alleges unequal terms of employment. Dkt. No. 35-1, pg. 14 (Pg. ID 304). Plaintiff asserts that Dawayne Gilley, the resident Continental staff at KCAP, required Plaintiff to work the night shift even after Plaintiff had seniority over his Caucasian inspection partner, Brandon White. *Id.* at pgs. 14–16 (Pg. ID 304–06). Plaintiff's complaint states that he began conducting inspections with Radim Urban, a Caucasian male from the Czech Republic. *Id.* at pg. 14 (Pg. ID 304). Dawayne Giley assigned Urban to do the day inspections and Plaintiff to do the night

inspections. *Id.* Gilley informed Plaintiff that Urban conducted the day inspections because Urban had seniority over Plaintiff. *Id.* Urban then went back to the Czech Republic, and Defendant assigned a new employee, Brandon White, to conduct inspections with Plaintiff. *Id.* at pg. 16 (Pg. ID 306). Brandon White is a Caucasian male. *Id.* Gilley assigned White to conduct the day inspections and Plaintiff to conduct the night inspections, even though Plaintiff had seniority over White. *Id.* Plaintiff asked Gilley why he was not doing the day inspections and Gilley responded by telling Plaintiff that he (Gilley) was in charge. *Id.*

Defendant argues that there was no seniority between the temporary employees at Continental. Dkt. No. 104, pg. 12 (Pg. ID 2246); Dkt. No. 104-2, pg. 27 (Pg. ID 2360). Further, Defendant states that it was essential for Urban to work the day shift because of the time difference with the Czech Republic, where he remained responsible for operations of a plant. Dkt. No. 104, pg. 12 (Pg. ID 2246); Dkt. No. 104-2, pg. 29 (Pg. ID 2362). Lastly, Defendant contends that White only assisted the inspections at KCAP for one week, and he had to work the day shift in order for Gilley to train him. Dkt. No. 104, pgs. 12–13 (Pg. ID 2246–47); Dkt. No. 104- 4, pg. 54 (Pg. ID 2460).

Count II of Plaintiff's complaint is fundamentally a claim of disparate treatment. Disparate treatments requires a plaintiff to demonstrate that an employer has treated him less

favorably than others due to a protected trait, such as race or national origin. *Dunlap v. Tenn. Valley Auth.*, 519 F.3d 626, 630 (6th Cir. 2008). Courts analyze alleged discrimination under the *McDonnell-Douglas* framework. *Id.* Under the framework, (1) the plaintiff must establish a prima facie case of racial discrimination; (2) the employer must articulate some legitimate, nondiscriminatory reason for its actions; and (3) the plaintiff must prove that the stated reason was in fact pretextual." *Id.* A plaintiff can establish a prima facie case of discrimination by showing "(1) that he is a member of a protected group, (2) that he was qualified for the position at issue, and (3) that he was treated differently than comparable employees outside of the protected class." *Id.*

Proof of discriminatory motive is critical under a disparate treatment theory. *Id.* Discriminatory motive can be inferred from the fact that there was a difference in treatment, or "from the falsity of the employer's explanation for the treatment." *Id.*

Plaintiff establishes that he is a member of a protected group, that he was qualified for his job position, and that Defendant required him to work the night shift while his white counterparts worked the day shift. However, Defendant articulates nondiscriminatory reasons that Urban and White worked the night shift. Urban was responsible for overseeing operations at a plant in the Czech Republic with a 7 or 8 hour time difference between the KCAP plant. White needed Gilley to train him, and Gilley worked during the day; therefore White

was required to work the day shift with Gilley. Plaintiff does not bring forth evidence to establish that Defendant's reasons are pretext. Plaintiff has therefore failed to meet his burden of production to establish a claim of disparate treatment. Therefore, this Court will grant Defendant's Motion for Summary Judgment on Count II of Plaintiff's complaint.

3. Retaliation

Count Three alleges retaliation. Dkt. No. 35-1, pg. 16 (Pg. ID 306). Plaintiff alleges that Defendant placed him in a hostile work environment as a form of retaliation. *Id.* at pg. 17 (Pg. ID 307).

> To establish a prima facie case of retaliation, a plaintiff must demonstrate that (1) [he] engaged in activity protected by Title VII; (2) the defendant knew of [his] exercise of her protected rights; (3) the defendant subsequently took an adverse employment action against the plaintiff or subjected the plaintiff to severe or pervasive retaliatory harassment; and (4) there was a causal connection between the plaintiff's protected activity and the adverse employment action.

Barrett v. Whirlpool Corp., 556 F.3d 502, 516 (6th Cir. 2009). Plaintiff asserts that the protected activity he engaged in was reporting the racial discrimination and disparate treatment that he faced at KCAP to Leon Koua, Jaime Fisk, Andrew Bayley, and Adrian Aguayo. Dkt. No. 120, pg. 30

(Pg. ID 5605). He states that after he reported the activity, Koua told him to follow Gilley's instructions and to lie low. *Id.* Plaintiff states that he was continuously demeaned, harassed, left to work without lunch, and treated disparately as a result of having to listen to Gilley. *Id.*

First, the record does not demonstrate that Defendant subjected Plaintiff to severe or pervasive retaliatory harassment. Plaintiff states that Gilley berated him for not driving a Ford and for not having a safety vest and goggles. Dkt. No. 35-1, pg. 19 (Pg. ID 309). However, the record does not establish that this treatment was severe or pervasive. Further, according to Plaintiff's own statement, he went without lunch on one occasion. Dkt. No. 120, pgs. 11–12, (Pg. ID 5586–87). This treatment also does not rise to the severe or pervasive level. For these reasons and for the reasons stated *infra*, this Court finds that the record does not establish that Defendant retaliated against Plaintiff. Summary Judgment is granted in favor of Defendant on Count III.

4. Harassment/Hostile Work Environment

The fourth count of the complaint alleges harassment. Dkt. No. 35-1, pg. 18 (Pg. ID 308). Plaintiff more specifically alleges hostile work environment in Count III of his complaint and in his response to Plaintiff's Motion for Summary Judgment. *Id.* at pg. 17 (Pg. ID 307); Dkt. No. 120, pg. 19 (Pg. ID 5594). Plaintiff alleges that when he

arrived at the KCAP plant, Dawayne Gilley began to complain that Plaintiff had parked in the wrong parking lot and that he was not driving a Ford vehicle. *Id.* at pg. 19 (Pg. ID 309). Gilley then began shouting at Plaintiff, telling him that he was "doing everything wrong" after Gilley realized that Plaintiff did not have a safety vest and goggles. *Id.* Plaintiff alleges before that point, no one ever told him that he needed a safety vest and goggles. *Id.* The complaint next states that one day Gilley asked Plaintiff if he had acquired a Ford vehicle yet. *Id.* at pg. 20 (Pg. ID 311). Plaintiff informed Gilley that the rental company did not have a Ford vehicle available, and Gilley began to shout at Plaintiff and said that he must get a Ford vehicle that day. *Id.* at pg. 21 (Pg. ID 311). Gilley then accompanied Plaintiff to get a Ford vehicle. *Id.* at pgs. 21–22 (Pg. ID 311–12).

Plaintiff's response to Defendant's Motion also alleges that in November of 2015, Gilley offered to get lunch for Radim Urban and Plaintiff. Dkt. No. 120, pg. 11 (Pg. ID 5586). Plaintiff states that Gilley brought Plaintiff a lunch that was "spilled" and contained ham; Plaintiff does not eat ham. *Id.* at pgs. 11–12, (Pg. ID 5586–87). Plaintiff's response next asserts that Gilley berated him by telling him not to talk to anybody, and just to conduct inspections. *Id.* at pg. 12 (Pg. ID 5587). Plaintiff lastly alleges that in November of 2015 Gilley made an accusation of theft against him. *Id.*

Courts analyze discriminatory harassment under the hostile work environment standard. *See*

Barrett v. Whirlpool Corp., 556 F.3d 502, 514 (6th Cir. 2009).

> To establish a prima facie case of a racially hostile work environment, a plaintiff must demonstrate that (1) [he] was a member of a protected class; (2) [he] was subjected to unwelcome racial harassment; (3) the harassment was based on race; (4) the harassment unreasonably interfered with [his] work performance by creating an intimidating, hostile, or offensive work environment; and (5) the employer is liable.

Barrett, 556 F.3d at 515. A hostile work environment is one that is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* at 514. Assessment of the fourth prong requires an examination of the totality of the circumstances. *Id.* at 515. Courts consider the frequency of the discriminatory conduct, the severity of the conduct, if the conduct was physically threatening or humiliating, if the conduct was merely an offensive utterance, and whether the conduct "unreasonably interfere[d] with an employee's work performance." *Id.*

Plaintiff has established that he is a member of a protected class. However, Plaintiff has not proved the other prongs of the prima facie case of hostile work environment. Nothing in the record, either

direct or circumstantial, supports the proposition that Gilley's treatment of Plaintiff was because of Plaintiff's race or national origin. Further, Plaintiff does not establish that any adverse treatment unreasonably interfered with his work. In contrast, Plaintiff asserts throughout his pleadings that he was an exemplary worker. *See* Dkt. No. 35-1, pg. 15, 27 (Pg. ID 305, 317); Dkt. No. 104-16, pgs. 3–4 (Pg. ID 2623–24). For these reasons, the Court will grant summary judgment in favor of Defendant on Plaintiff's Count IV.

5. Negligence

The fifth cause of action alleges negligence. Dkt. No. 35-1, pg. 24 (Pg. ID 314). Plaintiff alleges that Defendant was negligent in investigating the grievances that Plaintiff placed and also negligent in failing to reasonably supervise the Continental Resident staff at KCAP. *Id.* at pgs. 24–26 (Pg. ID 314–16). Defendant asserts that Plaintiff did not complain of discrimination until he filed his complaint with the EEOC. Dkt. No 119, pg. 2 (Pg. ID 5473).

To establish a prima facie case of negligence, a plaintiff must prove: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Finazzo v. Fire Equip. Co.*, 918 N.W.2d 200, 210 (Mich. Ct. App. 2018).

Continental has a written policy prohibiting discrimination based on race or national origin.

Dkt. No. 104-1, pg. 7 (Pg. ID 2273). Jaime Fisk, the Human Resources Coordinator, testified under oath that complaints of discrimination based on race or national origin are investigated. *Id.* at pg. 8 (Pg. ID 22774). Leon Koua similarly testified that it was custom for harassment complaints to be reported to Human Resources and investigated. Dkt. No. 104-15, pgs. 3–5 (Pg. ID 2618–20). On December 17, 2015, Plaintiff wrote an email to Adrian Aguayo and Leon Koua about his removal from the KCAP plant. Dkt. No. 104-16, pgs. 3–4 (Pg. ID 2623–24). The letter described that he was unsure why he was removed from the plant because he always did what was required of him. *Id.* The letter does not mention discrimination as a reason for why Plaintiff believed he was removed. *Id.* Adrian Millan also testified that Plaintiff never informed him that Dawayne Gilley treated him differently because of his race. Dkt. No. 104-6, pg. 19 (Pg. ID 2504).

Plaintiff's complaint states that he informed Jaime Fisk and Andrew Bayley, his manager, about disparate treatment, harassment, and discrimination that he received from Gilley. Dkt. No. 35-1, pg. 25 (Pg. ID 315). Plaintiff alleges that Leon Koua "promised" to investigate the issue, but never did. *Id.* Plaintiff also asserts that he told Adrian Aguayo about the discrimination. *Id.* Aguayo told Plaintiff to send him his concerns via email, which Plaintiff did without response from Aguayo. *Id.* Plaintiff also maintains that he brought his discrimination complaints to Human

Resources, and the department likewise failed to investigate his complaints. *Id.* Plaintiff's response to Defendant's summary judgment motion states the Koua failed to address his complaint of discrimination and did not report it to HR. Dkt. No. 120, pg. 30 (Pg. ID 5605). However, Plaintiff's citations to the record do not point to any objective evidence of Plaintiff's claims. *See id.*

Plaintiff's response also re-states that Aguayo asked him to send an email with his complaints of discrimination to which Plaintiff never received a response. *Id.* at pg. 32 9Pg. Id 5607). However, Plaintiff does not cite to any evidence in the record to support this claim.

"[D]istrict courts [are] not required to accept unsupported, self-serving testimony as evidence sufficient to create a jury question. *Brooks v. Am. Broad. Companies, Inc.*, 999 F.2d 167, 172 (6th Cir. 1993). Here, Plaintiff alleges that he informed Fisk, Bayley, Koua, and Aguayo that Gilley subjected him to discrimination. However, nothing in the record supports this claim, except for Plaintiff's subjective testimony. Further, evidence in the record supports the conclusion that Plaintiff did not complain about racial or national origin discrimination until he filed his EEOC complaint. No evidence suggests that Defendant breached its duty to investigate claims of discrimination.

Plaintiff also alleges that Defendant was negligent in failing to supervise its staff at KCAP. However, Plaintiff cannot establish that Defendant

breached its duty to supervise because the evidence does not support Plaintiff's discrimination allegations. *See* Section 2, Unequal Terms, *supra*.

For these reasons, the Court will grant summary judgment in favor of Defendant on Count V of Plaintiff's complaint.

6. Implied Contract

Count Six of Plaintiff's complaint alleges breach of implied contract. Dkt. No. 35-1, pg. 27 (Pg. ID 317). Plaintiff alleges that KCAP was a temporary project and that it was implied that his regular job at Continental would continue at the termination of the KCAP project. *Id.* Plaintiff asserts that he was in charge of at least one other project for Continental with a third-party company and that he had interviewed for other positions at Continental in Germany. *Id.* The complaint also states that one of Plaintiff's supervisors told him he was doing a "good job" at KCAP, which also presents evidence that an implied contract existed between the parties. *Id.*

A contract may be implied where (1) "there is a receipt of a benefit by a defendant from a plaintiff"; and (2) "retention of the benefits is inequitable, absent reasonable compensation." *Daimler-Chrysler Servs. N. Am., LLC v. Summit Nat., Inc.*, 289 F. App'x 916, 925 (6th Cir. 2008). Part of the rationale for implying a contract-in-law is to prevent unjust enrichment. *Id.*

Plaintiff presents no evidence and the record

does not demonstrate the existence of an implied contract between the parties. Plaintiff was Defendant's at-will employee. Dkt. No. 199, pg. 5 (Pg. ID 5476). Plaintiff does not present evidence in the record to establish an inequitable relationship existed in which Defendant was unjustly enriched. For these reasons, the Court will grant summary judgment in favor of Defendant on Count VI of Plaintiff's complaint.

7. Denial of Due Process

The last count of Plaintiff's complaint alleges that Defendant denied him due process by not following the internal rules and policies in investigating Plaintiff's complaints of discrimination. Dkt. No. 35-1, pg. 28 (Pg. ID 318). Plaintiff also asserts a denial of due process because Defendant terminated him "with cause." *Id.* This Court presumes that Count VII alleges procedural due process violations, considering that Plaintiff's complaint alleges grievance procedure violations and that Defendant failed to afford him "due process" before firing him. *Id.*

First, Plaintiff asserts that Defendant denied him due process by not properly investigating his complaints of discrimination. To establish a procedural due process claim, a plaintiff must demonstrate that: (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this interest; and (3) the *state* did not provide him with adequate

procedural rights before depriving him of the property interest. *Crawford v. Benzie-Leenanau Dist. Health Dep't Bd. of Health*, 636 F. App'x 261, 266 (6th Cir. 2016) (emphasis added).

First, Plaintiff's employment was at-will and the record does not establish that he had a property interest in his employment. Second, Plaintiff's employment was not with the government. For these reasons, Plaintiff cannot sustain a procedural due process violation. Further, the record does not support Plaintiff's allegations that he complained to Defendant about Gilley's discrimination. *See* Section 5, Negligence, *supra*.

The second part of Count VII alleges a violation of due process because Defendant terminated him "with cause." However, Plaintiff was not a government employee; he was an at-will employee who could be terminated at any time for lawful reason. Dkt. No. 199, pg. 5 (Pg. ID 5476). Plaintiff does not dispute nor does he present evidence that his employment was not at-will. As such, he had no due process right in his employment. *Gregory v. Hunt*, 24F.3d 781, 785 (6th Cir. 1994) (an *at-will public* employee does not have a property interest in continued employment") (emphasis added).

Plaintiff cannot establish that he filed discrimination grievances against Dawayne Gilley or that he had a property interest in his continued employment. Defendant is therefore entitled to summary judgment on Count VII of Plaintiff's complaint.

V. CONCLUSION

For the reasons discussed herein, the Court will grant Defendant's Motion.

SO ORDERED.

Dated: March 26, 2019

s/Gershwin A. Drain
HON. GERSHWIN A. DRAIN
United States District Court Judge

STATUTES INVOLVED

("Title VII"), provides in pertinent part: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex[,] or national origin"

Title VII's anti-retaliation provision in Section 704(a), 42 U.S.C. § 2000e-3(a) (1982) provides:

"Its full text states as follows: It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation,

proceeding, or hearing under this subchapter"

42 U.S.C. § 2000e-2(m) provides in pertinent part that "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that [a protected classification] was a motivating factor for any employment practice, even though other factors also motivated the practice