THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

Case No. 2011-CP-42-4538
Appellate Case No. 2016-002125

Gary G. Harris,..... Appellant,

v.

Tietex International Ltd, ... Respondent,

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

Case No. 2011-CP-42-4538
Appellate Case No. 2014-000902

Tietex International Ltd, ... Respondent,

v.

Gary G. Harris,..... Appellant,

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

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ORDER

This matter is before the Court on Defendant Tietex International, Ltd.'s ("Tietex") Renewed Motion for Summary Judgment. After consideration of the record, argument of counsel, memoranda, and submissions made, the Court finds that Defendant's Renewed Motion for Summary Judgment should be and is therefore GRANTED.

I. RELEVANT PROCEDURAL HISTORY

Plaintiff Gary G. Harris ("Harris") originally filed a lawsuit against Tietex in this Court on August 15, 2008—C.A. No. 2008-CP-42-4316 ("First Action"). Harris' First Action included a claim for violation of the Age Discrimination in Employment Act ("ADEA"), and various state law claims.[1] Tietex removed the First Action to the United States District Court for the District of South Carolina based on Harris's ADEA claim. After engaging in discovery in the First Action, Tietex moved for summary judgment on all of Harris' claims. On October 28, 2010, the Federal Court granted Tietex's motion on Harris' ADEA claims but chose not to address Harris'

[1] Harris' state law claims in the First Action included (1) breach of contract, (2) breach of contract accompanied by a fraudulent act, and (3) defamation (consisting of four separate allegations of defamation). All of Harris's claims in the First Action arose from allegations regarding his employment with Tietex and his separation therefrom.

#1

remaining state law claims, dismissing them without prejudice. The Fourth Circuit Court of Appeals affirmed the District Court's decision.

Harris filed a *pro se* Complaint in the present action ("Second Action") on October 21, 2011. Harris' *pro se* Complaint asserted claims against Tietex for defamation and unspecified discrimination, relying on the same general facts alleged in the First Action.

On March 8, 2012, Harris' newly-employed counsel entered his appearance. On August 10, 2012, the Court granted Harris' motion to amend his Complaint. On September 5, 2012, Harris filed his Amended Complaint in the Second Action alleging identical claims to those alleged in the First Action (except his ADEA claim) and adding a new claim for intentional infliction of emotional distress ("outrage") based on the same facts.[2] As in the First Action, all of Harris' claims in the Second Action arose from allegations regarding his employment with Tietex and his separation therefrom.

On May 3, 2013, Tietex moved for summary judgment in the second action asserting that (1) Tietex was entitled to summary judgment on the merits because Harris failed to identify a genuine dispute of material fact as to any of his claims; (2) Harris' claims were barred as a matter of law based on the conclusive findings by the Federal Court in the First Action; and (3) Harris' outrage and three new defamation claims were barred by the statutes of limitation and the doctrine of r*es judicata*. Harris opposed Tietex's motion, arguing in his brief and during the hearing that summary judgment was premature based on his inability to fully conduct discovery at that time.

On September 23, 2013, the Court denied Tietex's motion for summary judgment. The September 23, 2013, Order focused on Tietex's collateral estoppel argument did not rule on the

[2] Harris' *pro se* Complaint also added two new defamation claims that were not included in the First Action, and Harris identified a third new defamation claim during his deposition in the Second Action.

merits or address Tietex's arguments that Harris' outrage and new defamation claims were barred by the statute of limitations and *res judicata*. The September 23, 2013, Order also permitted Harris to engage in additional discovery, specifically including the depositions of two Tietex executives. Other than a site visit to Tietex's facility, Harris did not engage in any discovery after the September 23, 2013, Order was entered.

On January 27, 2014, Tietex filed its Renewed Motion for Summary Judgment and supporting memorandum. On February 6, 2014, the Court heard Tietex's Renewed Motion for Summary Judgment. On the record during the February 6, 2014 hearing, Harris voluntarily withdrew his claims for (1) breach of contract, (2) breach of contract accompanied by fraudulent act, and (3) outrage, leaving only his defamation claims before the Court.

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Having considered the record, argument of counsel, memoranda, and submissions made, the Court finds this case to be ripe for summary judgment.

II. FINDINGS OF FACT[3]

Harris began working at Tietex on July 13, 1994, as a Senior Research Chemist. (Harris Dep. 1 at 58-60, Exs. 6-7; Harris Dep. 2 at 140, Ex. 7.) Harris' normal working hours were 8:00 a.m. to 5:00 p.m., but he claims he was often at work by 6:00 or 6:30 a.m. and stayed later than 5:00 p.m. (Harris Dep. 1 at 74-75.) On occasion, Harris stayed until 8:00, 9:00, or 10:00 at night. (*Id.* at 77.) Harris admits that he was told by his supervisor, Wade Wallace, not to work in the plant for safety reasons when it was not operating. (*Id.* at 124.) Wallace told Harris he could work in the plant anytime the plant was operational, and he could come into the facility to do office work when the plant was down. (*Id.* at 123-24.) Harris admittedly ignored these directives due to his own opinion that it was safe for him to work with chemicals when the plant

[3] The undisputed facts the Federal Court adopted in granting Tietex's motion for summary judgment in the First Action are essentially identical to the Findings of Fact set forth herein.

was not operating. (*Id.* at 75-76, 124.) While his erratic hours had been acceptable to his previous supervisor, they were not acceptable to Wallace, and Harris admits this was a new directive under Wallace's supervision. (*Id.* at 125.) Harris admits he was the only employee who did lab work after hours. (*Id.* at 126-27.)

There are four sections in the technical building at Tietex: an office area; wet lab; physical testing; and an extension of the wet lab for chemists' work, with a burn room. (*Id.* at 86.) Harris' former supervisor, Jake Butts, had difficulty keeping track of Harris due to Harris' erratic work hours, so Butts relocated his office from the plant to the office areas of the technical building (the lab—where Harris' office was situated) in order to more closely supervise Harris. (*Id.* at 83, 86.)

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Soon after Butts relocated his office, Harris claimed he noticed a mold smell and had symptoms of congestion, sinus headache, and flu. (*Id.* at 87.) Harris does not recall anyone else complaining about the alleged smell. (*Id.* at 88.) Harris claimed that the smell originated from Butts' clothing and the furniture Butts moved into his relocated office. (*Id.* at 93-94.) After some time and several visits to doctors, Harris contended that the smell was the source of his illness due to a mold allergy. (*Id.* at 88-89.) Harris reported his belief to Butts. (*Id.*)

Based on Harris' allegation that mold in the lab was making him ill, Tietex hired a hygienist to perform testing. (*Id.* at 89.) The hygienist reported there was no mold contamination in the lab and the air in the lab was cleaner than the outside air. (*Id.* at 91.) Although Harris claims the testing was flawed, he admits he has no evidence of that. (*Id.* at 89-92.) Harris does not know who performed the testing or what kind of testing was performed. (*Id.*) Harris admits he has no first-hand knowledge of how the testing was conducted. (*Id.* at 90-91.) Harris' only specific complaint about the testing was that it tested all four sections of the lab rather than focusing solely on the office area. (*Id.* at 92.)

At some time in late 2006, Harris established a second office in the main plant. (*Id.* at 87-88.) Harris continued to do work in the lab until February 2007. (*Id.* at 87.) Effective February 1, 2007, Harris was removed from Butts' supervision and placed under the supervision of Wallace, in part due to Harris' continued complaints about the odor associated with Butts. (*Id.* at 101.)

Between February 2 and 5, Harris and Wallace discussed by e-mail whether Harris would be able to continue working in the lab because of Harris' continued complaints about the mold smell. (*Id.* at 94, Ex. 12.) Wallace agreed that Tietex would do whatever was necessary to shield Harris from any further exposure to an environment that might negatively impact his health. (*Id.* at 95, Ex. 12.) Wallace instructed Harris to wear a mask when he worked in the lab. (*Id.* at Ex. 12.) However, Harris decided the mask would not give him enough protection. (*Id.*) Wallace then told Harris not to enter the lab under any circumstances. (*Id.* at 101, Ex. 12.) Thereafter, Harris asked if he could work in the lab if he signed a waiver. (*Id.* at 122-23, Ex. 17.) Tietex rejected the waiver stating that a waiver was "unacceptable from an HR/liability perspective since [Tietex] would be allowing [Harris] to come in contact with an environment that might negatively affect [his] health." (*Id.*)

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Tietex purchased equipment to accommodate Harris' needs outside of the lab. (*Id.* at 112-13, Ex. 14.) Tietex provided Harris with an alternative work area because Tietex wanted to protect Harris' health. (*Id.* at Ex. 12.) Harris has no contradictory evidence. (*Id.* at 123.)

On February 7, 2007, Harris told Wallace he was overwhelmed by personal and emotional problems that had occurred in his personal life over the past year, and he was having difficulty functioning. (*Id.* at Ex. 13.) Harris admits (1) his wife was ill during this time period, (*Id.* at 106); (2) dealing with his wife's illness left him stressed with major sleep disturbances, (*id.* at 106-07, 111, Exs. 14, 44); and (3) he was a "wreck" because of his wife's illness (*id.* at

107 & Ex. 44). Wallace told Harris that Tietex "would support him if he felt he needed to utilize EAP," but Harris stated that was not necessary. (*Id.* at 111, Ex. 13.)

On February 22, 2007, Harris left voice mail messages for Wallace and Tietex's Owner, Martin Wildeman, at 3:00 a.m. complaining about his inability to sleep and about unspecified work-related issues. (*Id.* at 81, Ex. 14.) Harris expressed concern about being moved from the lab and that he was "still not set up to easily do his bench work." (*Id.* at Ex. 14.) Harris asked for a lab pad coater and a vented hood. (*Id.*) Wallace stated that it would take time to locate, acquire, and install the equipment; however, Harris could use the equipment in the beam/dye area, and/or coordinate to use Robert Culbreth (a chemical technician) to perform work for him in the lab in the meantime. (*Id.* at 111-13, Ex. 14.) Harris believes Tietex was motivated to keep him out of the laboratory to avoid liability for any health problems he might experience rather than out of a real concern for his health." (*Id.* at 123.) Harris never asserted Tietex was motivated to keep him out of the lab because of any unlawful reason. (*Id.*)

Harris admits he complained about being required to stay involved with environmental reporting and stated he was concerned about completing an environmental report that was due on March 1, given his other projects. (*Id.* at 113, Ex. 15.) Wallace saw no reason that Harris' projects would interfere with his ability to get the report done on time and made this clear to Harris. (*Id.*) Harris admits it was reasonable for Wallace to expect him to complete the environmental report on time. (*Id.* at 113.)

Wallace also asked Harris to come to him directly with issues before going to Wildeman. (*Id.* at Ex. 14; Wallace Dep. 2 at Ex. 1 ¶ 23.) Harris admits that, at times, he went directly to Wildeman rather than using the chain of command. (Harris Dep. 1 at 116.) Harris admits it was inappropriate for him to complain to Wildeman about having to do the environmental reporting. (*Id.* at 115.)

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On March 5, 2007, Wallace discussed several issues with Harris regarding his performance and documented the discussion at Harris' request in a memorandum to Human Resources Director David Wilson, with a copy to Vice President of Manufacturing (Mark Isbell) and Harris. (*Id.* at 117-18, Ex. 16.) Wallace noted that Harris made emotional and overly vocal accusations and statements without supporting research or data, was not honoring the chain of command, harbored grudges over past grievances and toward the management in general, and complained about ownership of environmental reporting duties. (*Id.* at Ex. 16.) The memorandum concluded with the statement, "As we discussed these issues are not sustainable and it is mandatory that Harris make significant progress towards resolving these issues within the next 30 days." (*Id.* at 120-21, Ex. 16.)

At the time, Harris did not protest any of the points in the March 5, 2007, memorandum or claim that Wallace's observations were not true. (*Id.* at 122.) Harris admits he was experiencing emotional stress (*id.* at 106-07, 111 & Exs. 14, 44), circumvented Wallace by going directly to Wildeman (*id.* at 116), and complained about environmental reporting tasks (*id.* at 113). Harris does not deny he harbored grudges, and admits he had unresolved issues that existed before he began reporting to Wallace and had discussed those issues with Wallace. (*Id.* at 119-20.)

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On June 18, 2007, Wallace had another discussion with Harris regarding his subpar performance. Wallace documented the discussion in a memorandum to Harris, with a copy to Wilson and Isbell. (*Id.* at 128, Ex. 18.) The discussion focused on two projects for which Harris was responsible. (*Id.* at 130, Ex. 18.) The first was the development and qualification of a Tietex coating compound ("C237 Project"). (*Id.* at 129, Ex. 18.) The second was the development of a finish formula and process ("T602 Project"). (*Id.* at 129-30.)

Harris had been working on the C237 Project for about six months. (*Id.* at 131, Ex. 18.) Harris had predicted the C237 Project would result in significant cost savings for Tietex. (*Id.* at 131-32, Ex. 18.) Harris claimed he had a successful trial before he began reporting to Wallace. (*Id.* at 132.) Despite Harris' characterization of the compound he created as a success, it was unacceptable to Tietex because it was much more complicated to produce commercially than Harris had initially promised. (*Id.* at Ex. 16.) In February, Wallace began working separately on a parallel C237 Project because it appeared Harris would fail to achieve the cost savings he had predicted. (*Id.* at 134, Exs. 16, 18.)

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Because of the expense, a plant production trial is only done if laboratory production is successful. (Wallace Dep. 2 at Ex. 1 ¶ 28.) Harris told Wallace the lab samples for the T602 project were promising, and Harris recommended a production trial. (Harris Dep. 1 at 135.) According to Harris, the first plant production trial showed mixed results with some samples that were "not good," but others that were "comparable," depending on the amount of finish. (*Id.* at 136.) However, Harris told Wallace that, based on the results, another plant production trial was warranted. (*Id.* at 137, Ex. 18.) On Harris' recommendation, a second plant production trial was performed, which was unsuccessful. (*Id.* at 137, 295, Ex. 18.) A third trial was similarly unsuccessful. (*Id.* at 137-38, 295, Ex. 18.) When the second and third trials failed, Wallace reviewed the results of the first plant production trial himself. (*Id.* at Ex. 18; Wallace Dep. 2 at Ex. 1 ¶ 29-31.) Wallace saw "that the results of the first trial had not been as [Harris] portrayed them, so the second and third trials were unwarranted based on the results of the first." (*Id.*)

Wallace's June 18, 2007 memorandum cited Harris for his poor analytical practices and instructed him to improve his performance within 30 days. (Harris Dep. 1 at 141, Ex. 18.) Harris considered this his final written warning. (*Id.* at 139, Ex. 18.)

Despite being told and understanding that his job was in jeopardy if his performance failed to improve, Harris made insufficient effort to complete the C237 project. (*Id.* at Ex. 19.) Instead, Harris began taking multiple days of vacation immediately after being given the warning on June 18. (*Id.* at 145-48.) These vacation days were frequently taken on short notice. (*Id.* at 145-46, Ex. 20.) Sometimes, Harris waited until the day before to notify Wallace. (*Id.*) Other than the environmental reporting, Wallace did not see that Harris improved on any of the issues cited in the March 5, 2007 memorandum. (*Id.* at Ex. 19.) Gate records and management observation showed that Harris continued to ignore the directive not to work in the chemical lab areas at nights or on the weekends. (*Id.* at Ex. 19.) The same records showed inconsistent work hours and erratic patterns of entry and exit to and from the facility. (*Id.*) Harris' co-workers complained that he did not return calls or e-mails consistently, disrupting their work patterns. (*Id.* at Ex. 19.)

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Harris was scheduled to fly to Indiana on June 14 to visit a customer and return on June 15. (*Id.* at 148-149, Ex. 19.) After flying the first leg of his trip, Harris turned around and came home because he had a headache. (*Id.*) Harris never told Wallace he had not met with the customer in Indiana. (*Id.* at Ex. 19.)

On the evening of Monday, July 2, after work, Harris left a voicemail message for Wallace telling him he had an ant infestation at his house. (*Id.* at 151-52.) Harris said he would take care of the ants first thing the following morning and then go to Hexion, a chemical facility, to work on a project. (*Id.*) Since Harris left this message after work hours, Wallace did not hear the message until the morning of Tuesday, July 3, 2007. (*Id.* at 151-52, Ex. 19; Wallace Dep. 2 at Ex. 1 ¶ 38.)

Harris purchased pesticide chemicals at Lowe's on the morning of July 3, at approximately 7:30 a.m. (Harris Dep. 1 at 251.) Harris called Wallace and left a voicemail

message around 9:00 a.m., saying he had resolved the ant problem and was going to work at Hexion. (Wallace Dep. 1 at Ex. 1 ¶ 39.) Harris did not arrive at Hexion until 1:30 p.m. (Harris Dep. 1 at 154 & Ex. 21.) Harris could not enter Hexion because he could not contact anyone he knew there to gain entry. (*Id.* at 152-53, 155-56.) Harris left without performing any work. (*Id.*) There are no witnesses to establish how long Harris was allegedly at Hexion. (*Id.* at 157.) Harris is vague about how long he was at Hexion trying to get in—he estimates he was there between thirty and ninety minutes. (*Id.* at 157-58.)

Harris claims that after leaving Hexion, he drove around for 30 to 45 minutes looking for Chemurgy, another chemical facility. (*Id.* at 159-60.) When Harris located Chemurgy, no one was there, so he did not stay. (*Id.*)

Harris did not call Wallace to tell him about being unable to get in at Hexion or about his intent to go to Chemurgy. (*Id.* at 160.) Harris admits it would have been reasonable for him to call Wallace and tell him his plans had changed. (*Id.* at 165.) Harris understood he needed to let Wallace know his whereabouts, to let him know when he was away from the plant, and to keep his cell phone on so he could be reached. (*Id.* at 117.) Harris acknowledges it was reasonable for his supervisor to expect to be informed of his whereabouts "at all times." (*Id.* at 117.)

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The purpose of Harris' intended visit to Hexion was to procure sulfuric acid. (*Id.* at 160-61.) Harris contends he told a Hexion employee to get the acid together so Harris could pick it up "at the guard house or something." (*Id.* at 160.) Harris never accomplished this task. (*Id.*)

During the afternoon of July 3, George Henderson, a Hexion employee, brought the sulfuric acid Harris needed to Tietex. (*Id.* at 160.) Wallace was confused, as Harris was supposed to be at Hexion. Wallace called Henderson and asked if he had seen Harris that day, but Henderson had not. (Wallace Dep. 2 at Ex. 1 ¶ 42-43.) Henderson said he had a voicemail from Harris saying he needed some sulfuric acid urgently because he was planning to do some

work on July 4. (*Id.*) Wallace was troubled because Harris was not where he said he would be and it appeared Harris planned to work with chemicals in the lab on a day the plant was supposed to be closed. (*Id.*)

Harris admits Wallace had no idea what Harris was doing on July 3, or even if Harris was working. (Harris Dep. 1 at 164-65.) Harris claims Wallace called him on his cell phone between 4:30 p.m. and 5:00 p.m. and asked where he had been. (*Id.* at 162.) Harris told Wallace he had been at Hexion. (*Id.*) Wallace told Harris that Henderson had been to Tietex and said that Harris had not been at Hexion that day. (Wallace Dep. 2 at Ex. 1 ¶ 44.) Harris then admitted he had gone to Hexion, but had been unable to get in or find anyone, so he left. (*Id.*) Harris could not give Wallace an adequate explanation of his whereabouts for the day. (Harris Dep. 1 at 158-59; Ex. 19; Wallace Dep. 2 at Ex. 1 ¶ 44, 47-48.)

Wallace told Harris he was suspended until Wallace returned from vacation. (Harris Dep. 1 at 165.) During the phone call, Harris and Wallace were disconnected, and Wallace could not reach Harris again by telephone. (*Id.* at 165-66; Wallace Dep. 2 at Ex. 1 ¶ 45.) Wallace believed Harris had hung up on him, although Harris denies it. (*Id.*) Wallace talked to Wilson about what transpired, and a voicemail message was left for Harris reiterating that he was suspended with pay and should not return to work until contacted by Tietex. (Wallace Dep. 2 at Ex. 1 ¶ 45.)

Wallace conducted an investigation of the events of July 3 when he returned from vacation. (*Id.* at ¶ 47.) Wallace could not verify Harris' whereabouts for most of the hours between 9:00 a.m. and 4:00 p.m. on July 3. (*Id.*; Harris Dep. 1 at Ex. 19.) Wallace recommended the termination of Harris' employment, and the decision to do so was made by Wallace, Wilson, Wildeman, Cunningham, and Isbell. (Wallace Dep. 2 at Ex. 1 ¶ 49.) Harris was told he was not being terminated for one specific deficiency, but for many shortcomings that

"added up," including the issues Wallace had addressed with him in the March 5, 2007 memorandum. (Harris Dep. 1 at 142, Ex. 16.) These issues were also documented in a memorandum dated July 18, 2007. (*Id.* at Ex. 19.) Harris' employment was terminated on July 19, 2007. (*Id.* at 167, Ex. 22.) Harris admits his employment was terminated for unsatisfactory performance. (*Id.*)

III. SUMMARY JUDGMENT STANDARD

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 541, 730 S.E.2d 340, 347 (Ct. App. 2012) (citations omitted). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." *D.R. Horton*, 398 S.C. at 541, 730 S.E.2d at 347.

The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). The moving party may discharge this responsibility "by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim." *D.R. Horton*, 398 S.C. at 542, 730 S.E.2d at 347. "Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or

denials of his pleadings." *Id.* (citing *inter alia* Rule 56(e), SCRCP). "[T]he nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.'" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (quoting *Baughman*, 306 S.C. at 107, 410 S.E.2d at 545).

"Where a verdict is not '*reasonably possible* under the facts presented, summary judgment is proper.'" *Id.* (quoting *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000)) (emphasis in original). While a party opposing summary judgment "'is only required to submit a mere scintilla of evidence'" to withstand the motion, *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 250, 734 S.E.2d 161, 163 (2012) (quoting *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)), Harris has failed to present any evidence demonstrating the presence of a genuine issue for trial. Accordingly, "[t]his case illustrates well the utility of summary judgment in disposing of a meritless claim." *Cox & Floyd Grading, Inc. v. Kajima ConsDep. Svcs., Inc.*, 356 S.C. 512, 517, 589 S.E.2d 789, 792 (Ct. App. 2003).

IV. ANALYSIS

A. Defamation.

Harris must "prove the following four elements to state a claim for defamation: '(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.'" *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012) (quoting *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006)).

The truth of an alleged defamatory statement "is a complete defense to an action based on defamation and evidence establishing a statement is substantially true is a sufficient defense."

Haulbrooks v. Overton, 295 S.C. 380, 383, 368 S.E.2d 676, 679 (Ct. App. 1988) (citing *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 221 S.E.2d 770 (1976)). "It is not necessary to establish the literal truth of the precise statement made." Restatement (Second) of Torts § 581A (1977).

"One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (citing *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999)). "'The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.'" *Id.* (quoting *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 32, 315 (Ct. App. 1987)). "There is a basis for applying a qualified privilege to situations in which an employee's job performance is properly evaluated." *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989); *see also Bell v. Bank of Abbeville*, 211 S.C. 167, 44 S.E.2d 328 (1947) (attaching a qualified privilege to communications between an employer and employee during the employer's inquiry into the employee's alleged misconduct).

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"Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." *Swinton Creek Nursery*, 334 S.C. at 484-85, 514 S.E.2d at 134. To prove actual malice, Harris must show that Tietex was activated by ill will, intending to causelessly and wantonly injure Harris, or that the statements were published with such recklessness as to show a conscious disregard for Harris' rights. *Id.* at 485, 514 S.E.2d at 134.

Whether an occasion gives rise to a qualified privilege is a question of law for the court. *Id.* "'While abuse of privilege is ordinarily an issue for the jury, . . . in the absence of a controversy as to the facts . . . it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.'" *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (quoting *Woodward v. S.C. Farm Bureau Ins. Co.*, 297 S.C. 29, 32-33, 292 S.E.2d 599, 601 (1981)) (emphasis in original); *see also* Restatement (Second) of Torts § 619, cmt. b (court decides if privilege has been abused where only one conclusion can reasonably be drawn).

While Harris' Amended Complaint includes only one cause of action for defamation, he has identified seven separate allegedly defamatory statements or incidents on which he is attempting to rely. (Harris Dep. 2 at 27-30.) Separate allegations of defamation are analyzed as independent claims. *See, e.g., George v. Fabri*, 345 S.C. 440, 456-61, 548 S.E.2d 868, 876-79 (2001) (analyzing defamation allegations separately in affirming grant of summary judgment); *McBride v. School Dist. of Greenville County*, 389 S.C. 546, 559-63, 698 S.E.2d 845, 851-54 (Ct. App. 2010) (analyzing alleged defamatory statements individually).

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The first four of Harris' claims are internal Tietex e-mails and memoranda discussing Harris' work performance. Even interpreting the facts in the light most favorable to Harris, the record shows that each of these communications was substantially true. This is an absolute defense to defamation, rendering summary judgment proper on these claims. *Haulbrooks*, 295 S.C. at 383, 368 S.E.2d at 679 (citing *Ross*, 266 S.C. 75, 221 S.E.2d 770). As internal, performance-related communications, these four communications also give rise to a qualified privilege. *See Wright*, 298 S.C. at 474, 381 S.E.2d at 506; *see also Bell*, 211 S.C. 167, 44 S.E.2d 328. Harris has not produced any evidence to support a finding of actual malice or other abuse of the qualified privilege. The qualified privilege thus stands as a matter of law, and Tietex is

entitled to summary judgment. *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (citing *Woodward*, 297 S.C. at 32-33, 292 S.E.2d at 601).

The statements on which Harris relies in support of his fifth, sixth, and seventh defamation claims are less clear. Given the ill-defined nature of the alleged defamatory statements and the lack of evidence to support these claims, Harris has failed to create a triable issue of fact.

Harris has failed to produce evidence sufficient to overcome Tietex's motion for summary judgment on any of his seven defamation claims. The Court will now examine each of Harris' seven defamation claims more fully.

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1. February 9, 2007 E-mail from Wallace to Wilson.

Harris' first defamation claim is based on a February 9, 2007 e-mail that his supervisor Wade Wallace sent to Human Resources Director David Wilson with a copy to Wallace's supervisor, Mark Isbell. (Harris Dep. 2 at 27-28, Ex. 13.) In this internal e-mail between managerial employees at Tietex, Wallace summarized a discussion he had with Harris two days earlier regarding personal and emotional problems Harris was experiencing that were impacting his performance. (Harris Dep. 2 at Ex. 13.) Harris claims this e-mail was defamatory because he alleges that it was false and that it "showed a definite disregard for [his] stability mentally and that kind of thing." (*Id.* at 27.)

This defamation claim fails because the content of the February 9 e-mail was substantially true. Harris admitted as much on more than one occasion—during his unemployment hearing (*id.* at 38), and during his deposition in the First Action (*id.* at 34-37).

The February 9 e-mail also gives rise to a qualified privilege, and Harris has not presented any evidence showing that Wallace acted with actual malice. In fact, Harris admitted

he has no evidence of malice on Wallace's part, stating he did not think Wallace was trying to "get rid of him" and has no idea about Wallace's motivation. (Harris Dep. 1 at 196, 337-38.)

The sole allegations of malice in Amended Complaint surround a contention that Tietex engaged in a conspiratorial campaign to "put forward false and defamatory reasons for the termination of [Harris] to achieve ulterior objectives"—namely, the alleged objective "to replace [Harris] with a much younger woman with whom Mr. Isbell [allegedly] had an ongoing personal relationship." (Am. Compl. at ¶¶ 14-15, 23-25.) This is merely an attempt to re-litigate the issues underlying his age discrimination claim in the First Action. Among other findings in its Orders in the First Action, the Federal Court specifically concluded (1) Tietex did not discriminate against Harris based on his age, (2) Harris was not meeting Tietex's legitimate expectations at the time of his termination, and (3) Tietex did not replace Harris with a younger employee. As such, all allegations in the Amended Complaint that could support a finding of malice are precluded under the doctrine of collateral estoppel.

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The undisputed facts also demonstrate Wallace did not exceed the scope of the privilege. Wallace's e-mail recounted his conversation with Harris to his own supervisor and Tietex's Human Resources Manager—both of whom Harris admits "had legitimate business need to know about and discuss" the issues in the e-mail. (Harris Dep. 2 at 55-56.)

2. *March 5, 2007 Memorandum from Wallace to Wilson.*

Harris' second defamation claim focuses on the March 5, 2007, memorandum Wallace sent to Wilson with copies to Isbell and Harris. (Harris Dep. 2 at 28, Ex. 16.) Like the February 9 e-mail, this memorandum documented a performance-related discussion Wallace had with Harris. (*Id.* at Ex. 16.) Harris admits that Wallace only generated the March 5 memorandum because Harris requested that he do so. (*Id.* at 60.)

This memorandum is not actionable as defamation because Harris has admitted that each of the points Wallace made in the memorandum was substantially true. (Harris Dep. 1 at 106-07, 111, 113, 116, 119-20.) As with the February 9 e-mail, this memorandum is also entitled to a qualified privilege. Harris has not produced any evidence to show that Wallace acted with actual malice in drafting the memorandum (particularly since Harris himself specifically requested that Wallace prepare it) or that Wallace exceeded the scope of the privilege.

3. *June 18, 2007 Memorandum from Wallace to Harris.*

Harris' third defamation claim relates to the June 18, 2007 memorandum Wallace provided to Harris, with copies to Wilson and Isbell, which Harris has described as his "final written warning." (Harris Dep. 2 at 28, Ex. 18.) The June 18 memorandum focuses exclusively on Harris' performance issues with respect to the C237 and T602 projects.

Harris' own testimony precludes a finding that the June 18 memorandum was false and defamatory, as he admits the statements in the memorandum are substantially true.[4] Harris admits he had been working on the C237 project for six month and projected significant savings for Tietex. (Harris Dep. 1 at 131-32, Ex. 18.) Although Harris claims he had a successful trial before reporting to Wallace, he admits the direction of the project shifted. (Harris Dep. 1 at 132.) Tietex was convinced Harris' compound was too complicated to produce commercially, and, therefore, unacceptable. (Harris Dep. 1 at Ex. 18.) Harris admits that Wallace began working separately on a parallel C237 project in February. (Harris Dep. 1 at 134, Ex. 18.) Harris admits his compound was never used by Tietex. (Harris Dep. 1 at 134.) Harris admits the first trial of the T602 project was not completely successful, with mixed results, but he

[4] In the First Action, the Federal Court concluded that Harris failed to meet Tietex's legitimate expectations on the C237 and T602 projects for the very reasons summarized in Wallace's June 18 memorandum. Thus, beyond the undisputed facts showing the substantial truth of the June 18 memorandum, the doctrine of collateral estoppel prevents Harris from asserting in this action that he performed up to Tietex's legitimate expectations on the C237 and T602 projects.

recommended a production trial anyway. (Harris Dep. 1 at 135-37, Ex. 18.) Harris admits the two subsequent trials, run on his recommendation, were unsuccessful. (Harris Dep. 1 at 137-38, Ex. 18.) The June 18 memorandum is substantially true, according to Harris' own testimony.

As an internal memorandum addressing employee performance, the June 18 memorandum was subject to a qualified privilege. Harris has produced no evidence of actual malice or other abuse of the privilege, as Wallace prepared and distributed the June 18 memorandum to a small group of Tietex managers who needed to be aware of the issues discussed therein.

4. *July 18, 2007 Memorandum from Wallace to Harris.*

The final specific statement on which Harris relies in making his defamation claims is the July 18, 2007 memorandum from Wallace to Wilson (with a copy to Isbell) in which Wallace summarized Harris' performance issues and recommended the termination of Harris' employment. (Harris Dep. 2 at 28-29, Ex. 19.) This claim fails for reasons similar to Harris' first three defamation claims.

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The summary of Harris' performance deficiencies in the July 18 memorandum is substantially true based on Harris' own testimony. (Harris Dep. 1 at 106-07, 111, 113, 116-17, 119-20, 131-32, 134-38, 145-49, 151-60, 165; *see also* Section II *supra*.). An internal memorandum from an employee's supervisor to Human Resources recommending the employee's termination based on performance issues is entitled to a qualified privilege. There is no evidence in the record to support a finding that Wallace acted with actual malice in publishing the memorandum. Harris acknowledges that Wallace did not exceed the scope of the privilege or act unreasonably in providing the memorandum to Wilson and Isbell, as he admits that both Wilson and Isbell "would have had a need to know" about the subject matter of the memorandum. (Harris Dep. 2 at 100.)

5. *Rumors in the Industry.*

Harris' fifth defamation claim surrounds his contention that there were "rumors in the industry that [he] w[as] terminated from Tietex for falsifying a test report." (Harris Dep. 2 at 29.) However, Harris never identified an actual statement that Tietex made with respect to these "rumors." Rather, Harris simply contended that he spoke to two former Tietex employees who allegedly informed him that they had heard about rumors being spread about him. (*Id.* at 114-24.) Harris never even alleged that Tietex was the actual source of these alleged rumors, and he never produced a witness to testify about what Tietex supposedly said. In the absence of any such allegations or testimony, this defamation claim cannot overcome Tietex's motion for summary judgment. Rule 56(e), SCRCP, requires that a party desiring to oppose summary judgment with testimony must "set forth such facts as would be admissible in evidence." Harris' claim regarding "rumors in the industry" is based on inadmissible hearsay. Accordingly, Harris cannot establish there was a statement or that Tietex published the statement, let alone prove the remaining elements of this claim.

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6. *Harris' July 2007 Suspension with Full Pay.*

Harris' sixth defamation claim alleges that Tietex defamed him by suspending his employment—with full pay and benefits—in July 2007. (Harris Dep. 2 at 29.) The only statements Harris identified with respect to this claim are (1) Wallace's telephone call to Harris in which he informed Harris of the suspension, and (2) Wallace allegedly informing an individual at another company, Textile Rubber, that Harris was suspended. (*Id.* at 124-30.)

With respect to the telephone call between Wallace and Harris, there was no publication to a third party, as Harris admits that they were the only parties on the call. (*Id.* at 126-27.) Regarding Wallace's alleged statement to the Textile Rubber employee, Harris relies on inadmissible hearsay. Beyond being unable to specify any details about the alleged statement,

Harris admits that "[t]he only information [he] h[as] is like second hand what George Henderson told [him]." (*Id.* at 129.) Thus, Harris cannot establish that any statement was published for the purposes of this motion. Even assuming Wallace had informed this individual Harris was suspended, that statement is wholly true and cannot be defamatory as a matter of law.

7. *Harris' February 2007 Ban from the Laboratory.*

Finally, Harris contends that being "banned from going to the laboratory building" in February 2007 was defamatory. (Harris Dep. 2 at 29-30.) The only "statement" the Court can infer from this allegation is when Wallace told Harris "not to enter the lab under any circumstances." (Harris Dep. 1 at 101, Ex. 12.) While Wallace did make that statement, the Court is unable to determine how it could be defamatory with respect to Harris.

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First, the statement was not about Harris—it was a work directive. Second, Wallace made that statement, and Tietex prohibited Harris form entering the lab, after Harris complained that the work conditions in the lab were detrimentally impacting his health. (*Id.* at 87-94, Ex. 12.) Tietex and Harris jointly attempted to find a solution that would have allowed Harris to continue working in the lab without harming his health, but they were unable to do so. (*Id.*) After "banning" Harris from the lab, Harris admits Tietex made special purchases of equipment to allow him to set up a work area in a different location that would be better for his health. (*Id.* at 111-13, Ex. 14.) These circumstances do not support any allegation of defamation.

B. Collateral Estoppel.

Placing aside the absence of any genuine dispute as to the material facts in this matter, the doctrine of collateral estoppel is fatal to Harris' claims. "Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits were the same." *Carolina*

Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (citing *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009)).

"The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* (citing *Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189-90 n.1 (Ct. App. 1984)). Tietex has met its burden to establish the presence of these elements.

Harris' claims in the First Action and his claims in this matter all rely on the same factual allegations—his contentions (a) that he was performing his job at Tietex at a level that met Tietex's legitimate expectations; (b) that the internal memoranda describing his performance deficiencies were false and defamatory; (c) that Tietex did not have a legitimate reason for terminating his employment; and (d) that Tietex's stated reason for terminating his employment was pretextual. However, the Federal Court considered all of these factual allegations in the First Action and made factual findings and conclusions that directly contradict Harris' version of the facts.

The Federal Court's findings and conclusions were necessary and relevant for its determination of Harris' ADEA claims, and the same findings and conclusions are equally applicable to the following issues at the forefront of Harris' state law claims in the Second Action, among others: (a) whether Tietex was justified in terminating Harris' employment; (b) whether Tietex's internal memoranda regarding Harris' performance—on which Harris relies heavily to support his defamation claims—were substantially true; (c) whether Tietex exhibited any actual malice or otherwise exceeded the scope of the qualified privilege with respect to the internal memoranda regarding Harris' performance; (d) whether Tietex conspired to replace him with a younger employee, as alleged in the Amended Complaint; (e) whether Tietex engaged in a

campaign to set up Harris for failure, as alleged in the Amended Complaint; (f) whether Tietex intentionally made it impossible for Harris to perform his job duties, as alleged in the Amended Complaint; (g) whether Tietex put forward false and defamatory reasons for the termination of Harris' employment, as alleged in the Amended Complaint; and (h) whether Tietex terminated Harris' employment based on pretextual reasons, as alleged in the Amended Complaint.

Harris "actually litigated" all of these issues in the First Action, in which he (a) submitted a brief in opposition to Tietex's motion for summary judgment; (b) submitted written objections to the Magistrate Order; (c) appealed to the Fourth Circuit Court of Appeals, which affirmed the Federal Court's decision; (d) filed a petition for re-hearing with the Fourth Circuit, which was denied; and (e) submitted a letter to the Federal District Court requesting further review after exhausting all avenues with the Fourth Circuit, which was rejected.

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All of these issues were "directly determined" and were "necessary to support the prior judgment" in the First Action, as the Federal Court expressly relied on its findings and conclusions in granting Tietex's motion for summary judgment.

In light of the Federal Court's Orders, the Court is unable to imagine any set of credible facts Harris could present at trial that would support his claims without contradicting the findings and conclusions of the Federal Court. There is no evidence in the record that would accomplish this result, rendering summary judgment proper based on the doctrine of collateral estoppel.

C. **Statute of Limitations and *Res Judicata*.**

Harris admits that his First Action did not allege the following defamation claims: (1) his claim based on the February 9, 2007 e-mail from Wallace to Wilson (*id.* Harris Dep. 2 at 33); (2) his claim based on Tietex suspending his employment in July 2007 (*id.* at 33-34); or (3) his claim based on Tietex "bann[ing] him from the laboratory" (*id.* at 34). Rather, he first asserted the first two of these claims in his *pro se* Complaint in the Second Action, and he only identified

his claim based on being banned from the lab in his deposition in the Second Action. Using the October 12, 2011, filing of his *pro se* Complaint as the date on which Harris asserted these claims (assuming the third of these claims relates back to that date), they are barred by the statute of limitations. Due to Harris failing to in any way plead these claims in the First Action, they are also barred by the doctrine of *res judicata*.

The statute of limitations applicable to Harris' defamation claims is two years. S.C. Code Ann. § 15-3-550. The two-year statute of limitations runs from the date on which the allegedly defamatory statement was published, not from the time the statement was allegedly discovered. *Jones v. City of Folly Beach*, 326 S.C. 360, 369, 483 S.E.2d 770, 775 (Ct. App. 1997) ("[S]ummary judgment [should be granted] because South Carolina has not adopted the discovery rule in libel and slander cases."). Harris' defamation claims based on (1) the February 9, 2007 e-mail from Wallace, (2) Tietex suspending his employment in July 2007, and (3) Tietex banning him from the lab in February 2007, are all based on "statements" that Tietex allegedly made in February and July 2007. Harris first alleged these claims in the Second Action, which he did not file until October 12, 2011. (Harris Dep. 2 at 33-34.) Thus, the two-year statute of limitations bars these claims.

While Harris asserts that the statute of limitations for these claims should have been tolled under 28 U.S.C. § 1367(d) while his First Action was pending, he misreads that statute. Section 1367(d) is limited on its face to "any claim asserted under [a federal court's supplemental jurisdiction], and . . . any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under [a federal court's supplemental jurisdiction]." Harris did not plead these defamation claims in the First Action, and they were not dismissed from the First Action. Thus, they are excluded from the tolling provision of section 1367(d).

The complete absence of these three defamation claims in the First Action also implicates the doctrine of *res judicata*. "The doctrine of *res judicata* bars a litigant from raising any issues which were adjudicated in the former suit [between the parties] and any issues which might have been raised in the former suit." *Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997) (citing *Hilton Head Ctr. v. Public Serv. Comm'n*, 294 S.C. 9, 362 S.E.2d 176 (1987)); *see also id.* ("'*Res judicata* also bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.'" (quoting *Riedman Corp. v. Greenville Steel Structures, Inc.* 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992))).

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These three defamation claims arose out of the same transaction or occurrence that was the subject of the First Action—his employment with Tietex and separation therefrom. Harris could have raised these claims in the First Action, but he chose not to do so. Based on Harris' failure to assert these claims in the First Action, the doctrine of *res judicata* precludes him from asserting the claims in the Second Action.

V. CONCLUSION

For all of the foregoing reasons, the Court finds that Tietex is entitled to summary judgment on all of Harris' defamation claims. It is hereby ORDERED, ADJUDGED, and DECREED that this action be DISMISSED, in its entirety, WITH PREJUDICE, and that JUDGMENT be entered in favor of Tietex.

Entered on this 20 day of March, 2014.

The Honorable J. Derham Cole, Jr.
South Carolina Circuit Judge
Seventh Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-42-04538

Gary G. **HARRIS**, — PLAINTIFF(S)

TIETEX International, Ltd., — DEFENDANT(S)

Submitted by: the Court	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☒ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other SCRCP 56

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ Formal order to follow) ☒ Statement of Judgment by the Court:

This matter is before this Court on motion of the defendant for summary judgment pursuant to SCRCP 56. After consideration of the record, argument of counsel, memoranda, and submissions made, this Court finds that the defendant's **motion** for **summary judgment** should be and **is** therefore **granted**. This matter was also before the Court on motion of the plaintiff's counsel to be relieved. With consent of the plaintiff and the defendant, counsel's **motion to be relieved is granted**. Defendant's counsel is instructed to prepare a proposed formal order for the Court's consideration relating to the granting of summary judgment in favor of the defendant.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

Circuit Court Judge	2053 Judge Code	2/18/14 Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

D. Alan Lazenby, *Esq.*
Post Office Box 6099
Spartanburg, S. C. 29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

Fred W. Sugg's, Jr., *Esq.*
Lucas J. Asper, *Esq.*
Post Office Box 2757
Greenville, S. C. 29602

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Linda Moffitt

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-42-04538

Gary G. HARRIS, — PLAINTIFF(S)

TIETEX International, Inc., — DEFENDANT(S)

Submitted by: Court	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter came before the Court on motions of the plaintiff to Compel Entry and Inspection of Premises and To Return A Privileged Communication. Based upon the record in this case, the argument of counsel, and the applicable court rules this Court finds that the correspondence of plaintiff's counsel to defendant's counsel requesting an entry upon and inspection of the premises is sufficient to make a proper request pursuant to rules 34 and 37 SCRCP. Motion to compel inspection is granted and to be accomplished within 15 days.

This Court further finds that the communication from the plaintiff to defendant's counsel is not a privileged communication as it (1) did not seek legal advice, (2) was not a discussion of the merits of the case, (3) was not inadvertantly disclosed to defendant's counsel (4) and was not made in confidence. Motion to return a "privileged" communication is denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

	2053	Janaury 10, 2014
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

D. Alan Lazenby, Esq>
Post Office Box 6099
Spartanburg, South Carolina 29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

Fred W. Suggs, Jr., Esq.
Post Office Box 2757
Greenville, South Carolina 29602

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ROA 000030
APP 000033

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FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.

2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

   The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).

4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.

5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.

6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.

7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.

11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.

13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.

14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Spartanburg
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-42-4538

Gary G. Harris
PLAINTIFF(S)

Tietex International, Ltd.
DEFENDANT(S)

Submitted by: Court	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☒ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 OCT 17 AM 9:57
M. HOPE BLACKLEY

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter came before the court on August 30, 2009.

Defendant's motion for summary judgment is hereby denied. The court finds the doctrine of collateral estoppel does not apply to Plaintiff's claims. The findings in the Federal Court were applicable soley to the ADEA claim, which is not the issue in the present suit. Specifically, the District Court found that the plaintiff was not performing his job duties at a level that met his employer's legitimate expectations at the time of the adverse employment action. The District Court used the burden-shifting method of proof found in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Because plaintiff did not meet his prima facie burden, there was no need for the burden to shift to the defendant to proffer a nondiscriminatory reason for the adverse action. As such, any findings of fact made after the plaintiff failed to meet his burden, specifically, the element of whether or not he was meeting his employer's legitimate expectations, were not necessary to support the judgement of the District Court and are not binding in this state court action. For this reason the defendant's motion for summary judgment is denied.

Defendant's motion for a protective order with regard to the depositions of Mr. Martin Wildeman and Mr. Reed Cunningham is also denied. Defendant stated in a response to interoggatories in the Federal litigation dated October 8, 2008 that both Mr. Wildeman and Mr. Cunningham "will know about Harris' employment, performance, Tietex's policies and procedures, the facts and circumstances surrounding Harris' termination from employment, and the distribution of duties performed by Harris after his termination." Based upon the representations made by Defendant, Plaintiff has demonstrated that these witensses may possess relevant discoverable evidence.

SCANNED

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX **Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**		
Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
		$
		$
		$
If applicable, describe the property, including tax map information and address, referenced in the order:		

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 OCT 17 AM 8:57
M. HOPE BLACKLEY

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge | 2159 Judge Code | 9/23/13 Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

D. Alan Lazenby

ATTORNEY(S) FOR THE PLAINTIFF(S)

Fred W. Suggs, Jr.

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley / Marshall Long, P.C.

CLERK OF COURT

Court Reporter: Pamela Faucette

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-42-4538

Gary G. Harris
PLAINTIFF(S)

Tietex International, Ltd.
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 JUN 19 PM 2:43
M. HOPE BLACKLEY

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : The Plaintiff may continue the deposition of Tietex Representative Wade Wallace for four (4) more hours on the date scheduled. If four (4) hours is not sufficient then the Plaintiff may petition the Court for an extension of time in which he must specifically set forth the information he wishes to cover. The parties conferred with Judge Couch via a telephone conversation June 13, 2013 at 1:45 pm by agreement of counsel.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	Judge Code	Date
	2135	6/13/13

For Clerk of Court Office Use Only

This judgment was entered on the 19 day of June, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 19 day of June, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
Alan Lazenby PO Box 6099 Spartanburg, SC 29304	Fred Suggs 300 North Main Street, Suite 500 Greenville, SC 29602

CLERK OF COURT

M. Hope Blackley
Pat Dickelson DC

Court Reporter:

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 JUN 19 PM 2:43
M. HOPE BLACKLEY

AO450 - Judgment in a Civil Case

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Gary G. Harris,

Plaintiff,

vs.

Tietex International Ltd,

Defendant.

JUDGMENT IN A CIVIL CASE

Case Number: 7:08-3020-JMC

[X] **Decision on the Record.** This action came before the court on the record. The issues have been reviewed and a decision rendered. It is

ORDERED, ADJUDGED AND DECREED that summary judgment is entered as to the defendant; and the court declines to exercise supplemental jurisdiction over Plaintiff's state law claims.

LARRY W. PROPES, Clerk

s/Amanda Williams
By_____
Deputy Clerk

October 28, 2010

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Gary G. Harris, Plaintiff, vs. Tietex International, Inc., Defendant.	Civil Action No. 7:08-3020-HFF-KFM **ORDER AND REPORT OF MAGISTRATE JUDGE**

This matter is before the court on the defendant's motion for summary judgment (doc. 68) and motion to strike (doc. 111). In his complaint, the plaintiff alleges that the defendant, his former employer, violated the Age Discrimination in Employment Act ("ADEA")[1] by terminating his employment and replacing him with a younger individual. He further alleges the defendant violated the ADEA by retaliating against him for complaining about age discrimination toward other employees. He also alleges state law claims against the defendant for breach of contract, breach of contract accompanied by a fraudulent act, and defamation.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Rule 73.02(B)(2)(g), D.S.C., all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

FACTS PRESENTED

The plaintiff was terminated from employment with Tietex International, Ltd., at the age of 62. The plaintiff began working at Tietex on July 13, 1994, as a Senior Research Chemist. (*Id.* 57-61, ex. 6-7, 15). Prior to February 1, 2007, the plaintiff reported

[1]In his response in opposition to the motion for summary judgment, the plaintiff implies that the defendant may have violated the Americans With Disabilities Act. (Pl. resp. m.s.j. 15). However, no such claim was alleged in his complaint, and thus it will not be addressed here.

to Jake Butts. The plaintiff's normal working hours were 8:00 a.m. to 5:00 p.m., but he claims he was often at work by 6:00 or 6:30 a.m. and stayed later than 5:00 p.m. (Pl. dep. 74-75). On occasion, the plaintiff stayed until 8:00, 9:00, or 10:00 at night. (*Id.* 77). The plaintiff admits he was the only employee who did lab work after hours and that he left messages for managers when he knew they would not be answering their phones. (*Id.* 81-82, 126-27, ex. 10, 14; Wallace decl. ¶¶ 20-21). Mr. Butts testified that the plaintiff worked "odd" hours but he "didn't worry about [the plaintiff's] timekeeping ... [and] always felt that [the plaintiff] had a good work ethic. He's certainly, in my opinion, a brilliant chemist and could accomplish the things that needed to be accomplished. And when I've asked him to work on a specific thing, he's been able to do what I needed him to do." (Butts dep. 47, 59).

Mr. Butts relocated his office from the plant to the office area of the technical building, where the plaintiff's office was located. Soon after Mr. Butts relocated his office, the plaintiff claimed he noticed a mold smell and had symptoms of congestion, sinus headache, and flu. The plaintiff claimed that the smell originated from Jake Butts' clothing and the furniture Mr. Butts moved into his relocated office. After some time and several visits to doctors, including an ENT and allergist, the plaintiff contended that the smell was the source of his illness due to an allergy to mold. The plaintiff reported his belief to Mr. Butts. The defendant hired a hygienist to perform testing in the lab. The hygienist reported that there was no mold contamination and that the air in the lab was cleaner than the outside air. Although the plaintiff claims the testing was flawed, he admits he has no evidence of that. His only specific complaint about the testing was that it did not focus solely on the office area of the lab, but tested all four sections of the laboratory. (Pl. dep. 87- 89, 91-94; Wallace decl. ¶ 12). At some time in late 2006, the plaintiff established a second office in the main plant. He continued to do work in the lab until February 2007. (Pl. dep. 87-88). According to the plaintiff, he was not bothered by the allergy when he spent short periods of time in the lab area. (Pl. aff. ¶ 7).

Effective February 1, 2007, the plaintiff was placed under the supervision of Wade Wallace. The defendant argues this was in part due to the plaintiff's continued complaints about the smell associated with Jake Butts. The plaintiff believes the reason for the change in his reporting relationship was so that Mr. Wallace could assist him in getting more involved with special projects. The defendant agrees that this was also a factor in the decision to place the plaintiff under the supervision of Mr. Wallace. (Pl. dep. 101-103; Wallace decl. ¶¶ 5-6).

Between February 2 and 5, the plaintiff and Mr. Wallace discussed by e-mail whether the plaintiff would be able to continue working in the lab because of his continued complaints about the mold smell. Mr. Wallace stated the defendant would "do whatever [was] necessary to shield [the plaintiff] from any further exposure to an environment(s) that might negatively impact [his] health," and he instructed the plaintiff to wear a mask when he worked in the lab. However, the plaintiff decided that the mask would not give him enough protection. Mr. Wallace then told the plaintiff not to enter the lab under any circumstances. Mr. Wallace reminded the plaintiff to give him a list of items he would need to do his job outside the lab, and Mr. Wallace would have them relocated for the plaintiff. Thereafter, the plaintiff asked if he could work in the lab if he signed a waiver. Mr. Wallace rejected the waiver stating that it "was still unacceptable from an HR/company liability perspective since [the defendant] would be allowing [the plaintiff] to come in contact with an environment that might negatively affect [his] health. Equipment was purchased to accommodate the plaintiff's needs outside of the lab. However, the plaintiff claims that the equipment was not put into place because there was always a problem with "where [the equipment] was going to go." The plaintiff also asked if he could work on Saturdays and Sundays. Mr. Wallace told him that he could work in the plant anytime the plant was operational, and he could come into the facility to do office work when the plant was down. The plaintiff was told not to operate any lab equipment in a lab setting when the plant was down and no other

employees were present. Mr. Wallace told the plaintiff that if he had to do lab work after regular business hours he should do it on weekday evenings when the second shift was operating. (Pl. dep. 95, 101, 112-13, 122-23, ex. 12, 17; Wallace decl. ¶¶ 13-17).

On February 7, 2007, the plaintiff told Mr. Wallace that he was overwhelmed by personal and emotional problems that had occurred in his personal life over the past year, and he was having difficulty functioning. The plaintiff testified that his wife was ill during this time period. Dealing with his wife's illness left him stressed with major sleep disturbances. He testified he was a "wreck" because of his wife's illness. Mr. Wallace told the plaintiff that the company "would support him if he felt he needed to utilize EAP," but the plaintiff stated that was not necessary. (Pl. dep. 106-107, 111, ex. 13, 44; Wallace decl. ¶ 18).

According to Mr. Wallace's deposition testimony, the plaintiff complained to him in February 2007 that he did not feel he was being treated fairly. According to Mr. Wallace, the plaintiff "felt like Tietex, in general did not value him, did not recognize him and did not utilize his skills in a way that he thought that they should." The plaintiff further complained that he "had not been promoted in a manner in which he felt was acceptable, and his compensation had not grown in a manner which he felt was acceptable." Mr. Wallace further testified that the plaintiff "never mentioned age." (Wallace dep. 84).

On February 22, 2007, the plaintiff left voice mail messages for both Mr. Wallace and Tietex's owner, Martin Wildeman, at 3:00 a.m., complaining about his inability to sleep, and about unspecified work-related issues. The plaintiff expressed concern about being moved from the lab and that he was "still not set up to easily do his bench work." The plaintiff asked for a lab pad coater and a vented hood. Mr. Wallace stated that he would take time to locate, acquire, and install the equipment, but stated that in the meantime the plaintiff could use the equipment in the beam/dye area, and/or coordinate to use Robert Culbreth, a chemical technician, to perform work for him in the lab. (Pl. dep. 111-12, ex. 14;

Wallace decl. ¶¶ 14, 16, 20). The plaintiff believes that the defendant was motivated to keep him out of the laboratory to avoid liability for any health problems he might experience rather than out of a real concern for his health. (Pl. dep. 123). Importantly, the plaintiff does not assert that the defendant was motivated to keep him out of the lab because his age.

The plaintiff also complained about being required to stay involved with environmental reporting and stated he was concerned about completing an environmental report that was due March 1, given his other projects. Mr. Wallace stated in an e-mail to David Wilson, the Human Resources Manager, and Mark Isbell, the Vice President of Operations, that he saw "no reason that [the plaintiff's] projects would interfere with his ability to get this report done on time." Mr. Wallace further stated that he "made this clear" to the plaintiff. The plaintiff admitted in his deposition that it was reasonable for Mr. Wallace to expect him to complete the environmental report on time. Mr. Wallace also asked the plaintiff to come to him directly with issues before going to Mr. Wildeman. (Pl. dep. 113, ex. 14, 15; Wallace decl. ¶ 23).

On March 5, 2007, Mr. Wallace discussed several issues with the plaintiff regarding his performance and documented the discussion at the plaintiff's request in a memorandum to David Wilson, with a copy to Mark Isbell and the plaintiff. Mr. Wallace noted the plaintiff made emotional and overly vocal accusations and statements without supporting research or data, was not honoring the chain of command, harbored grudges over past grievances and toward the management in general, and complained about ownership of environmental reporting duties. The memorandum concluded with the statement, "As we discussed these issues are not sustainable and it is mandatory that Gary make significant progress towards resolving these issues within the next 30 days." (Pl. dep. 117-18, ex. 16; Wallace decl. ¶ 25).

On June 18, 2007, Mr. Wallace had another discussion with the plaintiff regarding his work performance. Mr. Wallace documented the discussion in a

memorandum to the plaintiff, with a copy to David Wilson and Mark Isbell. The discussion focused on two projects for which the plaintiff was responsible: (1) the development and qualification of a Tietex coating compound as a replacement for the coating that was currently being used on C237 ("C237 Project"); and (2) the development of a finish formula and process for parabolic application of T602 ("T602 Project"). (Pl. dep. 128-30, ex. 18; Wallace decl. ¶ 26).

The plaintiff had been working on the C237 Project for about six months. The plaintiff had predicted that the C237 Project would result in significant cost savings for the defendant. The plaintiff claimed he had a successful trial before he began reporting to Mr. Wallace. Despite the plaintiff's characterization of the compound he created as a success, it was unacceptable to the defendant because it was much more complicated to produce commercially than the plaintiff had initially promised. In February, Mr. Wallace began working separately on a parallel C237 Project because it appeared that the plaintiff would fail to achieve the cost savings he had predicted. Eventually, the situation was resolved by the provider lowering its price. (Pl. dep. 131-34, ex. 18; Wallace decl. ¶ 27).

Because of the expense, a plant production trial is done only if laboratory production is successful. The plaintiff told Mr. Wallace that the lab samples for the T602 project were promising and recommended a production trial. According to the plaintiff, the first plant production trial showed mixed results with some samples that were "not good," but others that were "comparable," depending on the amount of finish. However, the plaintiff told Mr. Wallace that, based on the results, another plant production trial was warranted. On the plaintiff's recommendation, a second plant production trial was performed, which was unsuccessful. A third trial was similarly unsuccessful. When the second and third trials failed, Mr. Wallace reviewed the results of the first plant production trial himself. Mr. Wallace testified that the results of the first trial had not been as the plaintiff portrayed them,

so the second and third trials were unwarranted based on the results of the first. (Pl. dep. 135-41, 295, ex. 18; Wallace ¶¶ 28-32).

Mr. Wallace cited the plaintiff for his poor analytical practices and instructed him to improve his performance within 30 days. The plaintiff considered this his final written warning. (Pl. dep. 139, 141, ex. 18; Wallace decl. ¶ 32).

According to Mr. Wallace, the plaintiff made no effort to complete the C237 project. Instead, the plaintiff began taking multiple days of vacation immediately after being given the warning on June 18. These vacation days were frequently taken on short notice. Sometimes, the plaintiff waited until the day before to notify Mr. Wallace. Other than the environmental reporting, the plaintiff had not improved on the issues cited in the memorandum of March 5, 2007. Gate records and management observation showed that the plaintiff had continued to ignore the directive not to work in the chemical lab areas at nights or on the weekends. The same records showed inconsistent work hours and erratic patterns of entry and exit to and from the facility. The plaintiff's co-workers complained that he did not return calls or e-mails consistently, disrupting their work patterns. (Pl. dep. 145-48, ex. 19, 20; Wallace decl. ¶¶ 33-36).

The plaintiff was scheduled to fly to Indiana on June 14 to visit a customer and return on June 15. After flying the first leg of his trip, the plaintiff turned around and came home because he had a headache. (Pl. dep. 148-49). According to Mr. Wallace, the plaintiff never told him he had not met with the customer in Indiana. (Pl. dep., ex. 19; Wallace decl. ¶ 37).

On the evening of Monday, July 2, after work, the plaintiff left a voicemail message for Mr. Wallace, telling him that he had an ant infestation at his house. The plaintiff said he would take care of the ants first thing the following morning and then go to Hexion, a chemical facility, and work on a project. (Pl. dep. 151-52). Since the plaintiff left this message after work hours, Mr. Wallace did not hear the message until the morning of

Tuesday, July 3, 2007. (Pl. dep., ex. 19; Wallace decl. ¶ 38). The plaintiff called Mr. Wallace and left a second voicemail message around 9:00 a.m., saying he had resolved the ant problems and was going to work at Hexion. According to the plaintiff, he needed sulfuric acid to do testing. The plaintiff did not arrive at Hexion until 1:30 p.m. The plaintiff could not enter Hexion because he could not contact anyone he knew there to gain entry. The plaintiff estimates he was at Hexion between 30 minutes to an hour and a half. The plaintiff claims that after leaving Hexion, he drove around for 30 to 45 minutes looking for Chemurgy, another chemical facility. When the plaintiff located Chemurgy, no one was there, so he did not stay. (Pl. dep. 154-60, ex. 21; Wallace decl. ¶ 39).

The plaintiff left a message for Hexion employee Pam Westmoreland, telling her that he could not get into the laboratory. The plaintiff stated in his message that he needed a small sample of sulfuric acid, and he would come back and pick it up. Hexion employee George Henderson told Ms. Westmoreland that he would take the sample to the plaintiff at Tietex on his way home. (Pam Westmoreland aff. ¶¶ 5-9).

The plaintiff did not telephone Mr. Wallace to tell him that he could not get in Hexion and that he was going to Chemurgy or anywhere else. (Pl. dep. 160; Wallace decl. ¶ 48). The plaintiff admits it would have been reasonable for him to call Mr. Wallace and tell him that his plans had changed. (Pl. dep. 165).

George Henderson, the Hexion employee, brought the sulfuric acid to Tietex for the plaintiff. Mr. Wallace later called Mr. Henderson and asked if he had seen the plaintiff that day, but Mr. Henderson had not. Mr. Henderson said that he had a voicemail from the plaintiff saying he needed some sulfuric acid urgently because he was planning to do some work on July 4th. According to Mr. Wallace, he was troubled because the plaintiff was not where he said he would be and because it appeared the plaintiff had planned to work with chemicals in the lab on a day the plant was supposed to be closed. (Pl. dep. 160; Wallace ¶¶ 42-43).

Mr. Wallace called the plaintiff on his cell phone between 4:30 p.m. and 5:00 p.m. and asked where he was. The plaintiff told Mr. Wallace that he had been to Hexion. Mr. Wallace told the plaintiff that Mr. Henderson had been to Tietex and said that the plaintiff had not been at Hexion that day. The plaintiff then stated he had gone to Hexion, but had been unable to get in or find anyone, so he left. The plaintiff could not give Mr. Wallace an adequate explanation of his whereabouts for the day. Mr. Wallace told the plaintiff he was suspended until Mr. Wallace returned from vacation. During the phone call, the plaintiff and Mr. Wallace were disconnected, and Mr. Wallace could not reach the plaintiff again by telephone. Mr. Wallace talked to David Wilson, the Human Resources Director, about what transpired, and a voice mail message was left for the plaintiff reiterating that he was suspended with pay and should not return to work until contacted by the defendant. (Pl. dep. 158-66, ex. 19; Wallace ¶¶ 44-48).

Mr. Wallace conducted an investigation of the events of July 3 when he returned from vacation. Mr. Wallace recommended the plaintiff's employment be terminated, and the decision to do so was made by Mr. Wallace; David Wilson, Human Resources Director; Martin Wildeman, Owner; Reed Cunningham, President; and Mark Isbell, Vice President of Manufacturing. The plaintiff was told he was not being terminated for one specific deficiency, but for many shortcomings that "added up," including the issues Mr. Wallace had addressed with him in the March 5, 2007, memorandum. (Pl. dep. 142, ex. 16; Wallace decl. ¶¶ 48-50). These issues were also documented in a memorandum dated July 18, 2007. (Pl. dep., ex. 19; Wallace decl. ¶ 51). The plaintiff's employment was terminated on July 19, 2007. The plaintiff does not know who made the decision to terminate his employment. (Pl. dep. 167-68, ex. 22).

APPLICABLE LAW AND ANALYSIS

Motion to Strike

The defendant has moved to strike several paragraphs in the plaintiff's affidavit submitted in opposition to the motion for summary judgment, arguing they contain assertions that lack personal knowledge, are conclusory, are based on unsupported personal opinion or speculation, are based on hearsay, or contradict the affiant's own prior sworn deposition testimony or documentary evidence. The paragraphs pertinent to the court's analysis of the motion for summary judgment are discussed below.

Motion for Summary Judgment

Federal Rule of Civil Procedure 56 states, as to a party who has moved for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that he is entitled to summary judgment as a matter of law. As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist which give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Ross v. Communications Satellite Corp.,* 759 F.2d 355, 365 (4th Cir. 1985), *overruled on other grounds,* 490 U.S. 228 (1989). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson,* 477 U.S. at 248. Accordingly, when Rule 56(e) has shifted the burden of proof to the non-movant, he must provide existence of every element essential to his action which he bears the burden of adducing at a trial on the merits.

ADEA

The ADEA makes it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). "[A] plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action." *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 2352 (2009). The evidence may be direct or circumstantial. *Id.* at 2351.

Direct evidence is "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir.1995), *abrogated on other grounds by*, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). The plaintiff attempts to establish direct evidence of age discrimination based on a single statement allegedly made by Reed Cunningham, Tietex's President. The plaintiff claims that sometime before 2001 Mr. Cunningham commented that Tietex must get younger people into management. The plaintiff admits that it is quite reasonable to conclude that Mr. Cunningham did not mean he wanted the younger people to replace older workers, but believed the company needed a succession plan so that Tietex would have the ability to replace workers who either retired or left the company. The plaintiff admits Mr. Cunningham's comment was casual and confesses that, "[a]nd in all fairness to him, I personally don't think he meant anything by it..." The plaintiff admits he never complained to anyone about the statement. (Pl. dep. 187-88).

In his affidavit submitted in opposition to the motion for summary judgment, the plaintiff stated, "These incidents mirror the age-based animus voiced to me in 2000 by a high level manager Reed Cunningham about his plan to replace older managers with younger ones." (Pl. aff. ¶ 8). As argued by the defendant in its motion to strike, this statement contradicts the plaintiff's deposition testimony that the comment was casual and he did not think Mr. Cunningham meant anything by it. (Pl. dep. 187). If an affidavit conflicts with earlier sworn testimony, it must "be disregarded as a sham issue of fact." *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 975 (4th Cir. 1990). "A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir.1984). Based upon the foregoing, the defendant's motion to strike this portion of paragraph 8 of the plaintiff's affidavit is granted.

In *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542 (4th Cir. 1995), *rev'd on other grounds by*, 517 U.S. 308 (1996), a supervisor's remarks that, "[I]t's about time we get some young blood in this company," and "[Y]ou are too damn old for this kind of work," were insufficient evidence of discrimination because the remarks were not made in the context of replacing the plaintiff, but were made in another or an unknown context. *Id.* at 548-50. In *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir. 1994), a supervisor commented, "there comes a time when we have to make way for younger people." *Id.* at 511. The court noted that "[i]t is undisputed that the statement was made over two years before the discharge of [the plaintiff]. This remoteness in time makes it inappropriate to use . . . the statement as evidence of age discrimination." *Id.* at 511-12. The court further found "the statement in itself creates no inference of age bias. [The] comment reflects no more than a fact of life and as such is merely a 'truism[ ]' that carries with it no disparaging undertones." *Id.* at 512.

The comment here is similar to those in *O'Connor* and *Birkbeck*. This court agrees with the defendant that this comment, made over six years before the plaintiff's termination of employment and in no way related to his termination, cannot evidence any intent to discriminate against the plaintiff because of his age.

Under the burden-shifting method of proof of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973),[2] a plaintiff may establish a *prima facie* case of age discrimination under the ADEA by showing that he (1) is a member of the protected class, i.e., is at least 40 years old; (2) suffered an adverse employment action; (3) was meeting his employer's legitimate expectations at the time of the adverse action; and (4) was replaced

[2]The Supreme Court recently found that the text of the ADEA does not authorize a mixed-motive age discrimination claim. *Gross*, 129 S.Ct. at 2350. The Court also noted that it "has not definitively decided" whether the *McDonnell Douglas* framework, first developed in the context of Title VII cases, "is appropriate in the ADEA context." 129 S.Ct. at 2349 n.2. Accordingly, this court must follow Fourth Circuit precedent, which applies the *McDonnell Douglas* framework to ADEA claims. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir.2004). *See also Misner v. Potter*, 2009 WL 1972598, *2 n. 3 (D. Utah 2009) ("This court does not understand *Gross* as altering the use of the *McDonnell Douglas* framework at summary judgment on ADEA cases.").

by or treated less favorably than someone who is either outside the protected class or "substantially younger" than he is. *Mandengue v. ADT Security Systems, Inc.*, C.A. No. RDB-09-3103, 2010 WL 2365463, *5 (D. Md. 2010).

If the plaintiff can establish a *prima facie* case, the burden then shifts to the defendant to produce a legitimate, nondiscriminatory reason for its actions against the plaintiff. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981) (this is a burden of production, not persuasion). If the defendant meets this burden, the plaintiff must show by a preponderance of the evidence that the proffered reason was pretextual. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

The plaintiff is over 40 years old, and he suffered an adverse employment action when he was fired by the defendant. The defendant, however, argues the plaintiff cannot establish the third and fourth elements of a *prima facie* case.

First, the defendant argues the plaintiff was not performing his job at a level that met the defendant's legitimate expectations. This court agrees. As set forth above, the defendant articulated the deficiencies in the plaintiff's performance in memoranda dated March 5, June 18, and July 18, 2007. (Pl. dep., ex. 16, 18, 19). The plaintiff attempts to contradict the defendant's dissatisfaction with his performance by his subjective assessment of himself as a valuable, outstanding, and exemplary performer. However, the plaintiff's subjective view of his performance does not establish a *prima facie* case. *See McNally v. Norton*, 498 F.Supp.2d 167, 183 (D. D.C. 2007) ("Plaintiff's subjective belief of qualification is not evidence that can be used to establish that he was qualified for the job.") (citation omitted). The perception of the employer is critical, "not the self-assessment of the plaintiff." *Hawkins v. PepsiCo*, 203 F.3d 274, 280 (4th Cir. 2000) (citation omitted).

Next, the defendant argues that the plaintiff has no evidence he was replaced by a person substantially younger than himself. The plaintiff contends that "Wallace . . . became determined to rid Tietex of [the plaintiff] and replace him with a twenty-five year old

worker who was referred to Tietex by Wallace's boss, Mark Isbell." (Pl. resp. m.s.j. 16, ex. 8). The employee referred to by the plaintiff is Trish Guzman. However, as pointed out by the defendant, the plaintiff does not deny that Ms. Guzman's title of Chemist Lab Manager and his title of Senior Research Chemist were different. He also does not dispute that Ms. Guzman's job description as Chemist Lab/Environmental Manager is not an accurate description for the job he performed and is much smaller in scope. The plaintiff can only point to a few of his former duties that he claims Ms. Guzman performed. He claims Ms. Guzman dealt with vendors and formulations in an effort to purchase chemicals for less. (Pl. dep. 192-93). Ms. Guzman performed only a few of the general chemical duties that had previously been a portion of the plaintiff's job. (Wallace decl. ¶ 52). The plaintiff himself also claims another employee, Colon Knight, "replaced him to a certain extent." (Pl. dep. 224). Mr. Wallace testified that after the plaintiff was terminated several people performed his prior duties: Mr. Wallace did the project work; the evaluation and approval of all new chemicals was put on hold, so no one performed those duties; Jake Butts was reassigned some of the environmental work; and some environmental duties were later assumed by Paul Hite. (Wallace dep. 122-23; Butts dep. 34-36). Mr. Wallace testified that Ms. Guzman was later hired and took on two or three of the plaintiff's former duties. Further, Ms. Guzman did not report to Mr. Wallace, as the plaintiff had. (Wallace dep. 124).

The plaintiff also alleges that the defendant "replaced numerous older employees with younger employees." (Comp. ¶ 4). In his response in opposition to the motion for summary judgment, the plaintiff argues as follows:

> Over the past few years at Tietex, management has engaged in a pattern and practice of replacing older managers with younger ones. Judy Kramer was a lab manager aged approximately sixty-two (62). She was replaced by Rhonda Blanchard who was aged thirty (30) or younger. Bill Lynch was a sixty (60) year old Gray Mill operator, he was replaced by Joey Griffin, who was in his thirties (30s). Leroy McCraw was a sixty year old engineer who was pushed out by Tietex, given a severance and some "consulting" work and then was replaced by Paul Bartley, an engineer in his thirties (30s). Jake Butts,

> sixty-six (66) at time of discharge, was given a severance the month after Harris was terminated. He was replaced by Colin Knight, in his thirties (30s).

(Pl. resp. m.s.j. 16). In his affidavit submitted in opposition to the motion for summary judgment, the plaintiff makes similar allegations. (Pl. aff. ¶ 8). However, the plaintiff's affidavit directly contradicts his prior testimony in his deposition that (1) Judy Cramer retired, and the plaintiff, himself, chose Rhonda Blanchard to replace her; (2) he did not know if Bill Lynch was terminated and replaced with Joey Griffin; and (3) he denied that Leroy McCraw was terminated because of age and replaced with Paul Bartley. (Pl. dep. 201-206). Further, the plaintiff's affidavit contradicts Jake Butts' deposition testimony that he retired voluntarily with an incentive package. (Butts dep. 8-9). The plaintiff admitted in his deposition that he was not sure that Mr. Butts had been replaced because of his age, and he had no evidence that he was. (Pl. dep. 206). Accordingly, as paragraph 8 of the plaintiff's affidavit conflicts with earlier sworn testimony, it is stricken. *See Rohrbough*, 916 F.2d at 975.

This court finds that the plaintiff has failed to establish a *prima facie* case of age discrimination. The defendant has produced evidence showing it had legitimate, non-discriminatory reasons for firing the plaintiff. (Pl. dep., ex. 16, 18, 19; Wallace decl.). Even assuming the plaintiff could establish a *prima facie* case of age discrimination, he has failed to show that the proffered reasons for his termination of employment were pretext for age discrimination as set forth below.

The plaintiff points to several "material disputes of fact" that he argues shows age discrimination was the reason for his termination of employment. First, the plaintiff notes "[g]ross inaccuracies in Wallace's timeline testimony" with regard to the events of July 3, 2007. (Pl. resp. m.s.j. 12). Specifically, the plaintiff contends Mr. Wallace "relates a totally inaccurate timeline as to when the Hexion representative was at Tietex." Also, the plaintiff contends Mr. Wallace "made false statements in the termination memo" by wrongly stating that the plaintiff instructed the Hexion employee to deliver the sulfuric acid to Tietex.

(Pl. resp. m.s.j. 12). Assuming the plaintiff is correct, it is unclear how these facts are material to the issue of whether the plaintiff was terminated because of his age. As argued by the defendant, the Hexion employee's visit to Tietex is relevant only to the extent that it is what alerted Mr. Wallace to the fact that the plaintiff was not working at Hexion as he said he would be. Here, even assuming Mr. Wallace was motivated to terminate the plaintiff's employment based on an incorrect fact (that is, the timeline or whether the plaintiff asked the Hexion employee to deliver the sulfuric acid), this does not equate to being motivated by age.

The plaintiff next contends that Jake Butts' opinion of the plaintiff's performance and work hours is evidence that Mr. Wallace manufactured these performance deficiencies. While Mr. Butts testified that he did not have a problem with the plaintiff's "odd" work hours or performance, it is clear that Mr. Wallace did. However, the plaintiff has presented absolutely no evidence that Mr. Wallace's expectations of the plaintiff were motivated by age. Establishing "new, higher standards raises no suspicion of discrimination by itself; the courts must accept the employer's legitimate standards of qualification 'provided the decision is not based upon unlawful criteria.'" *Bossalina v. Lever Brothers, Inc.*, No. 86-2158, 1988 WL 60572, *2 (4th Cir. 1988) (quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981)).

Based upon the foregoing, the plaintiff has failed to show that issues of material fact remain. Accordingly, his discharge claim fails.

Retaliation

The plaintiff also alleged he was terminated from his employment in retaliation for his complaints about "past problems" to his former supervisor, Jake Butts. (Pl. dep. 184). Retaliation claims under the ADEA are governed by the *McDonnell Douglas* framework for circumstantial evidence, requiring the plaintiff to establish a *prima facie* case showing: (1)

he engaged in protected activity; (2) the defendant took adverse action against him; and (3) a causal connection existed between the protected activity and the adverse action. *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 191 (4th Cir. 2001). Protected activity may be in the form of participation in the charge filing process or protesting unlawful age discrimination in the work place. *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998).

The plaintiff claims he stated to his former supervisor, Jake Butts, in 2004 or 2005 that older workers seemed to be replaced by younger workers and that this concerned him. The plaintiff was terminated from employment on July 19, 2007. The plaintiff admits that Mr. Butts was not in a position to influence his employment status at the time of his termination from Tietex. He further admits he has no evidence that Mr. Butts told anyone about his conversation with the plaintiff, and no one else was present. The plaintiff testified that his only evidence that he was retaliated against was the fact that he was terminated. (Pl. dep. 180-84, 207, 210).

The plaintiff has absolutely failed to show any causal connection between the statements made to Mr. Butts and his termination. The two events are not closely related in time, there is no evidence anyone other than Mr. Butts was aware of the statements, and Mr. Butts had no influence or involvement in the plaintiff's termination from employment.

The plaintiff argues in his opposition to the motion for summary judgment that he met with Tietex's owner, Martin Wildeman, on June 21, 2007, "to address the discrimination and other problems he was experiencing with...Wallace." (Pl. resp. m.s.j. 5). He cites to his own affidavit submitted in support of his opposition memorandum. In that affidavit, the plaintiff states in pertinent part, "Specifically, on June 21, 2007, just two weeks before I was suspended, I met with Martin Wildeman, and addressed the issues of . . . 2) Discrimination . . . . Clearly, I reported discrimination right before I was fired to the highest authority at Tietex - the owner." (Pl. aff. ¶ 5). In his affidavit, the plaintiff cites a document that he created listing bullet points including "Discrimination" for a meeting with "Martin" on

June 22, which is marked through and replaced with June 21. The plaintiff's own handwritten notes on the document characterize the list as "topics I *would* go over." (Pl. aff., ex. D) (emphasis added). The plaintiff further states in his handwritten notes on the document, "I recall very little about what was discussed. I do recall that the owner refused to get into discussion, was of no support and aborted the meeting rather suddenly." (*Id.*). In his deposition testimony, the plaintiff testified that he could not recall ever having mentioned age discrimination to Mr. Wildeman. (Pl. dep. 176-78). The plaintiff confirmed on the document that Mr. Wildeman "was not provided a copy of this listing", so Mr. Wildeman did not even know that "Discrimination" was to a be a "topic" of discussion. (Pl. aff., ex. D). Based upon the foregoing, the plaintiff has provided no evidence he discussed discrimination with Mr. Wildeman. Further, as the statement in the plaintiff's affidavit is conclusory, not factual, and contradicted by the document he relies upon and his earlier sworn deposition testimony, this court grants the defendant's motion to strike this portion of paragraph five of the plaintiff's affidavit.

The plaintiff also contends he was not terminated until after he made "final complaints of mistreatment" on July 18, 2007. (Pl. resp. m.s.j. 9). The plaintiff cites to Human Resource Director David Wilson's testimony before the South Carolina Employment Security Commission that he allowed the plaintiff to "vent" prior to his termination. However, Mr. Wilson makes no reference to the plaintiff mentioning age discrimination or age in any way. (*Id.*, ex. 19 at 22-23). In his response to the motion for summary judgment, the plaintiff does not allege that he complained he was being discriminated against because of his age, only that, in his view, he was being treated unfairly. (Pl. resp. m.s.j. 9). As noted by the defendant, many people who are about to be terminated from their employment believe they are being treated unfairly, but expressing that feeling is not protected activity. *See* 29 U.S.C. § 623(d).

In summary, the plaintiff has absolutely failed to show any causal connection between the statements made to Mr. Butts and his termination. The plaintiff admitted he cannot remember discussing age discrimination with Mr. Wildeman. Further, he never used the term "age" or "discrimination" when describing his "venting" to Mr. Wilson, only that he was being treated unfairly. In addition, the plaintiff has come forward with no evidence that he complained of age discrimination to his supervisor, Mr. Wallace. Based upon the foregoing, the plaintiff's retaliation claim should be dismissed.

State Law Claims

As it is recommended that the plaintiff's federal claims be dismissed, the court should decline to exercise supplemental jurisdiction over the plaintiff's state law claims for breach of contract, breach of contract accompanied by a fraudulent act, and defamation. 28 U.S.C. § 1367(c); see United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").

CONCLUSION

Wherefore, based upon the foregoing,

IT IS ORDERED that the defendant's motion to strike (doc. 111) is granted in part as set forth above. To the extent the defendant moved to strike portions of the plaintiff's affidavit not discussed herein, such motion is moot. Further,

IT IS RECOMMENDED that the defendant's motion for summary judgment (doc. 68) be granted as to the ADEA claims, and that the court decline supplemental jurisdiction over the plaintiff's state law claims.

July 29, 2010
Greenville, South Carolina

s/Kevin F. McDonald
United States Magistrate Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Gary G. Harris,

Plaintiff,

vs.

Tietex International, Inc.,

Defendant.

Civil Action No. 7:08-3020-HFF-WMC

ORDER

This matter is before the court on the plaintiff's motion to reopen discovery and postpone summary judgment (doc. 78). In his complaint, the plaintiff alleges that the defendant, his former employer, terminated his employment in retaliation for his complaining about age discrimination toward other employees in violation of the Age Discrimination in Employment Act ("ADEA"). He also alleges state law claims against the defendant for breach of contract, breach of contract accompanied by fraudulent acts, and defamation.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Rule 73.02(B)(2)(g), D.S.C., all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

On August 4, 2009, this court granted the motion of the plaintiff's original attorney, Richard Stewart, to be relieved as counsel. The order provided that, "[a]ll deadlines are stayed pending further action of the court." The August 4 order gave the plaintiff until Friday, September 4, to find new counsel. On August 28, the *pro se* plaintiff, with the defendant's consent, filed a motion to amend the scheduling order for the sole purpose of extending the trial date. On September 10, this court entered a third amended scheduling order, extending the trial date until April 5, 2010, and also extending related pretrial deadlines. In the amended scheduling order, the deadline for dispositive motions was extended until September 22, but the discovery period, which closed on August 24,

was not extended. According to the defendant, both the plaintiff and defendant agreed that additional discovery was not needed. The plaintiff's former counsel had served the defendant with written discovery on July 20, and the defendant responded to it on August 21. The scheduling order had been amended twice to allow more time for discovery. The defendant filed a motion for summary judgment on September 22, 2009.

On October 5, 2009, the plaintiff's current counsel filed a notice of appearance, and on October 26, the plaintiff filed the instant motion pursuant to Federal Rule of Civil Procedure 56(f). In the motion to reopen discovery, the plaintiff argues:

> Important discovery pertaining to material facts in controversy was never pursued by Harris' counsel. For example Harris' counsel never issued discovery to receive and produce phone records, the guest register for a chemical vendor, and/or test reports and machine production records regarding plant trials at Tietex, among other things. Most glaringly, Harris' counsel never took a *single* deposition of Tietex's witnesses!

(Pl. m. to reopen discovery at 3). The plaintiff asks for a 120-day extension of discovery and asserts that the defendant will not be prejudiced as it would be allowed to renew its motion for summary judgment at the end of that period. The defendant opposes the motion, arguing that the plaintiff has had ample opportunity to conduct discovery (15 months and two extended scheduling orders), that the defendant would be unfairly prejudiced since it has already filed a motion for summary judgment revealing its theories and arguments, and that the plaintiff has not met his burden of identifying any "evidence" that would create genuine issues of material fact. The defendant also notes that the plaintiff's argument regarding former attorney Jason Kellett's suspension from the State Bar is disingenuous as the only attorney for the plaintiff with whom the defendant ever dealt was Richard Stewart.

On November 13, 2009, this court ordered the plaintiff to file a document within 10 days identifying (1) the names of the persons he seeks to depose and the relevance of such depositions; and (2) the documents he seeks and the relevance of such

documents. On November 23, 2009, the plaintiff filed a document identifying nine depositions and the documents he seeks. No depositions were taken by the plaintiff's former counsel. The defendant opposes the motion, arguing that the plaintiff has not shown sufficient relevance for the depositions or documents. As to the documents sought by the plaintiff, the defendant notes that it has already provided its policy manual and Guzman's personnel file to the plaintiff during discovery. Further, the defendants note that to the extent the plaintiff seeks his own cell phone records, he can obtain those through his own service provider. The plaintiff also seeks "sign-in records at Hexion," gate records for the defendant's facility, plant production trial data, formulas and tests conducted by the plaintiff; and travel records for a trip to Indiana. As relevance for these documents, the plaintiff states that they will show his work performance and corroborate his testimony. As discussed above, the plaintiff's former counsel served written discovery, and the defendant responded to written discovery, during the discovery period. This court finds that the plaintiff has failed to show that additional written discovery is essential to justify his opposition to the motion for summary judgment. *See* Fed.R.Civ.P. 56(f).

Based upon the foregoing, the plaintiff's motion (doc. 78) is granted in part and denied in part. Discovery is reopened in this case until December 31, 2009, for the limited purpose of the taking of three depositions, which the plaintiff shall choose from the list of nine requested depositions. No further written discovery will be allowed. The defendant will then have until January 8, 2010, to supplement its motion for summary judgment, and the plaintiff's response to the motion for summary judgment will be due within 14 days of the filing of the defendant's supplement.

IT IS SO ORDERED.

December 1, 2009
Greenville, South Carolina

s/William M. Catoe
United States Magistrate Judge

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS
Gary G. Harris, Plaintiff, vs. Tietex International, LTD., Defendant(s)	)	CIVIL ACTION COVERSHEET 2008- CP -42 - 4316

(Please Print)
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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

X **JURY TRIAL** demanded in complaint. **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
X This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (*Check One Box Below*)

Contracts
☐ Constructions (100)
☐ Debt Collection (110)
X Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Notice/ File Med Mal (230)
☐ Other (299)

Torts – Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
Other (399)

Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

Inmate Petitions
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)

Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)

Submitting Party Signature: _____ **Date:** August 15, 2008

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

EXHIBIT A

FOR MANDATED ADR COUNTIES ONLY
Florence, Horry, Lexington, Richland, Greenville and Anderson

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	**SUMMONS**
	)	
vs.	)	C.A. No.: 2008-CP-42-4316
	)	
Tietex International, LTD	)	
	)	
	)	**(Jury Trial Demanded)**
Defendant.	)	
	)	

TO: THE ABOVE NAMED DEFENDANT

YOU ARE HEREBY SUMMONED and required to answer the complaint of the Plaintiff in this action, a copy of which is herewith served upon you, (which was filed in the office of the Court of Common Pleas on the date indicated on the file stamp) and to serve a copy of your answer to the complaint upon the subscriber at 714 East McBee Avenue, Greenville, South Carolina, 29601, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the complaint within that time, a judgment by default will be rendered against you for the relief demanded in the complaint.

Richard S. Stewart (S.C. Bar No. 71720)
KELLETT & STEWART
714 East McBee Avenue
Greenville, SC 29601
864-271-9884

Attorneys for Plaintiff,
Gary G. Harris

Greenville, SC
August 15, 2008

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STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)	
)	
Gary G. Harris,)	
)	
Plaintiff,)	**COMPLAINT**
)	
vs.)	C.A. No.: 2008-CP-42-4316
)	
Tietex International, LTD)	
)	
)	**(Jury Trial Demanded)**
Defendant.)	
)	

The Plaintiff, complaining of the Defendant herein, would show unto this Honorable Court as follows:

1. Defendant Tietex International, LTD (hereinafter "Tietex") is a corporate entity organized and existing pursuant to the laws of South Carolina and which transacts business with offices and agents in Spartanburg County, South Carolina.

2. Plaintiff is a citizen of Spartanburg County, South Carolina, and was employed by Tietex from approximately 1994 to July of 2007. Plaintiff is a 63 year-old male, having been born on October 16, 1944.

3. On or about July of 2007, Plaintiff was terminated from the Defendant's employ. Prior to this time, he had heard employees in management make negative or disparaging comments, some directed toward him, concerning the ages of older employees and making reference to wanting to get younger people into management.

4. On or about this time, the Defendant replaced numerous older employees with younger employees, culminating in the Plaintiff's termination and his replacement with an employee

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approximately half his age with inferior qualifications. His termination was effective on or about July of 2007.

5. Thereafter, Plaintiff timely filed a Charge of Discrimination with the EEOC, alleging discrimination due to his age and retaliation. The EEOC issued a right to sue notice on May 22, 2008, which Plaintiff received on or about the following week.

FOR A FIRST CAUSE OF ACTION

(For Retaliation and Discrimination Pursuant to the Age Discrimination in Employment Act)

6. Plaintiff incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

7. Plaintiff timely filed a charge with the EEOC and has exhausted all administrative remedies prerequisite to the institution of this action and has filed this action within 90 days of receiving his Notice of Right to Sue letter from the EEOC.

8. The Plaintiff is a member of a protected class pursuant to 29 USC §621 *et seq.*, the Age Discrimination in Employment Act.

9. During all relevant times Plaintiff and Defendant satisfied the ADEA definition of employee and employer.

10. Plaintiff was terminated from his position without just cause in July 2007. Certain individuals in their 20s and 30s who were in similar positions to Plaintiff were allowed to remain, treated with preference, and even hired to replace older employees. Plaintiff was replaced by a newly hired employee approximately half his age.

11. Defendant's explanation for Plaintiff's termination was and is a pretext for discrimination.

12. Plaintiff was terminated because of his age. Plaintiff was treated in a disparate manner in relation to younger employees in the terms and conditions of his employment.

13. Plaintiff was retaliated against for bringing certain issues, including those related to discrimination, to the attention of his supervisors.

14. In terminating and treating Plaintiff in a disparate manner, Defendant violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.*

15. As a direct and proximate result of this intentional discrimination, Plaintiff has lost employment at a time in his career when employment opportunities are limited. Plaintiff has been damaged emotionally and has been unable to find substitute employment with income and benefits comparable to the position from which he was terminated.

16. Plaintiff has also suffered severe emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, embarrassment, humiliation, past, present, and future loss of income, and other economic damages.

17. Therefore, Plaintiff requests that this Court award Plaintiff back pay, with interest thereon, from the date of his discharge until the age of retirement; award Plaintiff liquidated damages, in an amount equal to the sum of all awards, for Defendant's willful violation of the ADEA, including the costs of this action, including attorney's fees.

FOR A SECOND CAUSE OF ACTION

(Breach of Contract)

18. Plaintiff incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

19. As an employee of Defendant, Plaintiff was trained regarding the formal policies of the Defendant, including those described to him by his supervisors and those memorialized in writing. These policies included but were not limited to a progressive discipline policy.

20. Plaintiff alleges that the above policies were binding promises that applied to him in his employment, and these statements were mandatory in nature. Therefore, these written polices constitute an enforceable part of Plaintiff's contract of employment.

21. Defendant, by and through its agents, violated the mandatory terms contained in Plaintiff's employment contract, denied rights guaranteed to him by his employment contract, and otherwise treated him in a manner contrary to the policies published by and explained by Defendant by and through its agents. Further, Defendant's reasons for terminating Plaintiff were pretextual and not in good faith.

22. As a direct and proximate result of the breach of the employment contract between the parties, the Plaintiff has been harmed in that he has been and will be denied benefits to which he is entitled under the contract, has lost wages and benefits to which he was entitled through his employment, has had his reputation and his work record harmed and damaged and undergone mental anguish and humiliation. Accordingly, Plaintiff is entitled to actual and punitive damages as determined by a jury.

FOR A THIRD CAUSE OF ACTION

(Breach of Contract Accompanied by a Fraudulent Act)

23. Plaintiff incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

24. Plaintiff was an employee of Defendant and the parties enjoyed a contractual relationship. As described more fully above, Plaintiff alleges that the above promises, policies and procedures communicated by Defendant constitute an enforceable contract.

25. Defendant committed fraud by fabricating pretextual reasons to deprive Plaintiff of the rights guaranteed to him under his contract with Defendant, knowing these reasons were false.

26. Accordingly, Plaintiff is informed and believes that as a result of the foregoing breaches by Defendant, he is entitled to actual and consequential damages as determined by the triers of fact.

38. Furthermore, Plaintiff is informed and believes that he is entitled to punitive damages to deter Defendant from future similar acts.

FOR A FOURTH CAUSE OF ACTION

(Defamation)

39. Plaintiff incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

40. Upon information and belief, the Defendant has issued false statements containing defamatory meaning about the Plaintiff since his termination.

41. These statements concern the Plaintiff's alleged lack of competence and acumen in his trade and profession.

42. The Defendant's publication of its defamatory accusations of the Plaintiff was with actual malice, and such information was communicated with reckless disregard of its truth, and designed to wantonly injure the Plaintiff without cause.

43. The Defendant's publication of these false allegations against the Plaintiff was to third parties in the Plaintiff's trade and profession.

44. The Plaintiff has suffered damages that are legally presumed, as well as special damages including but not limited to embarrassment, humiliation, and mental suffering. Further, his character and reputation has been damaged as a direct consequence of the Defendant's actions.

45. Accordingly, Plaintiff is informed and believes that he is entitled to actual and consequential damages as determined by the triers of fact.

46. Furthermore, Plaintiff is informed and believes that he is entitled to punitive damages to deter Defendant from future similar acts.

WHEREFORE, having stated his complaint against the Defendant, Plaintiff prays for the following relief: (1) back pay, (2) front pay, (3) attorney's fees and costs, and (4) such actual and punitive damages as determined by the trier of fact; and (5) such other and further relief as this Court deems just and proper.

Richard S. Stewart (S.C. Bar No. 71720)
KELLETT & STEWART
714 East McBee Avenue
Greenville, SC 29601
864-271-9884

Attorneys for Plaintiff,
Gary G. Harris

Greenville, SC
August 15, 2008

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

GARY G. HARRIS)
Plaintiff(s))

vs.)

TIETEX INTERNATIONAL, LTD.)
Defendant(s))

CIVIL ACTION COVERSHEET

2011 -CP- 42 - 4538

(Please Print)
Submitted By: GARY G. HARRIS
Address: 220 ST ANDREWS BLVD
CAMPOBELLO, SC 29322

SC Bar #:
Telephone #:
Fax #:
Other:
E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☑ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☑ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

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NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- Previous Notice of Intent Case # 20____-CP-____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☑ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: Gary G. Harris Date: 10/21/11

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gary G. Harris Plaintiff vs. Tietex International, Ltd. Defendant	IN THE COURT OF COMMON PLEAS SUMMONS File No. 2011-CP-42 - 4538

TO THE DEFENDANT ABOVE - NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at 220 St. Andrews Blvd, Campobello, S.C. 29322, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for relief demanded in the complaint.

Spartanburg, South Carolina

Gary G. Harris

Gary G. Harris - Plaintiff

Dated: October 21, 2011

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SPARTANBURG)	Case number: 2011 - CP - 42 - 4538
)	
Gary G. Harris)	
Plaintiff)	COMPLAINT
)	
v.)	
)	
Tietex International, Ltd)	
)	JURY TRIAL REQUESTED
Defendant)	

Previous History of Complaint

A Defamation complaint was originally filed along with other complaints including age discrimination against Tietex International in August of 2008 as Case Number 2008-CP-42-4316. The case was moved to Federal District Court in Greenville, South Carolina under the case: C.A. No. 7:08-cv-03020

On October 28 of 2010 the Federal District Judge supported an earlier Order and Report opinion by the Federal District Magistrate Judge that the Defamation part of the lawsuit was a matter for state court. This is based upon information and belief.

COME NOW THE PLAINTIFF complaining of the Defendant and would respectfully show unto this Honorable Court the following:

1. The Plaintiff is now a resident of Greenville County, South Carolina.

2. Upon information and belief, the defendant is a South Carolina Corporation with its principle place of business at 3010 North Blackstock Road in Spartanburg, South Carolina 29301.

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Basis of Claim

3. Defendant employees colluded and contrived a plan to get rid of the Plaintiff when the Plaintiff was employed at Tietex International, Ltd.

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4. Tietex employees Mark Isbell, Wade Wallace and HR manager David Wilson colluded and collaborated to create "cause" so that a case could be made for terminating the Plaintiff.

5. For months leading up to the Plaintiff's termination, Wallace maliciously published memos containing knowingly false and defaming information about the Plaintiff's job performance, character and capabilities. The published documents contained numerous elements stated as fact that were defaming, were maliciously and knowingly false and which caused and would cause significant damage to the Plaintiff.

6. The maliciously defaming statements would be passed on to top management. The maliciously false and defaming statements, stated as fact, would be the basis for and grounds on which the defendant employees would base their claim that the Plaintiff should be and would be terminated by his employer.

7. Based on the Plaintiff good employee standing and previous track record with Tietex International, the defendant employees considered the libelous and defaming memos as necessary in order to create "cause" that would lead to Plaintiff termination.

8. During 2002-2005 Mark Isbell gained control of the Tietex manufacturing operation. The Plaintiff was involved in Technical management areas during that time - not directly involved with Isbell. Two young Mark Isbell protégés, Wade Wallace (hired by Isbell at the age of 26 in 2000) and Joey Griffin, were given top managerial jobs by Isbell. Such decisions often ignored the standing and rights of older employees. Age discrimination and mistreatment of older employees became a covert topic of discussion at Tietex. Discrimination and racial slurs against two black employee were also of note.

9. The Plaintiff was very much aware of the discriminatory practices taking place. The Plaintiff was highly concerned because of the negative impact the unlawful practices would have on the company well being. When the Plaintiff made a serious decision to take the Tietex job in 1994, plans were that he would retire from Tietex. Therefore, company well-being and good performance were even more important.

10. Out of high concern, the Plaintiff made a visit to the EEOC about the discriminatory practices to see what recourses were available. Primarily the Plaintiff was looking for some possible remedial action that would not be disruptive. No help came from that effort. Some time later the Plaintiff went directly to his boss and requested that something be done. Not long after that, the Plaintiff was demoted two levels and assigned to report to Wade Wallace. That demotion occurred on February 1, 2007.

11. In early December of 2006, prior to his being assigned to report to Wallace, the

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Plaintiff had an important visit from the Tietex company owner Martin Wildeman. Typically, Mr. Wildeman stayed out of mainstream running of the company and attendant problem areas, preferring instead to let his top managers have full control.

12. The Plaintiff was asked to try to develop a less costly back coating for a large volume, popular Tietex fire barrier mattress fabric called C237. The cost of the C237 was being driven way up by an expensive back coating purchased from Noveon (Lubrisol).

13. Wildeman said Tietex was losing money with C237. The owner further told the Plaintiff that competition was out to take Tietex business by offering the Tietex customers less costly barrier fabrics. The owner said Tietex could not afford to go any lower with C237 prices to meet that competition.

14. Mark Isbell and his manager Wade Wallace were directly responsible for the C237 program and for development of Tietex products and, therefore; ultimately for the cost of such products. In December 2006 the sales lady for Noveon (Lubrisol) had been calling on Wallace at Tietex for more than a year and nothing of consequence had been done during that time about the over priced Noveon (Lubrisol) back coating compound.

15. By January 26, 2007 the Plaintiff had fully developed a viable replacement for the Noveon (Lubrisol) compound. It would save Tietex more than 3 million dollars annually if implemented into the Tietex C237 program.

16. Six days later on February 1, 2007 the Plaintiff mysteriously was told to report to Mark Isbell's office (Wallace's boss) for assignment to his new boss. First words out of Isbell's mouth when the Plaintiff entered Isbell's office were "You're mine now". Isbell told the Plaintiff that he would be reporting to Wade Wallace.

17. One of Wade Wallace's first directives was to ban the Plaintiff from going into the Tietex Technical building. A pretext reason was given for that banning. That building was the only place on the premises where the Plaintiff could do meaningful projects and development work. Wallace was well aware of that. Wallace further "justified" his move by announcing that the Plaintiff could order whatever equipment he needed and set up a laboratory operation in the main plant of the Tietex operation. All efforts made by the Plaintiff to set up a place to do meaningful work in the plant were thwarted by Wallace.

18. Wallace quickly set in to make things as miserable as possible for the Plaintiff. On February 7, 2007 Wallace made a visit to the Plaintiff's small make shift office area in back of the Tietex facility and verbally unloaded on the Plaintiff "for having ignored project requests." Wallace closed out the verbal onslaught by threatening the Plaintiff with if the Plaintiff did not shape up Tietex would be hiring another chemist.

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19. On February 9, 2007 Wallace would produced and issued a false and pretext memo regarding the events of two days earlier. The Plaintiff was not copied and would not know of that memo until many months later-after his termination.

20. On the morning of March 5, 2007 Wallace called the Plaintiff by phone and told the Plaintiff to come to Wallace's office for a 30-day review. When the Plaintiff arrived Wallace said that they needed to go to David Wilson's office (Wilson was a relatively new HR manager) so Wilson could sit in on the meeting.

21. In Wilson's office Wallace made numerous false, defaming and unfounded accusations. Wallace closed the meeting by informing the Plaintiff that he had 30 days to shape up or Tietex would be hiring a new chemist. Stunned by the accusations, the Plaintiff requested that Wallace email a listing to him of those areas in which he needed to shape up so he would not forget them. Wallace obliged by producing and issuing another knowingly false and defaming memo.

22. The Plaintiff made a special visit to speak face-to-face with HR manager David Wilson regarding what was happening to him. Wilson was short and not open to listening to the Plaintiff. Wilson ended the short meeting by telling the Plaintiff that "If you want to keep your job I advise to keep your mouth shut and do what you are told to do."

23. The Plaintiff barrier fabric back coating formula finalized just days earlier was a huge topic with Wallace since it involved an area of responsibility where Wallace and his boss Isbell had in essence let the company down. Wallace, during the first week of February 2007 told the Plaintiff that the compound would have to be made by an outside vendor. The Plaintiff had no problem with that directive in that Tietex could still generate a savings of close to 3 million dollars annually going that route.

24. One of the most significant items regarding the Plaintiff's C237 barrier fabric compound project was that it would necessarily take several months to play out. Since it was mandated by the company owner, Wallace and Isbell were in no position but to allow the project to run its course. Over the months that followed Wallace and Isbell did everything necessary to make sure the Plaintiff C237 project "failed".

25. In mid June of 2007 Mark Isbell went to see the Tietex owner and told the owner that the Plaintiff had failed miserably with two important projects and essentially told the owner that something had to be done.

26. On June 18, 2007 Wallace called the Plaintiff to his office. Once there Wallace presented the Plaintiff with a memo report regarding Plaintiff failures in two key

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projects. One of those "failures" was the C237 mattress fire barrier fabric replacement compound project. The memo was full of false and defaming statements. Wallace told the Plaintiff that he had 30 days to remedy the situation or he would be replaced.

27. The Plaintiff would later learn that the Wallace June 18 memo was prompted by Mark Isbell's earlier mid June visit to see the owner. It would also become evident later that Isbell had already met a 25 year old lady who was a Milliken employee, a textile chemist, and who was the evening bartender at a local bar where Isbell had connections. That young lady would be hired as the Tietex Chemist after the Plaintiff was terminated.

28. Strangely on June 18, 2007 the same day of what was dubbed "the final written warning" memo, Wallace assigned the Plaintiff a Project that would become known as the "TriBlend" project. That project had nothing to do with the two so-called "failed" projects listed in Wallace's June 18, 2007 memo.

29. The TriBlend project would require that the Plaintiff go to a local chemical sales company called Hexion to use their lab. The Plaintiff was still banned from the Tietex lab building. Wallace expressed that he had no problems with the Plaintiff going to an outside lab to get the project done. In the days following June 18 the Plaintiff started the TriBlend project. The Plaintiff needed time off during the week of June 25, 2007 and took approved vacation for that week. In spite of it being vacation, the Plaintiff did some project work that week.

30. Near the end of that vacation week Wallace left a phone message for the Plaintiff telling the Plaintiff that he needed to come back to work first of the following week (week of July 2, 2007) and get the TriBlend project finished before he (Wallace) left for a European Vacation. The Plaintiff felt that it would take 2-3 hours to complete the project and it would be completed at Hexion. The Plaintiff called Wallace and acknowledged that he had received Wallace's message.

31. On Monday July 2, 2007 the Plaintiff spent the entire day doing an EPA Form R report for the Tietex Environmental coordinator who needed help with the report. The Plaintiff called Wallace and mentioned to Wallace that he would go to Hexion on Tuesday to finish the TriBlend project for Wallace. Wallace concurred.

32. On the evening of Monday July 2, 2007 when the Plaintiff arrived home, his wife was very frantic and scared because fire ants were coming into the house at several different locations. She was highly allergic to fire ant bites. The Plaintiff called Wallace's work phone, got no answer and left a message indicating that he was going to take care of the fire ant problem Tuesday morning first thing and then would go on to

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Hexion to finish the TriBlend project. That phone call followed standard procedure for the Tietex operation and also per the arrangement between Plaintiff and Wallace.

33. On Tuesday, July 3, 2007 after taking take care of the ant problem the Plaintiff showered and went to Hexion to complete the TriBlend project for Wallace.

34. The Plaintiff could not get into Hexion because everyone was tied up in a staff meeting (the Plaintiff would learn this later). The Plaintiff then started looking for another place nearby where he could wrap up the project.

35. Later that day Wallace called the Plaintiff on his cell phone. Wallace first asked the Plaintiff to come to his office but when he learned the Plaintiff was not at Tietex he banned the Plaintiff from Tietex with no cause until July 19 after he had returned from his European vacation. It soon became apparent to the Plaintiff that Wallace had planned to terminate him on Tuesday July 3, 2007 before he left for his European vacation.

36. Following Plaintiff termination Tietex was obviously concerned that the Plaintiff could take a job with a mattress barrier fabrics competitor. Based on reliable information false and defaming rumors about the Plaintiff were spread outside the company.

37. One example: Not long after termination a former Tietex employee who was then working with a Tietex mattress fabrics competitor informed the Plaintiff of rumor out in the industry about why the Plaintiff was terminated. The Plaintiff was told word apparently had been put out that the Plaintiff was involved in a Tietex customer test report falsification issue and was terminated as a result. Some research into the matter indicated that a Tietex customer as far away as Texas had heard rumors about the reason for Plaintiff termination.

38. The memo issued by Wade Wallace on February 9, 2007 was pretext and contained false statements about the events of February 7. That memo belittles Plaintiff mental stability. Wallace has no evidence to support the content of the memo.

39. False and defaming statements made in a March 5, 2007 memo issued by Wallace belittle the Plaintiff's character and work ethic. Every point made by Wallace was been denied by the Plaintiff. Again, Wallace was making false and defaming accusations; therefore, there was and is no proof.

40. After Wallace and Isbell allowed the Plaintiff C237 project to sufficiently and necessarily run its course, they then colluded to produce a June 18, 2007 "final written warning" memo that would portray the Plaintiff as grossly incompetent with regard to

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doing his job. The false and defaming statements about two projects made in that report would be the "nail in the coffin" with regard to laying the groundwork for getting the Plaintiff fired. Of course witnesses but importantly Plaintiff documentation will show untruths in and pretext nature of that memo.

41. On July 18, 2007 one day before the Plaintiff was going to be terminated, Wallace put together a final memo in which he recommended termination of the Plaintiff. The memo was nothing but a compilation of knowingly false and defaming statements many already published in earlier memos.

42. The malicious, unjustified banning of the Plaintiff from Tietex premises by Wallace on July 3, 2007 hurt the Plaintiff reputation in the eyes of his coworkers.

DAMAGES

43. The Plaintiff, by gross unfairness, lost his job of 13 years and has been unable to find employment directly as a result of unlawful actions of his former employer.

44. The Plaintiff's ability to restart a career relative to his college degree was essentially destroyed by the defaming actions of his former employer.

45. The Plaintiff's efforts to restart a career as a consultant were short-lived. The Plaintiff feels confident this is because of defaming remarks made by Tietex.

46. Plaintiff's wife/family have sacrificed and have suffered undeserved emotional and other damages as a direct result of the defendant's unlawful actions. In particular, the past few years the Plaintiff's wife has been through a very difficult time mentally and physically as a direct result of the unlawful actions by the Plaintiff former employer.

47. The Plaintiff firmly believes and that the facts will show he was or has been a victim of Defamation and Defamation *per se*. The extent of the defamation is such that the Plaintiff also firmly believes that *special damages* have occurred.

Submitted October 21, 2011 Gary G. Harris

Gary G. Harris
220 St. Andrews Blvd.
Campobello, S.C. 29322
864-316-8019

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
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COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	**NOTICE OF APPEARANCE**
Plaintiff,	)	
v.	)	
	)	
Tietex International, Ltd.,	)	C.A. No: 2011-CP-42-4538
	)	
Defendants.	)	
	)	

YOU WILL PLEASE TAKE NOTICE that the Lazenby Law Firm will hereafter represent Gary G. Harris in the above referenced matter. All further communication intended for the Plaintiff Gary G. Harris should be directed to the below listed attorneys.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR -8 AM 11:05
M. HOPE BLACKLEY

D. Alan Lazenby
R. Patrick Martin
Lazenby Law Firm
134 Oakland Avenue
P.O. box 6099 (29304)
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Fax: (864) 804-5051
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Patrick@lazenbylawfirm.com

By: D. Alan Lazenby

D. Alan Lazenby
R. Patrick Martin
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March 8, 2012

ATTORNEYS FOR PLAINTIFF

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2004 MAR -3 AM 11:05
M. JOHN CLERK

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG)	
)	CASE NO.: 2011-CP-42-4538
)	
Gary G. Harris)	**MOTION AND ORDER INFORMATION**
Plaintiff,)	**FORM AND COVERSHEET**
vs.)	
)	
Tietex International, Ltd.)	
Defendant.)	

Plaintiff's Attorney:	Defendant's Attorney:
D. Alan Lazenby, Bar No. _____	Fred Suggs, Jr., Bar No. _____
Address:	Address:
P.O. Box 6099, Spartanburg, SC 29302	PO Box 2757, Greenville, SC 29602
Phone: 864-804-5050Fax 864-804-5051	Phone: 864-271-1300 Fax864-235-4754
E-mail: alan@lazenbylawfirm.com Other: _____	E-mail: _____ Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Plaintiff's Motion to Amend Complaint
Estimated Time Needed: 15 Minutes Court Reporter Needed: ☒YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff /☐ Defendant — April 6, 2012 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other:	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

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SPARTANBURG COUNTY
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J. HOPE BLACKLEY

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	**MOTION TO AMEND COMPLAINT**
Plaintiff,	)	
v.	)	
	)	
Tietex International, Ltd.,	)	C.A. No: 2011-CP-42-4538
	)	
Defendant.	)	
	)	

Plaintiff hereby moves the Court for an Order, pursuant to Rule 15(a), SCRCP, allowing it to amend its Complaint in order to clarify the factual allegations and add additional causes of action against Defendant. All claims Plaintiff seeks to add relate to Defendant's conduct in this case and therefore all claims should relate back to the date of the original filing.

Further in support of this Motion, the undersigned notes that Plaintiff filed the operative Complaint, *pro se*, without the assistance of counsel. An amendment is needed in order to properly set for the factual and legal claims in this matter.

Plaintiff asserts that this no party will be prejudiced if the Court grants the Motion. Although the parties have exchanged initial written discovery, Defendant has failed to properly respond to discovery and this failure will need to be taken up by the Court before the parties can take depositions.

This Motion is also based upon South Carolina case law, court rules, affidavits, and any memoranda of authority to be submitted hereafter.

April 6, 2012

By: _____

D. Alan Lazenby
R. Patrick Martin

LAZENBY LAW FIRM, LLC
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P.O. Box 6099 (29304)
Spartanburg, SC 29302
Phone: (864) 804-5050
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ATTORNEYS FOR PLAINTIFF

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR -6 PM 3:13
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	C.A. No.: 2011-CP-42-4538
Plaintiff,	)	
vs.	)	
	)	**SUMMONS FOR AMENDED COMPLAINT**
Tietex International, Ltd.,	)	**(JURY TRIAL DEMANDED)**
	)	
Defendant.	)	
	)	

TO DEFENDANT TIETEX INTERNATIONAL, LTD.:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within fifteen (15) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 SEP 4 PM 4:08
HOPE BLACKLEY

August 31, 2012

By: _____
D. Alan Lazenby
R. Patrick Martin

LAZENBY LAW FIRM, LLC
134 Oakland Ave. (29302)
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	C.A. No.: 2011-CP-42-4538
Plaintiff,	)	
vs.	)	**AMENDED COMPLAINT**
	)	
Tietex International, Ltd.,	)	**(JURY TRIAL DEMANDED)**
	)	
Defendant.	)	
	)	

Plaintiff Gary G. Harris (hereinafter "Plaintiff"), complaining of the above-named Defendant Tietex International, Ltd. (hereinafter "Defendant"), hereby Amends his Complaint and would respectfully show this court the following:

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SPARTANBURG COUNTY
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1. Plaintiff is a citizen and resident of Greenville County, South Carolina.

2. Defendant is a South Carolina Corporation organized and existing under the laws of the State of South Carolina, and maintains its principal place of business in the County of Spartanburg.

3. This Court has jurisdiction over Defendant. Venue is proper in this County pursuant to Section 15-7-30, Code of Laws of South Carolina, 1976, because Defendant has its principal place of business in this County.

FACTUAL BACKGROUND

4. Plaintiff was employed by Defendant Corporation from the summer of 1994 until July 19, 2007.

5. Plaintiff was employed under the Tietex Corporation Policy Manual (hereinafter "Manual"), the terms of which are incorporated herein by reference.

6. The Manual sets out procedures and rules compulsory for Defendant and which are applicable to Plaintiff.

7. Plaintiff was trained in the procedures and rules and instructed extensively on their compulsory nature.

8. Plaintiff performed the role of a Senior Chemist and Technical Manager for Defendant with an extensive job description.

9. Prior to early February, 2007, Plaintiff reported to Defendant employee, Jake Butts who has testified Plaintiff was capable and even "brilliant" in his job duties.

10. On February 1, 2007, Plaintiff was removed from the supervision of Mr. Butts and placed under the supervision of Robert "Wade" Wallace.

11. Among his other duties, Plaintiff was asked by Defendant Corporation owner, Martin Wildeman, to develop a back coating for a fire barrier fabric known as C237 and did so, producing a product in January, 2007 which would have meant a significant cost savings to Defendant Corporation as well as an improvement in product quality control.

12. Prior to this development, Defendant had been forced to purchase the coating compound for the fabric from a company called Noveon at an expensive price.

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SPARTANBURG COUNTY
2012 SEP -5 AM 10:
M. HOPE BLACKLEY

13. Defendant employee, Robert "Wade" Wallace, had ulterior plans for the supply of this back coating which included purchasing from an outside company via someone with whom he had a personal relationship at a loss to Defendant Corporation.

14. Defendant employee, Mark Isbell, conspired to replace Plaintiff with a much younger woman with whom Mr. Isbell had an ongoing personal relationship.

15. Defendant employee, Mr. Wallace, along with Defendant employee, Mr. Isbell began a campaign to set up Plaintiff for failure and eventual termination via harassment, defamation, and intimidation.

16. In February, 2007, Mr. Wallace banned Plaintiff from the technical building of Defendant Corporation, making Plaintiff's job, particularly as it related to the development of the C237 project, nearly impossible.

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SPARTANBURG COUNTY
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17. Mr. Wallace progressively banned Plaintiff from areas in which he needed to work, laying the groundwork for Mr. Wallace's allegations against Plaintiff that he should be terminated for absenteeism.

18. Mr. Wallace, upon becoming Plaintiff's supervisor, harassed and intimidated Plaintiff, to wit, revising Plaintiff's job description, making assertions of Plaintiff's mental incompetence with no compliance to procedure on obtaining help for Plaintiff, beginning a campaign to document any and all performance issues, ignoring Plaintiff's repeated requests for project support, and denying Plaintiff's repeated requests for access to the equipment needed to perform his job.

19. Mr. Isbell, as supervisor to Mr. Wallace, used his position of authority over Plaintiff to intimidate and establish "ownership" over Plaintiff.

20. Plaintiff complied with the policies of Defendant and performed his job well insomuch as Defendant employees did not intentionally make it impossible for Plaintiff to so do.

21. Defendant employees intentionally created an environment in which Plaintiff would struggle to perform his job responsibilities.

22. Defendant employees intentionally berated, harassed, defamed, and persecuted Plaintiff during the course of his employ at Defendant Corporation by making derogatory remarks regarding Plaintiff's age, job performance, mental status, and through verbal intimidation and threats of termination if Plaintiff did not maintain his silence regarding his working conditions.

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SPARTANBURG COUNTY
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23. Defendant employees conspired to put forward false and defamatory reasons for the termination of Plaintiff to achieve ulterior objectives including unwarranted and untrue claims of ineptitude, mental incompetence, and absence from work.

24. Defendant terminated the employment of Plaintiff on July 19, 2007 based upon the pretextual case crafted against him by Defendant employees.

25. Plaintiff was replaced at Defendant Corporation by Patricia Guzman, at the behest of Mr. Isbell who had been conspiring to achieve this end for some time.

FIRST CAUSE OF ACTION

(Breach of Contract)

26. Plaintiff incorporates and re-alleges each and every allegation contained herein above as if fully set forth herein verbatim where not inconsistent with this cause of action and would respectfully show the court the following based on information and belief.

27. Plaintiff was trained and instructed, as an employee of Defendant, in the formal policies and rules both verbally and via materials wherein the rules and procedures were memorialized in writing. These policies and rules included, but were not limited to a progressive discipline policy.

28. The policies and rules delineated to Plaintiff were mandatory for Defendant employees and applied to Plaintiff. These policies and rules constitute a contract of employment enforceable by Plaintiff.

29. Defendant, by and through its employee agents, breached the terms of the Plaintiff's employment contract by way of denying Plaintiff rights guaranteed him by virtue of his contract and by treating Plaintiff in a manner not in accordance with the policies set forth by the contract and by the Defendant Corporation via its employees/agents.

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SPARTANBURG COUNTY
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30. Defendant terminated Plaintiff based upon pretextual reasons and therefore in bad faith.

31. Plaintiff has suffered harm and damages as a direct and proximate result of this breach including the loss of wages and benefits to which he would have been

entitled through his employment, the loss of his good reputation and work history, and mental degradation and humiliation.

SECOND CAUSE OF ACTION

(Breach of Contract Accompanied by a Fraudulent Act)

32. Plaintiff incorporates and re-alleges each and every allegation contained herein above as if fully set forth herein verbatim where not inconsistent with this cause of action and would respectfully show the court the following based on information and belief.

33. The Defendant breached the contract with a fraudulent intent.

34. The breach of contract delineated hereinabove was accompanied by a fraudulent act – to wit, the active conspiring and eventual success of Defendant employees in terminating Plaintiff's employment based upon pretextual reasons not founded in truth and thus in willful violation of Plaintiff's terms and contract of employment as set forth hereinabove.

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SPARTANBURG COUNTY
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HOPE BLACKLEY

35. Defendant's breach of contract and fraudulent acts directly and proximately injured Plaintiff.

36. Plaintiff prays that this Honorable Court would award him actual, consequential, and punitive damages for the Defendant Corporation's breach of contract accompanied by a fraudulent act.

THIRD CAUSE OF ACTION

(Defamation)

37. Plaintiff incorporates and re-alleges each and every allegation contained herein above as if fully set forth herein verbatim where not inconsistent with this cause of action and would respectfully show the court the following based on information and belief.

38. Defendant, through its employees, has issued false statements of a highly inflammatory and defamatory nature regarding the Plaintiff and his professional competence which it published excessively and needlessly both verbally and in written form to third parties.

39. Defendant maliciously publicized the defamatory statements.

40. Defendant showed willful disregard for the rights and reputation of the Plaintiff and showed a reckless lack of temperance in the scope of its publishing of these statements even within the scope of the employer-employee relationship.

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SPARTANBURG COUNT
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M. HOPE BLACKLEY

41. Plaintiff has suffered damages which are presumed by law as well as special damages including humiliation and mental suffering. Furthermore, Plaintiff's character, reputation, and value as a prospective employee have been damaged as a direct result of Defendant's actions.

42. Therefore, Plaintiff is entitled to actual and consequential damages as well as punitive damages for the purpose of deterring the Defendant from future such acts.

FOURTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress)

43. Plaintiff incorporates and re-alleges each and every allegation contained herein above as if fully set forth herein verbatim where not inconsistent with this cause of action and would respectfully show the court the following based on information and belief.

44. Defendant employee agents, with full knowledge and forethought, using their position of power and authority over Plaintiff, sought to bully, intimidate, and humiliate Plaintiff to achieve their own ends, knowing the emotional damage they would and did inflict upon Plaintiff.

45. By virtue of screaming at, lying about, denying workspace and materials to, and setting traps for Plaintiff at a place he was entitled to protection from such behavior and in a manner so egregious as to be intolerable to any normal person, Defendant, by and through its employee agents knowingly and directly caused severe emotional harm and distress to Plaintiff.

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SPARTANBURG COUNTY
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M. HOPE ACKLEY

46. Defendant's conduct was extreme and outrageous, exceeding all bounds of decency.

47. No reasonable man could be expected to endure the distress.

48. Plaintiff suffered emotional and psychological harm and damage as a direct result of this vile, ongoing and constant campaign on the part of Defendant via its employee agents to undermine, ridicule, and be rid of Plaintiff and is entitled to relief in the form of damages both actual, consequential, and punitive.

WHEREFORE, Plaintiff prays for the damages outlined in the Amended Complaint, for a trial by Jury, and for such other relief as the Court deems just and proper.

August 30, 2012 By:

D. Alan Lazenby, Esquire
R. Patrick Martin, Esquire

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Fax (864) 804-5051
alan@lazenbylawfirm.com
patrick@lazenbylawfirm.com

ATTORNEY FOR PLAINTIFF

FILED
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SPARTANBURG COUNTY
2012 SEP -5 AM 10: 36
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF Spartanburg)	
)	CASE NO.: 2010-CP-42-4538
)	
Gary G. Harris,)	**MOTION AND ORDER INFORMATION**
Plaintiff,)	**FORM AND COVERSHEET**
vs.)	
)	
Tietex International, Ltd.,)	
Defendant.)	

Plaintiff's Attorney:	Defendant's Attorney:
D. Alan Lazenby, Bar No. ____	Fred W. Suggs, Jr., Bar No. 5423
Address:	Address:
P. O. Box 6099	300 North Main Street, Suite 500, Greenville,
Spartanburg, SC 29304	SC 29601
Phone: 864-804-5050Fax 864-804-5051	Phone: 864-271-1300 Fax864-235-4754
E-mail: alan@lazenbylawfirm.comOther: ____	E-mail: fred.suggs@odnss.comOther: ____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Defendants' Motion for Protective Order
Estimated Time Needed: 15 min. Court Reporter Needed: ☐ YES/☒ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Fredw. Suggs 1/11/13
Signature of Attorney for ☐ Plaintiff /☒ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: ____
- ☐ Other: ____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE ____
☐ Other:	Date: ____

CLERK'S VERIFICATION

Collected by:____ Date Filed: ____
☐ MOTION FEE COLLECTED: $ ____
☐ CONTESTED – AMOUNT DUE: $ ____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION FOR PROTECTIVE ORDER

COMES NOW Defendant, Tietex International, Ltd. ("Tietex"), pursuant to South Carolina Rule of Civil Procedure 26(c), and requests that the Court enter a Protective Order precluding Plaintiff from re-deposing a Tietex representative. Tietex shows as follows in support of its motion:

1. Plaintiff Gary G. Harris ("Harris") originally filed a lawsuit against Tietex in this Court on August 15, 2008—C.A. No. 2008-CP-42-4316 ("First Action").

2. Harris asserted claims against Tietex in the First Action alleging (1) violation of the Age Discrimination in Employment Act ("ADEA"), (2) breach of contract, (3) breach of contract accompanied by a fraudulent act, and (4) defamation.

3. All of Harris's claims in the First Action surrounded allegations regarding his employment with Tietex and his separation therefrom.

4. Tietex removed the First Action to the United States District Court for the District of South Carolina based on Harris's assertion of the federal ADEA claim.

5. Both parties engaged in thorough discovery in the First Action upon removal to federal court, including Harris taking the deposition of Tietex Representative Wade Wallace.

6. After the completion of discovery in federal court, Tietex moved for summary judgment with respect to all of Harris's claims.

7. On October 28, 2010, the federal court granted Tietex's motion with respect to Harris's ADEA claims and chose not to address Harris's remaining state law claims, dismissing them without prejudice.

8. Harris filed a *pro se* Complaint in the present action ("Second Action") on October 21, 2011.

9. Harris's *pro se* Complaint asserted claims against Tietex for defamation and discrimination, relying on the same factual allegations he made in the First Action.

10. On March 8, 2012, Harris's current counsel entered his appearance.

11. On August 10, 2012, the Court granted Harris's motion to amend his Complaint.

12. On September 5, 2012, Harris filed his Amended Complaint in the Second Action.

13. Harris's Amended Complaint in the Second Action alleges identical claims as those alleged in the First Action (excepting his ADEA claim) and adds a new claim for intentional infliction of emotional distress.

14. Identical to the First Action, all of Harris's claims in the Second Action surround allegations regarding his employment with Tietex and his separation therefrom.

15. Notwithstanding that Harris has already taken Mr. Wallace's deposition in the First Action with respect to the same facts on which Harris now relies in the Second Action, Harris has noticed Mr. Wallace's deposition to take place on January 24, 2013.

16. Rule 26(c), SCRCP, permits the Court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including . . . (1) that the discovery not be had."

17. Tietex requests that the Court exercise its power under Rule 26(c) and enter a Protective Order precluding Harris from re-taking Mr. Wallace's deposition, as there is nothing on the face of the Amended Complaint in the Second Action suggesting that Mr. Wallace would have discoverable information not already provided in his deposition in the First Action.

18. Harris is simply seeking a second bite at the apple with respect to Mr. Wallace's deposition, and Mr. Wallace should not be forced to incur the associated undue burden and expense.

WHEREFORE, Tietex requests that the Court enter a Protective Order directing that Mr. Wallace's deposition noticed for January 24, 2013, not take place.

Dated this 14th day of January, 2013.

Respectfully submitted,

By: _____
Fred W. Suggs, Jr. (SC Bar # 5423)

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street (29601)
Post Office Box 2757
Greenville, South Carolina 29602
Telephone: (864) 271-1300
Facsimile: (864) 235-4754
Email: Fred.Suggs@ODNSS.com

Attorneys for Defendant Tietex International, Ltd.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2013, a true and correct copy of the above **DEFENDANT'S MOTION FOR PROTECTIVE ORDER** was served by U.S. Mail, postage prepaid, upon Plaintiff at the following address:

D. Alan Lazenby, Esq.
R. Patrick Martin
Lazenby Law Firm, LLC
P.O. Box 6099
Spartanburg, SC 29304

By: Fred W. Suggs, Jr.
Fred W. Suggs, Jr. (SC Bar # 5423)

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street (29601)
Post Office Box 2757
Greenville, South Carolina 29602
Telephone: (864) 271-1300
Facsimile: (864) 235-4754
Email: Fred.Suggs@ODNSS.com

Attorneys for Defendant Tietex International, Ltd.

14127121.1

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gary G. Harris ☒ Plaintiff v. Tietex International, Ltd. ☐ Defendant.	)	IN THE COURT OF COMMON PLEAS CASE NO. 2011-CP-42-4538 MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
D. Alan Lazenby, Bar No. 13906 Address: PO Box 6099, Spartanburg, SC 29304 phone: 864-804-5050 fax: 864-804-5051 e-mail: alan@lazenbylawfirm.com other:	Fred W. Suggs, Jr, Bar No. 5423 Address: 300 North Main St., Suite 500, Greenville SC 29601 phone: 864-271-1300 fax: 864-235-4754 e-mail: fred.suggs@odnss.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Protective Order
Estimated Time Needed: 15 min Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant — January 14, 2013 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE: Date:

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CLERK OF COURT
SPARTANBURG COUNTY
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CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	**MOTION FOR ENTRY OF PROTECTIVE ORDER**
	)	
Plaintiff,	)	
vs.	)	
	)	
Tietex International, Ltd.,	)	
	)	C.A. No.: 2011-CP-42-4538
Defendant.	)	
	)	

COMES NOW, by and through his undersigned counsel of record, Plaintiff Gary G. Harris, and hereby moves this Court, at such time and place as counsel may be heard, and pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure, for a Protective Order related to further depositions in this case based upon the following:

On January 9, 2013, Plaintiff gave notice to Defendant of his intent to take the deposition of defense witness Wade Wallace pursuant to Rule 30 of the South Carolina Rules of Civil Procedure on January 24, 2013.

In correspondence dated January 7, 2013, by Defense Counsel, Plaintiff was notified of Defendant's intent to seek the protection of this Court preventing the deposition of its witness Wade Wallace on the grounds that he had been deposed previously in Federal Court. Defense Counsel has now filed a Motion for a Protective Order. Defense Counsel asserts that by seeking to depose Wade Wallace in this civil action, Plaintiff is seeking another bite of the apple.

Both Plaintiff and Mr. Wallace were deposed in a related civil action that has since been dismissed. Despite the fact that Defense Counsel is taking the position that Mr. Wallace may not

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SPARTANBURG COUNTY
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MICHELLE BLACKLEY

be deposed in this civil action, he seeks to take the deposition of Plaintiff. Defendant gave notice to Plaintiff of its intent to hold the deposition of Plaintiff on January 17, 2013.

Plaintiff asserts that because this litigation is separate from the previously dismissed litigation, Defendant's Motion for Protective Order is without merit. However, Plaintiff seeks a an Order of Protection placing a stay on all further depositions in this case of any persons previously deposed in the previous, to include that of Plaintiff Gary G. Harris, until the Court has had opportunity to rule on Defendant's Motion for Protective Order regarding the deposition of Wade Wallace. The reason for this motion is that it would be inequitable for Plaintiff to be deposed while refusing to allow Mr. Wallace to be deposed.

Furthermore, to the extent that the Court agrees that the one deposition rule applies and believes Mr. Wallace is entitled to protection from being deposed, Plaintiff moves in the alternative that any questioning of Plaintiff be limited to new allegations raised in the Amended Complaint.

This Motion will be further supported by the pleadings of record and such other and further documents, affidavits, and/or memoranda as may be served upon the Court prior to the hearing and upon the common and statutory laws of the State of South Carolina.

January 14, 2013

By: _____

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ATTORNEYS FOR PLAINTIFF

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 JAN 14 PM 4:09
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND IN OPPOSTION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

COMES NOW Defendant, Tietex International, Ltd. ("Tietex"), and submits this Memorandum in support of its Motion for Protective Order and in opposition to Plaintiff Gary G. Harris's ("Harris") Motion for Protective Order.

I. PROCEDURAL HISTORY AND RELEVANT FACTS

Plaintiff Gary G. Harris ("Harris") originally filed a lawsuit against Tietex in this Court on August 15, 2008: C.A. No. 2008-CP-42-4316 ("First Action"). Harris asserted claims against Tietex in the First Action alleging (1) violation of the Age Discrimination in Employment Act ("ADEA"), (2) breach of contract, (3) breach of contract accompanied by a fraudulent act, and (4) defamation. All of Harris's claims in the First Action surrounded allegations regarding his employment with Tietex and his separation therefrom.

Tietex removed the First Action to the United States District Court for the District of South Carolina based on Harris's federal ADEA claim. Upon removal to federal court, both parties engaged in thorough discovery in the First Action, including Tietex taking Harris's deposition and Harris taking the deposition of Tietex Representative Wade Wallace.

After the completion of discovery in federal court, Tietex moved for summary judgment on all of Harris's claims. On October 28, 2010, the federal court granted Tietex's motion with respect to Harris's ADEA claims and chose not to address Harris's remaining state law claims, dismissing them without prejudice.

Harris filed a *pro se* Complaint in the present action ("Second Action") on October 21, 2011. Harris's *pro se* Complaint asserted claims against Tietex for defamation and unspecified discrimination, relying on the same factual allegations he made in the First Action. On March 8, 2012, Harris's current counsel entered his appearance. On August 10, 2012, the Court granted Harris's motion to amend his Complaint. On September 5, 2012, Harris filed his Amended Complaint in the Second Action.

Harris's Amended Complaint in the Second Action alleges identical claims as those alleged in the First Action (excepting his ADEA claim) and adds a new claim for intentional infliction of emotional distress. Identical to the First Action, all of Harris's claims in the Second Action surround allegations regarding his employment with Tietex and his separation therefrom.

Notwithstanding that Harris has already taken Mr. Wallace's deposition in the First Action with respect to the same facts on which Harris now relies in the Second Action, on January 9, 2013, Harris noticed Mr. Wallace's deposition to take place on January 24, 2013. On January 11, 2013, Tietex promptly moved for a protective order seeking to prevent Harris from re-taking Mr. Wallace's deposition.

On November 5, 2012, Tietex noticed Harris's deposition in the Second Action to take place on December 19, 2012. On December 21, 2012, Tietex rescheduled Harris's deposition to take place on January 17, 2013, to accommodate Harris. On January 14, 2013—a mere three

days before Harris's deposition—Harris filed a Motion for Protective Order seeking to stay his deposition pending a ruling on Tietex's Motion for Protective Order.

II. ARGUMENTS AND AUTHORITIES

A. Harris's Proposed Re-Deposition of Wade Wallace is Unreasonably Duplicative and Should be Prevented under Rule 26(c), SCRCP.

Rule 26(c), SCRCP, permits the Court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including . . . (1) that the discovery not be had." Tietex's Motion for Protective Order requests that the Court exercise its power under Rule 26(c) and enter a Protective Order precluding Harris from re-taking Mr. Wallace's deposition, as there is nothing on the face of the Amended Complaint in the Second Action suggesting that Mr. Wallace would have discoverable information not already provided in his deposition in the First Action.

Harris's Motion for Protective Order supports this conclusion, as there is nothing contained therein suggesting that Harris requires a second deposition of Mr. Wallace for any specific reason. Harris's motion simply contends "that because [the Second Action] is separate from the [First Action], Defendant's Motion for Protective Order is without merit." Harris is apparently relying solely on Rule 30(a)(2), SCRCP, which provides that "[t]he deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown." However, Harris disregards the Court's clear ability under Rule 26(c), SCRCP, to order that any given discovery "not be had" in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense." This is the provision on which Tietex relies in making its Motion for Protective Order, as Harris has not provided any reason to believe that there is a specific need to re-take Mr. Wallace's deposition.

Mr. Wallace's first deposition consists of sworn testimony about the very factual situation underpinning Harris's allegations in the Second Action—Harris's employment with Tietex and his separation therefrom. Harris has full access to the transcript of Mr. Wallace's first deposition, and he is obviously entitled to rely on that testimony in the Second Action. In the absence of any legitimate justification for re-taking Mr. Wallace's deposition, Tietex requests that the Court invoke its power under Rule 26(c) and prevent such deposition to protect Mr. Wallace from the annoyance, undue burden, and expense of having to be re-deposed.

B. Tietex's Proposed Re-Deposition of Harris is Necessary to Ascertain the Precise Basis for His Claims in the Second Action, Including One Claim Not Asserted in the First Action.

Unlike Harris's unknown purpose for re-deposing Mr. Wallace, Tietex's purpose in taking Harris's deposition in the Second Action is obvious: Harris has filed a new lawsuit against Tietex, including a claim he has never previously asserted. Tietex is clearly entitled to depose Harris to (1) ensure he is not attempting to change his story with respect to the three claims present in both the First Action and the Second Action, and (2) determine the facts on which he is basing his newly-asserted claim for intentional infliction of emotional distress. Harris must accept any potential burden he could allegedly incur by Tietex taking his deposition in the Second Action, as he chose to file the Second Action and insert a new claim therein. Harris's contention in his Motion for Protective Order that "it would be inequitable for Plaintiff to be deposed while refusing to allow Mr. Wallace to be deposed" ignores the facts—Harris, not Mr. Wallace, instigated this litigation, and Harris must accept the burden associated with his decision to do so.

III. CONCLUSION

For the reasons stated above, Tietex requests that the Court (1) grant its Motion for Protective Order and prevent Harris from unnecessarily re-deposing Mr. Wallace, and (2) deny Harris' Motion for Protective Order and allow Tietex to proceed with its deposition of Harris.

Dated this 17th day of January, 2013.

Respectfully submitted,

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Attorneys for Defendant Tietex International, Ltd.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2013, a true and correct copy of the above **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER** was served by U.S. Mail, postage prepaid, upon Plaintiff at the following address:

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Spartanburg, SC 29304

By: Fred W. Suggs Jr.
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Attorneys for Defendant Tietex International, Ltd.

STATE OF SOUTH CAROLINA COUNTY OF Spartanburg Gary G. Harris, Plaintiff, vs. Tietex International, Ltd., Defendant.	)	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT CASE NO.: 2011-CP-42-4538 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney:	Defendant's Attorney:
D. Alan Lazenby, Bar No. ____ Address: P. O. Box 6099 Spartanburg, SC 29304 Phone: 864-804-5050Fax 864-804-5051 E-mail: alan@lazenbylawfirm.comOther: ____	Fred W. Suggs, Jr., Bar No. 5423 Address: 300 North Main Street, Suite 500, Greenville, SC 29601 Phone: 864-271-1300 Fax864-235-4754 E-mail: fred.suggs@odnss.comOther: ____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Defendant's Motion for Summary Judgment
Estimated Time Needed: 30 min. Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ 5/1/13
Signature of Attorney for ☐ Plaintiff /☒ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ _____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: ____
- ☐ Other: ____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE ____ Date: ____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant Tietex International, Ltd. ("Tietex"), pursuant to Rule 56, SCRCP, and moves for summary judgment on all of Plaintiff Gary G. Harris' ("Harris") claims. Tietex shows as follows in support of this Motion:

1. Tietex is entitled to summary judgment on all of Harris' claims under the doctrine of collateral estoppel, as the United States District Court for the District of South Carolina made numerous factual findings and conclusions in a prior lawsuit between the parties ("First Action") that are fatal to Harris' claims in this matter.

2. The doctrine of *res judicata* precludes Harris from asserting three of his seven defamation claims and his claim for intentional infliction of emotional distress, as he failed to in any way raise those claims in the First Action.

3. Three of Harris' seven defamation claims and his claim for intentional infliction of emotional distress are barred by the applicable statutes of limitation.

4. All of Harris' claims fail as a matter of law based on the complete absence of a genuine issue of material fact with respect to the requisite elements for such claims.

Tietex's Motion for Summary Judgment is based on the pleadings on file in this matter, the Memorandum in Support of Defendant's Motion for Summary Judgment (filed contemporaneously herewith), and the following Attachments to Tietex's Memorandum:

1. Order and Report of Magistrate Judge Kevin F. McDonald in the First Action (Attachment A to Tietex's Memorandum);

2. Opinion and Order of District Judge J. Michelle Childs in the First Action (Attachment B to Tietex's Memorandum);

3. Applicable excerpts and exhibits from Harris' deposition in the First Action (Attachment C to Tietex's Memorandum);

4. Applicable excerpts and exhibits from Harris' deposition in this matter (Attachment D to Tietex's Memorandum);

5. Affidavit of Pamela Griffin (Attachment E to Tietex's Memorandum);

6. Applicable excerpt from Harris' document production in the First Action (Attachment F to Tietex's Memorandum); and

7. Opinion and Order of the United States Court of Appeals for the Fourth Circuit in the First Action (Attachment G to Tietex's Memorandum).

WHEREFORE, Tietex respectfully requests that the Court grant its motion for summary judgment and dismiss Harris' Complaint in its entirety, and grant such other and further relief the Court considers proper.

Dated this 15th day of May, 2013.

Respectfully submitted,

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Gary G. Harris,	)	
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	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2013, a true and correct copy of the above **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** was served by U.S. Mail, postage prepaid, upon Plaintiff at the following address:

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Gary G. Harris,	)	
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Plaintiff,	)	
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	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND STATEMENT OF THE CASE

Plaintiff Gary G. Harris ("Harris") originally filed a lawsuit against Tietex in this Court on August 15, 2008—C.A. No. 2008-CP-42-4316 ("First Action"). Harris asserted claims against Tietex in the First Action alleging (1) violation of the Age Discrimination in Employment Act ("ADEA"), (2) breach of contract, (3) breach of contract accompanied by a fraudulent act, and (4) defamation (consisting of four separate sub-claims). All of Harris's claims in the First Action arose from allegations regarding his employment with Tietex and his separation therefrom.

Tietex removed the First Action to the United States District Court for the District of South Carolina based on Harris's ADEA claim. Upon removal to federal court, both parties engaged in thorough discovery in the First Action, including Tietex taking Harris's deposition and Harris taking the deposition of Tietex Representative Wade Wallace, as well as the depositions of non-party witnesses Jake Butts and George Henderson.

After the completion of discovery, Tietex moved for summary judgment on all of Harris's claims. On October 28, 2010, the federal court granted Tietex's motion on Harris's ADEA claims and chose not to address Harris's remaining state law claims, dismissing them without prejudice.

Harris filed a *pro se* Complaint in the present action ("Second Action") on October 21, 2011. Harris's *pro se* Complaint asserted claims against Tietex for defamation and unspecified discrimination, relying on the same general facts alleged in the First Action. Harris's defamation allegations in his *pro se* Complaint added two new defamation claims that he never identified in the First Action.

On March 8, 2012, Harris's current counsel entered his appearance. On August 10, 2012, the Court granted Harris's motion to amend his Complaint. On September 5, 2012, Harris filed his Amended Complaint in the Second Action. Harris's Amended Complaint in the Second Action alleges identical claims to those alleged in the First Action (except his ADEA claim) and adds a new claim for intentional infliction of emotional distress ("outrage") based on the same facts. In addition to the two new defamation claims Harris first identified in his *pro se* Complaint, Harris identified a third new defamation claim during his deposition in the Second Action.

Identical to the First Action, all of Harris's claims in the Second Action arose from allegations regarding his employment with Tietex and his separation therefrom. Harris' claims in the Second Action ignore the Federal Court's factual findings and conclusions in the First Action. Harris' Second Action is nothing more than an attempt to obtain an impermissible second bite at the apple. This case is ripe for summary judgment.

II. SUMMARY OF ARGUMENT

A. Collateral Estoppel Bars All of Harris' Claims as a Matter of Law Based on Conclusive Findings by the Federal Court in the First Action.

All of Harris's claims fail as a matter of law under the doctrine of collateral estoppel. In granting summary judgment to Tietex on Harris's ADEA claim in the First Action, the Federal Court made numerous factual determinations and conclusions that are fatal to Harris's claims in the Second Action, including the following: (1) Harris was not performing his job at a level that met Tietex's legitimate expectations; (2) Tietex had a legitimate reason for terminating Harris's employment; and (3) Harris cannot show that Tietex's reasons for his termination were pretextual. Each of Harris's claims in the Second Action relies on an assertion contrary to one or

more of these conclusively-determined facts. Since the doctrine of collateral estoppel precludes Harris from making such contrary assertions, Tietex is entitled to summary judgment.

B. Harris' Outrage Claim and Three of His Defamation Claims are Barred by the Statutes of Limitation and the Doctrine of *Res Judicata*.

Each of the defamation claims that Harris first identified in his *pro se* Complaint (as well as the non-pleaded claim that he first identified in his deposition in the Second Action[1]) are barred by the statute of limitations and the doctrine of *res judicata*. These defamation claims are based on "statements" that were allegedly made in February 2007 and July 2007. Harris did not file his *pro se* Complaint in the Second Action until October 21, 2011. Harris' deposition in the Second Action did not occur until March 14, 2013. Sections 15-3-20 and 15-3-550 of the South Carolina Code required Harris to file these claims within two years of the date on which the alleged statements took place. Harris' new claims are barred by the statute of limitations. The doctrine of *res judicata* further bars these defamation claims, as his failure to in any way assert these claims in the First Action precludes him from asserting them in the Second Action.

Harris's outrage claim is also barred by the statute of limitations and the doctrine of *res judicata*. Harris's termination from Tietex occurred on July 19, 2007. Harris did not file his *pro se* Complaint in the Second Action until October 21, 2011. Harris did not file his Amended Complaint in the Second Action—the first pleading in which he alleged his outrage claim—until August 30, 2012. Even assuming that Harris's outrage claim relates back to the filing of his *pro se* Complaint on October 21, 2011, Harris did not assert the claim until more than four years after his termination from Tietex (the last event on which his outrage claim is allegedly based). Harris's outrage claim is barred under S.C. Code Ann. § 15-3-20, as S.C. Code Ann. § 15-3-530

[1] The non-pleaded defamation claim is also barred under Rule 9(h), SCRCP, which requires a complaint to state "the defamatory matter out of which the action arose."

required Harris to file the claim by no later than July 18, 2010. The doctrine of *res judicata* bars Harris's outrage claim for the same reason discussed above with respect to his newly alleged defamation claims—he cannot assert them in the Second Action after he failed to assert them in the First Action.

C. **Harris Has Not Identified a Genuine Dispute of Material Fact with Respect to Any of His Claims, and Tietex is Entitled to Summary Judgment on the Merits.**

Placing aside the preclusion of Harris's claims under the doctrines of collateral estoppel and *res judicata* and the statute of limitations, Tietex is entitled to summary judgment on Harris's claims due to the complete absence of a genuine issue of material fact. Harris has failed to produce a shred of evidence of any contractual obligations Tietex allegedly owed to Harris—he admits that he had no written contract, that he was employed at will, and that he cannot articulate any policies he relied upon in alleging a "contract" that could be breached. Even assuming the presence of contractual obligations, Harris has not produced any evidence that Tietex materially breached those unspecified obligations (and the Federal Court's orders conclusively show that Tietex rightfully terminated Harris' employment).

Harris' defamation claims in which he has actually pointed to a statement by Tietex rely exclusively on internal communications that were seen by only those to whom the memoranda were relevant.[2] Internal statements are covered by a qualified privilege, and Harris has produced no evidence of actual malice to overcome the privilege. Tietex is entitled to the complete defense of truth with respect to all of Harris' defamation claims, as the Federal Court's orders and Harris's own testimony make clear that all of Tietex's statements were substantially true.

[2] While Harris also vaguely alleged a defamation claim based on purported "rumors in the industry," Harris has not identified a single statement by Tietex in support of this claim, which is based on nothing more than inadmissible hearsay. Harris has also alleged defamation claims based on Tietex banning him from the lab and suspending his employment (with pay); however, Harris has again failed to identify a single statement that Tietex allegedly published to any third party that could support his claims.

Moreover, Harris cannot show that Tietex was negligent in making any of the allegedly defamatory statements, and the Federal Court's orders demonstrate that Tietex acted reasonably as a matter of law in all regards.

Harris's outrage claim falls incredibly short of the standard under which South Carolina courts are willing to recognize such a claim. In fact, when South Carolina appellate courts have encountered allegations nearly identical to Harris', they have held that such allegations do not constitute a viable outrage claim as a matter of law.

There are no disputed material facts with respect to any of Harris' claims that would allow him to overcome Tietex's motion for summary judgment. Accordingly, Tietex is entitled to judgment as a matter of law on Harris' Amended Complaint, in its entirety.

III. STATEMENT OF FACTS

A. Harris' Employment.

1. Harris Was Employed At-Will and Had No Contract.

Harris began working at Tietex on July 13, 1994, as a Senior Research Chemist. (Mag. Ord. at 1[3]; Harris Dep. 1 at 58-60 & Exs. 6-7[4].) Harris accepted an offer of employment; he

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[3] The Order and Report of Magistrate Judge Kevin F. McDonald in the First Action ("Magistrate's Order") is Attachment A and is referenced as "Mag. Ord." followed by the applicable page number(s). The Opinion and Order of District Judge J. Michelle Childs in the First Action ("District Judge's Order") is Attachment B and is referenced as "Dist. Judge Ord." followed by the applicable page number(s). In the District Judge's Order, Judge Childs expressly adopted the Magistrate's Order, in its entirety. (Dist. Judge Ord. at 1.) The Magistrate's Order and District Judge's Order were entered respectively as Exhibits 2 and 3 to Harris' deposition in the Second Action. Nearly all of the Statement of Facts set forth in this Memorandum come directly from the factual findings in the Magistrate's Order, the District Judge's Order, or both (and are quoted verbatim from the Orders). All these facts are conclusively determined and indisputable under the doctrine of collateral estoppel. *See Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997).

[4] All excerpts and exhibits from Harris's deposition in the First Action are Attachment C and are referenced as "Harris Dep. 1" followed by the applicable page number(s), exhibit number(s), or

knew he was employed at will; knew he could be terminated at any time for any reason; and knew he could leave Tietex at any time, for any reason. (Harris Dep. 1 at 60-61 & Ex. 6; Harris Dep. 2 at 140-42.) Harris admits he had no written contract of employment. (Harris Dep. 1 at 61-62; Harris Dep. 2 at 142.)

Harris claims he was given a copy of an employee handbook, which he kept for several years. (Harris Dep. 1 at 62.) Harris does not have a copy of the alleged handbook. (*Id.* at 63; Harris Dep. 2 at 143.) Harris claims employees were asked to turn in the handbooks at some point during his employment.[5] (*Id.*) Harris says he periodically referred to the handbook, but never read it cover to cover. (Harris Dep. 1 at 62.) There was nothing in the handbook that Harris did not understand, and he admits he would have asked if he had any questions about a policy. (*Id.* at 62-63.)

Harris claims there was a progressive discipline policy in the handbook, but cannot give any details about the policy. (*Id.* at 64; Harris Dep. 2 at 143-44.) This is the only policy he specifically recalls from the alleged handbook. (Harris Dep. 1 at 64.)

Harris does not know what policies he contends created a contract of employment upon which he bases his claim of breach of contract. (*Id.* at 64-65; Harris Dep. 2 at 143-45.) Harris admits he cannot state the basis for his breach of contract claim, or his claim for breach of contract accompanied by a fraudulent act. (Harris Dep. 1 at 65; Harris Dep. 2 at 144-45.)

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both. All excerpts and exhibits from Harris's deposition in the Second Action are Attachment D and are referenced as "Harris Dep. 2" followed by the applicable page number(s), exhibit number(s), or both. Harris acknowledged that all of his testimony from his deposition in the First Action remains true and accurate. (Harris Dep. 2 at 26.)

[5] Tietex has never had an employee handbook. (Griffin Aff. at ¶ 3.) The Affidavit of Pamela Griffin is Attachment E.

2. Harris' Work Hours.

Harris' "normal working hours were 8:00 a.m. to 5:00 p.m., but he claims he was often at work by 6:00 or 6:30 a.m. and stayed later than 5:00 p.m." (Mag. Ord. at 2; Harris Dep. 1 at 74-75.) "On occasion, Harris stayed until 8:00, 9:00, or 10:00 at night." (Mag. Ord. at 2; Harris Dep. 1 at 77.) Harris "admitted that he was told by [his supervisor Wade] Wallace not to work in the plant for safety reasons when it was not operating." (Dist. Judge Ord. at 5; *see also* Mag. Ord. at 3-4, 17.) "Mr. Wallace told [Harris] that he could work in the plant anytime the plant was operational, and he could come into the facility to do office work when the plant was down." (Mag. Ord. at 3.) Wallace told Harris "not to operate any lab equipment in a lab setting when the plant was down and no other employees were present." (*Id.* at 3-4.) "Mr. Wallace told [Harris] that if he had to do lab work after regular business hours he should do it on weekday evenings when the second shift was operating." (*Id.* at 4.) Harris "admittedly ignored these directives due to his own opinion that the plant was safe when not operating." (Dist. Judge Ord. at 5.) "While his erratic hours had been acceptable to his previous supervisor, they were not acceptable to Wallace." (*Id.*) Harris "admits he was the only employee who did lab work after hours." (Mag. Ord. at 2.)

3. Harris Left Messages at Odd Hours.

Harris admits "that he left messages for managers when he knew they would not be answering their phones." (*Id.*; Harris Dep. 1 at Ex. 14.) Those who received the messages concluded that Harris was attempting to avoid a two-way conversation.

4. Jake Butts Relocated His Office to More Closely Supervise Harris.

There are four sections in the technical building: an office area; wet lab; physical testing;

and an extension of the wet lab for chemists work, with a burn room.[6] (Harris Dep. 1 at 86.) Butts had had difficulty keeping track of Harris due to Harris' erratic work hours, so Butts relocated his office from the plant to the office areas of the technical building (the lab), where Harris' office was situated, in order to more closely supervise Harris. (Mag. Ord. at 2; Harris Dep. 1 at 83, 86.) Harris admits that Butts' relocation was effective, as he saw Butts infrequently before Butts moved his office, but more often thereafter. (Harris Dep. 1 at 85-86.)

5. Harris' Complaints About the Smell of Mold Resulted in His Reassignment.

Soon after Butts relocated his office, Harris "claimed he noticed a mold smell and had symptoms of congestion, sinus headache, and flu." (Mag. Ord. at 2; Harris Dep. 1 at 87.) Harris admitted that he does not recall anyone else complaining about the alleged smell. (Harris Dep. 1 at 88.) Harris "claimed that the smell originated from Jake Butts' clothing and the furniture Mr. Butts moved into his relocated office." (Mag. Ord. at 2; Harris Dep. 1 at 93-94.) "After some time and several visits to doctors, including an ENT and allergist, [Harris] contended that the smell was the source of his illness due to an allergy to mold." (Mag. Ord. at 2; Harris Dep. 1 at 88-89.) Harris "reported his belief to Mr. Butts." (*Id.*)

As a result of Harris' allegation that mold in the lab was making him ill, Tietex "hired a hygienist to perform testing in the lab." (Mag. Ord. at 2; Harris Dep. 1 at 89.) "The hygienist reported that there was no mold contamination and that the air in the lab was cleaner than the outside air." (Mag. Ord. at 2; Harris Dep. 1 at 91.) "Although [Harris] claims the testing was flawed, he admits he has no evidence of that." (Mag. Ord. at 2.) Harris does not know who performed the testing or what kind of testing was performed. Harris admits he has no first-hand

[6] Although the technical building consists of several lab areas and the office area, it is often referred to in the transcript generically as "the lab" as opposed to the production facility, which is referred to as "the plant."

knowledge of how the testing was conducted. (Harris Dep. 1 at 90-91.) Harris' "only specific complaint about the testing was that it did not focus solely on the office area of the lab, but tested all four sections of the laboratory." (Mag. Ord. at 2; Harris Dep. 1 at 92.) "At some time in late 2006, [Harris] established a second office in the main plant." (Mag. Ord. at 2; Harris Dep. 1 at 87-88.) Harris "continued to do work in the lab until February 2007." (Mag. Ord. at 2; Harris Dep. 1 at 87.)

"Effective February 1, 2007, [Harris] was [removed from Mr. Butts' supervision and] placed under the supervision of Wade Wallace." (Mag. Ord. at 3.) Tietex made this transition in part due to Harris' continued complaints about the smell associated with Mr. Butts.[7] (*Id.*; Harris Dep. 1 at 101.)

B. Harris Began Reporting to Wade Wallace.

1. Tietex's Resolution of Harris' Complaint About the Mold Smell.

"Between February 2 and 5, [Harris] and Mr. Wallace discussed by e-mail whether [Harris] would be able to continue working in the lab because of [Harris'] continued complaints about the mold smell." (Mag. Ord. at 3; Harris Dep. 1 at Ex. 12.) Wallace agreed that Tietex would "do whatever [was] necessary to shield [Harris] from any further exposure to an environment(s) that might negatively impact [his] health." (Mag. Ord. at 3; Harris Dep. 1 at 95 & Ex. 12.) Wallace "instructed [Harris] to wear a mask when he worked in the lab." (Mag. Ord. at 3.) "However, [Harris] decided that the mask would not give him enough protection." (*Id.*) "Mr. Wallace then told Harris not to enter the lab under any circumstances." (*Id.*; Harris Dep. 1 at 101 & Ex. 12.) "Thereafter, [Harris] asked if he could work in the lab if he signed a waiver."

[7] Harris "believes the reason for the change in his reporting relationship was so that Mr. Wallace could assist him in getting more involved with special projects." (Mag. Ord. at 3; Harris Dep. 1 at 101-03.) This was a factor in the decision. (Mag. Ord. at 3.) Tietex was also concerned about Harris' health. (Harris Dep. 1 at 95 & Ex. 12.)

(Mag. Ord. at 3.) Tietex "rejected the waiver stating that it was still unacceptable from an HR/liability perspective since [Tietex] would be allowing [Harris] to come in contact with an environment that might negatively affect [his] health." (*Id.*) Wallace's e-mail communications with Harris made clear that Tietex was more concerned about Harris' health than its own liability. (Harris Dep. 1 at Ex. 12.)

Tietex purchased equipment "to accommodate [Harris'] needs outside of the lab." (Mag. Ord. at 3; Harris Dep. 1 at 112-13 & Ex. 14.) Tietex provided Harris with an alternative work area because Tietex wanted to protect Harris' health. (Harris Dep. 1 at Ex. 12.) Harris has no contradictory evidence. (Harris Dep. 1 at 123.)

2. February 7, 2007, Discussion Between Wallace and Harris.

"On February 7, 2007, [Harris] told Mr. Wallace that he was overwhelmed by personal and emotional problems which had occurred in his personal life over the past year, and he was having difficulty functioning." (Mag. Ord. at 4; Harris Dep. 1 at Ex. 13.) Harris "testified that his wife was ill during this time period." (Mag. Ord. at 4.) "Dealing with his wife's illness left him stressed with major sleep disturbances." (*Id.*; Harris Dep. 1 at 106-07, 111 & Exs. 14, 44.) Harris admits "he was a 'wreck' because of his wife's illness." (Mag. Ord. at 4; Harris Dep. 1 at 107 & Ex. 44.) "Mr. Wallace told [Harris] that [Tietex] 'would support him if he felt he needed to utilize EAP, but [Harris] stated that was not necessary." (Mag. Ord. at 4; Harris Dep. 1 at Ex. 13.)

3. Documentation of Voicemail Complaints from Harris.

"On February 22, 2007, [Harris] left voice mail messages for both Mr. Wallace and Tietex's Owner, Martin Wildeman, at 3:00 a.m., complaining about his inability to sleep, and about unspecified work-related issues." (Mag. Ord. at 4; Harris Dep. 1 at Ex. 14.) Later, Harris

"expressed concern about being moved from the lab and that he was 'still not set up to easily do his bench work.'" (Mag. Ord. at 4.) Wallace reiterated his commitment to obtaining the necessary equipment for Harris, which would take time. (Harris Dep. 1 at 111-13 & Ex. 14.) Harris "asked for a lab pad coater and a vented hood." (Mag. Ord. at 4.) "Mr. Wallace stated that he would take time to locate, acquire, and install the equipment, but stated that in the meantime [Harris] could use the equipment in the beam/dye area, and/or coordinate to use Robert Culbreth, a chemical technician, to perform work for him in the lab." (Mag. Ord. at 4; Harris Dep. 1 at Ex. 14.) Harris "believes that [Tietex] was motivated to keep him out of the laboratory to avoid liability for any health problems he might experience rather than out of a real concern for his health." (Mag. Ord. at 5.) "Importantly, [Harris] does not assert that [Tietex] was motivated to keep him out of the lab because of [any unlawful reason]." (Mag. Ord. at 5; Harris Dep. 1 at 123.)

Harris "also complained about being required to stay involved with environmental reporting and stated he was concerned about completing an environmental report that was due on March 1, given his other projects." (Mag. Ord. at 5; Harris Dep. 1 at 113.) Mr. Wallace "saw 'no reason that [Harris'] projects would interfere with his ability to get th[e] report done on time' and 'made this clear' to Harris." (*Id.*) Harris "admitted . . . that it was reasonable for Mr. Wallace to expect him to complete the environmental report on time." (Mag. Ord. at 5; Harris Dep. 1 at 113 & Ex. 15.)

"Mr. Wallace also asked [Harris] to come to him directly with issues before going to Mr. Wildeman." (Mag. Ord. at 5; Harris Dep. 1 at Ex. 14.) Harris admits that, at times, he went directly to Martin Wildeman, rather than using the chain of command. (Harris Dep. 1 at 116.)

Harris admits it was inappropriate for him to complain to Wildeman about having to do the environmental reporting. (*Id.* at 115.)

C. Harris' Performance Deficiencies.

1. Memorandum Dated March 5, 2007.

"On March 5, 2007, Mr. Wallace discussed several issues with [Harris] regarding his performance and documented the discussion at [Harris'] request in a memorandum to David Wilson, with a copy to Mark Isbell and [Harris]." (Mag. Ord. at 5; Harris Dep. 1 at 117-18 & Ex. 16.) "Mr. Wallace noted [Harris] made emotional and overly vocal accusations and statements without supporting research or data, was not honoring the chain of command, harbored grudges over past grievances and toward the management in general, and complained about ownership of environmental reporting duties." (Mag. Ord. at 5; Harris Dep. 1 at Ex. 16.) "The memorandum concluded with the statement, 'As we discussed these issues are not sustainable and it is mandatory that [Harris] make significant progress towards resolving these issues within the next 30 days.'" (Mag. Ord. at 5; Harris Dep. 1 at Ex. 16.)

At the time, Harris did not protest any of the points in the March 5, 2007, memorandum or claim that Wallace's observations were not true. (Harris Dep. 1 at 122.) As noted above, Harris admits he was experiencing emotional stress (Harris Dep. 1 at 106-07, 111 & Exs. 14, 44), circumvented Wallace by going directly to Wildeman (*id.* at 116), and complained about environmental reporting tasks (*id.* at 113). Harris does not deny the statement that he harbored grudges, and admits that he had unresolved issues that existed before he began reporting to Wallace and had discussed those issues with Wallace. (*Id.* at 119-20.)

2. Memorandum Dated June 18, 2007.

"On June 18, 2007, Mr. Wallace had another discussion with [Harris] regarding his work

performance." (Mag. Ord. at 5.) "Mr. Wallace documented the discussion in a memorandum to [Harris], with a copy to David Wilson and Mark Isbell." (*Id.* at 5-6; Harris Dep. 1 at 128 & Ex. 18.) "The discussion focused on two projects for which [Harris] was responsible." (Mag. Ord. at 6; Harris Dep. 1 at 130 & Ex. 18.) The first was "the development and qualification of a Tietex coating compound as a replacement for the coating that was currently being used on C237 ("C237 Project")." (Mag. Ord. at 6; Harris Dep. 1 at 129 & Ex. 18.) The second was "the development of a finish formula and process for parabolic application of T602 ("T602 Project")." (Mag. Ord. at 6; Harris Dep. 1 at 129-30.)

a. The C237 Project.

Harris "had been working on the C237 Project for about six months." (Mag. Ord. at 6; Dist. Judge Ord. at 4; Harris Dep. 1 at 131 & Ex. 18.) Harris "had predicted that the C237 Project would result in significant cost savings for [Tietex]." (Mag. Ord. at 6; Dist. Judge Ord. at 4; Harris Dep. 1 at 131-32 & Ex. 18.) Harris "claim[ed] he had a successful trial before he began reporting to Mr. Wallace." (Mag. Ord. at 6; Dist. Judge Ord. at 4; Harris Dep. 1 at 132.) "Despite [Harris'] characterization of the compound he created as a success, it was unacceptable to [Tietex] because it was much more complicated to produce commercially than [Harris] had initially promised." (Mag. Ord. at 6; Dist. Judge Ord. at 4; Harris Dep. 1 at Ex. 16.) "In February, Mr. Wallace began working separately on a parallel C237 Project because it appeared that [Harris] would fail to achieve the cost savings he had predicted." (Mag. Ord. at 6; Harris Dep. 1 at 134 & Exs. 16, 18.) "Eventually, the situation was resolved by the provider lowering its price." (Mag. Ord. at 6; Harris Dep. 1 at 134.)

b. The T602 Project.

"Because of the expense, a plant production trial is only done if laboratory production is

successful." (Mag. Ord. at 6.) Harris "told Mr. Wallace that the lab samples for the T602 project were promising and recommended a production trial." (*Id.*; Harris Dep. 1 at 135.) "According to [Harris], the first plant production trial showed mixed results with some samples that were 'not good,' but others that were 'comparable,' depending on the amount of finish." (Mag. Ord. at 6; Harris Dep. 1 at 136.) "However, [Harris] told Mr. Wallace that, based on the results, another plant production trial was warranted." (Mag. Ord. at 6; Harris Dep. 1 at at 137 & Ex. 18.) "On [Harris'] recommendation, a second plant production trial was performed, which was unsuccessful." (Mag. Ord. at 6; Harris Dep. 1 at 137, 295 & Ex. 18.) "A third trial was similarly unsuccessful." (Mag. Ord. at 6; Harris Dep. 1 at 137-38, 295 & Ex. 18.) "When the second and third trials failed, Mr. Wallace reviewed the results of the first plant production trial himself." (Mag. Ord. at 6.) Mr. Wallace saw "that the results of the first trial had not been as [Harris] portrayed them, so the second and third trials were unwarranted based on the results of the first." (*Id.* at 6-7; Harris Dep. 1 at Ex. 18.)

"Mr. Wallace cited [Harris] for his poor analytical practices and instructed him to improve his performance within 30 days." (Mag. Ord. at 7; Harris Dep. 1 at 141 & Ex. 18.) Harris "considered this his final written warning." (Mag. Ord. at 7; Harris Dep. 1 at 139 & Ex. 18.)

D. <u>Final Events Leading Up to Harris' Termination</u>.

Despite being told that if his performance failed to improve, his job was in jeopardy, Harris' performance continued to be poor, and he demonstrated poor judgment. Harris "made no effort to complete the C237 project." (Mag. Ord. at 7; Harris Dep. 1 at Ex. 19.) "Instead, [Harris] began taking multiple days of vacation immediately after being given the warning on June 18." (Mag. Ord. at 7; Harris Dep. 1 at 145-48.) "These vacation days were frequently taken on short notice." (Mag. Ord. at 7.) "Sometimes, [Harris] waited until the day before to

notify Mr. Wallace." (*Id.*; Harris Dep. 1 at 145-46 & Ex. 20.) "Other than the environmental reporting, [Harris] had not improved on the issues cited in the memorandum of March 5, 2007." (Mag. Ord. at 7; Harris Dep. 1 at Ex. 19.) "Gate records and management observation showed that [Harris] had continued to ignore the directive not to work in the chemical lab areas at nights or on the weekends." (Mag. Ord. at 7; Harris Dep. 1 at Ex. 19.) "The same records showed inconsistent work hours and erratic patterns of entry and exit to and from the facility." (*Id.*) Harris' "co-workers complained that he did not return calls or e-mails consistently, disrupting their work patterns." (Mag. Ord. at 7; Harris Dep. 1 at Ex. 19.)

Harris "was scheduled to fly to Indiana on June 14 to visit a customer and return on June 15." (Mag. Ord. at 7.) "After flying the first leg of his trip, [Harris] turned around and came home because he had a headache." (*Id.*; Harris Dep. 1 at 148-49.) Harris "never told [Mr. Wallace] he had not met with the customer in Indiana. (Mag. Ord. at 7; Harris Dep. 1 at Ex. 19.)

E. Events of July 3, 2007.

"On the evening of Monday, July 2, after work, [Harris] left a voicemail message for Mr. Wallace, telling him that he had an ant infestation at his house." (Mag. Ord. at 7.) Harris "said he would take care of the ants first thing the following morning and then go to Hexion, a chemical facility, and work on a project." (*Id.*; Harris Dep. 1 at 151-52.) "Since [Harris] left this message after work hours, Mr. Wallace did not hear the message until the morning of Tuesday, July 3, 2007." (Mag. Ord. at 7-8; Harris Dep. 1 at Ex. 19.)

Harris purchased pesticide chemicals at Lowe's on the morning of July 3, at approximately 7:30 a.m. (Harris Dep. 1 at 251; Attach. F.) Harris "called Mr. Wallace and left a second voice mail message around 9:00 a.m., saying he had resolved the ant problems and was going to work at Hexion." (Mag. Ord. at 8.) Harris "did not arrive at Hexion until 1:30 p.m." (*Id.*; Harris Dep. 1 at 154 & Ex. 21.) Harris "could not enter Hexion because he could not

contact anyone he knew there to gain entry." (Mag. Ord. at 8.) Harris left without performing any work. (Harris Dep. 1 at 155-56.) There are no witnesses to establish how long Harris was allegedly at Hexion. (*Id.* at 157.) Harris is vague about how long he was at Hexion trying to get in—he estimates he was at Hexion between thirty and ninety minutes.[8] (Mag. Ord. at 8; Harris Dep. 1 at 157-58.)

Harris "claims that after leaving Hexion, he drove around for 30 to 45 minutes, looking for Chemurgy, another chemical facility." (Mag. Ord. at 8.) "When [Harris] located Chemurgy, no one was there, so he did not stay." (*Id.*; Harris Dep. 1 at 159-60.)

Harris "left a message for Hexion employee Pam Westmoreland, telling her that he could not get into the laboratory." (Mag. Ord. at 8.) Harris "stated in his message that he needed a small sample of sulfuric acid, and he would come back and pick it up." (*Id.*) "Hexion employee George Henderson told Ms. Westmoreland that he would take the sample to [Harris] at Tietex on his way home." (*Id.*)

Harris "did not telephone Mr. Wallace to tell him that he could not get in Hexion and that he was going to Chemurgy or anywhere else." (*Id.*; Harris Dep. 1 at 160.) Harris "admits it would have been reasonable for him to call Mr. Wallace and tell him that his plans had changed." (Mag. Ord. at 8; Harris Dep. 1 at 165.) Harris understood he needed to let Wallace know his whereabouts, to let him know when he was away from the plant, and to keep his cell phone on so he could be reached. (Harris Dep. 1 at 117.) Harris acknowledges that it was reasonable for his supervisor to expect to be informed of his whereabouts "at all times." (*Id.*)

[8] Harris previously testified to the SCESC that he was at Hexion around thirty minutes. (Harris Dep. 2 at 96-97.)

"George Henderson, the Hexion employee, brought the sulfuric acid to Tietex for [Harris]."[9] (Mag. Ord. at 8; Harris Dep. 1 at 160.) Wallace was confused, as Harris was supposed to be at Hexion. "Mr. Wallace later called Mr. Henderson and asked if he had seen Harris that day, but Mr. Henderson had not." (Mag. Ord. at 8.) "Mr. Henderson said that he had a voicemail from [Harris] saying he needed some sulfuric acid urgently because he was planning to do some work on July 4th." (*Id.*) Mr. Wallace "was troubled because [Harris] was not where he said he would be and because it appeared [Harris] had planned to work with chemicals in the lab on a day the plant was supposed to be closed." (*Id.*) Additionally, having sulfuric acid delivered in this way was against policy.

Harris admits that Mr. Wallace had no idea what Harris was doing, or even if Harris was working. (Harris Dep. 1 at 164-65.) Harris claims "Mr. Wallace called [him] on his cell phone between 4:30 p.m. and 5:00 p.m. and asked where he was." (Mag. Ord. at 9; Harris Dep. 1 at 162.) Harris "told Mr. Wallace that he had been to Hexion." (*Id.*) "Mr. Wallace told [Harris] that Mr. Henderson had been to Tietex and said that [Harris] had not been at Hexion that day." (Mag. Ord. at 9.) Harris "then stated he had gone to Hexion, but had been unable to get in or find anyone, so he left." (*Id.*) Harris "could not give Mr. Wallace an adequate explanation of his whereabouts for the day." (*Id.*; Harris Dep. 1 at 158-59 & Ex. 19.)

"Mr. Wallace told [Harris] he was suspended until Mr. Wallace returned from vacation." (Mag. Ord. at 9; Harris Dep. 1 at 165.) "During the phone call, [Harris] and Mr. Wallace were disconnected, and Mr. Wallace could not reach [Harris] again by telephone." (Mag. Ord. at 9.) Harris denies that he hung up on Wallace. (Harris Dep. 1 at 165-66.) "Mr. Wallace talked to David Wilson, the Human Resources Director, about what transpired, and a voice mail message

[9] Harris admits he needed the acid and had asked Hexion for it, but claims he intended to pick it up, rather than have Mr. Henderson deliver it. (Harris Dep. 1 at 161.)

was left for [Harris] reiterating that he was suspended with pay and should not return to work until contacted by [Tietex]." (Mag. Ord. at 9.)

F. Wallace Recommended the Termination of Harris' Employment.

"Mr. Wallace conducted an investigation of the events of July 3 when he returned from vacation." (*Id.*) "Mr. Wallace recommended [Harris'] employment be terminated, and the decision to do so was made by Mr. Wallace; David Wilson, Human Resources Director; Martin Wildeman, Owner; Reed Cunningham, President; and Mark Isbell, Vice President of Manufacturing." (*Id.*) Harris "was told he was not being terminated for one specific deficiency, but for many shortcomings that 'added up,' including the issues Mr. Wallace had addressed with him in the March 5, 2007, memorandum." (*Id.*; Harris Dep. 1 at 142 & Ex. 16.) "These issues were also documented in a memorandum dated July 18, 2007." (Mag. Ord. at 9; Harris Dep. 1 at Ex. 19.) Harris' "employment was terminated on July 19, 2007." (Mag. Ord. at 9.) Harris admits his employment was terminated for unsatisfactory performance. (Harris Dep. 1 at 167 & Ex. 22.)

IV. ARGUMENT

Tietex is entitled to summary judgment on all of Harris' claims. The Federal Court's factual findings in the First Action are fatal to Harris's claims in the Second Action, as he cannot dispute: (1) Harris was not performing his job at a level that met Tietex's legitimate expectations; (2) Tietex had a legitimate reason for terminating Harris' employment; and (3) Harris cannot show that Tietex's reasons for his termination were pretextual. Harris' failure to assert three of his seven defamation claims and his outrage claim in the First Action bar those claims under the applicable statutes of limitation and the doctrine of *res judicata*. Harris has not established that he had any contract of employment with Tietex; therefore, Tietex could not have breached a contract, with or without fraudulent intent. Harris has not established that Tietex

published any defamatory statements about him to any third party, as all allegedly defamatory statements were substantially true and covered by a qualified privilege that Harris cannot overcome. Finally, Harris has failed to allege (and certainly cannot prove) any set of facts that would permit his outrage claim to proceed to trial. Accordingly, Harris' Amended Complaint should be dismissed in its entirety.

A. **Summary Judgment Standard.**

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 541, 730 S.E.2d 340, 347 (Ct. App. 2012) (citations omitted). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." *D.R. Horton*, 398 S.C. at 541, 730 S.E.2d at 347.

The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). The moving party may discharge this responsibility "by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim." *D.R. Horton*, 398 S.C. at 542, 730 S.E.2d at 347. "Once the moving party

carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings." *Id.* (citing *inter alia* Rule 56(e), SCRCP). "[T]he nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.'" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (quoting *Baughman*, 306 S.C. at 107, 410 S.E.2d at 545).

"Where a verdict is not '*reasonably possible* under the facts presented, summary judgment is proper.'" *Id.* (quoting *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000)) (emphasis in original). Harris has failed to present any facts demonstrating the presence of a genuine issue for trial. Accordingly, "[t]his case illustrates well the utility of summary judgment in disposing of a meritless claim." *Cox & Floyd Grading, Inc. v. Kajima Constr. Svcs., Inc.*, 356 S.C. 512, 517, 589 S.E.2d 789, 792 (Ct. App. 2003).

B. Collateral Estoppel Bars All of Harris' Claims as a Matter of Law Based on Conclusive Findings by the Federal Court in the First Action.

Harris' claims in the First Action and his claims in this matter all rely on the same factual allegations—his contentions (1) that he was performing his job at Tietex at a level that met Tietex's legitimate expectations; (2) that the internal memoranda describing his performance deficiencies were false and defamatory; (3) that Tietex did not have a legitimate reason for terminating his employment; and (4) that Tietex's stated reason for terminating his employment was pretextual. However, the United States District Court of the District of South Carolina has already considered all of these factual allegations in the First Action and made factual findings and conclusions that directly contradict Harris' alleged version of the facts.[10] The doctrine of

[10] Based on an objection Harris' counsel made during Harris' deposition in the Second Action, Tietex anticipates that Harris will contend the findings of fact set forth in the Magistrate's Order

collateral estoppel prevents Harris from relitigating these factual issues. Applying the Federal Court's factual findings and conclusions to Harris' claims in this matter makes clear that Harris' claims fail as a matter of law and that Tietex is entitled to summary judgment.

"Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits were the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (citing *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009)). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* (citing *Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189-90 n.1 (Ct. App. 1984)). Tietex is able to easily demonstrate these elements with respect to each of Harris' four factual contentions set forth in the above paragraph.

1. Harris was not Performing His Job at a Level that Met Tietex's Legitimate Expectations.

In analyzing Harris' age discrimination claim in the First Action, the Federal Court was required to first determine whether Harris had articulated a *prima facie* case of discrimination. (Mag. Ord. at 13-14; Dist. Judge Ord. at 3-5.) The third element of a *prima facie* case under the ADEA required Harris to show that he "was meeting his employer's legitimate expectations at

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do not qualify as "findings of fact," based on the Magistrate Judge captioning that section of his Order as "Facts Presented." (Harris Dep. 2 at 104-05; Mag. Ord. at 1.) Harris is simply mincing words, as the Magistrate Judge's captioning of the factual section of his Order does not change the clear nature of what it is—findings of fact. The Magistrate Judge left no doubt in this regard through his statement of the standard of review, which made clear that he was "construe[ing] all inferences and ambiguities against [Tietex] and in favor of [Harris]." (Mag. Ord. at 10 (citation omitted).) Additionally, Harris ignores the District Judge's wholesale adoption of the Magistrate's Order, which clearly includes the findings of fact. (Dist. Judge Ord. at 1 ("[T]he Magistrate Judge's Report and Recommendation is adopted herein . . . .").)

the time of the adverse action." (Mag. Ord. at 13 (citation omitted).) Both Magistrate Judge McDonald and District Judge Childs unequivocally held that Harris could not establish this element. (*Id.* at 14; Dist. Judge Ord. at 3-5.)

Magistrate Judge McDonald held as follows:

> [T]he defendant argues the plaintiff was not performing his job at a level that met the defendant's legitimate expectations. This court agrees. As set forth above, the defendant articulated the deficiencies in the plaintiff's performance in memoranda dated March 5, June 18, and July 18, 2007. (Pl. dep., ex. 16, 18, 19). The plaintiff attempts to contradict the defendant's dissatisfaction with his performance by his subjective assessment of himself as a valuable, outstanding, and exemplary performer. However, the plaintiff's subjective view of his performance does not establish a *prima facie* case.

(Mag. Ord. at 14.)

District Judge Childs similarly ruled that "it is uncontroverted that [Harris] did not meet [Tietex's] expectations." (Dist. Judge Ord. at 3.) Specifically, District Judge Childs held that "it remains undisputed that [Tietex] determined that [Harris] had performed unsuccessfully and failed to complete the C237 Project to Wallace's satisfaction. Therefore, . . . the Magistrate Judge correctly determined that [Harris] failed to demonstrate that he was meeting his employer's legitimate standards at the time of his termination." (*Id.* at 4.) Additionally, District Judge Childs pointed out that Harris "admitted that he was told by Wallace not to work in the plant for safety reasons when it was not operating," and that Harris "admittedly ignored these directives due to his own opinion that the plant was safe when not operating." (*Id.*)

There can be no dispute that Federal Court's findings with respect to the issue of whether Harris was performing his job at a level that met Tietex's legitimate expectations was actually litigated in the First Action—both parties fully briefed the issue prior to the Magistrate's Order and the District Judge's Order, and both Judges addressed the parties respective arguments.

There is similarly no doubt that this issue was directly determined in the First Action—both the Magistrate Judge and the District Judge directly addressed this issue in their Orders. Finally, the Federal Court's findings with respect to this issue were clearly necessary to the judgment in the First Action, as the Court focused largely on the issue in granting Tietex summary judgment. Therefore, the doctrine of collateral estoppel applies and prevents Harris' attempted relitigation of the issue.

The Federal Court's conclusive determination that Harris was not performing his job duties at a level that met Tietex's legitimate expectations is fatal to all of Harris' claims in this matter. With respect to Harris' contract claims, the Federal Court's ruling conclusively proves that Tietex had reasonable cause to terminate Harris' employment and could not have breached its alleged (unspecified) contractual obligations to Harris. Applied to Harris' defamation claims, the Federal Court's ruling conclusively establishes that the allegedly defamatory statements Harris has identified (the internal memoranda regarding his performance) could not have been false and defamatory, as they simply "articulated the deficiencies in [Harris'] performance" that the Federal Court agreed to be present. (Mag. Ord. at 14; Dist. Judge Ord. at 3.) Finally, the Federal Court's determination undermines Harris' outrage claim, as the alleged "campaign . . . to undermine, ridicule, and be rid of" Harris was simply Tietex attempting to correct and ultimately terminate Harris' employment for his undisputable performance problems. (Am. Compl. at 8.)

2. Tietex's Internal Memoranda Regarding Harris' Performance Were True.

Both the Magistrate Judge and the District Judge in the First Action found that Tietex "articulated deficiencies in [Harris'] performance in memoranda dated March 5, June 18, and July 18, 2007," in concluding that Harris was not "meeting his employer's legitimate expectations at the time of the adverse action." (Dist. Judge Ord. at 3; Mag. Ord. at 14.) This issue was actually litigated in that the accuracy of the internal memoranda was critical in

determining whether Harris was meeting Tietex's legitimate expectations. This issue was also directly determined, as both the Magistrate Judge and the District Judge relied on the internal memoranda in analyzing whether Harris could establish his *prima facie* case under the ADEA. This issue was necessary to the judgment in the First Action, as the conclusion that Harris could not meet his *prima facie* case depended largely on the deficiencies Tietex articulated in the memoranda. Accordingly, Harris is collaterally estopped from arguing that Tietex's descriptions of his performance deficiencies in the March 5, June 18, and July 18 memoranda were false.

The Federal Court's determination of this issue renders summary judgment appropriate on all of Harris' claims. The truth of the internal memoranda establishes that Tietex provided multiple warnings to Harris regarding his poor performance and that Harris failed to correct his performance in accordance with those warnings; this precludes any argument that Tietex did not provide the allegedly obligatory "progressive discipline" on which Harris bases his contract claims. (Am. Compl. at 5-6.) The truth of the internal memoranda is fatal to Harris' defamation claims, which are based exclusively on an allegation that the memoranda were false and defamatory. (Harris Dep. 2 at 27-29.) The Federal Court's finding prevents Harris from contending in his outrage claim that Tietex "lied about" Harris' performance and engaged in a "campaign . . . to undermine, ridicule, and be rid of" Harris." (Am. Compl. at 8.)

3. Tietex Had Legitimate Reasons for Terminating Harris' Employment.

Based on its conclusion that Harris was failing to meet Tietex's legitimate expectations at the time of his termination, the Federal Court concluded that Tietex "produced evidence showing it had legitimate . . . . reasons for firing [Harris]." (Mag. Ord. at 16.) The Federal Court made this determination because the burden-shifting standard applicable to employment discrimination claims requires the employer to articulate a legitimate, non-discriminatory reason for termination. (Mag. Ord. at 14 (citation omitted).) Accordingly, Harris cannot dispute that this

issue was actually litigated, directly determined, and necessary to the judgment in the First Action.

As Tietex's reasons for terminating Harris's employment were legitimate, it could not have breached any contractual obligations it allegedly owed to Harris, rendering his contract claims invalid as a matter of law. Neither could Tietex have defamed Harris in making the statements set forth in its internal memoranda, as those memoranda simply "articulated deficiencies in [Harris'] performance"—deficiencies the Federal Court has conclusively determined to be "legitimate" and thus not false and defamatory. The Federal Court's conclusion similarly precludes Harris' outrage claim, as Tietex's legitimate reasons for terminating Harris' employment directly contradicts any allegation that Tietex was engaged in some campaign to set up Harris for failure and terminate his employment for improper reasons.

4. Tietex's Reasons for Terminating Harris' Employment were Not Pretextual in Any Way.

After determining that Tietex had "produced evidence showing it had legitimate . . . reasons for firing [Harris]," the Federal Court concluded that Harris "ha[d] failed to show that the proferred reasons for his termination of employment were pretext for [unlawful motivation]." (Mag. Ord. at 16.) Harris cannot dispute that this issue was actually litigated and directly decided in the First Action, as Harris made numerous arguments attempting to show that Tietex's proffered reasons for his termination were not worthy of credence and were pretextual, all of which the Federal Court addressed and rejected. (Mag. Ord. at 16-17.) There can also be no doubt that this issue was necessary to the judgment in the First Action, as the burden-shifting framework focuses on the issue of pretext once the employer articulates a legitimate explanation for the termination. (*Id.* at 14 (citation omitted).) Therefore, collateral estoppel prevents Harris

from arguing in this matter that Tietex's stated reasons for the termination of his employment were pretext for some unlawful reason.

The Federal Court's finding of no pretext renders invalid Harris' contract claims, which rely on his assertion that Tietex terminated Harris' employment "based upon pretextual reasons not founded in truth." (Am. Compl. at 6.) The absence of pretext is similarly fatal to Harris' defamation claims, as Harris' explanation of how the memoranda regarding his performance were allegedly defamatory focuses on his contention that the information therein was somehow pretextual. (Harris Dep. 2 at 87, 90, 173.) The Federal Court's determination of this issue precludes his outrage claim, which relies on his far-fetched allegation that all of his disciplinary actions were part of a grand pretextual scheme to "be rid" of him.

Harris' claims in this matter are nothing more than an impermissible attempt to obtain the proverbial second bite at the apple. Both Harris and his counsel understand this fact, as evidenced by his counsel's discussion of alleged age discrimination during Harris' deposition in this action—the very claim the Federal Court struck down as a matter of law in the First Action. (Harris Dep. 2 at 215.) Placing that clear indication aside, Harris left no doubt during the following exchange, also from his deposition in this matter:

> Q: Finally, you last gave a deposition over three years ago in the summer of 2009 and you've been asked questions about everything. But in general, has your view of this lawsuit changed in the last three years?
>
> A: It has. . . . Well, let me just put the statement like this. If I thought there was any doubt about my claim wasn't legitimate and all this in 2009, that doubt is no longer there. I mean, what I thought may have happened, today I know happened.

(Harris Dep. 2 at 231.) Harris acknowledges that his claims in this matter are identical to his claims in the First Action—he is simply relying on different legal theories. However, Harris

cannot overcome the doctrine of collateral estoppel, which prevents him as a matter of law from relitigating what he and Tietex already litigated extensively in the Federal Court (and through an appeal to the United States Court of Appeals for the Fourth Circuit).[11] The Federal Court's factual findings and conclusions render invalid all of Harris' claims in this matter, and Tietex is entitled to summary judgment.

C. **Harris' Outrage Claim and Three of His Defamation Claims are Barred by the Statutes of Limitation and the Doctrine of *Res Judicata*.**

Harris admits that his First Action did not in any way allege the following claims: (1) his outrage claim (Harris Dep. 2 at 17); (2) his defamation claim based on the February 9, 2007 e-mail from Mr. Wallace to David Wilson (*id.* at 33); (3) his defamation claim based on Tietex suspending his employment in July 2007 (*id.* at 33-34); or (4) his defamation claim based on Tietex "bann[ing] him from the laboratory" (*id.* at 34). Rather, he first asserted these claims on the following dates: (1) his outrage claim first appeared in his Amended Complaint in the Second Action, which he filed on September 5, 2012; (2) he first pleaded his defamation claim based on the February 9, 2007 e-mail from Mr. Wallace in his *pro se* Complaint in the Second Action, which he filed on October 21, 2011; (3) he first alleged his defamation claim based on Tietex suspending his employment in his *pro se* Complaint in the Second Action; and (4) he only identified his defamation claim based on being banned from the lab in his deposition in the Second Action, which occurred on March 14, 2013. Even assuming that Harris has properly pleaded all of these claims in the Second Action and that they relate back to the filing of his *pro se* Complaint on October 12, 2011, these claims are barred by the applicable statutes of

[11] The Fourth Circuit Court of Appeals affirmed the decision to grant Tietex summary judgment on Harris' ADEA claim. Harris then filed a petition for rehearing, which the Fourth Circuit denied. The Opinion and Order from the Fourth Circuit are Attachment G.

limitation. Due to Harris failing to in any way plead these claims in the First Action, they are also barred by the doctrine of *res judicata.*

The statute of limitations applicable to Harris' cause of action for outrage is three years. S.C. Code Ann. § 15-3-530. July 19, 2007—the date on which Tietex terminated his employment—is the latest date that any event on which Harris could be basing his outrage claim took place. That date is approximately four years and four months before the date on which Harris filed his *pro se* Complaint in the Second Action (which did not even include the outrage claim). Accordingly, the three-year statute of limitations on Harris' outrage claim had long passed when Harris filed his *pro se* Complaint, and the claim is barred under S.C. Code Ann. § 15-3-20.

The statute of limitations applicable to Harris' defamation claims is two years. S.C. Code Ann. § 15-3-550. The two-year statute of limitations runs from the date on which the allegedly defamatory statement was published, not from the time the statement was allegedly discovered. *Jones v. City of Folly Beach*, 326 S.C. 360, 369, 483 S.E.2d 770, 775 (Ct. App. 1997) ("[S]ummary judgment [should be granted] because South Carolina has not adopted the discovery rule in libel and slander cases."). Harris' defamation claims based on (1) the February 9, 2007 e-mail from Mr. Wallace, (2) Tietex suspending his employment in July 2007, and (3) Tietex banning him from the lab in February 2007 are all based on "statements" that Tietex allegedly made in February and July 2007. Harris first alleged these claims in the Second Action, which he did not file until October 12, 2011. (Harris Dep. 2 at 33-34.) Thus, each of these three defamation claims must be dismissed based on Harris' failure to bring them with the two-year statute of limitations.

The complete absence of these three defamation claims and the outrage claim in the First

Action also implicates the doctrine of *res judicata*. "The doctrine of *res judicata* bars a litigant from raising any issues which were adjudicated in the former suit [between the parties] and any issues which might have been raised in the former suit." *Pye*, 325 S.C. at 432, 480 S.E.2d at 458 (emphasis added) (citing *Hilton Head Ctr. v. Public Serv. Comm'n*, 294 S.C. 9, 362 S.E.2d 176 (1987)); *see also id.* ("'*Res judicata* also bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.'") (quoting *Riedman Corp. v. Greenville Steel Structures, Inc.* 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992)).

Harris cannot dispute that these three defamation claims and his outrage claim arose out of the same transaction or occurrence that was the subject of the First Action—his employment with Tietex and separation therefrom. Harris could have raised these claims in the First Action, but he chose not to do so. Based on Harris' failure to assert these claims in the First Action, the doctrine of *res judicata* precludes him as a matter of law from asserting the claims in the Second Action. Accordingly, Tietex is entitled to summary judgment on these claims.

D. Harris Has Not Identified a Genuine Dispute of Material Fact with Respect to Any of His Claims, and Tietex is Entitled to Summary Judgment on the Merits.

Placing aside the procedural and statutory flaws in Harris' claims that render summary judgment proper, Harris has also failed to identify any genuine disputes of material fact that would prevent summary judgment on the merits of his claims.

1. Harris' Contract Claims Fail Due to the Complete Absence of Contractual Obligations.

"To recover for a breach of contract, the plaintiff must prove: (1) a binding contract; (2) a breach of that contract; and (3) damages proximately resulting from the breach." *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 146, 697 S.E.2d 644, 655 (Ct. App. 2010) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)).

"To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: (1) *a breach of contract*; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002) (emphasis added). Both of Harris' contact claims fail because he has not identified any contractual obligations that Tietex allegedly owed to him.

"South Carolina has long recognized the doctrine of employment at-will." *Grant v. Mt. Vernon Mills, Inc.*, 370 S.C. 138, 145, 634 S.E.2d 15, 19 (Ct. App. 2006) (citing *Conner*, 363 S.C. at 471, 611 S.E.2d at 910-11). "This doctrine allows either party to terminate the employment 'for any reason or no reason' without being subject to a claim for breach of contract, subject to narrow exceptions and prohibitions against illegal discrimination which are not present here." *Id.* at 146, 634 S.E.2d at 19 (quoting *Horton v. Darby Elec. Co.*, 360 S.C. 58, 67, 599 S.E.2d 456, 460 (2004)). "The at-will employment doctrine is essentially an economic incentive that provides critically needed flexibility in the marketplace." *Id.* (citing *Prescott v. Farmers Tel. Co-op., Inc.* 335 S.C. 330, 334-35, 516 S.E.2d 923, 925 (1999)). In order to rebut the presumption of at-will employment, the burden is on Harris to establish that "all of the elements of a contract" are present. *Prescott*, 335 S.C. at 336, 516 S.E.2d at 926. Harris cannot meet his burden of proving that a contract existed, as he admits that he was an at-will employee and cannot point to anything that altered that relationship.

Harris admits that he "was aware of Tietex being an at will employer." (Harris Dep. 1 at 61; Harris Dep. 2 at 141-42.) Harris further acknowledges that "under the terms of [his employment] offer [with Tietex], [he] w[as] employed at will." (Harris Dep. 1 at 60; Harris Dep. 2 at 141.) Based on his status as an at-will employee, Harris fully understood (1) that his

"employment could be terminated any time for any reason," and (2) that he "could quit Tietex if [he] wanted to for whatever reason whenever." (Harris Dep. 1 at 60-61; Harris Dep. 2 at 141-42.)

Harris admits that he "didn't have any kind of written contract of employment when [he] w[as] hired" and that "during the time that [he] worked for Tietex, nobody ever gave [him] a written contract of employment to sign." (Harris Dep. 1 at 61-62; Harris Dep. 2 at 142.) Harris' lone attempt to claim that a contract allegedly existed consists of his entirely unsupported contention that an employee handbook contained a progressive discipline policy.[12] (Am. Compl. at 5; Harris Dep. 1 at 64; Harris Dep. 2 at 143.) However, Harris has not produced a copy of this alleged employee handbook and admits that he does not have a copy. (Harris Dep. 1 at 63; Harris Dep. 2 at 143.) Harris' inability to produce a copy of the alleged handbook (and the fact that he cannot remember anything in the handbook other than the purported progressive discipline policy[13]) stems directly from the fact that Tietex has never had an employee handbook. (Griffin Aff. at ¶ 3.)

Even assuming Harris' claims that he had an employee handbook for several years are true, Harris has testified that at some point during his employment, Tietex required all employees to turn in their copies of the alleged handbook "so [Tietex] could revise [it], and [he] never got a revised copy." (Harris Dep. 1 at 63; Harris Dep. 2 at 143.) Under the principles of unilateral

[12] While Harris' Amended Complaint specifically identifies the alleged progressive discipline policy as the basis for his contract claims, Harris acknowledged during his deposition in the First Action that he didn't "know what policies in the handbook . . . created a contract of employment" and that he didn't "know what in the handbook [he] would base [his] contract claims on." (Harris Dep. 1 at 64-65; Harris Dep. 2 at 143-44.)

[13] Harris cannot give details about any of the policies in the alleged handbook, or even recall the existence of any policy other than a progressive discipline policy. (Harris Dep. 1 at 64; Harris Dep. 2 at 143-44.)

contract (which apply to all cases in which employees attempt to show contractual obligations based on handbooks), Tietex rescinded any "offer" that allegedly existed in the non-existent handbook when it demanded that employees turn in that handbook. Tietex then made a new "offer" to continue working in an at-will status with no handbook, and Harris accepted that offer by continuing to perform his job duties. Harris admits that he "never got a revised copy" of the alleged handbook after he turned in his copy. (*Id.*) Even if there had been an employee handbook—though there was not—it clearly had no bearing on Harris' terms and conditions of employment at the time of his termination.

Harris has failed to produce any evidence beyond his unsupported and conclusory allegations that Tietex owed him any contractual obligations with respect to his employment or separation therefrom. In the absence of any such evidence, Tietex is entitled to summary judgment on both of Harris' contract claims.

2. Harris' Defamation Claims Fail Because All Statements Harris has Identified as Allegedly Defamatory were True and were Covered by a Qualified Privilege that Harris cannot Overcome, and Tietex was Not Negligent in Making the Alleged Statements.

Harris must "prove the following four elements to state a claim for defamation: '(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.'" *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012) (quoting *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006)).

The truth of an alleged defamatory statement "is a complete defense to an action based on defamation and evidence establishing a statement is substantially true is a sufficient defense." *Haulbrooks v. Overton*, 295 S.C. 380, 383, 368 S.E.2d 676, 679 (Ct. App. 1988) (citing *Ross v.*

Columbia Newspapers, Inc., 266 S.C. 75, 221 S.E.2d 770 (1976)). "It is not necessary to establish the literal truth of the precise statement made." Restatement (Second) of Torts § 581A (1977).

The United States Supreme Court has made clear that there can be no strict liability for defamation. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Some level of fault is required to establish liability for defamation, even when the plaintiff is a private figure. *Id.*; Restatement (Second) of Torts § 580B, cmt. c. The Restatement notes that negligence is likely the lowest fault threshold permissible under the *Gertz* standard.[14] *Id.*

South Carolina courts have neither expressly accepted nor rejected the prevailing view that negligence is the appropriate standard to apply to alleged defamation of a private figure. *See Erickson*, 368 S.C. at 475-76, 629 S.E.2d at 670 (applying negligence standard because the parties assumed it applied). However, given the constitutional imperative established in *Gertz*, the South Carolina Supreme Court has suggested that the negligence standard should apply. *See, e.g., Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C 502, 523, 506 S.E.2d 497, 508-09 (1998) (Toal, J., concurring) (opining that South Carolina should join most jurisdictions in requiring a private-figure plaintiff to prove negligence to recover for defamation); *see also* Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil § 14-11 (2009) (requiring proof of negligence to recover for defamation).

Under the negligence standard, Harris must prove that declarants of the alleged defamatory statements he has identified were negligent in making the statements—that the speaker breached a duty to exercise due care to refrain from making statements about Harris that

[14] Notably, the drafters of the Restatement have recognized that the fault requirement essentially eliminates the common law burden on defendants to prove truth. Restatement (Second) of Torts § 580B, cmt. j.

are false and defamatory. *See* Anderson, South Carolina Requests to Charge – Civil § 20-1.

"One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (citing *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999)). "'The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.'" *Id.* (quoting *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 32, 315 (Ct. App. 1987)). "There is a basis for applying a qualified privilege to situations in which an employee's job performance is properly evaluated." *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989); *see also Bell v. Bank of Abbeville*, 211 S.C. 167, 44 S.E.2d 328 (1947) (attaching a qualified privilege to communications between an employer and employee during the employer's inquiry into the employee's alleged misconduct).

"Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." *Swinton Creek Nursery*, 334 S.C. at 484-85, 514 S.E.2d at 134. To prove actual malice, Harris must show that Tietex was activated by ill will, intending to causelessly and wantonly injure Harris, or that the statements were published with such recklessness as to show a conscious disregard for Harris' rights. *Id.* at 485, 514 S.E.2d at 134.

Whether an occasion gives rise to a qualified privilege is a question of law for the court. *Id.* "'While abuse of privilege is ordinarily an issue for the jury, . . . in the absence of a

controversy as to the facts . . . it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.'" *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (quoting *Woodward v. S.C. Farm Bureau Ins. Co.*, 297 S.C. 29, 32-33, 292 S.E.2d 599, 601 (1981)) (emphasis in original); *see also* Restatement (Second) of Torts § 619, cmt. b (court decides if privilege has been abused where only one conclusion can reasonably be drawn).

While Harris' Amended Complaint includes only one cause of action for defamation, he has identified seven separate allegedly defamatory statements or incidents on which he is attempting to rely. (Harris Dep. 2 at 27-30.) Separate allegations of defamation are analyzed as independent claims. *See, e.g., George v. Fabri*, 345 S.C. 440, 456-61, 548 S.E.2d 868, 876-79 (2001) (analyzing defamation allegations separately in affirming grant of summary judgment); *McBride v. School Dist. of Greenville County*, 389 S.C. 546, 559-63, 698 S.E.2d 845, 851-54 (Ct. App. 2010) (analyzing alleged defamatory statements individually). Each of Harris' seven defamation claims fails as a matter of law due to his inability to prove several requisite elements for each of his claims.

a. February 9, 2007 E-mail from Mr. Wallace to Mr. Wilson.

Harris' first defamation claim is based on a February 9, 2007 e-mail that Mr. Wallace (his supervisor) sent to Mr. Wilson (Human Resources Manager) with a copy to Mark Isbell (Mr. Wallace's supervisor). (Harris Dep. 2 at 27-28 & Ex. 13.) In this internal e-mail between managerial employees at Tietex, Mr. Wallace simply summarized a discussion he had with Harris two days earlier regarding personal and emotional problems Harris was experiencing that were impacting his performance. (Harris Dep. 2 at Ex. 13.) Harris claims this e-mail was defamatory because he alleges that it was false and that it "showed a definite disregard for [his] stability mentally and that kind of thing." (*Id.* at 27.)

This defamation claim fails because the content of the February 9 e-mail was substantially (if not completely) true. Harris has admitted as much on more than one occasion—during his unemployment hearing (*id.* at 38), and during his deposition in the First Action (*id.* at 34-37). The Federal Court's findings of fact also demonstrate the truth of the February 9 e-mail, as the Magistrate's Order summarizes the February 7 conversation between Harris and Mr. Wallace in a manner that is perfectly consistent with the February 9 e-mail. (Mag. Ord. at 4.)

This defamation claim also fails because the February 9 e-mail clearly gives rise to a qualified privilege, and Harris has not presented any evidence showing that Mr. Wallace acted with actual malice or otherwise abused the privilege. Similarly, Harris cannot show that Mr. Wallace was negligent in making the statements set forth in the February 9 e-mail, as the conclusively-determined facts make clear that he did nothing more than accurately recount a conversation to his own supervisor and Tietex's Human Resources Manager—both of whom Harris admits "had legitimate business need to know about and discuss" the issues in the e-mail. (Harris Dep. 2 at 55-56.) Therefore, summary judgment is proper on this claim.

b. March 5, 2007 Memorandum from Mr. Wallace to Mr. Wilson.

Harris' second defamation claim focuses on the March 5, 2007 memorandum that Mr. Wallace sent to Mr. Wilson with copies to Mr. Isbell and Harris. (Harris Dep. 2 at 28 & Ex. 16.) Like the February 9 e-mail, this memorandum simply documented a performance-related discussion that Mr. Wallace had with Harris. (*Id.* at Ex. 16.) In fact, Harris admits that Mr. Wallace only generated the March 5 memorandum because Harris requested that he do so. (*Id.* at 60; Mag. Ord. at 5.)

This memorandum cannot constitute actionable defamation because Harris has admitted that each of the points Mr. Wallace made in the memorandum was substantially true. (Harris Dep. 1 at 106-07, 111, 113, 116, 119-20.) The truth of the memorandum is further shown by the

fact that, during the performance discussion referenced in the memorandum, Harris did not protest any of the listed deficiencies or claim they were inaccurate. (*Id.* at 122; Harris Dep. 2 at 65.) Additionally, South Carolina precedent establishes that this type of performance-related discussion regarding an employee is entitled to a qualified privilege, and Harris cannot show that Mr. Wallace acted with actual malice in drafting the memorandum (particularly since Harris himself specifically requested that Mr. Wallace prepare it). Neither could Mr. Wallace have acted negligently in preparing this memorandum, as it accurately summarizes the meeting and lists only deficiencies that Harris has acknowledged to be accurate. Accordingly, Tietex is entitled to summary judgment.

c. June 18, 2007 Memorandum from Mr. Wallace to Harris.

Harris' third defamation claim relates to the June 18, 2007 memorandum that Mr. Wallace provided to Harris (with copies to Mr. Wilson and Mr. Isbell), which Harris has described as his "final written warning." (Harris Dep. 2 at 28 & Ex. 18.) The June 18 memorandum focuses exclusively on Harris' performance issues with respect to the C237 and T602 projects.

The conclusively determined facts leave no room for Harris to claim that the June 18 memorandum was false and defamatory. Both the Magistrate's Order and the District Judge's Order make clear that Harris failed to perform up to Tietex's legitimate expectations with respect to the C237 and T602 projects. (Mag. Ord. at 6-7, 14; Dist. Judge Ord. at 3-4.) This very performance issue is what Mr. Wallace documented in the June 18 memorandum, and the truth of the memorandum is thus established as a matter of law. (Harris Dep. 2 at Ex. 18.) Here again, the June 18 memorandum was also subject to a qualified privilege, and Harris cannot in good faith argue that Tietex abused that privilege or was negligent based on the Federal Court's determinations. Thus, Harris' claim fails as a matter of law.

d. July 18, 2007 Memorandum from Mr. Wallace to Harris.

The final actual statement on which Harris relies in making his defamation claims is the July 18, 2007 memorandum from Mr. Wallace to Mr. Wilson (with a copy to Mr. Isbell) in which Mr. Wallace summarized Harris' pattern of poor performance and recommended his termination. (Harris Dep. 2 at 28-29 & Ex. 19.) This claim fails for reasons similar to Harris' first three defamation claims.

The July 18 memorandum truly and accurately summarized Harris' performance deficiencies between February 2007 and July 2007. The accurate nature of the memorandum is clear based on the Federal Court's Orders, which summarize the same set of facts in concluding that Harris was not meeting Tietex's legitimate expectations and that Tietex lawfully terminated his employment. (Mag. Ord. at 5-9, 14, 16; Dist. Judge Ord. at 3-5.) There can be no doubt that an internal memorandum to an employee's supervisor and Human Resources recommending the employee's termination based on performance issues is entitled to a qualified privilege. Harris acknowledges that Mr. Wallace did not abuse the privilege and acted reasonably in providing the memorandum to Mr. Wilson and Mr. Isbell, as he admits that both Mr. Wilson and Mr. Isbell "would have had a need to know" about the subject matter of the memorandum. (Harris Dep. 2 at 100.) Harris cannot meet his burden with respect to this claim, mandating the entry of summary judgment.

e. Rumors in the Industry.

Harris' fifth defamation claim surrounds his contention that there were "rumors in the industry that [he] w[as] terminated from Tietex for falsifying a test report." (Harris Dep. 2 at 29.) However, Harris has never identified a single actual statement that Tietex allegedly made with respect to these mysterious "rumors." Rather, Harris has simply contended that he spoke to two former Tietex employees who allegedly informed him that they had heard about rumors

being spread about him. (*Id.* at 114-24.) Harris has never even alleged that Tietex was the actual source of these alleged "rumors," and he has certainly never produced a witness to testify about what Tietex supposedly said. In the absence of any such allegations or testimony, this defamation claim is far from adequate to overcome Tietex's motion for summary judgment. Rule 56(e), SCRCP, plainly requires that a party desiring to oppose summary judgment with testimony must "set forth such facts as would be admissible in evidence." Harris' claim regarding "rumors in the industry" is based on nothing more than inadmissible hearsay. Thus, Harris cannot even establish that there was a statement or that Tietex published the statement, let alone prove the remaining elements of this claim.

f. Harris' July 2007 Suspension with Full Pay.

Harris' sixth defamation claim alleges that Tietex somehow defamed him by suspending his employment—with full pay and benefits—in July 2007. (Harris Dep. 2 at 29.) The only statements Harris has identified with respect to this claim are (1) Mr. Wallace's telephone call to Harris in which he informed Harris of the suspension, and (2) Mr. Wallace allegedly informing an individual at another company (Textile Rubber) that Harris was suspended. (*Id.* at 124-30.)

With respect to the telephone call between Mr. Wallace and Harris, there was obviously no publication to a third party, as Harris admits that they were the only parties on the call. (*Id.* at 126-27.) Regarding Mr. Wallace's alleged statement to the Textile Rubber employee, Harris once again is relying on nothing more than inadmissible hearsay. Beyond being unable to specify any details regarding the alleged statement, Harris admits that "[t]he only information [he] h[as] is like second hand what George Henderson told [him]." (*Id.* at 129.) Thus, Harris cannot establish that any statement was published for the purposes of this motion. Even assuming Mr. Wallace had informed this individual that Harris was suspended, that statement is

100% true and cannot be defamatory as a matter of law. Therefore, Tietex is entitled to summary judgment.

g. Harris' February 2007 Ban from the Laboratory.

Finally, Harris contends that being "banned from going to the laboratory building" in February 2007 was defamatory. (Harris Dep. 2 at 29-30.) The only "statement" that Tietex can infer from this allegation is when Mr. Wallace told Harris "not to enter the lab under any circumstances." (Mag. Ord. at 3; Harris Dep. 1 at 101 & Ex. 12.) While Mr. Wallace did make that statement, Tietex is unable to determine how it could even potentially be defamatory with respect to Harris.

First, the statement was not even about Harris—it was a work directive. Second, Mr. Wallace only made that statement (and Tietex only prohibited Harris form entering the lab) after Harris complained that the work conditions in the lab were detrimentally impacting his health. Tietex and Harris jointly attempted to find a solution that would have allowed Harris to continue working in the lab without harming his health, but they were unable to do so. Third, After "banning" Harris from the lab, Harris admits that Tietex made special purchases of equipment to allow him to set up a work area in a different location that would be better for his health. The Magistrate's Order thoroughly and conclusively summarizes these undisputed facts, and there is simply no defamation to be found. (Mag. Ord. at 2-3.) Harris' claim regarding this statement must be dismissed accordingly.

3. Harris' Outrage Claim Fails To Allege Any Facts that Rise to the Level of Extreme and Outrageous Conduct or Severe Emotional Distress that South Carolina Courts Require for Such a Claim.

Harris is obligated to prove all of the following elements to recover under his outrage claim: (1) that Tietex "intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from [its] conduct"; (2) that

Tietex's conduct "was so 'extreme and outrageous' so as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious and utterly intolerable in a civilized community'"; (3) that Tietex's actions caused Harris' emotional distress; and (4) that "the emotional distress suffered by [Harris] was 'severe' such that 'no reasonable man could be expected to endure it.'" *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007) (quoting *Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981)). The South Carolina Supreme Court has "emphasized the heightened burden of proof articulated in the second and fourth elements of the tort, insisting that in order to prevail in a tort action alleging damages for purely mental anguish, the plaintiff must show both that the conduct on the part of the defendant was 'extreme and outrageous,' and that the conduct caused distress of an 'extreme or severe nature.'" *Id.*, 650 S.E.2d at 71 (quoting *Ford*, 276 S.C. at 161, 276 S.E.2d at 778).

"In order to prevent claims for intentional infliction of emotional distress from becoming 'a panacea for wounded feelings rather than reprehensible conduct,' the court plays a significant gatekeeping role in analyzing a defendant's motion for summary judgment." *Id.* at 358, 650 S.E.2d at 72 (quoting *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 171, 321 S.E.2d 602, 611 (Ct. App. 1984)). Thus, "the court must determine that a genuine issue of material fact exists for each essential element of the plaintiff's claim." *Id.*, 650 S.E.2d at 71. A brief review of the facts alleged by Harris quickly demonstrates that he cannot come close to meeting his "heightened burden of proof" with respect to "the second and fourth elements of" of his outrage claim. *Id.* at 356, 650 S.E.2d at 71 (quoting *Ford*, 276 S.C. at 161, 276 S.E.2d at 778).

Harris' outrage claim relies solely on his contentions that (1) Tietex somehow set him up for failure in his position (Am. Compl. at 3-4, 8), (2) Mr. Wallace allegedly used a "disrespectful tone of voice" a Harris on three occasions (Harris Dep. 2 at 146-56), and (3) Mr. Wallace

allegedly yelled at Harris on those same three occasions (*id.* at 218-21). South Carolina appellate courts have made clear that allegations similar to Harris'—and even allegations far more egregious than Harris'—do not qualify as "extreme and outrageous" as a matter of law.

In *Wright*, the plaintiff made allegations that were nearly identical to Harris' contention that Tietex set him up for failure in an effort to "be rid of" him. *See* 298 S.C. at 472, 381 S.E.2d at 505. Specifically, the plaintiff alleged that the employer "set out on a course . . . to 'build a case' to justify firing her. She allege[d] he loaded her with responsibility while stripping her of authority. She also allege[d] he would change the manner of performing duties and then accuse her of not following his directions." *Id.* The Court of Appeals held that, while the plaintiff and her employer "disagreed about her job performance, the employer's "actions were not so extreme and outrageous as to exceed all possible bounds of decency." *Id.* at 473, 381 S.E.2d at 506.

In *Shipman v. Glenn*, the plaintiff alleged a set of facts that was plainly and palpably more outrageous than Harris' allegations about Mr. Wallace using a disrespectful tone of voice and yelling at him. *See* 314 S.C. 327, 328-29, 443 S.E.2d 921, 922 (Ct. App. 1994). There, the Court of Appeals was confronted with the following facts:

> (1) [the plaintiff] suffer[ed] from cerebral palsy, a condition that limit[ed] her speech and her physical movements; (2) [the employer] verbally abused and threatened her on the day in question with the loss of her job because she had discussed with others her concerns that she was the victim of intentional discrimination through a reduction in the school's work force; (3) [the employer] ridiculed her speech impediment; and (4) [the employer's] actions caused her to become emotionally upset, distressed, and worried, caused her to be physically ill to the point that she had to leave work early that day, caused her to live in constant fear of [her employer] and what he might do to injure her or harm her career, and adversely affected her personal life and her ability to function in her job.

Id. While the Court of Appeals recognized that the employer's conduct was "both callous and offensive," the Court held that the conduct "cannot provide the basis for an action for intentional infliction of emotional distress." *Id.*

If the conduct alleged in *Wright* and *Shipman* does not rise to the level of "extreme and outrageous" as a matter of law, there is simply no possibility that Harris' allegations could even approach that heightened threshold. Harris' claim is merely an attempt to accomplish what our courts have noted a "'widespread reluctance . . . to permit'"—the conversion of "'the tort of outrage [into] a panacea for wounded feelings rather than reprehensible conduct.'" *Hansson*, 374 S.C. at 357, 650 S.E.2d at 71 (quoting *Todd*, 283 S.C. at 171, 321 S.E.2d at 611).

Even assuming Harris could establish the presence of "extreme and outrageous" conduct, he cannot meet his heightened burden of proving that he suffered emotional distress so severe that "'no reasonable man could be expected to endure it.'" *Id.* at 356, 650 S.E.2d at 70 (quoting *Ford*, 276 S.C. at 162, 276 S.E.2d at 778). All Harris has offered with respect to his alleged "distress" is his own conclusory allegations. This is insufficient as a matter of law. *Id.* at 358, 650 S.E.2d at 72 ("Under the heightened standard of proof for emotional distress claims . . . , a party cannot establish a prima facie claim for damages resulting from a defendant's tortious conduct with mere bald assertions."). To survive summary judgment, Harris was required to provide "something 'more' – in the form of third party witness testimony and other corroborating evidence – in order to make a prima facie showing of 'severe' emotional distress." *Id.* Harris has made no such showing. In fact, Harris has admitted that he received absolutely no medical treatment as a result of the incidents he alleges to have been "extreme and outrageous." (Harris Dep. 2 at 158-60.) Thus, any alleged "emotional distress" that Harris purportedly suffered was far from "severe" under the well-established legal framework. Because Harris cannot make even

a prima facie showing of the second or fourth elements of his outrage claim, Tietex is entitled to summary judgment.

V. CONCLUSION

For all of the foregoing reasons, Tietex is entitled to summary judgment on all of Harris' claims against it. Accordingly, Tietex respectfully asks the Court to dismiss Harris' lawsuit in its entirety.

Dated this 1st day of May, 2013.

Respectfully submitted,

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Attorneys for Defendant Tietex International, Ltd.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of May, 2013, a true and correct copy of the above **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** was served by U.S. Mail, postage prepaid, upon Plaintiff at the following address:

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Attachment A

Order and Report of Magistrate Judge Kevin F. McDonald July 29, 2010

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Gary G. Harris, Plaintiff, vs. Tietex International, Inc., Defendant.	Civil Action No. 7:08-3020-HFF-KFM **ORDER AND REPORT OF MAGISTRATE JUDGE**

This matter is before the court on the defendant's motion for summary judgment (doc. 68) and motion to strike (doc. 111). In his complaint, the plaintiff alleges that the defendant, his former employer, violated the Age Discrimination in Employment Act ("ADEA")[1] by terminating his employment and replacing him with a younger individual. He further alleges the defendant violated the ADEA by retaliating against him for complaining about age discrimination toward other employees. He also alleges state law claims against the defendant for breach of contract, breach of contract accompanied by a fraudulent act, and defamation.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Rule 73.02(B)(2)(g), D.S.C., all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

FACTS PRESENTED

The plaintiff was terminated from employment with Tietex International, Ltd., at the age of 62. The plaintiff began working at Tietex on July 13, 1994, as a Senior Research Chemist. (*Id.* 57-61, ex. 6-7, 15). Prior to February 1, 2007, the plaintiff reported

[1]In his response in opposition to the motion for summary judgment, the plaintiff implies that the defendant may have violated the Americans With Disabilities Act. (Pl. resp. m.s.j. 15). However, no such claim was alleged in his complaint, and thus it will not be addressed here.

to Jake Butts. The plaintiff's normal working hours were 8:00 a.m. to 5:00 p.m., but he claims he was often at work by 6:00 or 6:30 a.m. and stayed later than 5:00 p.m. (Pl. dep. 74-75). On occasion, the plaintiff stayed until 8:00, 9:00, or 10:00 at night. (*Id.* 77). The plaintiff admits he was the only employee who did lab work after hours and that he left messages for managers when he knew they would not be answering their phones. (*Id.* 81-82, 126-27, ex. 10, 14; Wallace decl. ¶¶ 20-21). Mr. Butts testified that the plaintiff worked "odd" hours but he "didn't worry about [the plaintiff's] timekeeping ... [and] always felt that [the plaintiff] had a good work ethic. He's certainly, in my opinion, a brilliant chemist and could accomplish the things that needed to be accomplished. And when I've asked him to work on a specific thing, he's been able to do what I needed him to do." (Butts dep. 47, 59).

Mr. Butts relocated his office from the plant to the office area of the technical building, where the plaintiff's office was located. Soon after Mr. Butts relocated his office, the plaintiff claimed he noticed a mold smell and had symptoms of congestion, sinus headache, and flu. The plaintiff claimed that the smell originated from Jake Butts' clothing and the furniture Mr. Butts moved into his relocated office. After some time and several visits to doctors, including an ENT and allergist, the plaintiff contended that the smell was the source of his illness due to an allergy to mold. The plaintiff reported his belief to Mr. Butts. The defendant hired a hygienist to perform testing in the lab. The hygienist reported that there was no mold contamination and that the air in the lab was cleaner than the outside air. Although the plaintiff claims the testing was flawed, he admits he has no evidence of that. His only specific complaint about the testing was that it did not focus solely on the office area of the lab, but tested all four sections of the laboratory. (Pl. dep. 87- 89, 91-94; Wallace decl. ¶ 12). At some time in late 2006, the plaintiff established a second office in the main plant. He continued to do work in the lab until February 2007. (Pl. dep. 87-88). According to the plaintiff, he was not bothered by the allergy when he spent short periods of time in the lab area. (Pl. aff. ¶ 7).

Effective February 1, 2007, the plaintiff was placed under the supervision of Wade Wallace. The defendant argues this was in part due to the plaintiff's continued complaints about the smell associated with Jake Butts. The plaintiff believes the reason for the change in his reporting relationship was so that Mr. Wallace could assist him in getting more involved with special projects. The defendant agrees that this was also a factor in the decision to place the plaintiff under the supervision of Mr. Wallace. (Pl. dep. 101-103; Wallace decl. ¶¶ 5-6).

Between February 2 and 5, the plaintiff and Mr. Wallace discussed by e-mail whether the plaintiff would be able to continue working in the lab because of his continued complaints about the mold smell. Mr. Wallace stated the defendant would "do whatever [was] necessary to shield [the plaintiff] from any further exposure to an environment(s) that might negatively impact [his] health," and he instructed the plaintiff to wear a mask when he worked in the lab. However, the plaintiff decided that the mask would not give him enough protection. Mr. Wallace then told the plaintiff not to enter the lab under any circumstances. Mr. Wallace reminded the plaintiff to give him a list of items he would need to do his job outside the lab, and Mr. Wallace would have them relocated for the plaintiff. Thereafter, the plaintiff asked if he could work in the lab if he signed a waiver. Mr. Wallace rejected the waiver stating that it "was still unacceptable from an HR/company liability perspective since [the defendant] would be allowing [the plaintiff] to come in contact with an environment that might negatively affect [his] health. Equipment was purchased to accommodate the plaintiff's needs outside of the lab. However, the plaintiff claims that the equipment was not put into place because there was always a problem with "where [the equipment] was going to go." The plaintiff also asked if he could work on Saturdays and Sundays. Mr. Wallace told him that he could work in the plant anytime the plant was operational, and he could come into the facility to do office work when the plant was down. The plaintiff was told not to operate any lab equipment in a lab setting when the plant was down and no other

employees were present. Mr. Wallace told the plaintiff that if he had to do lab work after regular business hours he should do it on weekday evenings when the second shift was operating. (Pl. dep. 95, 101, 112-13, 122-23, ex. 12, 17; Wallace decl. ¶¶ 13-17).

On February 7, 2007, the plaintiff told Mr. Wallace that he was overwhelmed by personal and emotional problems that had occurred in his personal life over the past year, and he was having difficulty functioning. The plaintiff testified that his wife was ill during this time period. Dealing with his wife's illness left him stressed with major sleep disturbances. He testified he was a "wreck" because of his wife's illness. Mr. Wallace told the plaintiff that the company "would support him if he felt he needed to utilize EAP," but the plaintiff stated that was not necessary. (Pl. dep. 106-107, 111, ex. 13, 44; Wallace decl. ¶ 18).

According to Mr. Wallace's deposition testimony, the plaintiff complained to him in February 2007 that he did not feel he was being treated fairly. According to Mr. Wallace, the plaintiff "felt like Tietex, in general did not value him, did not recognize him and did not utilize his skills in a way that he thought that they should." The plaintiff further complained that he "had not been promoted in a manner in which he felt was acceptable, and his compensation had not grown in a manner which he felt was acceptable." Mr. Wallace further testified that the plaintiff "never mentioned age." (Wallace dep. 84).

On February 22, 2007, the plaintiff left voice mail messages for both Mr. Wallace and Tietex's owner, Martin Wildeman, at 3:00 a.m., complaining about his inability to sleep, and about unspecified work-related issues. The plaintiff expressed concern about being moved from the lab and that he was "still not set up to easily do his bench work." The plaintiff asked for a lab pad coater and a vented hood. Mr. Wallace stated that he would take time to locate, acquire, and install the equipment, but stated that in the meantime the plaintiff could use the equipment in the beam/dye area, and/or coordinate to use Robert Culbreth, a chemical technician, to perform work for him in the lab. (Pl. dep. 111-12, ex. 14;

Wallace decl. ¶¶ 14, 16, 20). The plaintiff believes that the defendant was motivated to keep him out of the laboratory to avoid liability for any health problems he might experience rather than out of a real concern for his health. (Pl. dep. 123). Importantly, the plaintiff does not assert that the defendant was motivated to keep him out of the lab because his age.

The plaintiff also complained about being required to stay involved with environmental reporting and stated he was concerned about completing an environmental report that was due March 1, given his other projects. Mr. Wallace stated in an e-mail to David Wilson, the Human Resources Manager, and Mark Isbell, the Vice President of Operations, that he saw "no reason that [the plaintiff's] projects would interfere with his ability to get this report done on time." Mr. Wallace further stated that he "made this clear" to the plaintiff. The plaintiff admitted in his deposition that it was reasonable for Mr. Wallace to expect him to complete the environmental report on time. Mr. Wallace also asked the plaintiff to come to him directly with issues before going to Mr. Wildeman. (Pl. dep. 113, ex. 14, 15; Wallace decl. ¶ 23).

On March 5, 2007, Mr. Wallace discussed several issues with the plaintiff regarding his performance and documented the discussion at the plaintiff's request in a memorandum to David Wilson, with a copy to Mark Isbell and the plaintiff. Mr. Wallace noted the plaintiff made emotional and overly vocal accusations and statements without supporting research or data, was not honoring the chain of command, harbored grudges over past grievances and toward the management in general, and complained about ownership of environmental reporting duties. The memorandum concluded with the statement, "As we discussed these issues are not sustainable and it is mandatory that Gary make significant progress towards resolving these issues within the next 30 days." (Pl. dep. 117-18, ex. 16; Wallace decl. ¶ 25).

On June 18, 2007, Mr. Wallace had another discussion with the plaintiff regarding his work performance. Mr. Wallace documented the discussion in a

memorandum to the plaintiff, with a copy to David Wilson and Mark Isbell. The discussion focused on two projects for which the plaintiff was responsible: (1) the development and qualification of a Tietex coating compound as a replacement for the coating that was currently being used on C237 ("C237 Project"); and (2) the development of a finish formula and process for parabolic application of T602 ("T602 Project"). (Pl. dep. 128-30, ex. 18; Wallace decl. ¶ 26).

The plaintiff had been working on the C237 Project for about six months. The plaintiff had predicted that the C237 Project would result in significant cost savings for the defendant. The plaintiff claimed he had a successful trial before he began reporting to Mr. Wallace. Despite the plaintiff's characterization of the compound he created as a success, it was unacceptable to the defendant because it was much more complicated to produce commercially than the plaintiff had initially promised. In February, Mr. Wallace began working separately on a parallel C237 Project because it appeared that the plaintiff would fail to achieve the cost savings he had predicted. Eventually, the situation was resolved by the provider lowering its price. (Pl. dep. 131-34, ex. 18; Wallace decl. ¶ 27).

Because of the expense, a plant production trial is done only if laboratory production is successful. The plaintiff told Mr. Wallace that the lab samples for the T602 project were promising and recommended a production trial. According to the plaintiff, the first plant production trial showed mixed results with some samples that were "not good," but others that were "comparable," depending on the amount of finish. However, the plaintiff told Mr. Wallace that, based on the results, another plant production trial was warranted. On the plaintiff's recommendation, a second plant production trial was performed, which was unsuccessful. A third trial was similarly unsuccessful. When the second and third trials failed, Mr. Wallace reviewed the results of the first plant production trial himself. Mr. Wallace testified that the results of the first trial had not been as the plaintiff portrayed them,

so the second and third trials were unwarranted based on the results of the first. (Pl. dep. 135-41, 295, ex. 18; Wallace ¶¶ 28-32).

Mr. Wallace cited the plaintiff for his poor analytical practices and instructed him to improve his performance within 30 days. The plaintiff considered this his final written warning. (Pl. dep. 139, 141, ex. 18; Wallace decl. ¶ 32).

According to Mr. Wallace, the plaintiff made no effort to complete the C237 project. Instead, the plaintiff began taking multiple days of vacation immediately after being given the warning on June 18. These vacation days were frequently taken on short notice. Sometimes, the plaintiff waited until the day before to notify Mr. Wallace. Other than the environmental reporting, the plaintiff had not improved on the issues cited in the memorandum of March 5, 2007. Gate records and management observation showed that the plaintiff had continued to ignore the directive not to work in the chemical lab areas at nights or on the weekends. The same records showed inconsistent work hours and erratic patterns of entry and exit to and from the facility. The plaintiff's co-workers complained that he did not return calls or e-mails consistently, disrupting their work patterns. (Pl. dep. 145-48, ex. 19, 20; Wallace decl. ¶¶ 33-36).

The plaintiff was scheduled to fly to Indiana on June 14 to visit a customer and return on June 15. After flying the first leg of his trip, the plaintiff turned around and came home because he had a headache. (Pl. dep. 148-49). According to Mr. Wallace, the plaintiff never told him he had not met with the customer in Indiana. (Pl. dep., ex. 19; Wallace decl. ¶ 37).

On the evening of Monday, July 2, after work, the plaintiff left a voicemail message for Mr. Wallace, telling him that he had an ant infestation at his house. The plaintiff said he would take care of the ants first thing the following morning and then go to Hexion, a chemical facility, and work on a project. (Pl. dep. 151-52). Since the plaintiff left this message after work hours, Mr. Wallace did not hear the message until the morning of

Tuesday, July 3, 2007. (Pl. dep., ex. 19; Wallace decl. ¶ 38). The plaintiff called Mr. Wallace and left a second voicemail message around 9:00 a.m., saying he had resolved the ant problems and was going to work at Hexion. According to the plaintiff, he needed sulfuric acid to do testing. The plaintiff did not arrive at Hexion until 1:30 p.m. The plaintiff could not enter Hexion because he could not contact anyone he knew there to gain entry. The plaintiff estimates he was at Hexion between 30 minutes to an hour and a half. The plaintiff claims that after leaving Hexion, he drove around for 30 to 45 minutes looking for Chemurgy, another chemical facility. When the plaintiff located Chemurgy, no one was there, so he did not stay. (Pl. dep. 154-60, ex. 21; Wallace decl. ¶ 39).

The plaintiff left a message for Hexion employee Pam Westmoreland, telling her that he could not get into the laboratory. The plaintiff stated in his message that he needed a small sample of sulfuric acid, and he would come back and pick it up. Hexion employee George Henderson told Ms. Westmoreland that he would take the sample to the plaintiff at Tietex on his way home. (Pam Westmoreland aff. ¶¶ 5-9).

The plaintiff did not telephone Mr. Wallace to tell him that he could not get in Hexion and that he was going to Chemurgy or anywhere else. (Pl. dep. 160; Wallace decl. ¶ 48). The plaintiff admits it would have been reasonable for him to call Mr. Wallace and tell him that his plans had changed. (Pl. dep. 165).

George Henderson, the Hexion employee, brought the sulfuric acid to Tietex for the plaintiff. Mr. Wallace later called Mr. Henderson and asked if he had seen the plaintiff that day, but Mr. Henderson had not. Mr. Henderson said that he had a voicemail from the plaintiff saying he needed some sulfuric acid urgently because he was planning to do some work on July 4th. According to Mr. Wallace, he was troubled because the plaintiff was not where he said he would be and because it appeared the plaintiff had planned to work with chemicals in the lab on a day the plant was supposed to be closed. (Pl. dep. 160; Wallace ¶¶ 42-43).

Mr. Wallace called the plaintiff on his cell phone between 4:30 p.m. and 5:00 p.m. and asked where he was. The plaintiff told Mr. Wallace that he had been to Hexion. Mr. Wallace told the plaintiff that Mr. Henderson had been to Tietex and said that the plaintiff had not been at Hexion that day. The plaintiff then stated he had gone to Hexion, but had been unable to get in or find anyone, so he left. The plaintiff could not give Mr. Wallace an adequate explanation of his whereabouts for the day. Mr. Wallace told the plaintiff he was suspended until Mr. Wallace returned from vacation. During the phone call, the plaintiff and Mr. Wallace were disconnected, and Mr. Wallace could not reach the plaintiff again by telephone. Mr. Wallace talked to David Wilson, the Human Resources Director, about what transpired, and a voice mail message was left for the plaintiff reiterating that he was suspended with pay and should not return to work until contacted by the defendant. (Pl. dep. 158-66, ex. 19; Wallace ¶¶ 44-48).

Mr. Wallace conducted an investigation of the events of July 3 when he returned from vacation. Mr. Wallace recommended the plaintiff's employment be terminated, and the decision to do so was made by Mr. Wallace; David Wilson, Human Resources Director; Martin Wildeman, Owner; Reed Cunningham, President; and Mark Isbell, Vice President of Manufacturing. The plaintiff was told he was not being terminated for one specific deficiency, but for many shortcomings that "added up," including the issues Mr. Wallace had addressed with him in the March 5, 2007, memorandum. (Pl. dep. 142, ex. 16; Wallace decl. ¶¶ 48-50). These issues were also documented in a memorandum dated July 18, 2007. (Pl. dep., ex. 19; Wallace decl. ¶ 51). The plaintiff's employment was terminated on July 19, 2007. The plaintiff does not know who made the decision to terminate his employment. (Pl. dep. 167-68, ex. 22).

APPLICABLE LAW AND ANALYSIS

Motion to Strike

The defendant has moved to strike several paragraphs in the plaintiff's affidavit submitted in opposition to the motion for summary judgment, arguing they contain assertions that lack personal knowledge, are conclusory, are based on unsupported personal opinion or speculation, are based on hearsay, or contradict the affiant's own prior sworn deposition testimony or documentary evidence. The paragraphs pertinent to the court's analysis of the motion for summary judgment are discussed below.

Motion for Summary Judgment

Federal Rule of Civil Procedure 56 states, as to a party who has moved for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that he is entitled to summary judgment as a matter of law. As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist which give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985), *overruled on other grounds*, 490 U.S. 228 (1989). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. Accordingly, when Rule 56(e) has shifted the burden of proof to the non-movant, he must provide existence of every element essential to his action which he bears the burden of adducing at a trial on the merits.

ADEA

The ADEA makes it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). "[A] plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action." *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 2352 (2009). The evidence may be direct or circumstantial. *Id.* at 2351.

Direct evidence is "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir.1995), *abrogated on other grounds by, Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). The plaintiff attempts to establish direct evidence of age discrimination based on a single statement allegedly made by Reed Cunningham, Tietex's President. The plaintiff claims that sometime before 2001 Mr. Cunningham commented that Tietex must get younger people into management. The plaintiff admits that it is quite reasonable to conclude that Mr. Cunningham did not mean he wanted the younger people to replace older workers, but believed the company needed a succession plan so that Tietex would have the ability to replace workers who either retired or left the company. The plaintiff admits Mr. Cunningham's comment was casual and confesses that, "[a]nd in all fairness to him, I personally don't think he meant anything by it..." The plaintiff admits he never complained to anyone about the statement. (Pl. dep. 187-88).

In his affidavit submitted in opposition to the motion for summary judgment, the plaintiff stated, "These incidents mirror the age-based animus voiced to me in 2000 by a high level manager Reed Cunningham about his plan to replace older managers with younger ones." (Pl. aff. ¶ 8). As argued by the defendant in its motion to strike, this statement contradicts the plaintiff's deposition testimony that the comment was casual and he did not think Mr. Cunningham meant anything by it. (Pl. dep. 187). If an affidavit conflicts with earlier sworn testimony, it must "be disregarded as a sham issue of fact." *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 975 (4th Cir. 1990). "A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir.1984). Based upon the foregoing, the defendant's motion to strike this portion of paragraph 8 of the plaintiff's affidavit is granted.

In *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542 (4th Cir. 1995), *rev'd on other grounds by*, 517 U.S. 308 (1996), a supervisor's remarks that, "[I]t's about time we get some young blood in this company," and "[Y]ou are too damn old for this kind of work," were insufficient evidence of discrimination because the remarks were not made in the context of replacing the plaintiff, but were made in another or an unknown context. *Id.* at 548-50. In *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir. 1994), a supervisor commented, "there comes a time when we have to make way for younger people." *Id.* at 511. The court noted that "[i]t is undisputed that the statement was made over two years before the discharge of [the plaintiff]. This remoteness in time makes it inappropriate to use . . . the statement as evidence of age discrimination." *Id.* at 511-12. The court further found "the statement in itself creates no inference of age bias. [The] comment reflects no more than a fact of life and as such is merely a 'truism[ ]' that carries with it no disparaging undertones." *Id.* at 512.

The comment here is similar to those in *O'Connor* and *Birkbeck*. This court agrees with the defendant that this comment, made over six years before the plaintiff's termination of employment and in no way related to his termination, cannot evidence any intent to discriminate against the plaintiff because of his age.

Under the burden-shifting method of proof of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973),[2] a plaintiff may establish a *prima facie* case of age discrimination under the ADEA by showing that he (1) is a member of the protected class, i.e., is at least 40 years old; (2) suffered an adverse employment action; (3) was meeting his employer's legitimate expectations at the time of the adverse action; and (4) was replaced

[2]The Supreme Court recently found that the text of the ADEA does not authorize a mixed-motive age discrimination claim. *Gross*, 129 S.Ct. at 2350. The Court also noted that it "has not definitively decided" whether the *McDonnell Douglas* framework, first developed in the context of Title VII cases, "is appropriate in the ADEA context." 129 S.Ct. at 2349 n.2. Accordingly, this court must follow Fourth Circuit precedent, which applies the *McDonnell Douglas* framework to ADEA claims. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir.2004). *See also Misner v. Potter*, 2009 WL 1972598, *2 n. 3 (D. Utah 2009) ("This court does not understand *Gross* as altering the use of the *McDonnell Douglas* framework at summary judgment on ADEA cases.").

by or treated less favorably than someone who is either outside the protected class or "substantially younger" than he is. *Mandengue v. ADT Security Systems, Inc.*, C.A. No. RDB-09-3103, 2010 WL 2365463, *5 (D. Md. 2010).

If the plaintiff can establish a *prima facie* case, the burden then shifts to the defendant to produce a legitimate, nondiscriminatory reason for its actions against the plaintiff. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981) (this is a burden of production, not persuasion). If the defendant meets this burden, the plaintiff must show by a preponderance of the evidence that the proffered reason was pretextual. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000).

The plaintiff is over 40 years old, and he suffered an adverse employment action when he was fired by the defendant. The defendant, however, argues the plaintiff cannot establish the third and fourth elements of a *prima facie* case.

First, the defendant argues the plaintiff was not performing his job at a level that met the defendant's legitimate expectations. This court agrees. As set forth above, the defendant articulated the deficiencies in the plaintiff's performance in memoranda dated March 5, June 18, and July 18, 2007. (Pl. dep., ex. 16, 18, 19). The plaintiff attempts to contradict the defendant's dissatisfaction with his performance by his subjective assessment of himself as a valuable, outstanding, and exemplary performer. However, the plaintiff's subjective view of his performance does not establish a *prima facie* case. *See McNally v. Norton*, 498 F.Supp.2d 167, 183 (D. D.C. 2007) ("Plaintiff's subjective belief of qualification is not evidence that can be used to establish that he was qualified for the job.") (citation omitted). The perception of the employer is critical, "not the self-assessment of the plaintiff." *Hawkins v. PepsiCo*, 203 F.3d 274, 280 (4th Cir. 2000) (citation omitted).

Next, the defendant argues that the plaintiff has no evidence he was replaced by a person substantially younger than himself. The plaintiff contends that "Wallace . . . became determined to rid Tietex of [the plaintiff] and replace him with a twenty-five year old

worker who was referred to Tietex by Wallace's boss, Mark Isbell." (Pl. resp. m.s.j. 16, ex. 8). The employee referred to by the plaintiff is Trish Guzman. However, as pointed out by the defendant, the plaintiff does not deny that Ms. Guzman's title of Chemist Lab Manager and his title of Senior Research Chemist were different. He also does not dispute that Ms. Guzman's job description as Chemist Lab/Environmental Manager is not an accurate description for the job he performed and is much smaller in scope. The plaintiff can only point to a few of his former duties that he claims Ms. Guzman performed. He claims Ms. Guzman dealt with vendors and formulations in an effort to purchase chemicals for less. (Pl. dep. 192-93). Ms. Guzman performed only a few of the general chemical duties that had previously been a portion of the plaintiff's job. (Wallace decl. ¶ 52). The plaintiff himself also claims another employee, Colon Knight, "replaced him to a certain extent." (Pl. dep. 224). Mr. Wallace testified that after the plaintiff was terminated several people performed his prior duties: Mr. Wallace did the project work; the evaluation and approval of all new chemicals was put on hold, so no one performed those duties; Jake Butts was reassigned some of the environmental work; and some environmental duties were later assumed by Paul Hite. (Wallace dep. 122-23; Butts dep. 34-36). Mr. Wallace testified that Ms. Guzman was later hired and took on two or three of the plaintiff's former duties. Further, Ms. Guzman did not report to Mr. Wallace, as the plaintiff had. (Wallace dep. 124).

The plaintiff also alleges that the defendant "replaced numerous older employees with younger employees." (Comp. ¶ 4). In his response in opposition to the motion for summary judgment, the plaintiff argues as follows:

> Over the past few years at Tietex, management has engaged in a pattern and practice of replacing older managers with younger ones. Judy Kramer was a lab manager aged approximately sixty-two (62). She was replaced by Rhonda Blanchard who was aged thirty (30) or younger. Bill Lynch was a sixty (60) year old Gray Mill operator, he was replaced by Joey Griffin, who was in his thirties (30s). Leroy McCraw was a sixty year old engineer who was pushed out by Tietex, given a severance and some "consulting" work and then was replaced by Paul Bartley, an engineer in his thirties (30s). Jake Butts,

> sixty-six (66) at time of discharge, was given a severance the month after Harris was terminated. He was replaced by Colin Knight, in his thirties (30s).

(Pl. resp. m.s.j. 16). In his affidavit submitted in opposition to the motion for summary judgment, the plaintiff makes similar allegations. (Pl. aff. ¶ 8). However, the plaintiff's affidavit directly contradicts his prior testimony in his deposition that (1) Judy Cramer retired, and the plaintiff, himself, chose Rhonda Blanchard to replace her; (2) he did not know if Bill Lynch was terminated and replaced with Joey Griffin; and (3) he denied that Leroy McCraw was terminated because of age and replaced with Paul Bartley. (Pl. dep. 201-206). Further, the plaintiff's affidavit contradicts Jake Butts' deposition testimony that he retired voluntarily with an incentive package. (Butts dep. 8-9). The plaintiff admitted in his deposition that he was not sure that Mr. Butts had been replaced because of his age, and he had no evidence that he was. (Pl. dep. 206). Accordingly, as paragraph 8 of the plaintiff's affidavit conflicts with earlier sworn testimony, it is stricken. *See Rohrbough*, 916 F.2d at 975.

This court finds that the plaintiff has failed to establish a *prima facie* case of age discrimination. The defendant has produced evidence showing it had legitimate, non-discriminatory reasons for firing the plaintiff. (Pl. dep., ex. 16, 18, 19; Wallace decl.). Even assuming the plaintiff could establish a *prima facie* case of age discrimination, he has failed to show that the proffered reasons for his termination of employment were pretext for age discrimination as set forth below.

The plaintiff points to several "material disputes of fact" that he argues shows age discrimination was the reason for his termination of employment. First, the plaintiff notes "[g]ross inaccuracies in Wallace's timeline testimony" with regard to the events of July 3, 2007. (Pl. resp. m.s.j. 12). Specifically, the plaintiff contends Mr. Wallace "relates a totally inaccurate timeline as to when the Hexion representative was at Tietex." Also, the plaintiff contends Mr. Wallace "made false statements in the termination memo" by wrongly stating that the plaintiff instructed the Hexion employee to deliver the sulfuric acid to Tietex.

(Pl. resp. m.s.j. 12). Assuming the plaintiff is correct, it is unclear how these facts are material to the issue of whether the plaintiff was terminated because of his age. As argued by the defendant, the Hexion employee's visit to Tietex is relevant only to the extent that it is what alerted Mr. Wallace to the fact that the plaintiff was not working at Hexion as he said he would be. Here, even assuming Mr. Wallace was motivated to terminate the plaintiff's employment based on an incorrect fact (that is, the timeline or whether the plaintiff asked the Hexion employee to deliver the sulfuric acid), this does not equate to being motivated by age.

The plaintiff next contends that Jake Butts' opinion of the plaintiff's performance and work hours is evidence that Mr. Wallace manufactured these performance deficiencies. While Mr. Butts testified that he did not have a problem with the plaintiff's "odd" work hours or performance, it is clear that Mr. Wallace did. However, the plaintiff has presented absolutely no evidence that Mr. Wallace's expectations of the plaintiff were motivated by age. Establishing "new, higher standards raises no suspicion of discrimination by itself; the courts must accept the employer's legitimate standards of qualification 'provided the decision is not based upon unlawful criteria.'" *Bossalina v. Lever Brothers, Inc.*, No. 86-2158, 1988 WL 60572, *2 (4th Cir. 1988) (quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981)).

Based upon the foregoing, the plaintiff has failed to show that issues of material fact remain. Accordingly, his discharge claim fails.

Retaliation

The plaintiff also alleged he was terminated from his employment in retaliation for his complaints about "past problems" to his former supervisor, Jake Butts. (Pl. dep. 184). Retaliation claims under the ADEA are governed by the *McDonnell Douglas* framework for circumstantial evidence, requiring the plaintiff to establish a *prima facie* case showing: (1)

he engaged in protected activity; (2) the defendant took adverse action against him; and (3) a causal connection existed between the protected activity and the adverse action. *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 191 (4th Cir. 2001). Protected activity may be in the form of participation in the charge filing process or protesting unlawful age discrimination in the work place. *Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998).

The plaintiff claims he stated to his former supervisor, Jake Butts, in 2004 or 2005 that older workers seemed to be replaced by younger workers and that this concerned him. The plaintiff was terminated from employment on July 19, 2007. The plaintiff admits that Mr. Butts was not in a position to influence his employment status at the time of his termination from Tietex. He further admits he has no evidence that Mr. Butts told anyone about his conversation with the plaintiff, and no one else was present. The plaintiff testified that his only evidence that he was retaliated against was the fact that he was terminated. (Pl. dep. 180-84, 207, 210).

The plaintiff has absolutely failed to show any causal connection between the statements made to Mr. Butts and his termination. The two events are not closely related in time, there is no evidence anyone other than Mr. Butts was aware of the statements, and Mr. Butts had no influence or involvement in the plaintiff's termination from employment.

The plaintiff argues in his opposition to the motion for summary judgment that he met with Tietex's owner, Martin Wildeman, on June 21, 2007, "to address the discrimination and other problems he was experiencing with...Wallace." (Pl. resp. m.s.j. 5). He cites to his own affidavit submitted in support of his opposition memorandum. In that affidavit, the plaintiff states in pertinent part, "Specifically, on June 21, 2007, just two weeks before I was suspended, I met with Martin Wildeman, and addressed the issues of . . . 2) Discrimination . . . . Clearly, I reported discrimination right before I was fired to the highest authority at Tietex - the owner." (Pl. aff. ¶ 5). In his affidavit, the plaintiff cites a document that he created listing bullet points including "Discrimination" for a meeting with "Martin" on

June 22, which is marked through and replaced with June 21. The plaintiff's own handwritten notes on the document characterize the list as "topics I *would* go over." (Pl. aff., ex. D) (emphasis added). The plaintiff further states in his handwritten notes on the document, "I recall very little about what was discussed. I do recall that the owner refused to get into discussion, was of no support and aborted the meeting rather suddenly." (*Id.*). In his deposition testimony, the plaintiff testified that he could not recall ever having mentioned age discrimination to Mr. Wildeman. (Pl. dep. 176-78). The plaintiff confirmed on the document that Mr. Wildeman "was not provided a copy of this listing", so Mr. Wildeman did not even know that "Discrimination" was to a be a "topic" of discussion. (Pl. aff., ex. D). Based upon the foregoing, the plaintiff has provided no evidence he discussed discrimination with Mr. Wildeman. Further, as the statement in the plaintiff's affidavit is conclusory, not factual, and contradicted by the document he relies upon and his earlier sworn deposition testimony, this court grants the defendant's motion to strike this portion of paragraph five of the plaintiff's affidavit.

The plaintiff also contends he was not terminated until after he made "final complaints of mistreatment" on July 18, 2007. (Pl. resp. m.s.j. 9). The plaintiff cites to Human Resource Director David Wilson's testimony before the South Carolina Employment Security Commission that he allowed the plaintiff to "vent" prior to his termination. However, Mr. Wilson makes no reference to the plaintiff mentioning age discrimination or age in any way. (*Id.*, ex. 19 at 22-23). In his response to the motion for summary judgment, the plaintiff does not allege that he complained he was being discriminated against because of his age, only that, in his view, he was being treated unfairly. (Pl. resp. m.s.j. 9). As noted by the defendant, many people who are about to be terminated from their employment believe they are being treated unfairly, but expressing that feeling is not protected activity. *See* 29 U.S.C. § 623(d).

In summary, the plaintiff has absolutely failed to show any causal connection between the statements made to Mr. Butts and his termination. The plaintiff admitted he cannot remember discussing age discrimination with Mr. Wildeman. Further, he never used the term "age" or "discrimination" when describing his "venting" to Mr. Wilson, only that he was being treated unfairly. In addition, the plaintiff has come forward with no evidence that he complained of age discrimination to his supervisor, Mr. Wallace. Based upon the foregoing, the plaintiff's retaliation claim should be dismissed.

State Law Claims

As it is recommended that the plaintiff's federal claims be dismissed, the court should decline to exercise supplemental jurisdiction over the plaintiff's state law claims for breach of contract, breach of contract accompanied by a fraudulent act, and defamation. 28 U.S.C. § 1367(c); see United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").

CONCLUSION

Wherefore, based upon the foregoing,

IT IS ORDERED that the defendant's motion to strike (doc. 111) is granted in part as set forth above. To the extent the defendant moved to strike portions of the plaintiff's affidavit not discussed herein, such motion is moot. Further,

IT IS RECOMMENDED that the defendant's motion for summary judgment (doc. 68) be granted as to the ADEA claims, and that the court decline supplemental jurisdiction over the plaintiff's state law claims.

July 29, 2010
Greenville, South Carolina

s/Kevin F. McDonald
United States Magistrate Judge

Attachment B

Opinion and Order of District Judge J. Michelle Childs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Gary G. Harris, Plaintiff,	)	C.A. No. 7:08-cv-03020-JMC
v.	)	**OPINION AND ORDER**
Tietex International, Ltd., Defendant.	)	

This is an employment discrimination case brought by Plaintiff under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* Plaintiff also alleges state law causes of action. On July 29, 2010, the Magistrate Judge entered his Report and Recommendation [Entry # 121] made in accordance with 28 U.S.C. § 636(b)(1)(A) and Local Civil Rule 73.02(B)(2)(g) for the District of South Carolina, wherein he recommends that Defendant's Motion for Summary Judgment [Entry # 68] be granted.

Plaintiff was apprised of his right to file objections to the Report and Recommendation and has done so in a memorandum filed with the Clerk of Court on August 16, 2010.[1] [Entry # 123]. In his opposition to the Report and Recommendation, Plaintiff argues that the Magistrate Judge failed to view the evidence in a light most favorable to Plaintiff and improperly resolved facts in controversy as to several arguments in Defendant's Motion for Summary Judgment. For the reasons contained herein, Defendant's Motion for Summary Judgment is granted, the Magistrate Judge's Report and Recommendation is adopted herein, this case is dismissed with prejudice as to the federal

[1]There seems to be confusion regarding whether or not Plaintiff timely filed objections to the Report and Recommendation. However, upon closer examination, it appears that a computer glitch caused the document to appear as though it was filed on August 17, 2010, instead of August 16, 2010. The Clerk of Court has subsequently remedied the mistake and the court finds that Plaintiff's objections were timely filed.

causes of action, and the court declines to exercise supplemental jurisdiction over the state law causes of action.

STANDARD OF REVIEW

The Magistrate Judge makes his Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina. A Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). The court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

DISCUSSION

Plaintiff objects to the Magistrate Judge's Report and Recommendation, arguing that the Magistrate Judge improperly resolved material facts in controversy as to whether: (1) Plaintiff met Defendant's (the employer) legitimate expectations at the time of the adverse actions; (2) Defendant replaced Plaintiff with an employee who is either outside the protected class or substantially younger than Plaintiff; and (3) Defendant retaliated against Plaintiff for making claims of age-related bias.[2]

[2] Harris argues the existence of material factual issues in his objections to the Magistrate Judge's Report and Recommendation by attaching a new and contradictory Affidavit. Harris has provided no explanation for his decision not to submit the Affidavit in connection with his response opposing Defendant's summary judgment motion. Therefore, the court, in its discretion, will not consider the Affidavit at this late stage of the proceedings. *See* Fed. R. Civ. P. 56(g); *Williams v. McNeil*, 557 F.3d 1287 (11th Cir. 2009) (affirming district court's discretion to refuse to consider arguments raised for the first time in objections to the magistrate judge's report and recommendation). However, the court will address the arguments made in Plaintiff's filed objections to the Report and Recommendation. To the extent that these arguments are supported by the contradictory affidavit, the court will not consider such arguments as stated herein.

I. Legitimate Expectations at Time of Adverse Action

Plaintiff contends that the Magistrate Judge improperly resolved a material fact in controversy which was directly relevant to whether Plaintiff was performing at the level of Defendant's legitimate expectations at the time of the adverse action. The Magistrate Judge determined that Defendant articulated deficiencies in Plaintiff's performance in memoranda dated March 5, June 18, and July 18, 2007, and found that Plaintiff did not establish a *prima facie* case of age discrimination under the ADEA because he failed to provide evidence that established that he was meeting his employer's legitimate expectations at the time of the adverse action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

A. The C237 Project

Plaintiff argues that the Magistrate Judge relied on inconsistent facts in recommending that summary judgment be granted regarding the date on which Plaintiff's supervisor, Wade Wallace ("Wallace"), began a parallel project to correct Plaintiff's failure to successfully execute the project known as the C237 Project. However, the fact in question is not material. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985), *overruled on other grounds*, 490 U.S. 228 (1989) (stating that conclusory allegations or denials, without more, are insufficient to preclude the granting of summary judgment).

Regardless of which date Wallace began the parallel project, it is uncontroverted that Plaintiff did not meet his employer's expectations because his compound was too expensive to produce.

Plaintiff contends that Wallace gave conflicting statements concerning when he began the project, and the Magistrate Judge stated in his Report and Recommendation that Wallace began the parallel project in February 2007 instead of June 2007. However, the evidence in the record demonstrates that Plaintiff had been working on the C237 Project for about six months and predicted that the C237 Project would result in significant cost savings for Defendant. Plaintiff claims he had a successful trial before he began reporting to Wallace. Despite Plaintiff's characterization of the compound as a success, Defendant deemed the project unacceptable because it was much more complicated to produce commercially than Plaintiff had initially anticipated. Therefore, the date on which Wallace began to oversee the parallel project is irrelevant. Even assuming that the Magistrate Judge had used Plaintiff's purported date, it remains undisputed that Defendant determined that Plaintiff had performed unsuccessfully and failed to complete the C237 Project to Wallace's satisfaction. Therefore, the court finds that the Magistrate Judge correctly determined that Plaintiff failed to demonstrate that he was meeting his employer's legitimate standards at the time of his termination.

B. Vacation Days

Plaintiff also argues that the Magistrate Judge erred in finding, as a material fact, that "[a]ccording to Mr. Wallace, Plaintiff made no effort to complete the C237 project. Instead, Plaintiff began taking multiple days of vacation immediately after being given the warning on June 18." Plaintiff contends that he actually worked at another lab in the days following June 18, 2007, and during the week of June 25, 2007. However, the dates averred in Plaintiff's objections contradict testimony in the record, which establishes that Plaintiff requested vacation for June 19th, 20th, the entire week of June 25th, July 2nd, and July 3rd. (*See* Harris Tr. 145:15-146:7; Wallace Decl. ¶ ¶ 33-34). Furthermore, Plaintiff admitted to taking vacation immediately following his June 18, 2007

warning by Wallace that his work was not satisfactory and he needed to complete the project. (Harris Tr. 147:24-148:2). Therefore, the Magistrate Judge did not err in finding that Plaintiff was not meeting his employer's legitimate expectations and that he could not establish a *prima facie* case of age discrimination.

C. Directives Regarding Working Hours

Plaintiff claims that the Magistrate Judge erroneously concluded that he ignored directives not to work in the chemical laboratory areas at night or on the weekends. Plaintiff argues that Wallace seemed to be determined to prevent Plaintiff from completing his work by denying him the opportunity to work at night and on the weekends, and that Jake Butts ("Butts"), his previous supervisor, had no concerns with Plaintiff's schedule in that regard. Plaintiff's argument with respect to Butts is irrelevant in the context of his new supervisor, Wallace. Plaintiff admitted that he was told by Wallace not to work in the plant for safety reasons when it was not operating. Plaintiff admittedly ignored these directives due to his own opinion that the plant was safe when not operating. While his erratic hours had been acceptable to his previous supervisor, they were not acceptable to Wallace. The court agrees with the Magistrate Judge that Plaintiff has presented no evidence that Wallace's expectations were motivated by age.

Therefore, based on the evidence in the record, the Magistrate Judge correctly determined that summary judgment should be granted in favor of Defendant.

II. Replacement by a Younger Employee

Plaintiff claims that the Magistrate Judge erred in finding that he was not replaced by an employee outside of the protected class or substantially younger than him. Specifically, Plaintiff argues that the job description given to him by Wallace on February 1, 2007 lists eleven duties, seven

of which were the same duties assigned to one of Plaintiff's replacements, Trish Guzman ("Guzman"). Furthermore, Plaintiff argues that the core of Guzman's job was identical to Plaintiff's previous job, and he performed all of the duties in the "scope of responsibilities" section of Guzman's job description. Again, the record does not support Plaintiff's assertions.

Instead, Defendant relied on evidence in the record to demonstrate that Plaintiff's position was eliminated and his duties were assigned to various other positions. Additionally, Plaintiff has acknowledged that Guzman's title of Chemist Lab Manager and his title of Senior Research Chemist were different. Furthermore, Plaintiff's objections directly contradict his deposition testimony where he did not dispute that Guzman's job description as Chemist Lab/Environmental Manager was not an accurate description for the job Plaintiff had performed, but much smaller in scope, as Guzman only dealt with vendors and formulations in an effort to purchase chemicals for less money. Furthermore, Guzman had responsibility for only a few of the general chemical duties that had previously been a portion of Plaintiff's job. Even Plaintiff claims Colon Knight "replaced him to a certain extent." (Harris Tr. 224:6-12). In addition, the Magistrate Judge considered Wallace's testimony that several employees performed Plaintiff's duties after his dismissal, Guzman assumed only two or three of Plaintiff's former duties, and Guzman did not report to Wallace, as Plaintiff had previously. Accordingly, Plaintiff's objections to the Magistrate Judge's finding that he was not replaced by a younger employee are unfounded based on the record before the court.

III. Retaliation

Plaintiff claims that the Magistrate Judge erred in concluding that no causal connection existed between his alleged complaints of age discrimination and the termination of his employment.

1. Jake Butts

The Magistrate Judge determined that Plaintiff could show no causal connection between statements made to his previous supervisor, Butts, and the termination of his employment because there was no temporal connection, no evidence that Butts repeated the statements to anyone else, and no evidence that Butts had any involvement in the decision to terminate Plaintiff's employment. Plaintiff has offered no argument to counter the Magistrate Judge's reasoning. Rather, in his objections, he simply repeats that he complained to Butts, while attempting to place the date of his complaint closer to the time of his termination by alleging it was "between late 2005 and January, 2007." However, this allegation is inconsistent with Plaintiff's earlier deposition testimony, where he claims he mentioned age discrimination to Butts in 2004 or 2005. (Harris Tr. 180:9-11; 181:2-12). Furthermore, Plaintiff admitted that Butts was not in a position to influence his employment status at the time of his termination. There is no evidence in the record to demonstrate that Butts told anyone about his conversation with Plaintiff. Plaintiff's conclusory statements to the contrary, therefore, are not sufficient to withstand Defendant's summary judgment motion.

2. Martin Wildeman

Plaintiff also claims in his objections to the Report and Recommendation that he reported discrimination to the owner of the company, Martin Wildeman ("Wildeman"). However, Plaintiff previously stated in his deposition that he cannot recall ever having mentioned age discrimination to Wildeman. The Magistrate Judge acknowledged Plaintiff's claim that he had reported discrimination to Wildeman, and noted Plaintiff's citation to a list of bullet points to be discussed in a meeting with "Martin." However, the Magistrate Judge properly concluded that because Plaintiff acknowledged Wildeman was never provided a copy of the bullet points, and because Plaintiff

admitted that he could not recall discussing discrimination with Wildeman, Plaintiff had provided no evidence that such a discussion had occurred. Therefore, Plaintiff's objections to the Magistrate Judge's Report and Recommendation that summary judgment be granted on his retaliation claim are unpersuasive.

V. State Law Claims

Because the court has found that Plaintiff's federal claims should be dismissed, the court shall decline to exercise supplemental jurisdiction over Plaintiff's state law claims for breach of contract, breach of contract accompanied by a fraudulent act, and defamation. 28 U.S.C. § 1367(c); *see United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").

CONCLUSION

For the reasons stated above, the court finds Plaintiff's Objections to the Magistrate Judge's Report and Recommendation [Entry # 123] unpersuasive. Therefore, it is **ORDERED** that the Magistrate Judge's Report and Recommendation [Entry # 121] is adopted and incorporated herein; Defendant's Motion for Summary Judgment [Entry # 68] is granted; and the court declines to exercise supplemental jurisdiction over Plaintiff's state law claims.

s/ J. Michelle Childs
United States District Judge

October 28, 2010
Greenville, South Carolina

Geren, Bonny L.

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Attachment C

Excerpts and Exhibits from First Deposition of Gary G. Harris July 13 & 15, 2009

Transcript of the Testimony of:

Gary G. Harris

July 13 & 15, 2009

In the Matter of

Gary G. Harris v. Tietex International, LTD
7:08-3020-HFF-WMC

G. W. Coleman Associates
P. O. Box 9177
Greenville, South Carolina 29604
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Q: Do you have any significant debts?
A: Not right now.
Q: Other than your mortgage?
A: No. Everything right now is in reasonably good shape. The only debt I guess would be significant is one of the cars there's probably $3,000 owed on it thereabouts.
Q: You don't have any big credit card debts?
A: Since this bankruptcy, I have gotten credit cards back and I probably got, I don't know, six or eight. I'll use two and put those away, use two more. But I will not let a, if a get a statement, I pay it immediately.
Q: You were telling me and I stopped you, about getting a call when you were at Chatham about the job at Tietex. Tell me about that. How did you find out about the job at Tietex?
A: I received a phone call and I think it would have been from some agency that they had hired to find someone would be my, based on what I remember of the situation.
Q: All right. And then you went for an interview, correct?
A: I did in April.
(Defendant's Exhibit 5 was marked for identification).
Q: And Exhibit 5 is your letter back to Tietex, essentially, thanking them for the interview.
A: Okay.

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Q: Correct?
A: Yes.
Q: And you interviewed, according to this letter, with Martin Wildeman and the HR Manager, Don Woodward, and the Printing and Finishing Manager, Dave Hughston, and then John somebody. Who's John?
A: John Broughton.
Q: Spell that, please.
A: B-r-o-u-g-h-t-o-n.
Q: Who actually hired you?
A: John Broughton along with Dave Hughston, but John was the key figure.
Q: And you see on this Exhibit 5, the fourth paragraph where you talk about Tietex having a very clean, modern facility. Do you see that?
A: Uh-huh (affirmative response).
Q: And would you agree that the facility stayed clean throughout your employment?
A: Yes.
(Defendant's Exhibit 6 & 7 were marked for identification).
Q: I'm going to give you two together. Exhibit 6 is an Offer of Employment to you and Exhibit 7 is looks like your New Hire sheet. According to these documents, you began working at Tietex on July 13, 1994. Any reason to dispute that?

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A: No.
Q: And your salary at hiring was $55,000. Any reason to dispute that?
A: No.
Q: And you were hired as a Senior Research Chemist. Any reason to dispute that?
A: That was the job title, but it did not cover what I was hired for.
Q: All right. And that Senior Research Chemist position was in the Printing and Finishing Department of Tietex, correct?
A: As far as the pay for that position, yes.
Q: As far as the what?
A: The pay.
Q: Well, it says, looking at Exhibit 6, it says in that first paragraph, second line, I'm sorry, first line, "We are pleased to offer you the position of Senior Research Chemist in our Printing and Finishing Department." Do you see that?
A: Yes, sir. That's what it reports to, but it doesn't spell out the responsibilities were plant wide.
Q: Okay. So Exhibit 6 is not a job description, right, it just states the name of the job?
A: Yes.
Q: And you reported to Dave Hughston, the Plant

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Manager of Printing and Finishing?
A: Yes.
Q: Now, if you will look, please, at Exhibit 6, the second page, which is Bates Numbered 229. Do you see the bold underlined language that's two paragraphs above Mr. Woodward's signature?
A: Yes.
MR. STEWART: Objection to form.
Q: It says, "This letter summarizes our offer. Nothing herein should be construed as a Contract of Employment or as a promise of any specific terms for any determined period of time. Did I read that correctly?
A: Yes.
Q: So under the terms of your offer, you were employed at will, correct?
MR. STEWART: Objection to form. You can answer, I'm objecting for the record.
Q: Remember what we said, that he might object but you go ahead and answer.
A: Okay. Yes.
Q: And your employment could be terminated any time for any reason, correct?
A: May I add to that?
Q: Sure. Well, give me a yes or no and then qualify it.

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A: Yes. I'm not sure time wise how long it was after I started the job, but Dave Hughston brought a paper in one day for me to sign. And, basically, it said, spelled out Tietex being an at will employer and so forth, and then it went on to say, you know, specifically that I could leave for any reason at any time and Tietex could ultimately do the same. It was both ways. And I told Dave, I said, "I don't think I want to sign this," something to that effect. And something to the effect of what happens if I don't sign. And he, essentially, told me that if you don't sign it, you'll probably lose your job, so that's when I signed it, but I was aware of Tietex being an at will employer.

Q: Do you have a copy of that document?

A: I do not.

Q: Well, you had quit other work, right, during your career before Tietex?

A: Sure.

Q: And you knew that you could quit Tietex if you wanted to for whatever reason whenever, correct?

A: Yes.

Q: And you told me about this document that Mr. Hughston brought you, but you didn't have any kind of written Contract of Employment when you were hired, did you?

A: Nothing formal that I know of.

Q: And during the term, well, during the time that

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you worked for Tietex, nobody ever gave you a written Contract of Employment to sign, did they?

A: No.

Q: Did you go through an orientation?

A: I don't recall.

Q: Do you ever recall anybody explaining and reviewing the Employee Handbook with you?

A: I do not recall that.

Q: Do you ever recall being given a copy of the Employee Handbook?

A: I definitely was given a copy. I do not know how early on it was, but I had one in my possession for several years.

Q: Did you read it?

A: I periodically would reference it regarding, say, one of the folks that reported to me had a question or anything of that nature, I would use it as a reference manual to try to answer questions or for my own.

Q: But you never read it cover to cover?

A: No.

Q: Do you recall any part of the Handbook that you read not understanding?

A: The only thing I can remember, and this is really too vague to be bringing up, but I do remember some things in there that I felt like were either outdated, a lot of

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outdated stuff that didn't really apply. And the thought there is, you know, this manual needs to be revised. That's the only thing I can recall that I didn't understand.

Q: Do you remember what they were?

A: No, I don't.

Q: Do you recall asking questions for clarification about the Handbook?

A: I don't recall it, but I'm sure if I was trying to get an answer for someone and I, just to back up my interpretation, I'm sure I probably did that, but I don't recall it.

Q: That would be in giving an answer for someone else who came to you, correct?

A: Most likely.

Q: Do you have a copy of that Handbook?

A: No. I actually, I'm not sure what year it was, it was around 2005, '6, along in there, there was a call for the manuals to be turned in so they could revise, and I never got a revised copy.

Q: I'm going to, if I may, read you the question and answer which is Interrogatory 13. "Interrogatory. Identify the specific statements, policies, or procedures which Harris claims were expressed in mandatory terms and formed a contract of employment." "Answer. Plaintiff beliefs that Tietex had an employment handbook when he was first hired

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which laid out responsibilities and duties of the employee and the employer. However, he does not currently have a copy of this handbook. It is believed that the Defendant would have a copy of this handbook and Plaintiff will formally request it. Therefore, the Answer to this Interrogatory will be supplemented as discovery progresses." Did you hear all that?

A: Yes.

Q: So would it be fair to say that as of today, as we're talking, you don't know what policies were in the Handbook?

A: I do know there was a policy in there that had to do with termination and the steps that were to be taken. I can't cite them or anything, but I knew they were like written warning, verbal warnings, and then written warnings and then termination. I knew that was in there.

Q: All right. Other than that, you don't know what was in the Handbook?

MR. STEWART: Object to the form.

A: I mean, I couldn't specifically tell you. I mean, we could sit here and talk and can tell you the kind of things that were in there, but I couldn't tell you a page number or anything.

Q: All right. Well, it would be fair to say then, that you don't know what policies in the handbook that you

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would contend today created a Contract of Employment?
MR. STEWART: Object to the form.
A: Yeah, I don't really feel like I could answer that question, so I'll just say I don't know the answer.
Q: You don't know. It's fair. Look, you can say yes, you can say no, you can say yes and no and qualify it, and you can say I don't know.
A: I'll say I don't know then.
Q: So you don't know what in the Handbook that you would base your contract claims on?
MR. STEWART: Same objection.
Q: Correct?
A: I don't know, I mean, I've got my thinking but I don't think it's, again, I don't think it's — The answer would be, no, I'm not sure. No, I'm not able to put my finger on something right now, but I have my thinking on it. I don't know.
Q: Okay. Now, there is a breach of contract claim in your Complaint which we just talked about. Then there is a second claim that's breach of contract accompanied by a fraudulent act. What do you claim that Tietex did that was fraudulent?
A: I'm not exactly sure where that is right now. I'll say I'm not sure right now.
(Defendant's Exhibit 8 was marked for identification).

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Q: Can you identify Exhibit 8 as the Equal Employment Opportunity Policy from the Tietex Policy Manual?
A: That's what I'm looking at, that's what it says.
Q: All right. And it says, "It is the policy of the Company to provide equal opportunity to all employees and applicants. No person shall be discriminated against because of race, religion, color, sex, age, national origin, handicap, or veteran status." Do you see that?
A: Yes.
Q: Did I read it correctly?
A: Yes.
Q: Now, remember when we were talking about your Offer Letter and you said, well, you know, that describes my title, but it doesn't really describe the job? Do you remember that?
A: Yes.
(Defendant's Exhibit 9 was marked for identification).
Q: I'm going to give you Exhibit 9, which is a Job Description for the job title that you had, Senior Research Chemist. Is Exhibit 9 an accurate description of the job that you had as Senior Research Chemist?
A: One second, please.
Q: All right. And let me just invite your attention to the second page which is marked 344. You can see it was written by Jake Butts, and he dated it January 6, 1998.

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A: Yeah, but, I mean, this is the first time I've ever seen this so that's why I'm ...
Q: Go ahead and take your time.
(Reviewing document).
A: I mean, most of the things on it are things that I was involved in, but there are some things that are not here.
Q: All right. Well, tell me what you would add.
A: Well, I can't, I mean, I could take this home and, you know, do some recall and come up with several I'm sure, but I'm looking for environmental stuff right now and I'm not seeing it. Maybe I'm overlooking it.
Q: Okay. So you say you had some environmental duties that aren't listed in the 16 job duties?
A: I would have to say, in all fairness to me, that I had the greatest degree of responsibility with regard to all EPA and environmental work and reporting.
Q: And your point is that to the extent that you had those environmental or EPA duties, they're not listed on Exhibit 9?
A: They're not listed. I don't believe I've overlooked them.
Q: No, I read it, I didn't see them either. Jake Butts is who you reported to, right?
A: At that time.

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Q: And he was the QA and Environmental Manager?
A: According to this.
Q: Now, you were first hired as a Senior Research Chemist, correct?
A: There was a job open and the title was Senior Research Chemist that within the, within the framework of that particular job that was open or duties that had been vacated by a gentleman who had gone elsewhere.
Q: So when you went to work for Tietex, we've already established that your job title was Senior Research Chemist, correct?
A: The title was because that was what was what was available, but the discussions I had with John Broughton and Dave Hughston at the time we were considering me or they were considering me, it was clear that I was over qualified for the job as written.
Q: And the last day you worked at Tietex, your job title was still Senior Research Chemist, wasn't it?
A: It was newly created, I believe it was like February of '07, it was newly created. It was a newly created position for me. It was advertised as a newly created, posted job, posted as a newly created whatever.
Q: All right. This is the transcript of your testimony before the Appeal Hearing on September 12, 2007.
A: Okay.

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A: I can't answer that. I was having to take, as far as environmental goes, I was having to take things home with me and do them, because I wasn't allowed to work overtime, that kind of thing, and I was carrying stuff home with me to do records keeping and reporting, so I don't know. I don't know.
Q: Okay. If you don't know, that's fair. Did you ever supervise employees? Did you ever have people reporting to you ...
A: A few.
Q: ... so that they looked at you as their supervisor.
A: Let me just throw this in. It's important, I think. When I first went to work there, Dave Hughston, the plant manager, gave me responsibility over all department managers. I had that responsibility over all of them. They would listen to me. That was a given. As far as actual folks reporting to me, I just had a few in the laboratory area.
Q: Who were they?
A: It would be Judy Cramer. What was the Quinn lady's ...
MS. DAVIS: Jean.
A: Jean Quinn, Rhonda Blanchard, Robert Culbreth, Gene Panell.

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Q: Last name?
A: Panell, P-a-n-e-l-l.
Q: Is that a male or a female?
A: It's a man. And what's the girl that had so many difficulties that worked with Rhonda who is another technician? Kay Ward.
Q: So all of these employees that you just named reported to you at some time or another?
A: Yes.
Q: All right. How many usually reported to you at once?
A: I guess at a minimum over the time I was there until I started reporting to Wade Wallace, maybe at any given time a minimum of three or four.
Q: Three or four at a time?
A: Yeah.
Q: What were your normal hours of work?
A: Let me just say that during an approximate six, seven year span, I would say that I averaged a minimum of 70 hours on the job site.
Q: I think my question wasn't clear. On the normal day, what time would you go to work and what time would you leave? What was your expected time to be at work?
A: The expected time, I believe, was 8 o'clock, and I believe the expected time we could leave was 5 with an hour

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for lunch. Most of the time, I'm talking about when I was actually involved and this other stuff hadn't started, I would be there 6, 6:30.
A: A.M.?
A: Uh-huh (affirmative response). And stay there for as long as I needed to to get as much done as possible. It wasn't unusual to stay there till 6, 6:30.
Q: Were there safety reasons for you to be at work during regular business hours?
A: Since I was the key person regarding safety, are you talking about chemicals and things I worked with?
Q: Yes.
A: I was the person, the person that made decisions as to what was safe, what was not, maintain the MSDS books for the most of the time I was there and oversaw a lot of that without title, I was the one that was relied upon for making those kind of decisions. And in the first, before I reported to Wade Wallace, there was never one instance where anyone came to me and said you shouldn't be in here on Saturday or Sunday.
Q: Were there reasons that you shouldn't be working alone with chemicals and lab equipment?
A: No.
Q: You claim it would have been safe for you to work alone with chemicals and lab equipment?

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A: No. I'm a professional in that area and I know what precautions to take. It would have actually been, I mean, take a scenario where I'm there and the plant's running and I'm working with chemicals, which I didn't do a lot of that, I mean, talking about hazardous chemicals, if I'm working with hazardous chemicals which, again, did not occur but fairly infrequently, I don't want, I'm not going to allow anyone else to be around me because then they would be, if something happened, then they would be exposed to it. There's no one any safer with regard to those kind of things than I. And it gets into the same area I was talking about earlier about being concerned for employee health.
Q: All right. If you had one of these employees that you named working under your supervision, would you permit them to work in the lab not during business hours but work back there by themselves?
A: Well, they did.
Q: Okay. Did part of your duties include working with production personnel in the testing processes?
A: I'm sorry.
Q: When you were working on tests and trials and so forth, things like that, did you need to work with production personnel?
A: That's a pretty broad question. There were times when I did and there were times when I didn't need to.

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There were other things more important that I needed to be doing that had to do with that trial.
Q: Were there times when you did not work from 8 to 5 or from 6 to 6 but worked irregular hours?
A: The only time I worked 8 to 5 was when I worked for Wade Wallace.
Q: And why was that?
A: Well, the main basic reason was I was not allowed to work after hours, weekends, or whatever.
Q: Wade Wallace was trying to keep track of you?
A: No, I would not classify it as that, no. There was no point in that.
Q: Did you ever report to work at 10 p.m. at night?
A: Now, when you say that, the first thing that comes to mind is one of the plant trials early on was going to have to be done on third shift which started, say, at 11 o'clock and I needed to go in at 10 in order to be there for the trial. Other than that, with me not being a night person, there's no reason I would go in to do work at 10 o'clock at night. Now, I may have been in there finishing up something at 8, 9, or 10, but there's no reason I'd show up at 10 other than for something like a plant trial.
Q: Did you ever work those hours like coming in on third shift before you reported to Wade Wallace?
A: Oh, I mean, the hours I had, again, I want to

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minimize those few years leading in to reporting to Wade Wallace since the last few years, because things were going on that was changing what I could do. But when you look at the heart of the matter going back I want to say 2003 and back, maybe part of '4 and back, I worked a lot of hours. It included the regular hours plus overtime.
Q: Did Jake Butts ever complain to you that he couldn't keep track of where you were?
A: No one, not Jake, not John, not anyone I ever reported to ever said the first negative about my job performance and they had plenty of good to say.
Q: Do you know if Jake ever complained to other people within Tietex management that he couldn't keep track of you?
A: The only thing I've heard about that, it was at the ESC Hearing and that's the extent of what I've — But other than that, no, never.
Q: Now, in our Requests to Admit that you responded to, you said that in order to have access to equipment and materials at other labs, you had to work at those other labs when the employees who were regularly employed there weren't present?
A: No.
Q: Not true?
A: No. Actually, what that probably stems from, I

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had an opportunity, and I was banned from the lab building, period, when I went to work for Wade. There was a section in the main plant that had some lab equipment. It was a, call it a finishing department lab or whatever, but it was a small lab that employees working in those departments used and they used it everyday. That was their job. I couldn't do anything in there when they were there, but had I been given permission to work overtime when they weren't there, I could have utilized that equipment. That was where that's coming from.
Q: Okay. What other labs were you working at?
A: Probably the main one during — You're talking about when I was reporting to Wade, obviously?
Q: Right. Right.
A: It would have been Rohm and Haas would be the big one.
Q: Any others besides Rohm and Haas?
A: Hexion.
Q: Okay.
A: And Rohm and Haas was a long way off, Charlotte. Hexion, I was beginning to get bad fibs there so there was one or two more in the works that I, as things had have gone on, I probably would have been able to do some work there.
Q: For Rohm and Haas you had to go all the way to

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Charlotte?
A: Yes. And the reason for it being Rohm and Haas is one of the projects I was working on, they had an employee, a strong, strong technical guy with regard to back coating, and he was assisting me. He was assisting me in the back coating project that was primary importance.
Q: Whose idea was it for you to work at these other labs like Rohm and Haas and Hexion?
A: I was given a substantial number of assignments and no place to do them. And I'm still a little bit puzzled about this, except I got my take of it now, but why would a manager really disable me. There's no doubt in my mind I was disabled. But yet, allow me to go to other places to try to get a job done. So it was my idea in order to try to get the work done.
Q: And who gave you permission to do Tietex's work at these other labs?
A: Wade.
Q: Did you leave a voice mail message for coworkers in the middle of the night?
A: Specifically, I woke up, when I knew I was going to be terminated and I couldn't sleep, then I woke up, I don't know, it was 2 or 3 in the morning and I knew my only hope — I mean, this was a very traumatic time for me. I can't describe how traumatic it was. And I, I mean, I knew

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Martin wasn't at work, Martin Wildeman wasn't at work at 2 or 3 in the morning. I left a message and told him I'd like to meet with him if I could.

Q: So you left a message for Mr. Wildeman in the middle of the night?

A: I don't know that it mattered when I left it, because I knew he wasn't at work.

Q: Would it have been like 3 o'clock in the morning?

A: It could have been. It could have been 4, it could have been 2. It was when I woke up and all was on my mind was getting terminated.

Q: So you admit you called Mr. Wildeman like 3 or 4 o'clock in the morning?

A: No. I did not call him, I left a message on his work phone knowing he was not there.

Q: This is Attachment 5 to your communications to the EEOC.

MR. STEWART: Fred, can I see these before you hand them over?

MR. SUGGS: Sure. Sure. Let me show you. Look at the C part which is the last paragraph.

Q: See C part it says, "Tietex stated that Gary Harris made phone calls and left messages in the middle of the night when he knew no one would be there to answer them. Of course, that's a malicious lie."

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A: Yeah. What that, the intent of the way that's said, no. Yeah, that's a lie based on the way it's worded and what it's trying to convey. That's not what happened. Can I see that again, please?

Q: Sure. That was Document Tietex 284. Do you recall leaving messages for Wade Wallace in addition to Martin Wildeman at non-business hours?

A: On the, I guess it was the evening of July 2 when I went home and saw this serious ant problem and non-business 7 o'clock ...

Q: PM or AM?

A: PM. You know, those are all non-business hours. I'm sure that I left messages that would have fallen outside of 8 to 5, but they were necessary or reasonable. I never left an unreasonable message.

(Defendant's Exhibit 10 & 11 were marked for identification).

Q: I'm going to show you these two together, and you've already seen one of them. Exhibit 10, that's Attachment 3 for the EEOC. And Exhibit 11, that's Attachment 5 for the EEOC. So if you're looking at Exhibit 10 and you go to the top of the page and then you come down to the third paragraph, you see it where it says, "One night I woke up about 3:00 a.m."?

A: Yeah.

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Q: Now, is this a document that you gave to the EEOC?

A: I would think so. It looks like it.

Q: And then if you look at Exhibit 11 and go down to paragraph C, that's the paragraph that says it's a malicious lie, right?

A: Yeah, that's correct. And may I add?

Q: Sure.

A: I had information already that in one of our former hearings that it was stated in a way that I routinely did that, and it included more than one person and it included Wade Wallace. That's the reason I call it a malicious lie because it's just not true and the person that said that wasn't true.

Q: And who said it, Wade Wallace?

A: In one of our ESC Hearings, maybe the last one, it was brought up. I don't know who to attribute it to.

Q: All right. Now, before Wade Wallace, you said Jake Butts was your immediate supervisor?

A: Yes, sir.

Q: And at some time did Butts move his office from the plant to the lab?

A: He did.

Q: Would that have been about June 2006?

A: Yes.

Q: Do you know why Butts moved his office from the

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plant to the lab?

A: I know that he and I had discussions over a period of time and I encouraged him because he was in this huge room and one desk in it. Well, there was another desk that was used sometimes for doing some, when the filing person was filing. And he and I would talk about it and he had occasionally periodically over time said, you know, things like I might move up here or whatever, but I encouraged him to move up there because for a lot of reasons. It just made sense. So why he moved, I don't know how much, if anything, but I certainly wasn't against it.

Q: Did Butts tell you that he was moving his office to the lab because he had difficulty keeping track of you and he thought he could have more direct supervision over you if he moved to the lab?

A: Absolutely not. In fact, Jake Butts was already encouraging me to establish a place down in the plant. So based on the scenario that you just mentioned, it would be more likely that he was, it was something in the works for him to go ahead and get up there and for me to be moved down to the plant so, no.

Q: How often did you see Mr. Butts before he moved from the plant to the lab?

A: Jake made a statement to me that I think's important with regard to your question. This goes back to

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the first time I started reporting to him. He essentially said that he had no abilities with regard to what I did, that he didn't understand the things I did. He didn't understand anything in the area, any chemistry or nothing, but he knew that my record was very good and, basically, he said to me, "You're your own supervisor. I know you'll do the right things and you have been doing the right things." And so that, to answer your question, we didn't see a lot of each other.

Q: So you saw him infrequently before he moved to the lab?

A: Yes. If he had something that he wanted done, most likely he would go directly to a technician, like a test or whatever. He didn't really, even the environmental part of it, I was really doing most of that and even though he had the title there. And we would, of course, get our things together when it came down to do a report or something and he would actually provide me with something he had accumulated so that it would enable me to do the complete report.

Q: And after Jake Butts moved to the lab, did you see him everyday?

A: After he moved to the lab? It didn't change anything I was doing at the time.

Q: Did you see him everyday after he moved to the

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lab?

A: I can't say yes or no to that. I don't know.

Q: All right. Did you see him just about everyday?

A: I don't know.

Q: Did you see him more often than you had seen him before he moved to the lab?

A: I would have had to have.

Q: Okay. That's what I thought. Did you object to Jake Butts supervising you more closely after Butts moved to the lab?

A: He never supervised me more closely.

Q: Now, when Butts moved to the lab, was your office in the lab?

A: Oh, yeah. There's four sections to the technical building and I was considered to be the Technical Center Manager, an accredited lab area. One section was the office area, another section was the wet lab, another section physical testing, and another section was sort of an extension of the wet lab, but it was where a real chemist would work, and we had a burn room. So, yes. He, obviously, moved into the office area which was huge and the area I had encouraged him to move to.

Q: And at some point did you move your office out of the lab?

A: Yes.

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Q: Where did you move it to?

A: Now, let me qualify that and say I didn't move it out of the lab, I just established another office, you might say, we'll call it an office, in the main plant.

Q: Do you know when that was?

A: It was — I'm going to take a stab at this, maybe December, November, December of 2006.

Q: Did you continue working in the lab up until, say, February 2007?

A: Yes.

Q: When do you claim you began to smell mold?

A: The middle of June '06. Well, whenever the furniture was moved in and that would have been in June.

Q: And what impact do you claim that these mold smells had on you?

A: I'm going to just, I'm going back to an area that I haven't looked at in more than two years as far as anything in writing, but I do remember being stopped up and, occasionally, it would go on to the point if like a, sort of like flu symptoms almost. But stopping up is one of the big things and occasionally that might lead to like a sinus headache or something, but really getting stopped up and couldn't breathe very well.

Q: Did anyone else voice complaints about the mold besides you?

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A: I can say this about that. The technicians that reported to me were very careful about anything they said. They were highly concerned for their job and had they had an opinion, in my mind, they would not have expressed it.

Q: Well, is the answer no?

A: I don't recall.

Q: You don't recall anybody else voicing a complaint to you about the mold?

A: I do not recall that, no.

Q: Did you complain about the mold smells and the stopping up and the flu like symptoms?

A: It took some time. It was not until I went to a second doctor and he was asking me a lot of questions and things and he's the one that led me to believe that it had to do with work.

Q: Who is this doctor?

A: Weir, Dr. Weir.

Q: Where is he?

A: In Spartanburg.

Q: Is that W-e-i-r?

A: I think it is, David Weir.

Q: What kind of doctor is he?

A: Ear, nose, and throat.

Q: ENT. Okay. Did you complain to anybody at Tietex?

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A: After — Oh, it became, I mean, things evolved to the point, which I can't remember all the details, but I'm sure that after I was convinced that that was what was going on, I don't recall saying anything to anyone, but it wouldn't have surprised me if hadn't have said something to like a nurse or somebody. I even brought it to Jake's attention, I know that.
Q: You did bring it to Jake's attention?
A: Absolutely.
Q: What did you say?
A: I don't recall what I said. I just recall that well into it and after, this is after I had put up, something triggered it that he said or whatever, but this was after I put up an office down in the plant and I believe it was after I went to an allergy specialist where they stick all these things in you and they determined I was allergic to mold.
Q: Did Tietex have a hygienist check the lab?
A: I was told that that occurred.
Q: Do you know what type of testing was performed?
A: I saw at some point, I forgot how, I managed to get a hold of an after the fact report and, I mean, I'm a strong technician and I know how to, I know how to do projects, I know how to get from point A to point B in the shortest time possible. Based on what I saw, it was a

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pathetic evaluation. They spent very little time and they did not concentrate on the area where the complaint was, which was the office area, and they did a little bit of dabbling around in several different sections of the laboratory when they should have been spending their time, all of it, concentrated wise in the office area.
Q: Do you know who performed the testing?
A: I do not.
Q: Do you know whether mold testing was performed?
A: No.
Q: No, you don't know or, no, it wasn't?
A: Oh, did you say where it was performed?
Q: Mold testing.
A: And where?
Q: Well, I just asked you if you knew whether mold testing was performed?
A: If I remember correctly, I believe the report said something to the effect that there's nothing — In order for it to have been tested for mold, it would have had to have stated what it did, which was, you know, it was very clear that kind of thing.
Q: So you believe mold testing was performed?
A: The paper showed it, but if I had to qualify it as being performed, I would say no, being a technician.
Q: Do you know whether mildew testing was performed?

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A: I do not know.
Q: So you claim that the testing that was done was flawed, correct?
A: Yes.
Q: But you admit that the hygienist reported finding no evidence of mold contamination, correct?
A: Yes. Yes.
Q: Well, and you were shown a copy of the report?
A: I don't remember how — I did see a copy, but I'm not sure if I had to go looking or what, but it was well after it was done that I was told it had been done and it may have been David Wilson. I'm not sure.
Q: And the hygienist said that the air in the lab was cleaner than the outside air, correct?
A: Yeah, that's the same thing these employees in the nickel bath were told, the situation I mentioned earlier.
Q: So you draw a parallel between the nickel bath situation at — What company was that?
A: Cherokee Finishing.
Q: At Cherokee Finishing and the mold at Tietex?
A: With regard to that kind of a statement. I think that's really an irresponsible statement.
Q: But you don't have any firsthand knowledge about how the hygienist's tests were conducted, right?
A: I do not, but I do know, also another thing I'll

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add to this, that all the furniture was sprayed, in the general area where it was was sprayed with Lysol periodically and it would have had to have been on weekends and after hours, so it would had to have been — If they were tested early in the week, it's a good possibility it was right on top of Lysol treatment.
Q: And you weren't present during the test?
A: No, sir.
Q: What information do you have to support your contention that the test was somehow faulty or unreliable?
A: The magnitude or degree of attention paid to the area of complaint, which was the office area. They had so much time to do testing, they had so much equipment to do it with, and they, it looks like to me, from memory, it looks like to me they delegated equal time to each of the four sections of the laboratory rather than concentrated on that one key area.
Q: So do you have any other information to support your contention that the testing was faulty other than the fact that they did not concentrate on the office?
A: No.
Q: Did you continue to complain about the mold smell after the testing?
A: I don't recall.
Q: Do you claim that Jake Butts was the cause of the

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smell?
A: Yes. I did have other employees concur with me there. I don't recall names or anything, but regarding what I envisioned, because I've seen this before and I certainly don't fault Jake, but a house that's, you know, real shaded or a older house, moisture problems, I've walked into houses like that like looking for a house, when you're looking at houses for sale, and you could smell that musty mildew. And if one hangs their clothes in there, you know, it's just going to, it's no way around the clothes smelling like that.
Q: So you claim that Jake Butts wore clothes that smelled like mildew?
A: Yes. Without question, yes. I'm not saying everything he wore everyday, but many times.
Q: Did anybody, did you ever discuss that with anybody at Tietex?
A: I'm sure I probably did, but not as a casual thing. It would have been with maybe the plant nurse or someone. And after Jake was aware of it, I wouldn't have, I don't think I would have handled it unprofessionally as far as going out and just, you know, making a joke of it or something. I don't recall any details.
Q: And you claim his office furniture smelled like mildew?

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A: Yes.
(Defendant's Exhibit 12 was marked for identification).
Q: Exhibit 12 is a series of e-mails beginning at the bottom with an e-mail from Wade Wallace to you and then it goes on with a message from you to Wade and then from Wade to you all in early February, between the 2nd and the 5th. Would you take a moment to look over that, please.
A: Okay.
(Reviewing document).
A: Okay.
Q: All right. You ready?
A: Yes.
Q: And would you agree with me that Exhibit 12 shows that Tietex moved you from the lab to remove you from the source of mold that you were complaining about?
A: I would prefer using the term banned, because I was already situated in the plant and they just didn't want me going back up there to do work anywhere in the building.
Q: And that was because you had complained about the mold, right?
A: In my opinion, no.
Q: All right. What evidence do you have to support your opinion?
A: Now, I cannot, I cannot say what David Wilson

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discussed. Obviously, David was only at Tietex for a few years. I think he came in 2005, so he was totally unaware of what occurred before then, only what he would be told. I don't know his relationship with Wade and how this, why this occurred. I don't know who was the stronger person. Was Wade purely doing what David Wilson required because of what he had experienced in his previous employment? That's possible. But it also fits very well with, you know, hindsight being 20/20 and my being able to get away from the situation and become more objective and not so subjective, it also fits in with a lot of other things that was a malicious thing. If Wade were in control of this actually happening just to get me away from being able to do the work because they knew that was my lifeline. They knew the laboratory building and everything in there was key for me to be able to do my job.
Q: All right. Looking at Exhibit 12 and the e-mail to you from Wade Wallace, it says, "I received your voice mail this morning. As we discussed yesterday, we will do whatever is necessary to shield you from any further exposure to an environment(s) that might negatively affect your health." Do you see that?
A: Yes.
Q: And then he goes on to say, "As David Wilson directed, please do not enter the lab or any other work

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areas that Jake occupies unless it is an approved exception (see the next paragraph)." See that?
A: On this?
Q: Yeah, right at the — Here, let me show you. Right down here.
A: Okay. Yes, I see that.
Q: All right. So you complained that the smell was coming from Jake, Jake's clothes and his furniture, so the company said, well, if it's impacting your health, don't go in the lab, correct?
MR. STEWART: Object to the form of the question.
A: There's one thing I would say about that. When this was being discussed and all, I said, "Okay. If you believe that my exposure to Jake will take care of, and my getting away from exposure to Jake will take care of the problem, then going forward, I do not want Jake Butts coming to see me nor in my office areas down here." He came when he wanted to and he stayed as long as he wanted to.
Q: But weren't you removed from being supervised by Jake so that you wouldn't have to interact with him?
A: He was still environmental and I was still doing environmental.
Q: But that was part of the reason for removing you from Jake Butts' supervision was so that you wouldn't have to interact with him, right?

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there."
A: Okay. So it was just a few days really, that was the 2nd of February and then the 5th.
Q: So you were told not to enter the lab because, (A) of the mildew smell which you associated with Jake Butts, his clothes and his furniture, and you didn't think that even a mask would be sufficient protection, correct?
A: There was no need for a mask. Let me just say this. If a mask would keep mold spores from getting into one's nose or sinuses or whatever, there was no need for a mask in the other three areas of the lab, only in the office area. That was a huge room with a door that closes and all the other rooms were separate with closing doors.
Q: All right. Is it fair to say that you began reporting to Wade Wallace around February 1, 2007?
A: I think, if I remember correctly, it was the 1st, because that's come up a lot and I think it was.
Q: And the reason Wade Wallace became your supervisor is because that you were complaining about Jake Butts and not wanted to have any interaction with him because of the smell you associated with him, right?
A: Probably not. I would say that it really stemmed from a conversation I had with the owner several years earlier when there was a lot of things that I was to be working on and a lot of trivial stuff coming my way that

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took a lot of time, but it wasn't necessarily stuff that I should have been doing. The owner was discussing with me the situation about getting me more involved. And I think it was all triggered when one day he said to me, he said, "Gary, I don't understand what's going on." He said, "There are a number of projects over the last few years that you should have been involved with." And I was physically separate from the plant as far as an office goes, the main plant, but not that I didn't go down there. I spent time down there. But he said, "I don't understand why you're not involved in some of these key projects and you should be. In fact, you should be heading up some of them. What's going on?" And I said, "Well, Martin, I don't know what you're talking about, but in my opinion, they're projects I don't even know about." Later we got back together and he talked with another person in the plant that was actually overseeing a lot of these projects and he said, "Well, they tell me, Gary, they said that they have approached you on a number of occasions when a key project is coming up and that you always tell them that you have other things to do, that you don't have time." And that was never the case.
Q: I'm a little lost. My question had to do with Wade Wallace becoming your supervisor because you complained about Jake Butts.
A: All right, this is what I'm getting to.

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Q: Okay.
A: Because the reason for that goes back to Martin. Right after that, Martin and I also talked about the trivial stuff I was doing. He saw what all crazy stuff I was doing as far as things that were taking a lot of time and taking me away from some key technical areas. So he then set things in motion for me to get more involved in the plant. And this Technical Finishing Manager arose from that and I was in the process of getting relocated in the plant so that I could do what he wanted, be closer to everything and get away from a lot of the day-to-day stuff where you don't even expect and it comes. That's how that happened.
Q: Was Wade Wallace supposed to assist in that regard, getting you closer to these projects?
A: Ultimately, in my opinion, it just took a long time to happen, but that was the end result of what I had discussed with Martin.
(Off the Record for Lunch from 12:08 p.m. to 12:58 p.m.)
Examination Resumed by Mr. Suggs:
Q: Remember when I asked you about lawsuits that you had been involved in?
A: Yes.
Q: I was going to ask you about whether your wife had been involved in a lawsuit. Did your wife file a claim against a hospital and doctors or both relating to some

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surgery that she had?
A: It never got that far.
Q: Never got that far? Was it settled?
A: No. Nothing was — We were encouraged to do so and it was looked into, but for several reasons, including her health, we opted to not go along, but it never got to where there was claims or anything like that or specifics.
Q: Okay. Just to make sure you told me everything that you intended to before we broke for lunch, you were telling me about why you thought that you were changed from reporting to Jake Butts to reporting to Wade Wallace and that had to do in part with Mr. Wildeman wanting you to be closer to projects. Did I summarize it correctly?
A: I would say that that's certainly a good possibility. I don't know all the details, but I think that certainly is one of the viable reasons that it happened.
(Defendant's Exhibit 13 was marked for identification).
Q: Okay. I'll show you what's been marked as Exhibit 13 and it is an e-mail from Wade Wallace to David Wilson and you are the subject of the e-mail. Would you take a moment and review that, please.
A: Yeah, I just saw that recently so I'm familiar with it.
Q: Okay. February 7 was about six days after you

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started reporting to Wade Wallace, correct?
A: Yes.
Q: And you told Mr. Wallace that you were overwhelmed with personal or emotional problems to the point that you couldn't function?
A: No.
Q: Tell me what happened.
A: There were two things that Wade Wallace wanted me to do. And as time wore on and I'm able to look back now too. Anything that I was doing that was a significant function were being removed from me. There was two of those in the very beginning when I started reporting to Wade that he wanted me to get the information to Jake Butts so he and whoever else could do those and I needed to train them and give them whatever they needed so they could do those. That was in the very beginning and that was paramount for Wade for me to do that. Then I was in the midst of trying to sort things out, find a place to work, and all this, and he comes in on this particular day and the first question he asked, "Have you completed those assignments that I gave you a few days ago to do for Jake Butts?" And I said, "No, I haven't. In fact, I've started on one of them, haven't completed it, and I haven't even started the other." Then he cut loose on me. I had never been talked down to in a demeaning way in my life. It was unbelievable. And I said

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to him, I said, this is basically what I said, I'm paraphrasing based on a very poor memory, but I said something to him to the effect, I said, "Look, Wade, I've got enough stress as it is and all that and all you're doing now is there's no point in you talking to me," things like that. You know, I don't remember the gist of it, but I do know that's what this is. Then he goes back at some point and creates this on the 9th, two days later, and sends it. I never know about it until we start having the ESC things.
Q: All right. Now, you see in the third line of that second paragraph where it says, "He explained that his personal life over the last year has made him so fragile emotionally, that sometimes he has episodes like the one he was experiencing." The last year in this context would have been 2006, right?
A: That's correct.
Q: Was it 2006 that your wife was ill?
A: That's correct.
Q: Did that take a toll on you nerve wise and make you kind of a wreck?
A: I got into a major sleeping problem caused mainly by stress and it did not happen until I went back to work and the way I was done after I got back to work.
Q: Would you say that your wife's condition

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contributed to how you were feeling?
A: What she went through was horrific and anything she goes through negative, I suffer along with her big time because we're so close. But this here is not what happened that day. It did not happen.
Q: Let me just invite your attention to page 155 of the hearing before the Employment Security Commission on March 28. I've got it highlighted here. It says, "At this time I was kind of, you know, nerve wise kind of a wreck because of what my wife went through." Do you see that?
A: Uh-huh (affirmative response). That's still not what happened here. And, also, I will say this about that transcript, I put no credence, zero credence in that because of when I went back and reviewed it and I got a copy of it, they didn't send me a copy, what I was attributed to saying and what I really said, there were so many fallacies it was unbelievable.
Q: Tell me what was the matter with your wife in 2006.
A: She had a colonoscopy in late '05 and the doctor that did the colonoscopy did a pre-exam and said he picked up on a cyst on one of her ovaries. Anyway, he does the colonoscopy and I went home one day and she was frantically on the phone with the doctor. I got home about six. It could have been that I would have gotten there later and

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she'd been dead. But right after I got home, she actually lost consciousness and when I got her to the hospital, she had bled so much all day long. I didn't know about it, but she was calling the doctor, what I would find out later, and he was telling her it would stop, it would stop, don't worry about it, and she was continuing to bleed to death. So, anyway, they basically saved her life at the emergency room. They were waiting for her when I got her there.
Q: She had an ovarian cyst?
A: No, this was a colonoscopy. This was purely from the colonoscopy.
Q: Oh, I see.
A: Then after she got through that hospital stay and started feeling somewhat better, it took weeks, then she wanted to handle the ovarian cyst and she actually went to a doctor that the guy that did the colonoscopy recommended. She goes to him and during the course of the surgery which ultimately came about, he severed a uterer connecting the kidney to her bladder and she was in the hospital for three days, two or three days blowing up while they were walking her for gas and the whole time her abdomen was full of urine and she had a side drain that they put in as a precaution, just a normal part of surgery. That was filling up very irregularly fast. And the nurse kept saying, "This ain't right." And the doctor that did the surgery came in and he

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said, "Aw, it's normal." But, anyway, surgery was on Monday. On Wednesday afternoon, evening I should say, they found that a stent that had been put in to put the top and lower part of the ureter back together, a temporary stent, and then they sewed and they would take that out later. That when the ureter was severed in the early part of the surgery, then they had to call in a urologist, Dr. Kinard, and he did a great job. And then when they went back in to finish sawing her up and everything, they moved the stent out of place so that the lower part of the stent was down under the gallbladder and it had a "J" shape to it and it was against the wall and urine could not go through that and it was actually going through the severed area of her ureter down into her abdomen.

Q: So that was all in 2006?

A: That was back to back.

Q: In 2006?

A: Yep.

Q: So that was quite a concern to you?

A: Oh, absolutely.

Q: Did you ever tell Wade Wallace that you were overwhelmed with personal and emotional problems?

A: No, not in those -- Those are, I don't know what I said, but I would never say anything like that.

Q: Did you ever tell Mr. Wallace that you were

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confused and disoriented?

A: Never.

Q: Did you say anything like that?

A: No.

Q: Did you tell him that your personal experiences over the last year had made you fragile emotionally?

A: I don't know what I could have said that would have triggered that. I think his words and whatever words I might have used are quite different.

Q: Well, would you confess that you had been made fragile emotionally because of your wife's condition like it says in the transcript?

A: Not emotionally.

Q: Sir?

A: No, not emotionally.

Q: Have you ever had panic attacks?

A: I don't know what for sure one is. I was told I had one and I don't agree with it when I was in Thailand.

Q: Was that working for Tietex?

A: Yeah. That's what it was described as and I don't agree with it being a panic attack.

Q: Have you ever been told you had a nervous breakdown?

A: No.

Q: During the time that your wife was experiencing

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these difficulties having to do with the colonoscopy and related surgery and so forth, did the physician give you medication to help you sleep and cope with her situation?

A: I actually, when I went back to work and realized what was going on and I started having this serious sleeping problem, I would literally stay up a night or two at a time. I went back to the doctor. I'm not sure what the time frame is relative to her being in the hospital, but I actually went back to him to get his help or whatever.

Q: Did you seek help from the EAP as Mr. Wallace suggested that you do in Exhibit 13?

A: No.

(Defendant's Exhibit 14 was marked for identification).

Q: All right. Have you had a chance to review Exhibit 14?

A: I've seen all I need to see.

Q: Okay. Well, in the first paragraph he just talks about that 3 a.m. call and how Martin Wildeman forwarded it to Wade Wallace, correct?

A: It also says that I left Wade Wallace a phone message and I doubt that seriously. I don't know why I would have and don't recall it.

Q: Did Mr. Wallace commit to you as this e-mail says, to get you a lab pad coater and vented hood?

A: Of course, I mean, Wade's aware of all this, so he

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could have — Oh, okay, so the second paragraph is not necessarily related to the phone call, is that correct?

Q: Correct.

A: It wasn't mentioned in the phone call in other words. I will say this about any and all equipment. There were several pieces of equipment that Wade Wallace agreed to purchase and, in fact, requisitions were done and they were actually purchased. There were several pieces of equipment in particular that I, one being a lab pad, tried my best to get installed for a period of weeks and I guess months. And this all started in probably maybe March. I'm not sure. But there was always something wrong with where it was going to go. Like the lab pad that was never installed. The burn equipment was never put together. Because always someone would find, no, we can't put it there, we can't put it there. And I just finally arrived at the point it's not going to be anywhere. But I stayed with it the entire time I was there trying to get stuff installed. Anything that was bought was never put in place. I'll just put it that way. It was a matter of and to make things look and certain way if I had to say now.

Q: But the equipment was purchased?

A: Some equipment was purchased, yes.

Q: And it was purchased to accommodate you because you couldn't go in the lab?

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A: That would have been the reason.
Q: And the third paragraph, you said you had read enough, I wanted to make sure you read the third paragraph.
A: Yeah, but the thing there was not so much a being bothered or anything. It was more taking a stand that why am I, I'm down here, you've dumped all these key manufacturing projects on me, why am I going to stay involved with this environmental reporting which made no sense. So I was really, let's get it to the guy that's getting paid for it, even though I knew he couldn't do it. That's what I was I was really after there. Why am I going to have to do this, all these other major plant projects you've given me. It didn't make sense.
Q: But Wade Wallace thought you had time to do it?
A: He did, apparently.
(Defendant's Exhibit 15 was marked for identification).
Q: Take a look, please, at Exhibit 15. And Exhibit 15 is just an e-mail from Wade Wallace telling you he expected you to get the environmental report done on time, right?
A: Yes.
Q: Was that reasonable?
A: For him to expect that, yes.
Q: And whose responsibility did you think it ought to be?

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A: The person in the job title of Environmental Manager.
Q: Do you know who that was?
A: Over the period of my being there, it could have been Jake Butts at that time, but Jake had it, John Knox had it. There was a guy that was hired back in the early 2000s that was hired specifically for that and he left the company, so at that time I'm not sure who it was.
Q: And didn't you voice mail to Mr. Wildeman protesting having to do the environmental report?
A: No. No. Are you talking about the one I left in the middle of the night?
Q: Yeah, Exhibit 14. It says, basically, Wallace says that Martin Wildeman forwarded your voice mail to him and two things were bothering you. One was lack of equipment and two was environmental reporting.
A: I wouldn't have --- I'm not seeing that. I'm just seeing, "He was distraught over all that's been going on."
Q: All right, look here. Exhibit 14, "Gary left voice mail messages for both me and Martin one morning this week ta 3 a.m. Martin forwarded me the one he received. Both messages consisted of him complaining about his inability to sleep due to being distraught over 'all that's been going on.'" The first thing, the equipment. The

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second thing, environmental reporting.
A: I think those other paragraphs are taken out of context. Those were not left on any message to anyone. It was a general message that I left to Martin requesting a meeting with him and it wouldn't have got specific. It would have mentioned the problems I was having with sleep for sure.
Q: So you agree that it would not have been appropriate for you to leave Martin Wildeman a message about not wanting to do the environmental report?
A: I'll agree with that, yes. I mean, I don't see why that would even be necessary.
Q: Do you recall Mr. Wallace telling you to bring these issues to him before going to Mr. Wildeman?
A: First of all, the relationship I had with Martin, most of the time when we got together was a casual encounter and he would say, "Come on in here," and it would involve a project or something and he'd want to know how it was going. And that meeting, that spur of the moment extemporaneous meeting might evolve into our getting into other stuff, how is it going for you and all that, and then some stuff happening like that. But we've had a relationship that, I mean, it's just there. It's just the way Martin was. He never, you know, he never had a problem with it and he never said, you know, you need to bring this. Anything he

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suggested I do, I did it though, if it meant bringing something up with whomever, I would always do that.
Q: Would you ever go around Wade Wallace to talk to Mr. Wildeman about work related issues?
A: No. No. I say that. I probably need to qualify that because if there were things happening that I saw were dishonest or that kind of thing, regardless of who it was, Wade or whomever it might be, I'm not going to go and, I mean, you do what you have to do. It's sort of like your house is on fire and you need to mow the grass, you're not going to cut the grass, you do what you've got to do. But, basically, generally I followed the chain of command. Within reason I followed it and it's just the way things were at Tietex with regard to what we had evolved to as far as my relationship with Martin.
Q: But you admit going directly to Mr. Wildeman?
A: I don't remember enough about any specific circumstances. I do know that I did that some, but I would say most of the time it had to do with like barrier fabric projects and things of that nature where he was wanting to know about it. It was nothing unusual for Martin to grab up somebody and start talking with them about something.
Q: When you began reporting to Wade Wallace, what did Mr. Wallace tell you about his expectations for your reporting to him?

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A: I really don't recall to be honest.
Q: Did Mr. Wallace tell you he expected you to let him know your whereabouts?
A: I don't think that came up that way, because at the stage of the game, you might say, I mean, that was like an understood thing. It was not like kindergarten or something.
Q: So you understood you were supposed to let Wade Wallace know where you were?
A: Our agreement was if I were, as far as where I was, that to me would mean away from the plant, and our agreement was keep the cell phone on was our agreement.
Q: But you agree with me that it's reasonable for a supervisor to want to know the whereabouts of the employees under his supervision, right?
A: At all times.
(Defendant's Exhibit 16 was marked for identification).
Q: You have before you Exhibit 16, which is a memo from Wade Wallace to David Wilson.
(Reviewing document).
Q: You got that?
A: Yes, sir.
Q: Okay. Now, it's from Wallace to Wilson with a copy to you and Mark Isbell, right?
A: Yes.

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Q: Do you have any evidence that this memorandum was seen by anyone other than you, David Wilson, Wade Wallace, and Mark Isbell?
A: I mean, right off the cuff, I don't know, I don't know that I have an answer for that.
Q: Do you have any evidence that the memo, which is Exhibit 16, was seen by anyone outside of Tietex or in the context of this lawsuit and your claims against Tietex?
A: I really don't, I don't know.
Q: Okay. If you examine the memo, it's dated March 5, 2007. Did Wade Wallace have a conversation with you on or about March 5 about the items listed in this memo?
A: Actually, I triggered this memo by requesting it. And the way that happened, Mr. Wallace called me to his ...
Q: Pardon me for interrupting and I'm going to let you say whatever you want to. But my question was simply did Wade Wallace have a conversation with you on March 5 about the items mentioned in the memo? And that's a yes or no answer.
A: Yes.
Q: Okay. Now, with respect to the items listed in the memo, tell me any parts of it that believe are not true?
A: All of it. We're talking in degrees when I say that, but my assessment to make a strong statement is either

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one of those by itself is and I disagree with all of them.
Q: All right. Taking the first one that you become emotional and overly vocal about problems before researching the situation. What evidence do you have to support your contention that that statement is not true?
A: It's just not me. Never done it.
Q: All right. "Not honoring the chain of command." What evidence do you have to support your contention that that statement is not true?
A: I can't go back and recreate everything, but I'll say this, I think most of the time if there was a formal get together with Martin Wildeman and one where we didn't just run into each other, I would have run it by Wade.
Q: It says in the third bullet, "He harbors negativity over past grievances with management." Did you have some unresolved grievances with management at the time that Wade Wallace began supervising you?
A: I'm not sure what he's referencing there. The only thing I can say about this is this stems from some discussion I had with him, so with that said, I feel like for him to take and broadcast it this way was certainly way out of line.
Q: Okay. My question was, when Wallace started supervising you, did you have some unresolved issues with the company that existed prior to his undertaking the

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supervision of you?
A: Oh, I had, I had a lot of concern about the things that had been going on since 2003.
Q: So you had those concerns when Wallace took over?
A: Well, this is all, anything he said here is because he and I talked about some things and not anything that he gathered otherwise. We would have had to have discussed it.
Q: What kind of things did you tell Mr. Wallace?
A: I don't remember. I do not remember.
Q: And then the last bullet is, "He complains about his ownership of environmental reporting." Now, that's true, isn't it?
A: You know, again, that falls in the category, here's a guy that I'm supposed to be reporting to and he's going, anything I say to him he broadcasts it. What kind of manager is that?
Q: When you say broadcast it, he sends it to David Wilson, Mark Isbell, and you?
A: Why would I ever say anything else to him again. Like I'm just having a discussion with him about something I'm concerned about and then the next thing you know, he's holding it against me and threatening me, basically.
Q: And he told you in this memo that you needed to make significant progress within 30 days, correct?

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A: Yes.
Q: Did he tell you that when he sat down with you?
A: Without taking a lot of our time, this day was the anniversary of like my 30 days or so and he calls me and says, "Gary, we need to talk," to have a 30 day review. Go to his office and he said, "Let's go down to David Wilson so he can sit in on this." I had what seemed to be the flu coming on and I felt, I mean, really, really terrible that day. I do remember that. And he hits me with these things here and it's purely verbal. There's no written, anything written. And when I finished I said, "Wade, would you do me a favor? Would you send me an e-mail covering what we just talked about so I'll know what I need to improve on?" And that's the e-mail that came.
Q: All right. Did you ever fail to attend meetings, meaning that a meeting was scheduled that you were supposed to be present for and you just didn't show up?
A: Never.
Q: Did you ever fail to return voice mails?
A: I'm sure over the years that everyone does that, but it's not malicious or intentional. I never intentionally ignored voice mails.
Q: And would that be the same for e-mails?
A: And same for e-mails. I'll just add this. I don't spend a lot of time at the computer, didn't then.

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(Defendant's Exhibit 17 was marked for identification).
Q: I'm going to give you Exhibit 17. Before we get to 17. You've told me that with respect to 16, at least the first three bullets were not true in your opinion. At the time that you talked to Wade Wallace, did you protest that these things were not true?
A: When we were talking in our meeting when David Wilson was present?
Q: Yes, sir.
A: I'm not sure what I said. I know I didn't feel like contesting anything that day, so I don't recall how I handled it.
Q: But those present in the meeting would have been you, David Wilson, Wade Wallace, and nobody else?
A: That's correct.
Q: All right. Let's take a look at Exhibit 17, which is April 4, 2007, e-mail from Wade Wallace to you and it's talking about working in the lab. Just let me know when you've read it.
(Reviewing document).
A: Yes, I've read it.
Q: Did you ask if you could work in the lab if you signed a waiver?
A: Yes.
Q: And you were told that Tietex thought that the waiver might not be good.
A: Yes.
Q: Do you agree that Tietex was trying to protect you from a negative impact to your health and from itself being liable for negatively impacting your health?
MR. STEWART: Object to the form.
A: The second part I'd say yes.
Q: You don't agree that Tietex was trying to protect you from a negative impact to your health?
A: I don't feel that way, no.
Q: What evidence do you have that supports your belief that Tietex was not trying to protect your health?
A: We could talk a long time there on my thinking of that, so I'll just, if I may, leave it at that.
Q: All right. Did you ask if you could work in the plant on Saturday and Sunday?
A: Absolutely.
Q: And were you told that you could only work when the plant was operational?
A: There was one time I was told that and I don't remember which came first, but I was later told that I couldn't go in at all unless -- I'm sorry. Okay, I just confused something in my own mind. Yes, I was told if it were operational, then I could go in on like a weekend or whatever.

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Q: And if the plant was down, you could go in but you could only do office work, not lab bench work, right?
A: That was what I was going to say. One would supersede the other. I was told at one time I couldn't go in at all, even with the plant, I mean, if the plant were not running, I couldn't go in at all.
Q: And that was changed to you could go in and do office work.
A: One way. I don't know which came first. I don't remember.
Q: But at one point you could go in and do office work?
A: That's correct.
Q: And that lasted until your last day of work?
A: I don't know. Again, I don't know which came first, that particular document or the other verbal. It could have been verbal, it could have been written where I couldn't go in at all unless the plant were running.
Q: But you understood that by Wade Wallace saying you could not operate lab equipment or production equipment or handling of dyes or chemicals when the plant was down and there weren't any other employees there was for safety reasons, right?
MR. STEWART: Object to the form.
A: Well, it could be done under that pretense but I

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knew. I had done all those things without question and I was the key person as far as all the issues of doing those things and the safety issues related to them and I had done so for 12 1/2 years without ever being told I couldn't come in on weekends, I couldn't come in at night, I couldn't come in when people weren't there. That was never an issue until I started reporting to Wade Wallace.

Q: Do you dispute that it was for safety reasons?

A: For a yes or no, I'll say yes.

Q: All right. And what do you claim the real reason was?

A: To keep me from doing the projects I was assigned.

Q: And why would Wade Wallace want to do that?

A: Well, we've talked about all that before in other meetings and things, but it's involved.

Q: Tell me.

A: As I've said before, I mean, hindsight being 20/20 and I don't have a lot going for me except I do have an analytical mind and I can put pieces of puzzles together and it's clear to me that entire time I was working for him, it was an effort to create cause so I could be terminated.

Q: And what evidence do you have to support your belief?

A: All the things put together. To make me fail at projects. Keep projects that were assigned and be sure I

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failed at them, couldn't do them, and so forth.

Q: Do you have any evidence that any other employees were allowed to work when the plant was not operational?

A: During my entire time at Tietex, and you could go back to the records kept by the gatekeepers that when they did have folks on the gates and kept records of those coming in, you will see that I was — The only other person I ever saw in there, two people I ever saw in there when the plant wasn't running that I remember would be Robert Fontaine, a key grey mill guy, and Martin Wildeman, the owner. And I was there many weekends trying to do work and ...

Q: Do you claim you actually did lab work when the plant was down before Wade Wallace became your supervisor?

A: I did. Again, there was a couple of years leading up to that that were kind of dead years, but going back before, say, 2004 and back, I did most of my lab work when the plant, outside of the 8 to 5 hours, I'll put it that way. Because I was so involved with running my other jobs 8 to 5, that I had to do these other things outside hours.

Q: Was the plant operational?

A: Most of the time not. If it were weekends, not, not at all.

Q: But you were the only employee who did that?

A: For the most part. For the most part.

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Q: Can you identify anybody else other than the two you just named, Martin Wildeman and the other guy?

A: I would periodically see someone from information services that worked in like the computers' area in to do something, but otherwise, no. I mean, the other manufacturing folks that were salaried and all and the department managers, no, they worked normal hours.

(Defendant's Exhibit 18 was marked for identification).

Q: Well, I guess there's something I don't understand and that is why couldn't you do the lab work during, say, 8 to 5 and if other work was to be done and needed to be done after 5 o'clock, make that your office work?

A: The other stuff had to do with managing people and running the laboratories and stuff like that, which had to be done when they were there. In other words, if I went off on, and we're talking about some high level projects in many cases that require a good ability to concentrate and so forth and might be interrupted, and any time I attempted to take on something like that, if I had time to do it, between regular hours ...

Q: Excuse me. You could have done your environmental reporting and prepared those documents as office work if the plant wasn't running, couldn't you?

MR. STEWART: Object to the form.

A: Most of the environmental stuff was done hours

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wise, time wise, was done outside of the 8 to 5. Much of that was done at home. Things like that, there was no point, some of it was no point in going to work to do. I carried it home with me.

Q: Take a look at Exhibit 18, please. And that has to do with the C237 and T602 projects and it's dated June 18, 2007. See that?

A: Yes, sir.

Q: And that memo is addressed to you from Wade Wallace with a copy to David Wilson and Mark Isbell just like the other one, right?

A: Yes.

Q: Did you receive a copy of it about the time it was written?

A: Yes.

Q: Do you have any evidence that this memorandum was seen by anyone else other than the addressees?

A: Not offhand I don't.

Q: Do you have any evidence that this memorandum has been seen by anyone outside of Tietex or outside the scope of this lawsuit or the other claims that you have made?

A: I'm sure my wife has seen it.

Q: Because you showed it to her?

A: Yeah.

Q: Okay. Anybody else?

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A: I don't know. I don't recall.
Q: You don't have any other evidence?
A: Not right now, no. Nothing comes to mind.
Q: All right. C237 was the development and qualification of a Tietex coating compound formula to replace the current coating formula, is that right?
A: It was a mattress fire barrier fabric, Tietex fabric coated with a chemical compound. At the time it was purchased outside and applied at Tietex and was sold to your mattress manufacturers as a barrier fabric.
Q: Okay. And T602 was a finish formula change. Is that right?
A: T602 was a product that I jointly came up with with a guy named Zhiping Ni. He came up with the fabric.
Q: With who?
A: Z-h-i-p-i-n-g and his last name is N-i, Chinese. He invented the fabric and I came up with a formula to put on the fabric and it evolved into a Tietex product called T602.
Q: Did Mr. Ni work for Tietex?
A: Yes.
Q: Okay.
A: And, anyway, the product was originally run on a pad finish, on one pad finish, and that particular finish was more suited for running window fabrics, finishing window

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fabrics. And so we were doing this on that, a unit with the goal of taking it elsewhere. Wade came to me one day and wanted to know if I could create a foam finish so we could, instead of running it through just an old watery pad finishing and padding it on, could I create a foam finish because we had, I don't know, three other machines there that were equipped with foam finish units. He said, "If we can do that, then we can free up this number ten range we're needing for window fabrics." So ultimately, what that led to was that project where I was investigating doing a foam finish on T602 instead of a pad finish.
Q: So these two assignments were made to you?
A: Absolutely. These two projects no one else there could have taken them on. I was the only one that could have even come close to ...
Q: And they were priority projects?
A: Big time. Well, I would say that the C237 was definitely big time priority.
Q: Were you working on 237 before you started working with Wade Wallace?
A: I had done work on weekends and had come up with a formula that would come close to but not, I hadn't gone far enough with it, to replace the business that was currently coming from a company called Noveon.
Q: Was the answer yes?

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A: Yes. Yes.
Q: At the time this memo was written, which is Exhibit 18, had you been working on the 237 project for about six months?
A: Yes.
Q: Had you made any progress?
A: Oh, yeah. Had actually on January 26 ran a trial that, effectively, gave us what we needed.
Q: And you say you initiated the project?
A: Not really. Martin Wildeman would be the one that prompted it and I was reporting to Jake Butts at the time. This would have been November, December '06 when Martin came to me and --- He accosted me. He came over to me in a meeting and he says, "Gary, we've got a major problem and need your help." Basically what he said was, "We've got this barrier business that's only going to grow. We've got good volume now, we're not making any money, because we can't be cost effective." And he said, "The biggest part of it is this compound we're buying from Noveon and I understand you've been doing some work and that you might can help us come up with a cheaper compound." So that started it.
Q: Did you tell the management of Tietex that developing the C237 coating would result in significant cost savings to the company?

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A: Yes.
Q: And that was versus the compound that Tietex was using at the time, right?
A: Yes.
Q: Did Tietex project the savings that you predicted into the budget?
MR. STEWART: Object to the form.
A: No.
Q: Do you know?
A: At the time I started working on the project — On January 26, real quickly, January 26, '07, we had the successful trial. I was not reporting to Wade Wallace. Six days later after having the successful trial, I was reporting to Wade Wallace. And the direction we were going with this and the way we were going to do it was totally changed.
Q: Now, you say you ran a successful trial before reporting to Wade Wallace?
A: Yes.
Q: Were you successful in developing a compound that could be produced commercially?
A: Yes.
Q: And who would be a witness to that?
A: Harry Sparrow.
Q: Say again.

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A: Harry Sparrow, like the bird.
Q: Anybody else?
A: He was integrally involved in it. I don't know if there was anyone else involved. He and I were the key people that worked on this.
Q: Do you know if Wade Wallace started a parallel project to develop a replacement because you hadn't made sufficient progress?
A: He did not.
Q: Do you know if he worked toward doing that on a parallel basis?
A: I'm looking, I'm able to look back now and I know there was a lot of resentment in my getting involved with Martin, even though I did not cause it. When Martin came to me and Mark Isbell and Wade Wallace would find out about this later, they highly resented it based on things that would happen because they felt like, first of all, that was casting a real bad light on what they had already done because the areas that were being complained about were theirs. It was their responsibility. Wade Wallace was the key person at Tietex that called on Noveon and the lady there. He was the key liaison and going all the way back to months before I started reporting to Wade and Martin coming to me, he was that person and we were getting overcharged by Noveon big time. And, anyway, as it moves along, this

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relationship was continuing. When I started to reporting to Wade in February of '07, that relationship continued and since that ...
Q: Mr. Harris, I'm going to let you tell me whatever, but I don't understand how what you're telling me relates to the question about whether you know if Wade Wallace was successful in his endeavor to develop a project, a product like 237.
A: I thought I said no.
Q: Okay.
A: Then I was explaining why.
Q: All right. Well, do you want to give me some more explanation?
A: Only that there is, you know, there's this stuff that happened in February that shows he was, he and I both were working on C237 in tandem separately.
Q: So you agree he was working along a parallel course with you?
A: It was put down that way.
Q: But you claim he was not successful?
A: I'm claiming that he wasn't working on it. I'm claiming that all that ultimately would happen would be Noveon lowered their price and then it was passed off as an advanced product or something when all they did was lower their pricing.

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Q: Okay. T602, did you tell Wade Wallace that the lab samples for this project were promising?
A: Oh, absolutely they were promising. They were well above my expectations.
Q: Did you recommend a production trial?
A: Yes.
Q: Who was present at that trial?
A: Ron Simms would have been the key figure. Ron Simms oversaw all plant trials. If there was going to be a plant trial in finishing, Ron would be the one to put it together.
Q: Ron Simms. Who else?
A: Grady Corbin would have been the department manager.
Q: All right. C-o-r-b-i-n?
A: Yes, sir.
Q: Who else?
A: That's all I can come up with right now.
Q: So it was you, Simms, and Corbin?
A: Yes.
Q: Wade Wallace was not present?
A: Wade was not --- Now, we had more than one trial.
Q: Well, let's talk about the production trial. Is that the first trial?
A: I'd have to go back and review it. Now, I've got

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good notes on all this, but I'd have to go back. I'm sorry, I don't, I can't answer that, but I have good notes if I need to later.
Q: Do you recall Wade Wallace being present?
A: I recall Wade Wallace dropping in and then dropping out.
Q: So he wasn't present the whole time?
A: No.
Q: Did you tell Wade Wallace that the results of the trial were comparable to the current product?
A: Well, we actually reviewed the results. You know, there was no — I did show him the lab results where they were tested and we had some samples that were not good where we put a certain amount of finish on and we had some samples that comparable where we put more finish on, which led us to believe, hey, we can vary the amount of finish and maybe we've got something. But I had no expectations going into this trial as far as it being something we'd be able to do.
Q: All right. I'm just reading it from the bottom of page 336 of Exhibit 18. "Although I was not presented the actual numerical results of the first production trial, Gary assured me that the results were comparable to the current product." And my question is did you give that assurance to Wade Wallace that the results were comparable to the current product?

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A: No.
Q: What did you tell him?
A: I said based on the results, in effect now, this is in effect, based on the results, another plant trial was warranted.
Q: And did you do another trial?
A: Yes.
Q: Was it successful?
A: I think we tried two more trials and, again, I'd need to go back and really read to get all the details, but I believe it was the second trial when there was a bent bar that was an integral part of the machinery and this would have been Ron Simms' operator, something for them to pick up on. You'd have to have been there and seen what I had to do as my part of it to know that I couldn't have picked up on it. But they ran, we only had a small amount of yardage to run, and all the yardage was run with a bent bar. All the finish was on one side or the other and the middle of the fabric had no finish, so it was a mechanical malfunction that should have been caught.
Q: The second trial for various reasons was not successful?
A: That's correct.
Q: And how about the third trial, it wasn't successful either, was it?

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A: The third trial was a failure because of Mark Isbell. We were prepared. We had the bar fixed and we were prepared to run the trial on the machine we had run the first two on. And the word comes to the management and department level, Mark Isbell says we need to run this over on number three instead of two, and two totally different machines. And anyone that, you know, to know what I know, I know, and Ron said right away, said, "You know, that's a mistake. We can't do this," because of the variables that are introduced. And there were several things that we were set up to do on two that we couldn't do on three. And we, essentially, had the same kind of fabric come off of that trial as we did on the second one, a very uneven finish. And I could go back in my notes and give you a good, clear explanation of that, but I don't recall otherwise.
Q: Did you do anything wrong or make any mistakes with regard to either the T602 or the C237 projects?
A: No. No. When I say that, I mean I did what I was supposed to do and would have done under any circumstances. And these kind of projects are highly involved and technical and it's where my expertise is and I was very aware of everything I needed to do and did my best to see that it was done.
Q: But Wade Wallace told you that he thought your performance on these two projects was unacceptable, correct?

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A: One quick comment.
Q: Just tell me whether Wade Wallace said that or not, then you can explain.
A: Oh, yes. May I explain now?
Q: Yes.
A: On or about June 15, 14, 15, Mark Isbell, Wade's boss, went to Martin Wildeman. This is what he told him pretty much. And so I didn't know about that. And then on the 18th, three of four days later, I'm called to Wade's office and I see this.
Q: "This" meaning Exhibit 18?
A: Yes, sir. All right. Then, and this was at a time when, you know, I knew I was going to terminated. It was just a matter of when then. And, you know, it didn't matter about procedure or anything, but I went to see Martin and I showed him this and he said to me, he looks at it and he reads it. He said, "That's the same thing that Mark Isbell talked with me about back a week, a week and a half ago."
Q: Do you think that Mark Isbell prompted Wade Wallace to give you this warning to pave the way for you getting fired?
MR. STEWART: Objection to form.
A: I mean, I would classify it as, you know, could be a final written warning.

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Q: That wasn't my question. My question is do you think Mark Isbell was behind it to pave the way for your termination?
A: Yes.
MR. STEWART: Same objection.
Q: And do you think that he was behind it because he wanted to see you replaced by his friend, Guzman?
A: I don't think that.
Q: This is Tietex document 314 and I'm going to show your lawyer the last paragraph of it. This is Attachment 10 for the EEOC, Gary G. Harris, April 24, 2008.
A: Uh-huh (affirmative response).
Q: See that. "Importantly, the report was prompted by Mark Isbell when it went to the owner just a few days before." That's what you just told me, right?
A: It is.
Q: "The trip appears to have been directly related to paving the way for termination of Harris and bringing someone else on board. (See attachment 9)." And that someone else was Guzman, right?
A: Yeah. The key word there is appears.
Q: Okay. Which that's what you thought?
A: I thought it was a possibility. I mean, again, that's hindsight. Obviously, I didn't know anything about Ms. Guzman until the fall. That's all looking back.

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Q: But you knew that Isbell and Guzman were friends, right?
A: That's what I was told.
Q: And on June 18, Wallace told you you had 30 days to improve, correct?
A: Yes.
Q: Did you have any conversations with Mark Isbell about either C237 or T602?
A: Not the I recall.
(Defendant's Exhibit 19 was marked for identification).
Q: You have before you Exhibit 19. Have I given you plenty of time to read it?
A: I'm fine if you're going to just ask specific questions because it's quite voluminous.
Q: Well, are you familiar with it?
A: Yes.
Q: Now, this memo is addressed like the others to David Wilson from Wade Wallace to CC: Mark Isbell, so it's Wilson, Wallace, and Isbell, right?
A: Yes.
Q: Now, you weren't addressed on the memo, were you?
A: No.
Q: Did you get a copy of this document on or about the time that you were terminated?
A: I don't remember. I may have but I don't

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remember.
Q: Okay. Do you have any evidence that this document was seen by anyone else other than perhaps you, David Wilson, Wade Wallace, and Mark Isbell?
A: No.
Q: Who informed you of the termination of your employment?
A: David Wilson.
Q: Were you told that you were being terminated for failing to improve on the issues that had been addressed to you in the two former meetings and memoranda?
A: Generally what I was told was it's not one specific thing, but just a whole lot of things that have added up.
Q: Well, Wade Wallace claims in the second paragraph that you still had the issues that he had pointed out back in March, right?
A: Yes, he does.
Q: With the exception of the environmental reporting. I mean, see that at the bottom of that paragraph? He says, "With the exception of the environmental reporting." So I take it what he means by that is environmental reporting was no longer an issue. Do you agree?
A: I take it that he says I wasn't complaining about it.

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Q: Okay. And you contend that these other things weren't true anyway at the time, right?
A: I do.
Q: After being told not to do so, did you continue to come in and work in the chemical lab areas late at night and on weekends?
A: Never once.
Q: It says here, "Gate records and management observation indicate that he has continued to do this." See that?
A: That's a lie. Let me just say this. If there were any gate records that showed I came in the plant at any time, it was at a time when it was okay to be there. Otherwise, I'm smart enough to know I could have gone in and out of the plant, I could have gone in and out of the lab building, if I had have wanted to, and they would have never known it. There was no need to use the gate, the main gate and the card that's required. I could have parked outside and gone into the lab building, which was outside. It wasn't in the main gate enclosure. And, also, there was a gate going from the lab building into the main plant, so had I wanted to violate what he had asked me to do, he would have never known it and that is just an untruth. And I'll say again, I never once, not just in that area, in no area did I go against anything he asked me to do. I did

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everything he required, no question.
Q: And then the bottom part of it says that on the C237 and T602 projects, that you didn't get them done and that you instead of working on the projects, you took vacation.
A: Those projects ended on the 18th of June. I can't go into the details, it's just too cumbersome again. But, no, as of June 18, those projects were dead. And I can tell you why if you'd like to know, but ...
Q: Okay, tell me why.
A: Okay. On the C602 [sic], per my recommendation ...
Q: Whoa, whoa, whoa. On the T602?
A: Yes, that's one of them, one of the two. I was going to give you both of them.
Q: Okay, go ahead.
A: As of the 18th of June when that final written I call came out, I had made a recommendation to Wade back when he wanted me to investigate foam finishing the project, I said, "Why don't we take ..." There was an available pad that wasn't being used. I said, "Why don't we take this pad and move it over and put it on the front of the number two tenner frame where we've been doing the foam finishing trials." As of the 18th of June, the decision had been formalized and made and in the works to start doing T602

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on a new pad, I mean, a used pad that was being installed. So that project was killed because of that decision. We're not going to foam finish anyway, no need to go forward with it.

Q: All right.

A: The C237, the Noveon folks had already reduced their price by about, I don't know, 20 or 25 cents a pound, and was further working on getting it on down. And the word was rather than go to and continue on with this and have to go to another vendor or whatever, let's just continue to deal with folks we're used to and they'll get our price in order. So that's ultimately what happened. They lowered the price on down into the seventies. So the direction I was going in both cases were brought to a halt.

Q: Let me ask you some questions about your vacation. You agree that you took multiple vacation days between Monday, June 18, and Wednesday, July 18, don't you?

A: I remember putting in for a week vacation in June. I don't remember anything else. And then asking to add two days to that.

Q: Okay. You don't dispute that you left a voice mail message on the morning of Tuesday, June 19, asking to be out that day, June 19, and the next day, June 20?

A: I don't recall that. I may have, but I don't recall it.

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Q: All right. And on Saturday, June, 23, you requested a week of vacation beginning the next Monday, June 25, correct?

A: I did request a week of vacation and I followed that up with a phone call requesting that I add July 2 and 3 to that. I was going to have seven consecutive working days for vacation.

Q: So you left a voice mail message on the afternoon of July 3 indicating that you would be taking the entire week beginning Monday, July 9 through 13?

A: No.

Q: What evidence do you have to dispute that?

A: On the afternoon of July 3, I had received a phone call and been put on administrative suspension or whatever you call it.

Q: Before your suspension, you called in and said you wanted to be off July 9 through July 13.

A: I don't recall that, I don't at all.

Q: None of these vacation days were approved in advance were they?

MR. STEWART: Object to the form.

A: If advance is before the vacation, actually was what happened, yes.

Q: Well, the day of is not before, is it?

A: No. No, I'm talking about like the week, requested a week and the two days that followed. No, those were all advanced then. Those weren't the day of.

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Q: Well, when you call in on Saturday, which is not a traditional work day, and ask for vacation beginning the next Monday, that's not in advance, is it?

MR. STEWART: Object to the form.

A: And Saturday what date?

Q: The 23rd of June.

A: That was covered with an e-mail. That week of vacation was covered with an e-mail.

Q: You agree that you were required to request vacation days in advance don't you?

A: I think that's pretty normal and I think I was one of those that followed pretty close the way we did things there.

Q: Well, let me just be clear. You agree that you were supposed to request vacation in advance, don't you?

A: Certainly.

Q: And you say that this vacation didn't interfere with the projects because as far as you were concerned, those projects were over on June 8, is that correct?

MR. STEWART: Object to the form.

A: The projects were over, yes.

Q: And you took the vacation days immediately after being given a warning on June 18, which is Exhibit 19.

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MR. STEWART: Object to the form.

A: That's correct.

Q: Now, during the period from June 18 to July 18, did you submit any data to Wallace about these two projects, C237 or T602?

A: Not that I remember.

Q: Now, you were scheduled to fly to Indiana on June 14 to visit a customer and return on the 15th, right?

A: If the dates are correct, yes.

Q: And you flew to Indiana?

A: I'm not sure where I flew to.

Q: You flew toward Indiana?

A: Somewhere, Detroit or somewhere. I'm trying to remember, but the next leg was to go into Indiana.

Q: So you turned around and came home?

A: Yes.

Q: And you did not visit with the customer?

A: No.

Q: You claimed you had got a headache on the plane?

A: In fact, this trip was arranged by Wade Wallace through the sales manager who wanted me to go and I was not to visit a customer.

Q: Was that Steve Acker?

A: Yes.

Q: The sales manager was?

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A: Right.
Q: And you were to meet Acker and the customer in South Bend?
A: For lunch.
Q: I'm sorry?
A: He was having meetings in the morning and I was going to meet them for lunch.
Q: And you returned to the plant without having met with the customer.
A: That's correct.
Q: And you did not tell Wade Wallace that you had aborted the trip.
A: You know, that's an area that I can't say for sure anything on right now, but when I got back in, I'm confident that I would have called him. But Steve Acker, when I called him, I told him the situation I was having and he and I together decided it best that I wait, I waited as long as I could before the flight was to leave for South Bend, and nothing had let up and we decided it best that I either spend the night there or come on back.
Q: You don't have any evidence that you told Wade Wallace that you had aborted this trip, do you?
A: I mean, I have no records of any kind in writing or anything.
Q: And you don't recall doing it?

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A: I know I would have. I know I would have called him and left a message if I didn't get him and told him the — It was toward the end of, I don't remember, it was sort of toward the end of the week. I was in pretty sick shape when I got back.
Q: You see in the memo it says, "He never informed me of this and while I thought he was in Indiana."
A: I disagree with that. I think he may have ignored anything I may have informed him on there and used that like that. But I think the most important thing in that particular scenario is his approving me to go there for no good reason and I didn't even know about and wasn't in on it.
Q: Hexion, July 3. Are you with me?
A: I know Hexion.
Q: July 3?
A: Yes.
Q: Did you leave a message for Wade Wallace telling him that you would be at Hexion in Greenville all day on July 3?
A: I left — You say in Greenville?
Q: Yes, Hexion in Greenville.
A: No, they're not in Greenville.
Q: Where are they?
A: They're in, they're near Spartanburg. Roebuck.

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Q: All right, Roebuck. Did you leave a message for Wade Wallace telling him you would be at Hexion in Roebuck on July 3 and that you would be at Hexion all that day?
MR. STEWART: Object to the form.
A: No. No.
Q: Did you leave him a message at all?
A: Yes.
Q: What did the message say?
A: It said that — Let me just real quickly say it had to do with a project that I was going to work on that I couldn't work on at the plant and could work on it at Hexion and other places. So the message was that there was a serious ant problem at my house that I encountered when I got home and my wife was literally berserk with ants in two or three different places coming into the house and she's highly allergic to them, fire ants. Now, I don't know at what point before that I had left Wade any message, but at that point I left Wade a message and said, "Wade, I've got a serious problem. First thing in the morning I'm going to do my best to get it taken care of and as soon as I finish, I'm going to go on over to Hexion and work on the project." And he knows the project that I was referencing.
Q: What time did you leave that message?
A: My guess, I think it was early, in early evening after I got home from work.

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Q: On what date?
A: This would have been the 2nd.
Q: So you say you didn't leave him a message on the 3rd?
A: The 3rd is the day I was at Hexion.
Q: Did you ever get permission from Wade Wallace to go work at Hexion?
A: Oh, yes.
Q: When?
A: The same permission I had to go to Rohm and Haas or any ...
Q: Sort of standing permission in your mind?
A: And let him know I was going and when and cell phone on.
Q: Did you go to Hexion?
A: Yes.
Q: What time did you get there?
A: I'm going to use a little wider — Well, it would have been around 12:30.
Q: But you didn't do any work at Hexion?
A: I couldn't get in.
MR. STEWART: Object to the form.
A: Couldn't get in.
Q: So the answer to my question is, no, you did not do any work?

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A: That day, no. No.
Q: What time did you leave Hexion?
A: I would say and, again, I'm looking back and guesstimating, 1:15 to 2:00 or something like that.
(Defendant's Exhibit 20 was marked for identification).
Q: How about take a look at Exhibit 20.
(Reviewing document).
Q: Do you have any reason to dispute the entries on Exhibit 20?
A: The thing that's written here, I don't recall.
Q: Which thing?
A: Received voice mail on the 19th.
Q: "Left voice mail on morning of June 19"?
A: Yeah, to be out 19th and 20th. I don't remember that.
Q: Okay.
A: "left voice mail on afternoon of July 3 ... was suspended."
Q: "... before he was suspended."
A: And without question, that's not true. I mean, it makes no sense is the reason I say that. I can't imagine that.
Q: Well, you would agree with me that June 9 through 13 should have been July 9 through 13, right?
MR. STEWART: Object to the form.

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A: I don't know.
(Defendant's Exhibit 21 was marked for identification).
Q: Let me show you what's been marked as Exhibit 21. Do you contend that this is the Hexion Visitors' Register?
A: Absolutely.
Q: How did you get it?
A: I got it from a girl named Pam Westmoreland. She copied this for me right out of the manual.
Q: Out of the what?
A: Out of the, whatever you call it, register. I call it a manual.
Q: What do you contend that this Visitors' Register proves?
A: Well, it shows that I signed it.
Q: It says, "7/3 Gary Harris, Tietex, 1:30."
A: 1:30.
Q: Is that 1:30 p.m.?
A: So I guess I got there at 1:30.
Q: Is that 1:30 p.m.?
A: Yes.
Q: And your work day doesn't typically begin at 1:30, does it?
A: My work day begins usually when I get up.
Q: So not 1:30 p.m.?
A: This was not a typical day. No.

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Q: So your work day doesn't normally begin at 1:30 p.m., right?
A: When I was with Tietex, no.
Q: The most this document shows is that you stopped by Hexion and signed in, correct?
MR. STEWART: Object to the form.
A: I mean, if you take it for what's here, yes, that's true.
Q: And you had told Mr. Wallace that you would be at Hexion all day?
A: I didn't say that, no.
Q: What did you say?
A: What I said earlier, I had an ant problem that had to be fixed and as soon as I took care of it, I was going to Hexion.
Q: All right.
A: No time given.
Q: And there was nobody at Hexion to let you in so you left?
A: There were people at Hexion that I later would find out that they were having a meeting that included the technicians, the people I would normally call and spoken with and gotten to come to the door. It included key management and everything. They have several buildings and that particular building, they were having a meeting and I

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made phone calls one after another to everyone I knew there over a period of time, waited and tried it again, waited and tried it again.
Q: You couldn't get in?
A: Couldn't get in.
Q: So you left?
A: Yes.
Q: And you didn't see a living sole at Hexion?
A: At that time I did not know of a procedure that they had ...
Q: Just please answer the question. Did you see a living sole at Hexion?
A: Yes.
Q: Who?
A: I don't know their names. I saw folks at Hexion. I mean, to answer your question, I saw, physically saw people there, here and there, but they weren't the people I was there to see. They weren't in that building.
Q: You didn't see anybody you knew the name of?
A: No.
Q: Or who knew you?
A: No.
Q: So this sign in sheet that's Exhibit 21 is the only proof that you have that you were at Hexion?
A: Probably some phone calls.

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Q: I'm sorry?
A: I mean, we don't have it here, but I suspect some phone calls will validate I was there as well during some time.
Q: Oh, you mean phone calls that you claim you made from the lobby ...
A: Yeah.
Q: ... to the interior of the plant?
A: Yeah. And also some other records.
Q: What other records?
A: Phone calls.
Q: But there aren't any individuals who can substantiate your being there?
A: That's correct. Not that they saw me or anything like that, that's correct.
Q: And you admit that you were at Hexion at most for about 30 minutes?
A: No. I mean, earlier when you asked me and, again, I haven't looked at this since, what's it been, a year and a half or so, but just trying to recall a time, I said 12:30, getting there at 12:30 and leaving, what 1:15 to 2:00 or something to that effect. Well, now that I see that I was actually there at 1:30 because I forgot, probably would have left more like 2:15 to 3:00 o'clock.
Q: All right. Let me invite your attention to the

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ESC transcript March 28, 2008, page 171. "Question. And you stayed there for about 30 minutes." "Claimant." That's you. "My guess is 30 minutes." "Question. Pardon me?" "My guess is 30 minutes." "Question. Thirty?" "Claimant. An estimate, from memory, an estimate."
A: Okay.
Q: Do you agree with 30 minutes?
A: About 30 minutes because I don't know, I didn't keep a record of it. I would say, probably now I would change that to at least 30 minutes because of what I did. Because I was fairly, it was a time when I was concerned about getting in and finishing the project. I'll put it that way.
Q: And you agree with me that Wade Wallace, based on your phone call, expected you to be at Hexion?
MR. STEWART: Object to the form.
A: Yes.
Q: What did you do when you left Hexion?
A: What I did after Hexion was probably, in my mind anyway, it was like I was at a loss. I had tried to get this project done. And let me say this, I've never mentioned this before, but in the back of my mind, I knew that there were places other than Hexion and I chose Hexion because they were close. I could have just as easily gone to Rohm and Haas or somewhere else or to one of these new

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places I hadn't been before. With that said, I called this guy that I knew that he had told me of two different places that he could get me a place to work, to do lab work, because he was aware of my situation as far as needing a place to work and so forth. And he wasn't a friend, he was an acquaintance from chemical sales. He and I met, I don't ...
Q: Can you just tell me where you went?
A: All I know is he and I met somewhere, I don't remember. I cannot call where we met but it was for him for the purpose, he couldn't go with me to tell me how to get to Chemurgy and all that. And we met for a period of time, I don't know how long, and when I left him I went looking for Chemurgy and to see if the folks were there and all this and I was going to go ahead and introduce myself and see if what their schedule was the balance of the week and I was going to go ahead and just break that ice and get in with those guys.
Q: So you went to Chemurgy about 4:30 p.m.?
A: No, it would have been before then. Maybe. I probably was leaving there about that time. I don't remember. Because it probably took me, I don't know, 30 or 45 minutes of driving.
Q: You didn't see anybody at Chemurgy, did you?
A: No.

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Q: And the guy you met, was it Dean Roberts?
A: Dean Roberts.
Q: So on July the 3rd you went to Hexion for about 30 minutes and you went to Chemurgy but didn't speak to anybody.
A: That's correct.
Q: And how long do you claim you were at Chemurgy?
A: I'm going to guess and say it probably took, for me to find the place, between 30 minutes to an hour maybe.
Q: How long did you actually stay on the premises there?
A: There was no sign of anybody there.
Q: Did you telephone Wade Wallace and tell him you couldn't get into Hexion and you were going to go somewhere else?
A: No, I did not.
Q: Did you instruct a Hexion employee to bring sulfuric acid to you at the Tietex plant?
A: No, I did not.
Q: Did a Hexion employee bring you sulfuric acid at the Tietex plant?
A: I was told he did.
Q: And that was George Henderson?
A: Yes.
Q: And did you, in fact, want sulfuric acid, you have

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some need for it?
A: The sulfuric acid would have been used, had I been able to get into Chemurgy, it would have been used as — Like I said, I didn't feel welcome at Hexion, and if I could just get the chemical then I was going to go, if they were open at the end of the week, I was going to go over and finish the project. I did not tell Hexion to bring any acid, period. What I told Hexion was, if you will get some acid together — and if I remember correctly, I'll pick it up, leave it at the guard house or something. I don't remember the details exactly, but I can come back by and get it. They got a guard house that stays open. And I don't remember the details.
Q: It would have been against Tietex's procedure to have George Henderson bring you a beaker of sulfuric acid, wouldn't it?
A: Well, again, going back to earlier, those are the kind of procedures I would have put together. And it depends on how he brought it and how it was — it would have had to have been wrapped properly, MSDS. It had to be a safe container and so forth. It wasn't a beaker, by the way. I was told later, I talked with George and he said it was a sealed container that was proper for acid.
Q: And Wade Wallace told you that he had been trying to get in touch with you all day on July the 3rd, didn't he?

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A: No.
Q: And didn't Wade Wallace finally reach you on your cell phone about 3 in the afternoon?
A: No.
Q: When did he reach you?
A: First of all, I would object to the finally because I'm confident I had my cell phone on the whole time, and I received a phone call from him between 4:30 and 5 o'clock. He wanted to know where I was.
Q: Did you tell him that you had been at Hexion?
A: I told him exactly what had happened, which is what we've already talked about.
Q: Did you tell Wade Wallace that you had been to Hexion?
A: Yes.
Q: Did Wade Wallace tell you he knew you hadn't been at Hexion?
A: I don't — No, he didn't say that to me when we were talking on the phone.
Q: Did Mr. Wallace tell you he knew you hadn't been at Hexion because George Henderson, the lab manager from Hexion, had brought sulfuric acid to the Tietex plant looking for you?
A: I don't know that we discussed that or not. I don't recall discussing that in our phone call. May I —

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Just a key part of that phone call was, he gets in touch with me, wants to know where I am. And I tell him, I give him, I spend time telling him the events, and then he says, "Well, I'm putting you on administrative suspension. I don't want you back in the plant until when I'm back from vacation on July 8th, whatever, July 18 or something.
Q: Will you agree with me that it would look suspicious to a reasonable person for them to have an employee who was supposed to be at Hexion, and then a Hexion lab manager shows up at Tietex looking for him?
MR. STEWART: Object to the form.
A: I would say no.
Q: You don't think that looks suspicious?
A: Not under the circumstances. I mean, if a person's looking for something, trying to create something, yes.
Q: All right. You tell Wallace you're going to be at Hexion. Henderson shows up at Tietex looking for you. He's from Hexion. Now, don't you think that looks suspicious?
A: What time did Mr. Henderson, may I ask what time he came?
Q: I don't know.
A: See, that's the key. Wade Wallace said he came right after lunch when, in fact, George Henderson came at

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the end of the day when he was on his way home from work. And all he announced was Gary Harris had come by and needed acid, left a message, left a message he needed acid.
Q: Well, didn't you say that the call to you was between 4:30 and 5:30?
A: Yes.
Q: Well, that would have been consistent with the time that you say Henderson went by there, right, at the end of the day?
A: Yeah, but inconsistent with when Wade said he came by. Wade said he came by like 1:30.
Q: But Henderson asked the people at Tietex where you were, and they said, well, he's supposed to be at Hexion.
A: I don't believe he, I don't believe he asked that question.
Q: You don't believe who asked what question?
A: I don't think George Henderson asked where I was. All he was doing, he knew that I was going to come back at some point and pick up acid, and he decides — that's the way George is — as a courtesy he decided, well, on my way home I'll just drop this acid off to Gary and he won't have to pick it up. And he didn't call me or anything and say he was going to do that.
Q: Well, for all Wade Wallace knew you could have been fishing or cutting the grass or anything else other

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than working, right?
A: That's true.
Q: And wouldn't it have been reasonable for Wallace to expect you to call him and say, look, my plans have changed. I can't go in to Hexion. I'm going to make other arrangements?
MR. STEWART: Object to the form.
A: I think that's one of those marginal questions that could go either way. I mean, I'll agree but then again I think I could give a reason that it's okay.
Q: During this conversation did Wade Wallace ever say, well, tell me where you've been all day?
A: Well, when he called me he wanted to know where I was, and I explained to him about what had transpired and, I mean, just right on top of that --- we probably talked no more than, I want to say three minutes. He said, "Well, I'm going to put you on administrative leave or suspension," whatever it's called, "and I don't want you back in here." Now, the other part that I had a problem with there, why did he not want me to come on back in right then and talk with him. Why did he ban me then? I mean, that still bothers me and I don't understand that.
Q: Did you hang up on Wade Wallace?
A: No.
Q: Did the telephone get disconnected?

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A: No, we were talking and it was after he had told me all that and everything, and I don't know if it's where I was driving or what, but we got cut off.
Q: Do you know what Wade Wallace did to investigate?
A: No, I don't.
Q: Do you know who he talked to?
A: Oh, I do. I think he called both those fellows, George Henderson and Dean Roberts. Word was he called them.
Q: Do you know if he talked to anyone else?
A: Not to my knowledge.
Q: Do you know the content of Wallace's conversation with Henderson?
A: No, but I will say this, that it was pretty strong according to what George said. George said he felt it to be highly unprofessional, the way it was handled because it made me look kind of, maybe something I didn't need to be made to look like.
Q: Well, what do you claim that Wade Wallace said to George Henderson that you object to?
A: I can't recall that, I'm sorry.
Q: So you don't have any evidence that Wade Wallace said anything to George Henderson that would have been defamatory towards you. It was just unprofessional, is that what you're saying?
A: Probably more so unprofessional, yeah, if I had to

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say one or the other.
Q: And what you know about that conversation you learned from who, Wade Wallace or George Henderson?
A: From George. George actually called me about it.
Q: And does Dean Roberts work for Spartan Chemical?
A: He works for — he did, I'm not sure. I haven't talked with him in a long time, but he was with Spartan Chemical at the time.
Q: And you said that you have some information that Wallace called Roberts.
A: Right, yeah, Dean and Wade Wallace were reasonably close and they had a, I mean, I don't know if it was a friendship relationship but they were pretty close.
Q: Do you know what Wade Wallace said in that conversation?
A: I don't.
Q: So you don't have any claims that Wade Wallace made any remarks about you to Dean Roberts that were defamatory.
MR. STEWART: Object to the form.
A: I don't know. I don't know of any right now, no.
Q: Now, your employment was terminated on July 19, 2007, for unsatisfactory performance, correct?
A: Yes.
Q: Do you know who made the decision to terminate

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your employment?
A: No.
Q: Do you know how old David Wilson is?
A: No.
Q: Do you know how old Wade Wallace is?
A: When I went to work for him, I think he was 33.
Q: Do you know how old Martin Wildeman is?
A: Well, I think he was like around 30, 31 in '94, so do the math, whatever that is, mid-forties?
Q: How about Reed Cunningham, do you know how old he is?
A: I do not know.
Q: How about Mark Isbell?
A: Mark is, I'd say he's somewhere mid to upper forties, I don't know.
Q: And then you're just basing your best guess on how these gentlemen appear?
A: I mean, there's a lot of stuff out there that I could go by, but I'm just giving you an off-the-cuff general answer based on trying to answer.
Q: Reed and David's about as old as you are.
A: I doubt that.
Q: Close.
A: I doubt that.
(Defendant's Exhibit 22 was marked for identification.)

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Q: You mean how many depositions we're going to take and so forth.
A: Yes.
Q: Now, there are a number of documents that we got from the EEOC that you gave the EEOC, but when it came time to respond to our Request for Production, we didn't get those documents from you. Do you know why?
A: No.
Q: You don't know why you would have given the EEOC documents you didn't give to us?
A: I guess, you know, are you saying that if I gave EEOC a document at any time that I was supposed to give it to other people?
Q: Well, here's the deal. We made a Freedom of Information Act to the EEOC to give us everything in their file on you, and they did that. And it contained documents that when it came time for, when we compared what we got from the EEOC with what we got from you, we got things from the EEOC that we didn't get from you.
A: But you did get them.
Q: From the EEOC, not from you.
A: Well, you know, I'm obviously not an attorney and I don't really — I'm sure there's something there I don't understand, okay? I'm sorry.
Q: Well, I just want to make sure that we've gotten

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all there is to have, that you don't have other documents like these recordings that you told us about that we haven't gotten yet.
A: In other words, any documents that may show up that I have at some point, at a deposition or whatever, which this is the, you know, this is really the, I guess the first time we've met like this other than ESC ...
Q: Right. If the document is relevant to your case.
A: So in other words, I can give you all my documents. I would love to.
Q: Okay, well, that's what we want. Do you have documents you haven't given your lawyer yet?
A: Yes. I've got plenty of documents.
Q: That are relevant to this case?
A: I don't know. Some of them are and — I'm not the expert there. But there's like all this accumulated crap I got.
Q: Can we have an agreement that you will give those documents to your lawyer and if he decides they're relevant, he can give them to us?
A: If that's the way you want to do it, yes.
MR. SUGGS: Do you agree with that?
MR. STEWART: I agree with that, yes.
A: That said, that said, one of the key documents that I have is a document that shows — and I've mentioned

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this before, I think, in the hearing — but I have a document that shows where I purchased chemicals on the morning of July 3 from Lowe's. It spells out chemicals, it spells out the time that I checked out and all that. Is that the kind of thing we're talking about?
Q: Yeah.
A: Okay.
Q: Absolutely.
A: Anything I got like that I'll give to my attorney. I've got, I mean, I'd love to share it.
MR. STEWART: I'll look over it and try to get it to you in an expedited fashion.
A: One quick question, if I have, like, for example, going back to February of '07 following a visit to my office by Mr. Wallace, and I made a series of notes and comments and dated it, and that kind of thing, would that be considered a document that you would want?
Q: Uh-huh (affirmative response), absolutely. Look at these. This is Tietex 266 to 272, and show them to your lawyer so he can see them, too. And 274, 275, and 277, 278.
A: Yes, sir.
Q: Now, do those documents have anything to do with your lawsuit?
A: I suspect what this has to do with is simply demonstrating that, in fact, I did have something to do with

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the environmental at Tietex because I got a call from Mark Delledone and I made notes on what he said. This was, this ended up being a crude way of investigating and not meeting somewhere like at Tietex, but we did it by phone. And one of the things that he said — and I've got notes about five or six different things he said about Tietex — he said Tietex claims that you did not have any employees reporting to you or has had none reporting to you and he said Tietex also complains that you haven't had anything significant to do with the EPA OSHA stuff at Tietex. And so this would be, you know, this is something I kept. These are records I gathered and then I produced quarterly reports for EPA and that kind of thing. That's all that is, just to show in fact — and let me say this. What I have in that area versus what I produced is very, very limited because most of the stuff that I had in forms of memos and documents and things were left at Tietex.
Q: Well, 266 is a document on Tietex letterhead, right?
A: That's correct, yes.
Q: Signed by you as Gary Harris, Senior Research Chemist.
A: Yes.
Q: This is Tietex document, isn't it?
A: A Tietex document?

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MR. SUGGS: Object to the form, leading.
Q: Do you have a reason as to your beliefs?
A: Well, as I said before, and part of this was hindsight because I went into the situation in spite of any negatives when I started reporting to Wade, in spite of knowing my qualifications versus his, I went in with an open mind and ready and willing to give him 110 percent and do everything possible to make it a good situation. But after those first instances where he, like on around February 5 or 6, after I'd been with him for less than a week he comes in and just unloads on me when no one else is around, and then out in public he's Mr. nice guy when everyone else is around. And then he did that again later. I knew then that this would not, nothing that I had to do with Tietex going forward was going to pass because I was out, I would soon be out the door. I mean ...
Q: Let me stop you. That's not a good question to ask. Why do you think they did not want your C237 project to make this stuff internally succeed? Why?
A: I don't know.
Q: Do you have any ideas?
A: Well, first of all, I know Mark Isbell — a lot of this is hindsight — resented me highly. And if you look back, I can now look back and see all the pieces of the puzzle and being a technician and a highly technical person,

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that's easy for me to take the pieces now after getting away from the situation and becoming very objective, for me to look back and put all the pieces together and see that the guy just hated me ....
Q: Let me ask ...
A: ... and I was an adversary ...
Q: Let me ask ...
A: ... in his opinion.
Q: ... about Noveon now. Does Tietex still get this formula that they listed at .885 cents per pound at the time of this memo from Noveon?
MR. SUGGS: Object to the form in that there's no basis for this witness's answer to that question.
Q: You can answer. To the best of your knowledge.
A: I would learn that they dropped the price further and, as I said before, it was my understanding that ultimately they lowered the price and gave the product another name. I don't, in my opinion, based on some stuff I saw, I don't think they really came up with another product. They simply just lowered the price. At this time I don't, I haven't kept up with what's going on over there, so I don't know what they're doing now. I don't know if they're buying from Noveon or whomever. I don't, you know, and if you'd have asked me probably a year ago, I couldn't have told you because I haven't really ...

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Q: Let me ask you this. Last time you heard or you knew, how much were they getting the product from Noveon for?
MR. SUGGS: Object to the form, requires speculation and an answer based totally on hearsay.
Q: You can answer.
A: I remember something to the tune of the mid seventies based on a friend of mine who he and I had a conversation and he was, and we'd spent some time together, and he was still working at Tietex at the time.
Q: What was the name of the ...
MR. SUGGS: Whoa, whoa, whoa. Move to strike. Speculation, hearsay.
Q: What was the name of the salesperson from Noveon that Wade Wallace dealt with?
A: Lisa Bowes.
Q: If you will, tell me how many inaccuracies you see in this memo, Defendant's Exhibit Number 18, as it relates to the T602 formula.
A: The second trial as well as the third trial is a correct statement. They were unsuccessful. But, okay, they were unsuccessful. The test results that he, of course, he generalizes a lot and he doesn't, he basically is highly misleading as to what really happened. He doesn't spell out that the second trial was a failure because of a significant

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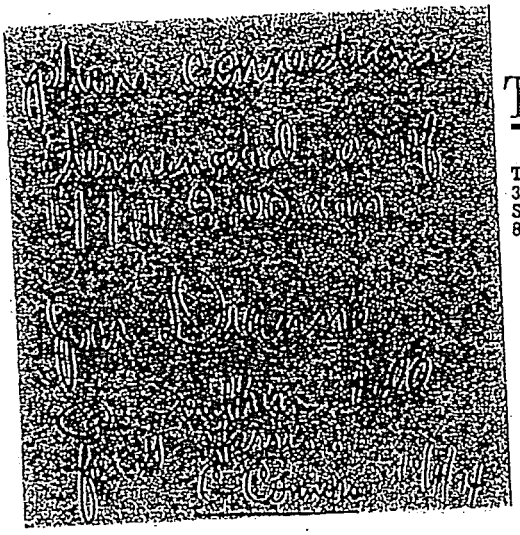
machine problem with regard to a bar being bent and this was overlooked by the machine operator as well as the technician that was overseeing the trial. And they ran the allotted yardage with a bent bar causing uneven distribution of the finish, and therefore an unsuccessful trial. And he does not say in here that his boss, Mark Isbell, is directly responsible that the third trial was unsuccessful in that he chose to at the last minute move the trial to a machine totally different from the machine that the trial was and the mix was made for, and all the adjustments and everything that were already learned that needed to be made from the early trial, first trial, that we didn't get to try in the second trial because the bar, and we had them tried but we didn't get good results because of the bent bar, we couldn't assay or whatever any accomplishments that were made with these changed settings to fine tune. And finally in the third trial, and the — one thing I'll add, the reason Mark Isbell changed to the other machine, in my opinion, either he was highly ignorant and incompetent or it was malicious in order to undermine the trial. It's one of the two, there's no other option. He just didn't know what he was doing, or if he did, he was highly malicious. That said, he already at the point in time he made that decision had made another decision that we weren't going to go forward with any more attempts to foam finish that product anyway because



TIETEX

TIETEX CORPORATION
3010 North Blackstock Road, P.O. Box 6218
Spartanburg, SC 29304
803 574-0500 FAX 803 574-9440

CONFIDENTIAL

June 14, 1994

Mr. Gary Harris
309 Fox Run Drive
Galax, Virginia 24333

Dear Gary:

We are pleased to offer you the position of Senior Research Chemist in our Printing and Finishing Department. This position reports to Dave Hughston, Plant Manager, Printing and Finishing.

The purpose of this letter is to provide you with a summary of the offer, as follows:

1. Your base salary will be $55,000 per year. As an exempt employee, you will be paid monthly, and paychecks are issued on the 25th of each month. For information, we provide direct payroll deposit. To begin the direct deposit process, you will need to provide us with a deposit slip for your banking account.

2. We have provided you with handouts which outline our fringe benefits package. Each of these will be explained in greater detail to you on your first day of employment. In the meantime, however, if you have any questions, please let me know.

3. We will provide you with certain relocation-related benefits. These include:

   a) We will pay all costs associated with the move of your household goods, clothing, furniture, etc. from Galax, Virginia to Spartanburg, South Carolina.

   b) We will provide reasonable temporary housing for you for a period of up to sixty days. This will consist of a furnished apartment plus utilities.

   c) We will pay you the equivalent of one month's salary ($4,583.33 gross amount) for incidental relocation-related expenses. Payment

DRH 9/9/94 extend 30 additional days at Tietex expense to (Oct. 15, 1994)

11/14* Advised Gary of conversation w/ Amber @ Timberlane. To extend lease 1 more month @ Tietex expense. He's to advise Amber of this. 11/14 after initial

will be made on your request following the closing of the purchase of your Spartanburg residence or the lease of an apartment by you as your permanent address.

d) We will pay up to $5,000 toward closing costs associated with the purchase of your Spartanburg residence. (This does not apply to rental of property.) This benefit will be available to you for a period of up to twelve months following the date of your employment.

e) Any other requests for assistance during the pre-relocation period must be reviewed and approved in advance.

f) All items listed above which relate to relocation shall be handled in accordance with all applicable state and federal tax laws. You are encouraged to consult with your tax advisor to make the necessary plans.

We remind you that on the first day you report to work you will need to bring with you certain documents which will be used for form I-9 purposes. Suggested documents are a valid driver's license and a birth certificate or social security card.

This letter summarizes our offer. Nothing herein should be construed as a contract of employment or as a promise of any specific terms for any determined period of time.

We have enjoyed meeting with you and hope that you will accept our offer to join Tietex. We will be available to help you get settled in Spartanburg and to help you in any way as you begin your career with us.

Sincerely,

TIETEX CORPORATION

Donald P. Woodward
Human Resources Manager

REDACTED

DATE: 7-13-94

TIETEX CORPORATION

Salaried X
Non-Exempt
Hourly

NAME Gary G. Harris (First Middle Last)
08 (DEPT.) 3335 (EMP. NUMBER)

ADDRESS Timberlane Apts. # 316
106 Kensington Drive
Spartanburg SC 29301 (City State Zip)
HIRE DATE 7-13-94

SOC. SEC. NO.

SEX M MARITAL STATUS M

PHONE 587-8959

DATE OF BIRTH

JOB TITLE Senior Research Chemist
JOB CODE —
JOB SERV. DATE 7-13-94

SALARY

ANNUAL RATE $55,000.00

WEEKLY RATE

HOURLY RATE SHIFT 1

*DIRECT DEPOSIT
(*attach authorization agreement)

TAX DATA

FEDERAL TAX -2-

STATE TAX -2-

ADD'L. TAX Ø

DEDUCTIONS

	AMOUNT		AMOUNT
GROUP INSURANCE	Eligible 60 days from H.D.	MISC.	
LIFE INSURANCE	" " " " "		
401(K)	After 3 months of service		
UNITED WAY	Ø		
SAVINGS	Ø		

DEFENDANT'S EXHIBIT D

EMPLOYEE SIGNATURE Gary G. Harris DATE July 13, 1994

PERSONNEL Cynthia H. Connors

COPY TO PAYROLL 7/18/94

TIETEX
000215

DPW 7/18/94

Wallace, Wade

F: Wallace, Wade
Se... Monday, February 05, 2007 1:42 PM
To: Harris, Gary
Cc: Wilson, David; Isbell, Mark
Subject: RE: Acceptable work areas

Thanks. I got your voice mail this morning where you mentioned that your original thoughts on wearing a mask may have been wrong and that it may still not be enough protection. I spoke with David Wilson and we do not want to take any chances with your health. Please do not enter the lab under any circumstances, even if you are wearing a mask. Give me a the list of items you need and I will have them relocated without any need for you to go up there.

-----Original Message-----
From: Harris, Gary
Sent: Monday, February 05, 2007 10:18 AM
To: Wallace, Wade
Cc: Wilson, David; Isbell, Mark
Subject: RE: Acceptable work areas

Wade:

As I stated in a phone message earlier today, I am working on a list of needed equipment, etc. for the new work area. This is a very important undertaking and I want to be sure that it is handled correctly and thoroughly in the beginning on my part.
I hope to have this completed by the end of the week.

Gary 2/5/07

-----Original Message-----
From: Wallace, Wade
Sent: Friday, February 02, 2007 11:53 AM
To: Harris, Gary
Cc: Wilson, David; Isbell, Mark
Subject: Acceptable work areas

Gary,

I received your voicemail this morning. As we discussed yesterday we will do whatever is necessary to shield you from any further exposure to an environment(s) that might negatively affect your health. As David Wilson directed please do not enter the lab or any other work areas that Jake occupies unless it is an approved exception (see next paragraph). In addition, we will protect your new work areas from any potential exposure by directing Jake not to enter those areas. You have set up a temporary work place in the office/lab in the compounding area so this area will be protected. Also, you are free to utilize or permanently relocate your work area to the color shop area and this area will be protected as well. Both of these locations have ample countertop and sink space for laboratory bench work. If there are any tools, supplies, or equipment in the lab that you need for your work, please make a list and I will have them moved to your new work area.

As we discussed by phone today there may be exceptions to entering the lab in order to perform your job duties. One specific example is that your project work will require you to witness testing on the bench burn apparatus. It is neither practical or economical to relocate the bench burn testing outside of the lab due to the smoke venting and ambient room conditioning needed. Therefore you will need to enter the lab to do so. In these situations always wear proper respiratory protection in the form of a mask with sufficient coverage and filtration to keep out any potential irritants. You have indicated that you have tried this approach and feel it will work fine for periods of limited exposure. If you encounter any more job functions where it is not practical or economical to move the equipment, please let me know and we will consider the same procedure for these situations.

Thanks for you cooperation,

Wallace, Wade

From:	Wallace, Wade
Sent:	Friday, February 09, 2007 8:58 AM
To:	Wilson, David
Cc:	Isbell, Mark
Subject:	Gary Harris

Per our conversation, I'd like to document the discussion I had with Gary Harris on Wed 2/7/07.

Gary called me mid afternoon on Wed and stated that at that moment his personal and emotional problems had overwhelmed him and he was confused, disoriented, and could not function. He did not know what to do. I immediately went out to his office to discuss his problem in person. He explained that his personal life over the last year has made him so fragile emotionally that sometimes he has episodes like the one he was experiencing. As we talked he felt better and mentioned that the project work I had assigned him would be help keep his mind off his personal problems.

I took that opportunity to remind Gary that Tietex is committed to our employees well being and that at any time we would support him if he felt he needed to utilize EAP. He said that that was not necessary and that he could work through it. I also asked him to be open with me if in any case this personal problem interfered with his ability to perform his job as we would need to sit down with HR to find a resolution.

When I left him he assured me that he was OK and thanked me for my support and patience.

ATTACHMENT D

Wallace, Wade

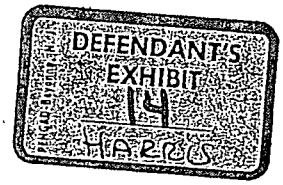
From: Wallace, Wade
Sent: Thursday, February 22, 2007 4:16 PM
To: Wilson, David; Isbell, Mark
Subject: Voicemails from Gary this week

Gary left voicemail messages for both me and Martin one morning this week at 3am. Martin forwarded me the one he received. Both messages consisted of him complaining about his inability to sleep due to being distraught over "all that's been going on."

The first thing that was bothering him this week have been that his work area has been moved from the lab and he is still not set up to easily do his bench work. I have covered this with him several times and he has asked for a lab pad coater and a vented hood. I have committed to both but he must understand it will take some time to locate, acquire, and install the equipment. In the meantime he is to make do with the pad in the beam dye area and/or seek chemical tech resource time from Robert Culbreth in the lab (coordinating with Jake). Robert is qualified and trained to do this and can help if Gary needs something done on the pad in the lab since he cannot go up there.

The second thing bothering him is his responsibilities regarding environmental reporting. He has a report due March 1 and is concerned about having to do it due to his project work. I have reviewed his project work and it does not consume all of his time. Unless he convinces me otherwise, I see no reason that his projects would interfere with his ability to get this report done on time. I made this clear to him. Although his environmental reporting duties have not changed, he does not think this should continue to be his responsibility. Regardless I have made it clear to him that it still is his responsibility and must be done.

I will update Martin as he was confused by Gary's email. I will also encourage Gary to bring his problems to me first since I am his immediate manager.



Wallace, Wade

From:	Wallace, Wade
Sent:	Thursday, February 22, 2007 4:04 PM
To:	Harris, Gary
Subject:	Environmental reporting

Gary,

You left me a voicemail this week expressing concerns over the upcoming environmental report(s) due March 1st. As we discussed when you transitioned into the Development/Improvement department, your environmental reporting duties have remained unchanged. There is a possibility that we could transition these duties to the engineering department at a later date. However, this may take some time and you will need to continue with it until it happens.

You expressed concern about getting it done. Please be sure to complete this on time. If you have difficulty managing this task and your project work, please see me tomorrow when I am back in the office so that I may understand the situation better.

Thanks,

TIETEX
000333

To: David Wilson

From: Wade Wallace

CC: Mark Isbell, Gary Harris

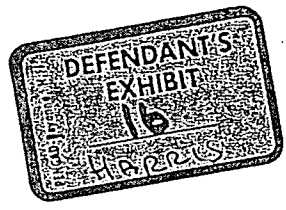
Date: March 5, 2007

Subject: Gary Harris' Transition

During the last thirty days as Gary Harris has transitioned into his new role, several issues relating to his work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

As we discussed these issues are not sustainable and it is mandatory that Gary make significant progress towards resolving these issues within the next 30 days.



ATTACHMENT F

TIETEX

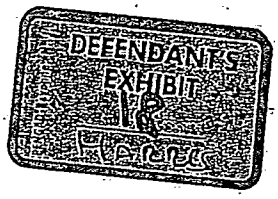
To: Gary Harris

From: Wade Wallace

CC: David Wilson, Mark Isbell

Date: June 18, 2007

Subject: Gary Harris Work Perfomance

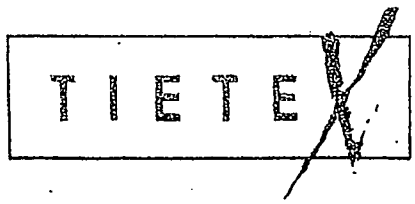


During the last ninety days some issues relating to Gary Harris' project work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

Of Gary's multiple duties two projects were identified ninety days ago as priorities and he was instructed to give them his most thorough and diligent focus. The first project was the development and qualification of a Tietex coating compound formula as a replacement for the current coating used on C237. Gary actually began work on this project prior to his reporting to me. His lab coating work began in December 2006 so the project has been ongoing for over six months. The second project was to develop a finish formula change and process to enable T602 to be finished with the parabolic applicator instead of a pad application. The project was assigned and work began ninety days ago.

Although the first project has been on going for six months no significant progress has been made toward completion. This project was initiated solely by Gary and he convinced senior management that it was completely feasible in order to gain support. He committed to developing a compound that would cost between $0.60 and $0.62 per pound verses the current product which cost $0.885 per pound. Despite months of lab work in house and at four different chemical supplier locations and numerous production trials he has been unsuccessful in creating a viable product. The formulation which Gary developed has proven to be much more complicated to reproduce commercially than initially promised. Gary exercised poor judgement by making claims and commitments that he could not deliver. This project was included in corporate financial improvement goals. Due to the failure of this project I have personally had to begin parallel project work with other suppliers to develop a suitable replacement to achieve the financial commitment of the project.

The scope of the second project to develop a finish formula and process for parabolic application of T602 was a technical challenge. However, Gary informed me that lab samples were promising and recommended a production trial. Although I was not presented the actual numerical results of the first production trial Gary assured me that the results were comparable to



the current product. From this I approved a scale up run for statistical qualification. The second trial, as well as a third were unsuccessful. These subsequent failures concerned me and I personally recalled samples from the first trial that Gary assured me was a success. I witnessed them being tested and found that the product from that initial trial did not perform comparable. By this I can conclude that Gary did not conduct adequate scientific and numerical analysis of the first trial. This negligence was costly in that two subsequent production trials could have avoided. In addition, this negligence in applying the proper scientific analysis is unacceptable in the work of a Sr. Research Chemist.

Obviously the two issues regarding the C237 project failure and poor analytical practices demonstrated in the T602 project are not sustainable. It is mandatory that Gary make significant progress towards resolving the problems with the C237 project and improving on his analytical practices within the next 30 days.

To: David Wilson

From: Wade Wallace

CC: Mark Isbell

Date: July 18, 2007

Subject: Gary Harris Work Performance

Despite efforts to counsel Gary Harris we continue to have issues with his work practices and performance. These issues are listed in the following paragraphs. On this basis I am recommending that we terminate his employment immediately.

In February 2007 he was reprimanded for the following issues:

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

With the exception or the environmental reporting he continues to have these issues.

In April 2007 he was instructed not to come in and work in the chemical lab areas at nights or on weekends for safety reasons. Gate records and management observation indicate that he has continued to do this.

In June 2007 he was reprimanded for the two following issues and given a thirty-day deadline for resolution. It was made completely clear that failure to complete this task and resolve this issue would jeopardize his employment.

- Failure to complete the project to replace the current C237 coating compound with formula of his design.
- Not conducting and reporting adequate scientific and numerical analysis to substantiate lab and plant trials.

He has not demonstrated any effort to complete the C237 project. Despite the deadline to complete the project within four weeks he took two vacation days the first week, five the second week, and was planning to take five days the fourth week. This would have accounted for more than 50% absenteeism during this time and no effort to complete the project as instructed. None of these days were approved in advance. He left messages the day of the vacation without any

DEFENDANT'S EXHIBIT

advance notice despite my request that he have them pre-approved. In addition he has not submitted to me any scientific data on any of his other projects.

I recently found out that also in June that Gary missed an important trip to visit a customer and did not inform me. He was scheduled to fly to Indiana on June 14 to visit with United Shade and return on June 15. On the way there he suffered a headache and returned to SC a day early and did not see the customer. He never informed me of this and while I thought he was in Indiana.

In July 2007, prior to the end of his thirty-day deadline several more issues have arisen.

- Only July 3, 2007 he did not show up for work and left me a message that he would be at Hexion in Greenville all day. He did not get permission for this trip. Later I found out directly from the Hexion representative that he did not show up. Although he did see another supplier in Greenville briefly, he has no been able to adequately account to me his whereabouts for the entire day.
- Also on this day he instructed the Hexion representative to deliver sulfuric acid to him at the plant without an MSDS. This is in direct violation of company policy.

In the last three months he has also demonstrated other poor work habits that are affecting his work performance.

- Does not return calls or emails consistently. His co-workers consistently complain of this as it affects their ability to complete their tasks that are contingent on his work.
- Does not keep consistent work hours and often cannot be physically located at the facility. Gate entries indicate an erratic pattern of coming and going that is not approved in advance.

In light of the continued problems with Gary's work practices and performance I am recommending that we terminate his employment at Tietex. Gary has been counseled about these issues, but at this point I have lost confidence in his ability to perform his job in a satisfactory manner.

TIETEX

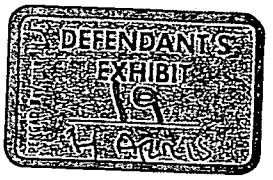
To: David Wilson

From: Wade Wallace

CC: Mark Isbell

Date: July 18, 2007

Subject: Gary Harris Work Performance



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- Not conducting and reporting adequate scientific and numerical analysis to substantiate lab and plant trials.

He has not demonstrated any effort to complete the C237 project. Despite the deadline to complete the project within four weeks he took two vacation days the first week, five the second week, and was planning to take five days the fourth week. This would have accounted for more than 50% absenteeism during this time and no effort to complete the project as instructed. None of these days were approved in advance. He left messages the day of the vacation without any

TIETE

advance notice despite my request that he have them pre-approved. In addition he has not submitted to me any scientific data on any of his other projects.

I recently found out that also in June that Gary missed an important trip to visit a custome did not inform me. He was scheduled to fly to Indiana on June 14 to visit with United Sh return on June 15. On the way there he suffered a headache and returned to SC a day earl did not see the customer. He never informed me of this and while I thought he was in In

In July 2007, prior to the end of his thirty-day deadline several more issues have arisen.

- Only July 3, 2007 he did not show up for work and left me a message that he wo Hexion in Greenville all day. He did not get permission for this trip. Later I fou directly from the Hexion representative that he did not show up. Although he di another supplier in Greenville briefly, he has no been able to adequately account his whereabouts for the entire day.
- Also on this day he instructed the Hexion representative to deliver sulfuric acid the plant without an MSDS. This is in direct violation of company policy.

In the last three months he has also demonstrated other poor work habits that are affect work performance.

- Does not return calls or emails consistently. His co-workers consistently comp as it affects their ability to complete their tasks that are contingent on his work.
- Does not keep consistent work hours and often cannot be physically located at facility. Gate entries indicate an erratic pattern of coming and going that is no in advance.

In light of the continued problems with Gary's work practices and performance I am recommending that we terminate his employment at Tietex. Gary has been counsele these issues, but at this point I have lost confidence in his ability to perform his job i satisfactory manner.

Wallace, Wade

F: Wallace, Wade
Sent: Monday, June 25, 2007 8:03 AM
To: Harris, Gary
Subject: RE: Vacation

Gary,
I do not have a problem with you taking vacation this week. However, in the future please try to communicate this kind of time off further in advance.

----Original Message----
From: Harris, Gary
Sent: Saturday, June 23, 2007 9:47 AM
To: Wallace, Wade
Subject: Vacation

Wade:

As a result of an important situation, I need week of June 25 for vacation. There are several key work related issues that need attention which I will arrange to cover.

Thanks,
Gary

Left Voice mail on morning of June 19 to be out June 19 & 20.

Left Voice mail on afternoon of July 3 before he was suspended indicating he would take vacation entire week of June 9 – 13.

TIETEX
000340

ATTACHMENT J

VISITORS REGISTER

ADDRESS	TIME	REMARKS
Warden's Conf. Center N.L.V.		
United Way		
Clark Cnty. Detention Center Las Vegas, Nev.		
Henry Hoagland NV		
Colorado		
Spec. Ct. Deputy	9:00 10:05	
Virginia		
Texas		
	2:35 Arrest	
Rebel	6/14	
TROY	6/14	
KSL		
Omega Technologies	7:30	

DEFENDANT'S EXHIBIT 21

2007

VISITORS REGISTER

DATE	VISITOR'S NAME	ADDRESS	TIME	REMARKS
6/20	Gary Harris	Trust	8:40	
6/25	Gary Harris	Trust	3:10	
7/1	Gary Harris	Trust	1:30	
7/11	Gary Harris	Arrest	10:00	
7/18	Dean Roberts			
8/28	Gary Harris	Attorney	10:40	
9/4	Dan Haines	Las Vegas	7:15	
9/18	Ted Sakhleh	Firm		
9-18	James Winston	Trial		
9/19	Dan Rio	Sparton	8:45	
9/20	GARY HARRIS	SPARTON	8:50	
11/1	D Mally	Trial	11:30	
11/1	C. Al Simms	Sparton	2:50 3:00	
11/8	S. Tojisawa	Central Glass Intl Inc.	10:00 10:50	

ATTACHMENT K

REDACTED

DEFENDANT'S EXHIBIT 25

TIETEX
000342

TIETEX INTERNATIONAL, LTD.
3010 North Blackstock Road, P.O. Box 6218
Spartanburg, SC 29304
(864) 574-0500 FAX (864) 574-9440

* Paid → 7/31/07
Do Not owe 1.32 Hr. Vacation
✓ RJO Heggy

EMPLOYEE TERMINATION

Effective Date 7-19-07 | Employee No. _____ | Employee Name GARY HARRIS
W/E Date _____ | Hire Date 7-13-94 | Social Security No. _____
Termination Date 7-19-07 | Dept. No. 55 Shift D | Department PRODUCT DEV & PROCESS IMP.
Rehire: Yes ____ No ✓ | Termination Type (V/I/L/M) I (V = VOLUNTARY, I = INVOLUNTARY, L = LAYOFF, M = MEDICAL (LTD))
Comments GARY IS NOT CONSIDERED TO BE A GOOD MATCH FOR TIETEX'S NEEDS. | Supervisor N/A | Date _____
Dept. Mgr. Approval _____ | Date _____
Plant Mgr. Approval _____ | Date _____
HR Approval _____ | Date 7-19-07

CHECKLIST

A. ID Card	✓	F. Payroll Deductions		L. Vacation Years Service	13
B. Uniforms	N/A	1.	N/A	1. Hours Taken	88
C. Keys/Tools/Equipment	✓ (3)	2.	N/A	2. Hours Accrued	89.32
D. Manuals/Guides		G. Garnishments	N/A	3. Hours Vacation Due	*0 (1.32)
1. Policy Manual	N/A	H. Computer Access	✓ (5G)	M. 401K	
_____	N/A	I. Voice Mail	✓	N. Pension	
E. Credit Cards		J. Tuition, Classes, etc.	N/A	O. Insurance/COBRA	✓
1. _____	N/A	K. Miscellaneous	N/A	P. Co. Agreement	✓

Reason for Leaving AFTER EVALUATING COUNSELING & GARY CONVERSATIONS THIS UNSATISFACTORY WORK PERFORMANCE, THE COMPANY HAS LOST CONFIDENCE IN GARY'S ABILITY
Comments _____ | Exit Interview By David A. Wh | Date 7-19-07
HUMAN RESOURCE DEPT.

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
631 Hampton Street
Post Office Box 995
Columbia, South Carolina 29202

Date: March 28, 2008

NOTICE OF HEARING BEFORE THE COMMISSION

APPEAL NO 13018

CLAIMANT: HARRIS GARY G
473 CRESTHAVEN DRIVE
BOILING SPRINGS SC 29316

CLAIMANT'S SSN: XXX-XX-7868

LIABLE EMPLOYER: APPEAL NO 13018
TIETEX INTERNATIONAL LTD
P O BOX 6218
SPARTANBURG SC 29304

SEPARATING EMPLOYER:

A hearing has been scheduled in this matter for Thursday, April 10, 2008 at 10:20 a.m. All hearings are held at the offices of the Commission.

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
C. LEM HARPER, SR., CENTRAL OFFICE ANNEX BUILDING
631 HAMPTON STREET, ROOM 350, COLUMBIA, SC

The Commission acts as a Board of Review, and hearings are heard solely on the record, no further evidence is admissible. Parties may appear in person or be represented by counsel. Parties may also submit written argument that deals with the record. Failure to appear may result in your interests considered abandoned.

Commission Appeals Unit
Legal Department
(803) 737-2668
(803) 737-0124 FAX

cc: Claimant
Claimant Attorney – Richard Stewart, Esquire
Liable Employer
Separating Employer
Employer Attorney – Fred Suggs, Esquire
Local Office – Spartanburg
File

Appeal No.00679-13616

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

Columbia, South Carolina

Transcript of Testimony

Before
Natasha Pauling, Administrative Hearing Officer

Gary G. Harris 473 Cresthaven Drive Boiling Springs, SC 29316 Claimant SSN: xxx-xx-7868	))))	**CLAIMANT**
Tietex International, LTD PO Box 6218 Spartanburg, SC 29304	)))	**LIABLE EMPLOYER**

PLACE OF HEARING: SC Employment Security Commission
440 South Church Street
Spartanburg, South Carolina

DATE OF HEARING: February 5, 2008

APPEARANCES:

For Claimant: In Person
Attorney

For Employer: Attorney
Two Witnesses

TESTIFYING WITNESSES

CLAIMANT:

Gary G. Harris

Richard Stewart, Esq.

EMPLOYER WITNESSES:

David Wilson, Human Resources Director

Wade Wallace, Director of Sales and Marketing

Fred Suggs, Esq.

daughter and she said, "Gosh, he invented everything at Tietex" and this is the most incredible thing I ever seen. And they said, "not one time did he ask how she was." That turned out to be a huge hospital bill and so I'm thinking, you know ... I don't know. Maybe I shouldn't say that. It ... it's all a mess in that time and when he tried to get me to move down to the plant, I said, "Jake, all of my stuff is up here. There is nothing down there for me to work with." And at this time, I was kind of, you know, nerve-wise, kind of a wreck because of what my wife went through. He said, "No, you need to move down there." So, I forgot why I prohibited ... I ran into the owner and I literally ran into him somewhere in ... and I told him, "if they want me to move down there" and he said, "That doesn't make any sense to me." So I went back and so I ... I stayed up there. And Jake, at that time, had moved up there, but several months later he literally moved up.

HEARING OFFICER: Okay.

CLAIMANT: But I mean this is just ... it could go on and on and stuff like that. I wouldn't want to inconvenience you with nothing else, so. I can say that concerning new procedures regarding chemicals and all, initially, in the beginning, when we did the ... what we call a "QAF Program" for describing how we need things, I actually wrote and signed off how we bring in chemicals and off. So, I was very familiar with how we did it. And so, you know, if I'm in there ... I'm aware of a ... so I taught it, I very much understood. In fact, when Mr. Wilson came to work for us, we had had this [INAUDIBLE] that had been involved in ... in ... in the safety area and whatever. And it was his responsibility to do the MS/DS codes and weed out ... that responsibility became Mr. Wilson's when he ... he came in at Tietex, I think he said "2005" and our lab kept him maybe two hours to get the MS/DS notes from a mess to at least workable. And in his hands ... we had stumbled upon that. I just say that the March 5th get together was sort of like the February occurrence when Mr. Wallace came into the office and ... and it what was awesome, it was out of the blue, he really stoned at me verbally, but in ... in a way that was really mean. But March 5th, was the situation where Mr. Wallace called me and said, "Gary, you will come to my office at this time for a 30-day review." And I go to his office and he says, "We need to go down to Mr. Wilson's office" and we went to his office ... of Mr. Wilson and conduct this meeting so he ... he'd be a part of it. And then when we get down there, it's like all this stuff. And by the way, this is how my employer was: That day, I had the

Attachment D

Excerpts and Exhibits from 2nd Deposition of Gary G. Harris March 14, 2013

Page 17

A: They did not rehear it if that's what you mean. They refused to rehear it.
Q: So that the decision of the District Court stood.
A: That's correct.
Q: And the District Court refused or I should say declined, the District Court declined to rule on your State claims of breach of contract, breach of contract accompanied by fraud, and defamation, correct?
A: That was my understanding.
Q: And there was no claim in your previous lawsuit filed in 2008 for intentional infliction of emotional distress, correct?
A: I do not recall.
Q: You don't recall whether there was or not?
A: I do not recall that. It may have been. I haven't looked at these documents in a while.
Q: Okay. All right. Let's go back to Exhibit 1.
A: Okay.
Q: And show me any claim in that Complaint for intentional inflection of emotional distress.
A: Are you telling me it's not in there?
Q: Yes, sir.
A: Okay, then I'm going to concur with you and not even waste our time.
Q: All right.

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(Defendant's Exhibit 4 was marked for identification).
Q: I'll show you what's been marked as Exhibit 4. And that's the Complaint in Spartanburg County, South Carolina, that you filed pro se on October 21, 2011, isn't it?
A: Yes.
(Defendant's Exhibit 5 was marked for identification).
Q: And Exhibit 5 is the Amended Complaint filed in Spartanburg County that Mr. Lazenby filed for you, right?
A: Yes.
Q: Now, in your pro se Complaint, which is Exhibit 4, you didn't allege intentional infliction of emotional distress, did you?
A: No.
Q: But it is raised in the Amended Complaint that Mr. Lazenby filed for you, isn't it?
A: Yes.
Q: Now, you brought suit against Pioneer Chemical, right?
A: I did, yes.
Q: And you sued Pioneer Chemical in Circuit Court in Spartanburg County, correct?
A: I really don't recall where that was filed. I know that attorney David Alford, it was his idea, in essence, to do it. We were into another situation and I

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don't know if he did it in Greenville or in Spartanburg.
(Defendant's Exhibit 17 was marked for identification).
Q: Let me show you Exhibit 17 and invite your attention to the second paragraph which says, "WHEREAS, THE RELEASOR ..."
A: Uh-huh (affirmative response).
Q: And then it refers to Gary Harris versus Jerry Campbell, Pioneer Chemicals. And it talks about being filed in the Court of Common Pleas for Spartanburg County. See that?
A: Yes.
Q: And it says "venue later transferred to Greenville County." See that?
A: Yes.
Q: And you settled that lawsuit with Jerry Campbell and Pioneer Chemicals for $9,000?
A: I settled it for — I don't want to waste our time here today, but just to get away from it, I settled it for an amount of money he owed me, outright owed me.
Q: Look at paragraph 1.
A: Okay.
Q: Now, that paragraph recites a figure of $9,000. Is that what you settled for?
A: You're talking about $9,000 on this?
Q: Yeah, on Exhibit 17, paragraph 1 on the first

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page.
A: I don't, maybe I'm overlooking something. I don't see $9,000 on that.
Q: Let me show you.
A: You said paragraph 1, that's paragraph ...
Q: Paragraph numbered 1.
A: Oh, okay. Yes. It says $9,000.
Q: And that's what you settled for?
A: That's correct.
(Defendant's Exhibit 20 was marked for identification).
Q: I'll show you what's been marked as Exhibit 20. You brought a FINRA claim against Wachovia and Jeremy Bishop in May 2009?
A: Yes.
Q: And FINRA is the Financial Industry Regulatory Authority?
A: It has to do with regulating the securities industry, and I'm not sure about what the letters mean.
Q: And your case was arbitrated?
A: It turned out that way.
Q: And the Arbitrator ruled for Wachovia?
A: I would say mostly.
Q: The Arbitrator assessed hearing fees against you in the amount of $1,575?
A: There were hearing fees. I don't recall that

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litigation with Tietex, have you been sued?
A: Not to my knowledge. I'm having to think about it a little bit because the questions are, you know, it's somewhat broad and I have to kind of, well, is that being sued or is it not. But I don't recall of anything that would be considered a lawsuit against me.
Q: Okay. I don't mean any disrespect by this question, but since the earlier deposition that you gave, have you been arrested?
A: Not to my knowledge.
Q: Have you been convicted of a crime?
A: No.
Q: Since your earlier deposition, have you had any major physical illnesses or injuries?
A: I mean, I've got things that I probably should see a doctor for, but I haven't been to the doctor since I think the last time was 2008. I've got some problems that definitely need attention, but for obvious reasons I could go into, they'll just have to keep needing attention.
Q: Do you have any physical limitations?
A: Again, that's a broad question. I apologize for taking it that way. I think what you mean is, relative to what I think you mean, I don't. But, I mean, I've got like a major hernia. Does that matter?
Q: Does it limit what you can do?

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A: I don't let it.
Q: And so you haven't seen a doctor since 2008?
A: I'm thinking that it was, I remember I had a situation that I felt like I couldn't handle myself and it looked like a serious eye infection or something and that was the last time I recall going to the doctor.
Q: Do you know when that was?
A: I think it was the summer of 2008.
Q: Are you taking any medications now?
A: No.
Q: When you gave your deposition in the Federal lawsuit that you brought against Tietex and were put under oath, did you tell the truth?
A: My deposition?
Q: Yeah.
A: Yes.
(Defendant's Exhibit 8 was marked for identification).
Q: I'll show you what's been marked as Exhibit 8. Do you recognize Exhibit 8 as your Responses to Tietex's First Interrogatories in this case that was submitted January 20, 2012?
A: I mean, that's what it appears to be without reading all through it.
Q: All right. The pages aren't numbered, but look if you will at the last page before the Certificate of Service.

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A: Okay.
Q: That's it, the one that bears the signature, the next page down.
A: Oh, okay.
Q: Do you recognize your signature and the date, 20th of January 2012?
A: Yes.
Q: Now, take a look at Exhibit 4.
A: Okay.
Q: Now, in your pro se Complaint, which is Exhibit 4, you allege that certain communications were defamatory. And one of those was the February 9, 2007, e-mail from Wade Wallace to David Wilson. And that's in your Complaint at paragraphs 19 and 38.
A: Okay.
Q: In this lawsuit, do you claim that e-mail was defamatory?
A: I definitely think it was. For a third party reading that and believing it, would have to be. It showed a definite, to me, it's my thinking on that, it showed a definite disregard for a person's stability mentally and that kind of thing. I mean, the memo was so farce and whatever.
Q: Is your answer yes?
A: Ask me again, please.

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Q: In this lawsuit, do you claim that the February 9, 2007, e-mail from Wade Wallace to David Wilson was defamatory?
A: Yes.
Q: Now, let's do it that way. I'm not going to cut you off, but if you'll give me a yes and if you want to continue and explain, I'm not going to cut you off. Okay.
A: Okay.
Q: But it's going to be clearer. Now, the March 5, 2007, memo from Wade Wallace to David Wilson with a carbon copy to Mark Isbell and you is referenced in your Complaint, Exhibit 4, at paragraph 20 and at paragraph 39.
A: I remember that. Okay.
Q: Do you claim in this lawsuit that the March 5, 2007, memo from Wallace to Wilson was defamatory?
A: Yes.
Q: The June 18, 2007, memo from Wallace to you with a cc: to David Wilson and Mark Isbell is mentioned in your Complaint, Exhibit 4, at paragraphs 26, 27, 28, and 40. Do you claim in this lawsuit that the June 18, 2007, memo was defamatory?
A: Yes.
Q: All right. July 18, 2007, memo from Wade Wallace to David Wilson with a carbon copy to Mark Isbell is mentioned in your pro se Complaint, Exhibit 4, at paragraph

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41. Do you claim the July 18, 2007, memo from Wallace to Wilson was defamatory?
A: Yes.
Q: In your Complaint at paragraph 36, you refer to "rumors in the industry" that you were terminated from Tietex for falsifying a test report. Do you claim that those rumors in the industry were defamatory?
A: Yes.
Q: All right. That's a claim in this lawsuit?
A: Yes.
Q: In your Complaint, Exhibit 4, paragraphs 35 and 42, you refer to your ban from the premises on July 3, 2007, by Wade Wallace. Do you claim in this lawsuit that ban from the premises was defamatory?
A: Yes.
Q: All right. These are the only written or verbal statements or actions that you are claiming are defamatory?
MR. LAZENBY: Object to the form of the question.
A: That includes whatever may be, but without, obviously, not having the time to expand on that here --- There's another issue that was just right on the tip of my tongue that you didn't mention. There was the issue of being banned on July 3, which I say was defamatory. Also, and I don't recall exactly what you said there, the detailed wording, but the fact that I was banned from going to the

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laboratory building in itself, I'm considering that defamatory, very much so. When I was banned from going to the lab building on February 1, 2007, when I was assigned to report to Wade Wallace.
Q: Okay. In addition to the list of items that we went through and you said were issues in this lawsuit, you would add to that your banning from the laboratory during the time that you worked for Tietex?
A: That's correct.
Q: Is there anything else that you claim was defamatory that's an issue in this lawsuit?
A: As far as what's in that what you've got there?
Q: No, what we're going to litigate in this case. I'm asking you what your claims are. That's what we're here for.
A: I don't think there's something off the cuff I want to start speculating on that may be out there that I've overlooked.
MR. SUGGS: All right, counselor. You want to get your witness to answer the question.
MR. LAZENBY: I think he's answered the question.
MR. SUGGS: I don't think he's answered it at all.
Q: Mr. Harris, I'm asking you right now, do you have any other claims of defamation other than what we've gone through? If you do, I want to know what they are.

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A: I may have, but they don't come to mind right now. I cannot — We can sit here for a week and I can probably come up with a bunch of stuff that should have been mentioned that's going to be possible. But I will just simply say this, I reserve the right to anything that has happened that's not on there since the time to be, you know, be able to include that as defamation. But to sit here today and say that what you've listed is the only considerations as far as defamation go and that's going to be it, I don't think that's proper. I can't sit here and under the whatever, the duress of what we're doing and start trying to think and, you know, speculate on it. We don't have the time.
Q: I've got all the time there is. If you've got any other claim, let's hear it right now.
MR. LAZENBY: I'm going to object to the form.
A: Well, right now, being, you know, a poor amount of sleep and everything, there's just not a lot coming to mind in that area. I mean, I can start thinking, but gain, it's going to be things that, well, probably that or probably not that type thing. But I'm not — In other words, let me just word it this way. I'm not hiding anything from you. I'm being open with you on the question. And right now there's just nothing that I can add.
MR. LAZENBY: Can we take a short break?

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MR. SUGGS: Sure.
(Off the Record)
Examination Resumed by Mr. Suggs:
(Defendant's Exhibit 9 was marked for identification).
Q: Mr. Harris, I'm going to give you Exhibit 9, which are your Answers to Tietex's First Interrogatories in the United States District Court suit that was filed back in September 2009.
(Defendant's Exhibit 10 was marked for identification).
Q: And then I'm going to give you Exhibit 10, which are your Responses to Tietex's First Request to Admit that was submitted in this lawsuit.
A: Okay.
Q: Now, you claimed in your Federal lawsuit, which was the earlier lawsuit, that the March 5, 2007, memo and the June 8, 2007, memo --- I'm sorry --- June 18. March 5, 2007, memo, June 18, 2007, memo and the rumors about the reason for your termination were defamatory, correct?
A: Without looking, I'll agree with that. Yeah, it sounds truthful.
Q: All right. And you also claimed in your Federal lawsuit that statements Wade Wallace made to George Henderson and Dean Roberts on July 3, 2007, were defamatory, correct?
A: Based on what I was told, yes.

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Q: Now, you're not making that claim in this lawsuit are you?
A: No.
Q: Now, in your earlier United States District Court lawsuit, you didn't claim that the February 9, 2007, e-mail was defamatory, correct?
A: I don't recall doing that, no.
Q: So the claim about the February 9, 2007, e-mail being defamatory is a new claim made for the first time in this lawsuit, correct?
A: Yes, and if I may add to that. That's not that it should have not been part of the first one.
Q: Okay.
A: It was an oversight or a mistake or whatever on the part of my representation.
Q: Okay. And in your earlier lawsuit in Federal Court, you didn't claim that the July 18, 2007, memo from Wallace to Wilson was defamatory, did you?
A: For the same reason that I just said to the previous question. The same reasons, no, I did not.
Q: So that your claim that the July 18, 2007, memo was defamatory is a claim being made for the first time in this lawsuit?
A: That's correct.
Q: And in your earlier Federal lawsuit, you didn't

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claim that your ban from the premises on July 3, 2007, was defamatory, did you?
A: No, not that I recall. I don't think so.
Q: So being banned from the premises is a new claim being made for the first time in this lawsuit?
A: As far as I know, yes.
Q: And you didn't claim in your earlier lawsuit that being banned from the laboratory was defamatory, did you?
A: As far as I know, that's correct.
Q: And that's being made for the first time in this lawsuit.
A: As far as I know, yes.
(Defendant's Exhibit 13 was marked for identification).
Q: Mr. Harris, you have before you Exhibit 13?
A: Yes.
Q: And that's the February 9, 2007, e-mail from Wade Wallace to David Wilson?
A: Yes.
Q: And in your prior deposition, you talked about stress and emotional issues around the time this memorandum dated February 9, 2007, was written, didn't you?
A: There were questions asked of me, in your records in our under oath deposition and previous testimony, there were questions that were asked regarding that. And if you can go back and look at my deposition, you'll see that at

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this point in time here that referenced emotional stress and all had actually occurred mostly six months to a year earlier that was referenced. It was done in a way to make it appear, I don't know if it was made to appear that way, but it did appear in the testimony that it was going on at this time and, actually, the biggest issues I had with stress had to do with work related and my wife's hospitalization related issues that all occurred back in the spring of 2006 primarily. And then as time wore on, that gradually, you know, improved or whatever, went away.
Q: Well, in your conversation with Mr. Wallace that led to Wade Wallace preparing this memorandum dated February 9, 2007, you said to Mr. Wallace, "Look, Wade, I've got enough stress as it is," correct?
A: That was probably something to the effect of testimony. But I think, also, if you look, you will see that — And he references February 7, he references my calling him to come down, that I was having troubles. When, in fact, the real story was he came to my office that morning and asked me, the leading question was, "Have you done these two assignments that I requested you get done?" I hadn't even had time to do them. And I said, "Well, no, Wade, I haven't had time. I've been working on ...." And that led to an explosion. And so this memo, I don't know when this memo was done. According to this, it was done two

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days later and I never saw it until we started having our, after I was terminated later is when this shows up and I never was copied on it. So all this showed up, and I'm starting to ramble a little bit, but in the conversation I had with Mr. Wallace, in essence, it was after he was really verbally abusing me and "We can find another chemist," and all that kind of talk. Which is the way he typically operated if nobody was around to hear it. And it was, "Look, Wade, you don't have to talk to me like that." You know, I'd never been talked about, no one in my life had ever had reason to even talk like that to me. And it was incredible. It was amazing. And I think I might have said this before, but if there were any doubt about my going to be terminated, it was removed that day. And I'd only been reporting to him for, well, in essence, less than a week.
Q: In the course of this conversation that you were having with Mr. Wallace that led to the February 9, 2007, memo, you admit that you said, "Look, Wade, I've got enough stress as it is."
A: I think I said that, yes.
Q: And you admitted that in 2006, which was the year prior to this e-mail, your wife was ill and you had stress and sleep issues arising from her illness, correct?
A: The sleep issues, actually, arose directly from

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work stress, the way I was done after I went back to Tietex from her situation. I was, obviously, as anyone would be, very concerned about my wife and what she went through. That's pretty normal stuff that we can deal with. But when you throw in work stress, a place you're giving 60 and 70 hours a week into it, it becomes a different ball game.

Q: All right. I'm going to read from your deposition, page 106, line 18.

MR. LAZENBY: Hold on. Let me get there so he can read along.

Q: Ready?

MR. LAZENBY: He's there, yes.

Q: Okay. All right. Line 18, you with me?

A: Yes.

Q: "Question: Was it 2006 that your wife was ill?"
"Answer "That's correct."

A: Yes.

Q: Question, "Did that take a toll on you nerve wise and make you kind of a wreck?"
Answer "I got into a major sleeping problem caused mainly by stress and it did not happen until I went back to work and the way I was done after I got back to work."

That was your prior testimony, right?

A: Yes.

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Q: And you told the South Carolina Employment Security Commission that you were a nervous wreck, correct, because of what your wife went through.

MR. LAZENBY: Object to the form.

A: I think it's very broad and general. It could be for a lot of reasons, that happened to be part of it. I don't recall what I told them. But I would say that, I mean, someone could make a statement like that. That could be a very opinionated statement.

Q: All right. This is the Employment Security Commission transcript, February 5, 2008, see that?

A: Uh-huh (affirmative response).

Q: This is your testimony on page 55, that runs over from prior pages starting on 152. Just read what's highlighted there, please, sir.

A: You want me to read it?

Q: Yes.

(Reviewing document).

A: "Answer: And at this time I was kind of, you know, nerve wise, kind of a wreck because of what my wife went through."

Q: That's what you told the Employment Security Commission under oath, right?

A: Yeah. Taking that out of context, out of that total picture there, that was said.

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Q: So you admitted in your prior deposition and to the Employment Security Commission that around the time that this memorandum that Wade Wallace wrote on February 9, 2007, that you were emotional due to personal stresses.

MR. LAZENBY: Object to the form.

A: No, I don't agree with that. I think that any references I made to emotional stress that had to do with my wife had to have been talking about 2006 and, in particular, early in 2006. That was what I intended to have said.

Q: And you claim Mr. Wallace came to your office and asked you if projects had been completed and you told him, no, that they had not been completed. And then you assert that when you told Mr. Wallace that they hadn't been completed, that he verbally abused and threatened you that if they were not completed by a certain date, your employment would be terminated?

A: He told me something to the effect, "If you don't have those done by like Friday, we'll find another chemist."

Q: Did that mean to you your employment would be terminated?

A: Yes.

Q: So Wade Wallace was warning you that you had to complete your projects timely or your job was in jeopardy?

MR. LAZENBY: Object to the form.

A: Those two particular projects he wanted, for some

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reason, done and done right away. He wanted me to drop everything else.

Q: Was Mr. Wallace warning you that you had to complete these projects in a timely fashion or your job was in jeopardy?

MR. LAZENBY: Object to the form.

A: Those two projects, yes. May I add, those two projects had nothing to do with, they in particular had to my moving two areas of my responsibility to another employee so I would no longer — It was something Tietex needed done that he didn't want me being the person they had to depend on. He wanted me to move those two assignments to another area to someone else so that if something happened to me, I assume, later, you know. This is looking back at it later. That they wouldn't have to worry about knowing how to do that stuff. It was too, just to procedural projects that only I could do.

Q: Wade Wallace was your supervisor, right?

A: That's correct.

Q: And it was Mr. Wallace's job to make sure that you completed assigned projects in a timely fashion, wasn't it?

A: That would be true.

Q: And warning you to finish projects on time is not abusing or harassing, is it?

A: No. That in itself, no.

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guess when did he show up at your office, I think it was probably early in the morning. Because if he came to see me, typically, it was early in the morning just to come around and see what was going on. And he would come in and just say hey or that kind of thing. And so I would have had to have said that what really happened happened early in the morning. So you disagree on who initiated the conversation and the time of day, right?

A: I disagree not so much with the time of day as who initiated the conversation and what was said, what really took place in that conversation.

Q: And you say during the conversation that his primary focus was these projects that hadn't been completed?

A: They weren't — Let me just say this. They were more, I would put them — I see a project as something kind of big. It was more of an assignment.

Q: These assignments that hadn't been completed.

A: Okay.

Q: All right. Is there anything else about the memo, which is Exhibit 13, that you claim is incorrect?

A: I mean, I think I've pretty well covered it by just saying generally, this doesn't represent what happened that morning or that afternoon or whenever. It is not representative of what took place.

Q: Well, did you tell Mr. Wallace that the

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assignments hadn't been completed in part because of your personal and emotional issues?

A: No.

Q: During the course of the conversation, did Mr. Wallace suggest that you go to Tietex's EAP?

A: No.

Q: Is there any part of this memo, which is Exhibit 13, that you agree was said?

MR. LAZENBY: You can take your time and look at the entire document.

A: Okay.

(Reviewing document).

A: I can't recall specifically everything, but my answer is, no, I don't agree with any of that. What I'm basing it on is, like I said, I cannot recall February 7, 2007, but I can look at those things that are said there and know whether or not I would have said them. I mean, whether they fit or not. And my answer is no. I think all of it is totally representative of what took place, totally non-representative of what took place.

Q: So your opinion is that what Mr. Wallace wrote in Exhibit 13 is not representative of what was said?

MR. LAZENBY: Object to the form.

A: That's correct.

Q: You don't have any evidence or other information

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to show that this e-mail, which is marked Exhibit 13, was ever seen by anyone other than Wade Wallace and David Wilson except for this litigation, do you?

A: No, I don't.

Q: And that February 9, 2007, e-mail that's dated Exhibit 13, was an internal Tietex communication between two Tietex managerial employees, right?

A: Yes.

Q: One of them was Wade Wallace, who was your supervisor, correct?

A: That's correct.

Q: And the other one was David Wilson who was the Human Resource Manager?

A: Yes.

Q: So both Wallace and Wilson had legitimate business need to know about and discuss personal and emotional problems that you might have been facing that would have impacted your job performance or suggested that it would be prudent to refer you to EAP, correct?

MR. LAZENBY: Object to the form.

A: In the big picture, yes, that certainly should have been proper or would have been.

Q: Well, if you were under stress in performing your job duties, that would be a legitimate issue for your supervisor and HR to discuss, wouldn't it?

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A: Normally, yes.

Q: And your struggles with anxiety, depression, insomnia, and stress had previously resulted in you missing work time, right?

MR. LAZENBY: Object to the form.

A: I had no depression. I've never had any depression.

Q: Well, these mental and emotional issues resulted in you taking a two week medical leave, right?

MR. LAZENBY: Object to the form.

A: I was approved for that, and I only took a few days.

Q: You didn't take two weeks?

A: No.

Q: Were you approved for two weeks?

A: Yes. Well, I believe it was two weeks based on memory. But I only took a few days and realized that I think I was kind of addicted to work.

Q: Look back at Exhibit 11, page 185.

A: Okay.

Q: Entry for 4/7/2006, second to the last sentence in that block, "After discussion, will give two weeks medical leave of absence from work to taper off his Klonopin gradually over a two week period." See that?

A: Yes.

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Q: And is it your claim that you were approved by the doctor for two weeks of medical leave after having been treated for anxiety and depression and insomnia, but you didn't take it?

A: I took, I don't remember how many days, but it was less than a week. And as far as, I mean, I'm just trying to, you know, think and remember some of this as we talk and you ask questions. But my problem that I conveyed to the doctor had to do with work stress primarily and I do not recall going to him asking for time off. It's my opinion, based on memory, that he wanted to know if I thought that would do me some good or whatever. I may be wrong. It could have been — I do not recall, in other words, going to him. I was going to him just for my problem with sleep primarily. The sleep was very difficult and, of course, anxiety, stress, to me that's the same thing. But, in essence, that's it. I did not take the full two weeks.

Q: Are you suggesting that you didn't go to him asking for two weeks off, that the doctor recommended you take two weeks off?

A: I cannot recall the conversation we had. But my memory is that we were talking about options and that's something that I don't even know that I would have been aware of as something as a remedy or potential help. Again,

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I'm not going to sit here and just pure speculation, because I cannot recall what we talked about. But that would be my thinking, that he was looking to help me and may have come up with that as a suggestion.

Q: All right. Your lawyers got those in a nice stack for you, so find Exhibit 2 if you will.

A: Okay.

Q: And turn if you will to page 4.

A: Okay.

Q: And Exhibit 2 is the Magistrate Judge's Order and Report, isn't it?

A: It is.

Q: And if you will look with me on page 4 at that paragraph that begins, "On February 7, 2007," just read that to yourself.

(Reviewing document).

A: Okay.

Q: The Magistrate Judge found that you told Wade Wallace that you were overwhelmed by personal emotional problems, that your wife was ill during this period of time, and that you were stressed, sleepless, and a wreck due to your wife's illness, didn't he?

A: For the record, I disagree with a lot of what's in here. And I, to say that he found that, I don't know. I'm not a lawyer. That's what it says. What you read is what

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it says. But not being an attorney, I'm just simply saying that the stuff in here that really represents what we've already talked about that I disagree with.

Q: And the Magistrate Judge found that Mr. Wallace offered you assistance through the Employee Assistance Program, didn't he?

A: For what I just said, I mean, I cannot, I mean, there are things in here that I know to be wrong, and I cannot ...

Q: Well, look, it's fine with me if you say, yes, he found that but I disagree with him.

A: Okay. I'll just say yes and know that I probably disagree with it.

Q: Okay.

A: I'll just say yes.

(Defendant's Exhibit 16 was marked for identification).

Q: I'll show you what's been marked as Exhibit 16, and that's the March 5, 2007, memo from Wade Wallace to David Wilson with a copy to Mark Isbell and you, correct?

A: That is correct.

Q: And you see the handwriting at the bottom, it says, "Discussed with Gary on 3/5/2007"?

A: Yes.

Q: And that signature, do you recognize as David Wilson's?

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A: It appears. I don't know his signature, but that does say David something, W.

Q: Do you remember discussing this memorandum which is marked Exhibit 16 with Mr. Wilson?

A: I do not.

Q: But you don't deny that he discussed it with you?

A: I recall discussing something with him regarding some issues and, in essence, his telling me, if you want to keep your job, I would recommend you just go do it and keep your mouth shut. And that may have been after this if, in fact, and apparently I did discuss it with him. But since the — Now, what I'm taking this to mean, Mr. Suggs, is that he and Wade Wallace discussed it with me and then it was on 3/5 that we discussed it. And then I requested that Wade Wallace send me an e-mail to document all these things so I would know what I needed to improve on. So I think I'm responsible for the e-mail having been sent.

Q: Well, now, when you say e-mail, you mean Exhibit 16, right?

A: That is correct.

Q: So you admit that Exhibit 16 was prepared at your request to document the meeting regarding Tietex's 30-day review of your progress after you were transferred to Wade Wallace's supervision?

A: Yes.

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admitted that you had failed to return voicemails and e-mails, but you said that your failure was not malicious or intentional, correct?
A: It was normal.
Q: Sir?
A: It was normal. You know, it was like a situation where I didn't do it.
Q: You agree that you said that earlier?
A: I would think I would have.
Q: And in your earlier deposition, you admitted that you didn't contest the first three bullets on Exhibit 16 during the meeting, but you said in your opinion, the points were not true, correct?
A: During the course of our meeting, I recall having ...
Q: Hold on a minute. I said I wouldn't interrupt you, but give me a yes or no and then go on your ...
A: Yes. I mean, no, I did not directly contest them during the meeting. You're right.
Q: Okay. Did you want to say something else?
A: I was just going to simply say, I was sick that day. I actually had what I believe was the flu and I didn't' feel like contesting anything or I may have.
Q: All right. And you admitted that at times you went directly to Mr. Martin Wildeman rather than using the

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chain of command, correct?
A: Well, there were times when I went to Mr. Wildeman. In my training and all at Tietex, there was no chain of command. That was the normal Tietex. People all the time went directly to my technicians and bypassed me, which included Wade Wallace, and told them what they wanted done. On the other hand, my technicians went to whomever they wanted to, whether it be Mr. Wildeman or personnel or to Wade Wallace or whomever. They didn't tell me, they would go do it. That's just the way things were at Tietex.
Q: But you admit that you did go directly to Mr. Wildeman?
A: I don't recall going directly to him. I recall leaving a phone message wanting to meet with him. But mostly those, any encounters I had with Mr. Wildeman generally were coincidental.
Q: Look at your prior deposition, page 116, line 16.
A: Okay.
Q: "Question: But you admit going directly to Mr. Wildeman?
Answer: I don't remember enough about any specific circumstances. I do know that I did that some ..."
Did I read that correctly?

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A: Yes.
MR. LAZENBY: Fred, when we get to a good stopping point, can we just take another short break?
MR. SUGGS: Sure. I'll ask a few more questions, but if you say let's do it now, that's fine. I've just got a few more in this line to ask.
MR. LAZENBY: Sure, that's fine.
Q: You admitted it was not appropriate for you to complain to Mr. Wildeman about having to do the environmental reporting, correct?
A: I would have thought that would have, had I done that, that would have been not appropriate.
Q: Are you claiming you didn't do it?
A: I'm claiming I didn't do it.
Q: Sir?
A: Yes, I'm claiming I did not complain to him about having to do, nor did I complain in the true sense to anyone about having to do the environmental reporting, Mr. Wildeman, Mr. Wallace.
Q: And you admit that the only folks in the meeting about Exhibit 16, which is the March 5, 2007, memorandum, were you, Mr. Wallace, and Mr. Wilson, right?
A: That's correct.
Q: And this was an internal Tietex communication between Tietex management employees?

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A: Yes.
Q: And the e-mail was between your supervisor, Mr. Wallace, and David Wilson who was the Human Resource Manager, correct?
A: As far as I know.
Q: And Mark Isbell was Wade Wallace's boss?
A: That's correct.
Q: So all three of these individuals were management employees at Tietex who had a legitimate business need to discuss the issues listed in Exhibit 16, weren't they?
MR. LAZENBY: Object to the form.
A: I as a manager would have never handled it like that. I would have, in private. If I had these kind of problems, I wouldn't wait till 30 days were up. Each accusation by itself is a major problem. I would have, had I had a major problem with the people that reported to me, it would have been in private and head-to-head and I would have never gone and for some reason spread it in and around that this stuff happened and it didn't.
Q: Well, all three of the individuals, Wallace, Isbell, and Wilson were managerial employees at Tietex, right?
A: That's correct.
Q: And if you had issues with your supervisor or with the Company, they had a legitimate reason to discuss those

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Q: The Magistrate Judge found that you'd been working on the C237 Project for six months, had predicted significant cost savings for Tietex, and failed to deliver a compound that was acceptable to Tietex, correct?
A: That's what it says. I mean, that's what he, according to your word "found," that's what he found.
Q: And if we go back and look at Exhibit 18, then that was an internal communication between Tietex managerial employees, wasn't it?
A: It was.
Q: And the communication was between Wade Wallace, who was your supervisor, and David Wilson, who was the Human Resource Manager, right?
A: And myself, yes.
Q: And Mark Isbell who was Wade Wallace's supervisor was copied, right?
A: Correct.
Q: And you agree that all of these individuals had a legitimate reason to be concerned with your performance, correct?
MR. LAZENBY: Object to the form.
A: You know, I don't necessarily agree to that. I mean, I'm okay with what you say, but I don't necessarily agree with it.
Q: Well, don't you agree that Wade Wallace as your

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supervisor had a right to be concerned about these two assignments of C237 and T602?
A: Certainly as my supervisor he did.
Q: All right. And don't you agree that Mark Isbell as Wade Wallace's boss had a legitimate reason to discuss the status of these projects which the Company was counting on for cost savings with Wade Wallace and David Wilson?
A: For the same reasons, going back to the March 5, memo, for the same reasons, I think he should have handled it directly with me and in private and had me sign something. And if he was genuinely concerned about this, then that's the way it should have been handled. In other words, I think that anyone at Tietex should have been concerned about my performance as an employee there and we can take it to anyone in the plant who had a job there. They certainly should be concerned that I was going my job. I do not agree that David Wilson and Mark Isbell necessarily needed to know about this.
Q: All right. It would have been okay with you if Exhibit 18 had been just written from Wade Wallace to you?
A: I would have preferred that. And, you know, we could have handled the situation. You know, if that was the intent of making things better, we could have worked it out.
Q: But if you weren't performing on a project to the

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satisfaction of your supervisor, and a project that you said earlier the failure to finish on time might put your job in jeopardy, wouldn't it have been appropriate for Wade Wallace to involve Human Resources?
A: For the exact same reasons of what we discussed in the March 5, this again is untruthful. I mean, I just have to say it. This is a pretext memo and everything in here is not for the right reasons. So with that said, I can't, you know, to answer your question, it's got to be based on what this is really all about. And, I mean, I agree with you that Wade Wallace should have been concerned about my lack of performance, absolutely, but it wasn't there. He had no reason and was never given a reason.
Q: Okay. So you disagree with the content of the memo?
A: Again, exactly like March 5, absolutely.
Q: All right.
A: A hundred percent.
Q: And in your opinion, the content of Exhibit 18 is incorrect?
A: Yes.
Q: And in Wallace's opinion, since he wrote it, would you agree that Wallace's opinion was your progress on C237 and T602 had not been satisfactory?
A: I don't think that was his opinion. I think he

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made this up. I do not agree with that. He knew better. That was not his opinion. He expressed something here that's not truthful for a reason. That was not his opinion. He was never given any reason for that opinion.
Q: Do you agree that if your job status with the Company was in jeopardy, that Mark Wilson would have had a need to know it? I'm sorry, Mark Isbell. Pardon me, I misspoke.
A: Well, let me just say this if I may. I agree that, yes, he needed to know it because, I mean, David would have needed to know it. A lot of people would have needed to have known that. But we can go and we can find this, but let's don't. This e-mail was actually prompted by Mark Isbell. I mean, he's the one that caused this. He went and set the stage for this to happen about a week or five days earlier. So to answer your question, he already knew about it. He knew this was coming. It wasn't like this was written and then Mr. Isbell was surprised. He knew this was coming. He helped do this.
Q: And how do you know that?
A: Based on what Mr. Wildeman told me.
Q: What did Mr. Wildeman tell you?
A: Following this here, of course, you can't imagine where I was at this time. I knew it was just a matter of time when I saw this. And I mentioned this to Mr. Wallace.

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I said, "If you don't mind, I'm going to ..." At this time for some reason, I went ahead and got approval to go see and let him know that I was going to go see Mr. Wildeman. I set up a formal appointment and I carried this in there to Mr. Wildeman. And he looks at it and he reads it and he says, "You know, this is exactly what Mark Isbell discussed with me about a week ago or maybe ten days ago." He said, "This is exactly what he discussed with me. He told me about these two projects that you had failed in and something had to be done." So that's, that's how I know Mark had to have known this was coming.

Q: Well, T602 and C237 were projects that were important to the Tietex facility, correct?

A: Should have been. I mean, I would have thought, yeah.

Q: So it would have been reasonable for Wade Wallace to keep his boss, Mark Isbell, informed about the progress that you were making on those two assignments, right?

MR. LAZENBY: Object to the form.

A: I think it would have been reasonable, yes.

Q: Okay.

A: Normal, reasonable.

Q: And then if --- Who did Mark Isbell report to?

A: At that time I believe he reported to Reed Cunningham.

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Q: All right. But Martin Wildeman was the owner?

A: Yes.

Q: So Mr. Wildeman had a real interest in how that plant was performing, right?

A: I would think so, yes.

Q: And it would have been reasonable for Mark Isbell to say, you know, these projects, C237 and T602, are not progressing as we had hoped, wouldn't it?

MR. LAZENBY: Object to the form.

A: Well, again, I'll just say this. Yes, I agree with that. It would have been reasonable had that been the case. But, again, this is not truthful stuff. This is pretext stuff in this memo.

(Defendant's Exhibit 19 was marked for identification).

Q: I'll show you what's been marked as Exhibit 19. Exhibit 19 is the July 18, 2007, memo from Wade Wallace to David Wilson with a copy to Mark Isbell, right?

A: Yes.

Q: And in your earlier deposition, you claimed you couldn't recall if you received a copy of this document at the time your employment was terminated.

A: That's fair, yeah.

Q: Do you recall today whether you did or not?

A: I don't recall getting one.

Q: And you don't have any evidence that anyone other than Wilson, Wallace, and Isbell saw Exhibit 19 at around the time it was prepared, do you?

A: No, I do not.

Q: And, of course, you've seen it in the course of litigation, right?

A: Oh, yes.

Q: You don't have any evidence or information that Tietex disclosed Exhibit 19 to anyone in the Company other than Wilson, Wallace, and Isbell, do you?

A: No.

Q: And you don't have any information that Tietex revealed Exhibit 19 to anyone outside of Tietex, do you?

A: No.

Q: And you admit that you were told that your termination of employment was based on a lot of issues that added up?

A: Yes.

Q: And you admit that you took vacation after getting the June 18, 2007, memo which is Exhibit 18?

A: Approved vacation. I admit approved vacation.

Q: You started taking what you claim is approved vacation after you got the June 18, 2007, warning which is Exhibit 18?

A: I took approved vacation for the week of June 25, and I had two days approved for the first week or the following week, July 2 and 3. Those were all approved. And that's the only vacation.

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Q: All right. And turn with me back to Exhibit 2.

A: All right.

Q: Page 7.

A: Okay.

Q: The second full paragraph.

A: Okay.

Q: It starts with, "According to Mr. Wallace ..." See that?

A: Yes.

Q: "... the plaintiff made no effort to complete the C237 project. Instead, the plaintiff began taking multiple days of vacation immediately after being given the warning on June 18." Did I read that correctly?

A: Yes.

Q: That's what the Magistrate found, didn't he?

A: Well, yes. May I add a little bit?

Q: Sure.

A: The June 18 memo was given to me. Right after that, the same afternoon before I left Mr. Wallace's office, he said, "I'd like for you to start on the triblend project. Going forward we need to go start working on that, and I'd like for you to make it your priority project." He told me that on June 18. "I want you to make that triblend ..." We

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talked a little bit before June 18 about could we get into that. And on June 18, I mean, it was like do this, and then the next thing, I get this June 18, what I call a final written warning. And then the next thing I know, Mr. Wallace wants me to do the triblend. So for this to say that I ignored the C237, I was doing exactly what Mr. Wallace had asked me to do, which was start on and prioritize the triblend project. That's exactly what he told me.

Q: All right. You admit you failed to visit a customer in Indiana and did not tell Mr. Wallace about you not meeting with that customer, correct?

A: I will just say yes, but may I add to that?

Q: Sure.

A: I did not recall whether or not I had told Mr. Wallace about having to abort the trip. But I left it in the hands of Steve Acker who was with me. And I almost can say without, it's a knowing without knowing, that I said, "Would you call Mr. Wallace and tell him what has happened, that I've got to fly back?" So I would have thought that Mr. Acker would have handled that for me. Anyway, with that said, I'm still looking for an itinerary which will show that Wade Wallace and Steve Acker got together and planned this trip for me to play golf. Fly up, on the same morning that I would fly up, be picked up by Steve Acker. We would

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have lunch, go play golf with a customer, and then he would take me back to the airport. Now, that was really strange to me on June 14 with all this negative going on that it's okay for me to fly and play golf. But I am confident had that trip not been aborted and I had gone and played golf, then what we would have been looking at today would have been a report where Gary Harris claimed he was going to visit and customer and told me he was going to do that and instead he was going to play golf. That was orchestrated, in my estimation, to really add to all the other. And it was, it was a, it just happened, thank God, that, I mean, I thought I was having a hemorrhage or something in my brain on the airplane. It was tremendous. And, ultimately, breaking out in sweat. And discussed this with Mr. Acker after the first landing when before I flew on to where he was. And it was his and I decision that it was best I didn't continue the trip.

Q: Turn with me, please, to Exhibit 2, page 7.

A: Okay.

Q: And come down to the last full paragraph, which is the paragraph before "On the evening of Monday, July 2 ..."

A: Okay.

Q: Got it. Read that to yourself.

A: You're talking about the Indiana thing?

Q: Yeah.

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A: Okay, I have.

Q: All right. And the Magistrate Judge credited Mr. Wallace that the plaintiff never told Mr. Wallace he had not met with the customer in Indiana, correct?

A: That's what it says, yes.

Q: And you admit you were supposed to go to Hexion, but claim you couldn't get in?

A: No, July 2 and 3, if I wanted to go to Hexion, it was up to me. It wasn't like I was supposed to. I was on vacation July 2 and 3. That's never been a big issue, but it should have been.

Q: Well, you admit that you told Mr. Wallace that you were going to Hexion?

A: Out of pure courtesy, not that I had to.

Q: And that you went there, you claim, but you couldn't get in?

A: That's correct.

Q: And you admit you didn't do any work at Hexion?

A: No. I mean, yes, I admit I didn't do any work at Hexion that day.

MR. LAZENBY: I'm going to object to the form. I don't know what day you're referring to.

A: July 3.

Q: We're referring to ...

A: July 3.

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Q: ... July 3, 2007. Correct, Mr. Harris?

A: That's correct.

Q: So you admit you didn't do any work at Hexion on July 3, 2007?

A: That's correct.

Q: And you admit you told Mr. Wallace you were going to Hexion as soon as you took care of an ant problem at your home?

A: Out of pure courtesy, yes.

Q: And you admit that when you couldn't get in Hexion, you left?

A: After some time of trying to get in, I left a message for one of the technicians and then I left.

Q: And you admit there was no one who saw you at Hexion who could substantiate you being there?

A: As far as I know.

Q: And you admit you were only at Hexion for about 30 minutes?

A: Thirty or 45, I don't remember exactly. I'd say 30 to 45.

Q: Look at your deposition at page 158.

A: Okay.

Q: All right. This actually starts at 157, last line.

A: Uh-huh (affirmative response).

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Q: 157, the last line. You there?
A: **Yes.**
Q: Okay.
"Question: All right. Let me invite your attention to the ESC transcript March 28, 2008, page 171. 'Question. And you stayed there for about 30 minutes.' 'Claimant.' That's you. 'My guess is 30 minutes.' 'Question. Pardon me?' 'My guess is 30 minutes.' 'Question. Thirty?' 'Claimant. An estimate, from memory, an estimate.'
Answer: Okay.
Question: Do you agree with 30 minutes?
Answer: About 30 minutes because I don't know, I didn't keep a record of it. I would say, probably now I would change that to at least 30 minutes because of what I did."
A: **Okay. That's consistent.**
Q: And you admit that Mr. Wallace expected you to be at Hexion?
A: **No. Wait a minute. Let me just say that he was aware that at some point I was going to be going to Hexion. I was on vacation. I had no intention, I had no intention of going to Hexion, finishing a project, and going back to Tietex.**

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Q: Then look at your deposition, page 158.
A: **Okay.**
Q: Line 14.
"Question: And you agree with me that Wade Wallace, based on your phone call, expected you to be at Hexion?
Answer: Yes." Did I read that correctly?
A: **"Object to the form." Yes, that's what it says. But ...**
Q: Did I read it correctly?
A: **You did. You know, that's an opinion.**
Q: And you claim that you tried to get into work somewhere else but admitted you never notified Mr. Wallace that you were not going to be at Hexion?
A: **That was not in our way of doing things. I was required to keep a cell phone on when I was not at Tietex.**
Q: You claim that you tried to get into work somewhere else but you admit that you never told Mr. Wallace that you were not going to be at Hexion, correct?
A: **I had not — Let me just answer it this way, because I think that's a difficult way of, the way it's worded is difficult. I had told Mr. Wallace, again, out of courtesy, just to let him know what I was doing, something I did not need to do. I was on vacation. I was coming off of vacation to help him out. And I was just letting him know where I was as if I were at work, but I wasn't. And I let him know that I was going to Hexion. And there was no reason in our scheme of things and the way we had arranged things, there was no reason that when I couldn't get in at Hexion that I would need to call him and just every little detail.**
Q: Pick up your deposition, please, and turn to page 160.
A: **Okay.**
Q: Line 13.
"Question: Did you telephone Wade Wallace and tell him you couldn't get into Hexion and you were going to go somewhere else?
Answer: No, I did not."
Did I read that correctly?
A: **Yes.**
Q: And you admit that when Wallace telephoned you on your cell phone to ask where you had been and you explained that at that point Mr. Wallace suspended your employment?
A: **Yes.**
Q: And he suspended your employment with pay, correct?
A: **I would later find out, yes.**
Q: And Exhibit 19 was an internal Tietex communication between Tietex managerial employees, right?

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A: **Yes.**
Q: Wade Wallace who was your supervisor and David Wilson who was the Human Resource Manager?
A: **Yes.**
Q: And a copy to Mark Isbell who was Wade Wallace's supervisor and in your chain of command?
A: **Yes.**
Q: And this was a recommendation for termination, right?
A: **Yes.**
Q: Exhibit 19 recommended that your employment be ended, right?
A: **That's correct, yes.**
Q: So Mr. Wilson in Human Resources would have had a need to know that, right?
A: **Yes.**
Q: And Mark Isbell, who was Wade Wallace's boss would have had a need to know that Wade Wallace was recommending that one of his employee's employment be ended, right?
A: **In a normal situation, yes.**
MR. SUGGS: This is probably a good time to take a break if you're ready.
MR. LAZENBY: Sure, that's fine.
(Off the Record)
Examination Resumed by Mr. Suggs:

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Q: If you will, Exhibit 2, page 7.
A: Okay.
Q: And take that first full paragraph which says, "According to Mr. Wallace, the plaintiff made ..."
A: Okay.
Q: And just read that to yourself.
(Reviewing document).
A: Okay.
Q: All right. The Magistrate Judge found that you took vacation immediately after being given a warning, failed to improve on the issues in the memorandum of March 5, ignored directions not to work in the lab on nights or weekends, maintained inconsistent or erratic work hours, and failed to return phone calls and e-mails," correct?
A: Yes, that's what it says. But just as we move forward, and I should have already addressed this, because I need to understand. When you say "the Magistrate Judge found," can you tell me what that actually is saying, in other words, that I would understand?
Q: Yeah, that's what he found as fact.
A: But what this says is, it says, he's just reciting, "According to Mr. Wallace," and then he goes on to say what Mr. Wallace said. He is not necessarily agreeing with it. And that's my take on this.
Q: Oh, you don't think the Magistrate is agreeing

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with Mr. Wallace?
A: He's saying, "According to Mr. Wallace, the plaintiff made no effort to complete the C237 ..." and then he goes on and adds to that. So in my interpretation of that, he's just saying what Mr. Wallace said. Is that correct, or am I wrong?
Q: You're incorrect. He is crediting Mr. Wallace with truthful testimony.
A: Okay. Okay.
Q: And if you look at the next paragraph, just read that to yourself.
(Reviewing document).
A: Okay.
Q: And the Magistrate Judge found that you returned home from a trip without seeing the customer and without telling your supervisor that you had not seen the customer, correct?
A: Yes.
Q: And if you look at the next paragraph that starts on page 7 and goes over to page 8, why don't you take a moment to read that to yourself.
(Reviewing document).
A: Okay.
Q: The Magistrate Judge found that you left a voicemail for Mr. Wallace stating that you would be working

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at Hexion on July 3, but that you never told Mr. Wallace that you were unable to gain entry to Hexion to work, and that your failure to do so was unreasonable, correct?
A: That my failure to inform Mr. Wallace?
Q: Yes.
A: I'm not seeing that. I'm not seeing the unreasonable in this paragraph. I don't see where it says it was unreasonable.
Q: All right. Look down on page 8.
A: Okay.
Q: You see where it says, this is in the next to the last full paragraph, "The plaintiff admits it would have been reasonable for him to call Mr. Wallace and tell him that his plans had changed."
A: It says that, yes. But it doesn't mean that it was something that I had to do or needed to do. It's just simply saying, yeah, that was an option that would have made sense. In other words, it wouldn't have been ridiculous. That's what I meant. It wouldn't have been ridiculous for me to have called Mr. Wallace.
Q: And if you look at the paragraph at the bottom of page 8 where it starts with "George Henderson."
A: Okay.
Q: Read that to yourself, please.
(Reviewing document).

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A: Okay.
Q: The Magistrate Judge found that Wade Wallace learned you were not at Hexion only when George Henderson from Hexion came to Tietex to deliver a chemical and revealed that you were not at Hexion, correct?
A: Yes.
MR. LAZENBY: Object to the form.
Q: And on page 9.
A: Uh-huh (affirmative response).
Q: Read that top paragraph to yourself, please.
A: Okay.
(Reviewing document).
A: Now, to be sure I don't waste time and get into areas I shouldn't get into, just because I do not agree with this, I'm just agreeing with what it says. Is that correct?
Q: That is correct. I'm not asking you to agree it's correct, I'm just asking you to agree that that's what the Magistrate found.
A: That's what it says, yes. I mean, I've read it.
MR. LAZENBY: Let me just place an objection. And if you'll allow this to be a running objection so I won't object to every question. But I do want to object to the characterization that these are findings of facts and that the section is titled "Facts Presented," and not findings of

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fact on page 1 of this Order.
MR. SUGGS: Okay. Well, you've got a standing objection.
MR. LAZENBY: Thank you.
Q: Did you have any opportunity to read the first paragraph on page 9?
A: Yes.
Q: And the Magistrate found that when Mr. Wallace contacted you by telephone, you were unable to give him a satisfactory explanation of your whereabouts so he suspended you.
A: That's what it says, yes.
Q: And continuing on page 9 with the second paragraph, would you read that to yourself.
A: Okay.
(Reviewing document).
A: Okay.
Q: The Magistrate found that your employment was terminated for your performance deficiencies which were documented in the March 5, 2007, memo and the July 18, 2007, memo, correct?
A: Yes.
Q: Now, look please at Exhibit 3. And if you will, turn to page 3. And this is the District Court Judge's opinion, right?

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A: Yes.
Q: And Judge Childs concurred with the Magistrate Judge's findings in determining that you failed to meet Tietex's expectations because the C237 compound was too expensive to produce. And you can see that at the bottom of page 3.
A: I see that.
Q: So that's what she found, correct?
A: That's what it says, yes.
Q: And that if you look at the top of page 4, I'll give you an opportunity to read that down to part B. "Vacation Days."
(Reviewing document).
A: Oh, yeah, I've read it.
Q: Okay. And the Magistrate Judge found that you failed to meet Tietex's expectations in that you had been working on the C237 project for six months and had predicted it would result in significant cost savings for Tietex but it didn't, correct?
A: That's what it says, yes.
Q: And she found that Tietex determined that the compound you produced was too complicated to commercially produce, right?
A: That's what it says here.
Q: And she found that you took vacation time when you

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were failing to meet Tietex's expectations.
A: Correct.
Q: And she found that you admitted ignoring directives by Wallace not to work in the plant for safety reasons while the plant was not operating. That's on page 5.
A: Yes, it says that, correct.
Q: Now, let's go back to Exhibit 2 and go to page 14.
A: Okay.
Q: All right. If you look at the third full paragraph that begins with the word "First."
A: Okay.
Q: How about read that to yourself.
(Reviewing document).
A: Okay.
Q: The Magistrate Judge found as fact that Tietex had articulated the deficiencies in your performance in memoranda dated March 5, June 18, and July 18, correct?
A: Yes.
Q: And those were exhibits in this deposition 16, 18, and 19, correct?
A: Yes.
Q: And the Court found that you attempted to contradict Tietex's dissatisfaction with your performance by your subjective assessment of yourself as a valuable,

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outstanding, and exemplary performer, correct?
A: That's what it says.
Q: And the Court found that your subjective view of your performance didn't overcome the perception of Tietex, correct?
A: Yes, that's what it says.
Q: All right. If you look at page 4 of Exhibit 2. Exhibit 13 is the February 9, 2007, memorandum. And you can see that this first paragraph on page 4 deals with that February 7, 2007, memo, can't you?
A: Yes.
Q: And, in fact, in the last line of that paragraph, the Court references Exhibit 13, correct?
A: Yes.
Q: So the Court quoted the information in Exhibit 13 as fact, correct?
A: I mean, I'm not sure why they did this, but I would say it appears to be that way. I'm not sure what they consider fact or what.
Q: All right.
A: I'll agree to that if that's what you say.
Q: All right. Let's look down at the last paragraph that starts out, "On February 22." Do you see that?
A: Yes.
Q: How about take a moment to read that to yourself.

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was not telling the truth and could not be relied on. In summary judgement, it's very important. If there's any conflicts with whether someone is not telling the truth, that comes in question. That's what that was all about. It wasn't a matter of showing whether it happened in May of February, it was about showing somebody not telling the truth.
Q: Okay.
A: If he said this one time and he said that the other time.
Q: Look back at the paragraph we looked at previously on page 14 of Exhibit 2.
A: Okay.
Q: And you can see the citation in the middle of that paragraph to Exhibits 16, 18, and 19. See that?
A: Yes.
Q: And then read the sentence to yourself that is right before that citation to those exhibits.
(Reviewing document).
A: I think I've read what you asked me to.
Q: Okay. The Magistrate Judge found that Tietex had legitimate reasons for terminating your employment based on the employment deficiencies noted in Exhibits 16, 18, and 19, correct?
A: That's correct.

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Q: And let's go to Exhibit 3 and go to the bottom of page 3.
A: Okay.
Q: And look at page 3 through page 5.
(Reviewing document).
A: Okay.
Q: And the District Court in reviewing the evidence and the Magistrate's Report found as fact that the performance deficiencies cited by Tietex, which are listed in the memoranda in Exhibits 16, 18, and 19 were true, right?
A: Yeah, they concurred with the Magistrate Judge, yes.
Q: Right. Okay. Now, let me invite your attention to your claim about rumors in the industry.
A: Okay.
Q: Are you with me? And you claim it was reported to you that a former Tietex employee who had previously worked in sales for Tietex told you there were rumors about you in the market, right?
A: Yes.
Q: And you don't recall the name of this former Tietex sales employee?
A: Yes.
Q: Yes, you don't?

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A: I do.
Q: You do. Who is that?
A: Ann Weaver.
Q: Who?
A: Ann Weaver.
Q: Who is she?
A: All I know her as is Ron Weaver's wife and both of them worked at Tietex and they eventually got married. She was Ann someone else.
Q: Does she still work at Tietex?
A: No.
Q: Where does she work now?
A: I don't know.
Q: Do you have any contact information on her?
A: No.
Q: Tell me what you claim Ann Weaver said.
A: She told me that there were things being said and she thought I ought to know about them. And I didn't really pursue it that much. She said, "I'm just going to tell you that. There's been some things spread out there about you. You need to know about them." And I said, "Do you think the Tietex folks ..." She wasn't at Tietex then. I said, "Do you think any of the sales folks at Tietex would know?" She said, "It might be that. It might be that they would, they should. They're apparently involved in it."

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Q: Okay. Did Ann Weaver tell you what was being said?
A: No.
Q: She just said generally there were rumors?
A: She said some bad — I don't remember exactly. But it was obviously negative what she implied to me, or actually said was that it was negative stuff, general stuff. And I'm not the kind of person to start digging for details and I didn't really pursue it with her. I didn't ask her for much.
Q: When did you have this conversation with Ann Weaver?
A: I don't remember. It would have been, obviously, after I was terminated. And it could have been, I mean, maybe somewhere there's some where I was asked this same kind of a question, there may be some record when it was. But my thinking right now just based purely on memory is that it was probably in the fall of 2007. It could have been 2008 sometime, but it wasn't that long, not that far out from my termination.
Q: Where did the conversation with Ann Weaver take place?
A: It would have been probably by telephone.
Q: Who called whom?
A: I do not recall the reason why I was talking with

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her. There was several times we talked with each other, by the way, because at that time I was trying to restart a career and I knew Ann fairly closely.
Q: At the time of the conversation with you, who did Ann Weaver work for?
A: I don't know. I don't remember. Oh, at the time. Oh, you were saying now while ago. At the time, I believe it's something like Clama, Lava, Clama. I know there's a Lava and there's a Clama, but it was either Lava or Clama.
Q: If I set out to find Ann Weaver, where would I start looking?
A: Probably go to Pam. I mean, if I were you, Pam, I'm sure, she knows a lot of people who's worked at Tietex and the sales folks. She could trace it down for you. I mean, I'm being serious.
Q: When's the last time you talked to Ann Weaver?
A: Probably three years. Let me see. At least three years ago.
Q: When did it occur to you that Ann Weaver was the person who reported these rumors in the industry?
A: That she reported them?
Q: Yes.
A: In other words, saying when did we first talk?
Q: No, no. When I took your deposition in the Federal case, I asked you who it was that told you about

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these rumors and you said you didn't know.
A: Well, maybe I didn't at the time. I was still in a lot of — If I told you that, I meant it.
Q: And I'm asking you now when did it occur to you that it was Ann Weaver?
A: Well, I know it was Ann Weaver. I mean, it didn't occur to me. I know it and it's just a matter of when did it happen. Did it happen before July of 2009 or after? But at the time, if I in fact said what you said I said there, I meant it. If I'd have known it was Ann Weaver when you asked me the question, you would have gotten her name. There's no reason not to give it to you.
Q: Look at page 217 of your deposition.
A: Okay.
Q: All right. We'll just start at the top. This is part of your answer.
"--- and I'm not 100 percent sure about the person that told me, but they did work at Tietex and they're out in the sales force, and they said they had heard a rumor about me out in the market.
Question: You don't know the name of this person?
Answer: The one that alerted me first, I don't recall."
A: Well, I'll just tell you right now, there's absolutely no reason had I known it was Ann Weaver at that

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time, I would not have told you. There's absolutely no reason why I wouldn't have mentioned that. So, you know, I'd need to go do some digging now to figure out when I first learned it was Ann Weaver.
Q: At the time you had the conversation ...
A: But I ... I'm sorry.
Q: At the time you had the conversation with Ann Weaver, what was she doing? What was her job?
A: She was in sales, mattress fabric sales.
Q: But you're not sure of the name of her employer?
A: Not right now, no, absolutely not. That's been, like I said, three plus years since I talked with her.
Q: Okay. As a result of Ann Weaver telling you about rumors in the market, you telephoned Tietex employee Jimmy Fleming who worked in Tietex's color shop?
A: No. At that time Jimmy Fleming was in sales when I made the phone call.
Q: Look at page 216 of your deposition, line 13.
A: Okay.
Q: "Question: Tell me who Jimmy Fleming is.
Answer: He's a young fellow that was working in the color shop, just various jobs in the color shop ..."
Is that ...
A: Yes. Please, can I ask you to read the rest of it

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and you'll see what I'm talking about.
Q: "... right before I left there he ended up getting some sort of a degree from, I don't know if it was a community college or what but once he got that he was given a job in ticking sales, working in the sales marketing area for ticking fabrics. Fairly young fellow."
A: Yes.
Q: So where did he work?
A: He was in sales at the point in time I was terminated and he was going into sales pretty much right about that time. So by the time I was calling him on the phone whenever it was later, he was actually out there in the sales force. And I knew Jimmy. He and I had a fairly close relationship.
Q: Okay. As a result of your conversation with Ann Weaver, you called Jimmy Fleming?
A: I called him because I had his cell phone number and I knew him and I knew he would tell me the truth.
Q: Is it true that you called him as a result of your conversation with Ann Weaver?
A: Yes.
Q: And Jimmy Fleming told you that a ticking manufacturer's representative in Texas asked him if it were true your employment had been terminated for preparing a

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false testing report.
A: Yes.
Q: And you don't know the name of the person who allegedly asked Fleming if your employment had been terminated at Tietex for falsifying test results, do you?
A: I do not and did not pursue getting it. I intentionally did not pursue getting that information.
Q: And you don't know for what company that person worked?
A: I do not. I can't sit here and say I know exactly where the person works. But it was like a knowing without knowing. I just didn't bother pursuing it. I didn't, for a lot of reasons, I didn't want to start opening a can of worms and digging in and scaring people off and all that. I had all I needed and wanted.
Q: You've never spoken to this unknown person?
A: Not at this time, no.
Q: Do you know what Jimmy Fleming told this unknown person about whether Tietex had terminated your employment for falsifying test results?
A: I cannot sit here and say that we brought that up. The only thing I can remember about ...
Q: Is the answer yes or no? Do you know what Jimmy Fleming told him in answer to his questions?
A: No.

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Q: Now go ahead.
A: He did, I don't know if I asked him this, I probably did. Was there anyone else there that heard that from Tietex? And he said Kenny Parrish knew about it. So both he and Kenny Parrish knew about it.
Q: Did he say definitely that Kenny Parrish was present?
A: Yes. They were together. In fact — Well, let me just say, I gathered from what we discussed in that phone conversation that Kenny Parrish was with him that particular moment when that occurred.
Q: All right. Turn with me to page 217 of your deposition.
A: Okay.
Q: Line 22.
"Question: And you don't know the name of this person that was talking to Fleming?
Answer: No, I do not. He would if he remembers. And anyway it was, and anyway once I was told what I was told, and I asked him if anybody else was there and I think he mentioned that Kenny Parrish, who worked at Tietex at the time was also present there on that particular assignment."
A: I mean, I agree that you've read what I'm reading, yeah.

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Q: All right. Well, back when you gave your deposition in the Federal case, you said that you thought that Fleming said Kenny Parrish was present.
A: And I think it today. You know, I mean, just simply saying ...
Q: What evidence do you have that Parrish was there?
A: Based on what Jimmy Fleming told me.
Q: Did you ever talk to Kenny Parrish?
A: Not specifically about that.
Q: Now, when do you claim this conversation occurred?
A: I can't, because I'm not sure. I'm just simply saying, obviously, it had to have been after I was terminated. And if were putting out a guess, it would have ranged some time between the fall of 2007 on up into possibly some time in 2008.
Q: Could it have been summer of 2007?
A: No, it had to have been after I was terminated to have made sense that I would have been told all this in a phone call and then that Ann Weaver would have called me or I called her, whatever, that we talked. Because at the time we talked, I was actually trying to restart a career.
Q: So just so we're clear, I'm talking about when Jimmy Fleming's conversation with the ticking manufacturer's representative occurred. Do you know when that was?
A: No.

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Q: And you don't have any evidence that any representative of Tietex made any statements to this unknown named ticking manufacturer representative about you, do you?
A: Not at this time, no.
Q: Do you have any evidence that any representative of Tietex made any statement to anyone in the industry about the reasons for your termination?
A: Only that I have evidence, not evidence but --- Well, I guess you could call it evidence that may have occurred, but to say that I have evidence that absolutely that occurred, I don't.
Q: Now, when you refer to your ban from the premises on July 3, 2007, you're talking about Wade Wallace suspending you until he returned from vacation, correct?
A: Yes.
Q: And I think you said earlier you were suspended with pay.
A: That's what happened.
Q: And that was on the day, that suspension was on the day that you had told Mr. Wallace you were going to be working at Hexion, correct?
A: That was the day that I was going to be doing work at Hexion, July 3.
Q: And Wade Wallace telephoned you on July 3 to learn where you had been because he had information that you were

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not at Hexion, right?
MR. LAZENBY: Object to the form.
A: I will say yes, but I'd like to add something to that. In real life when this happened, and this is my speaking today when I know a lot more than I knew in 2009. I've forgotten information, obviously, with the passage of time, but I've also been able to become less subjective to the matter. And it's pretty clear to me today that what happened on July 3 was that Wade Wallace expected, based on our miscommunication, my thinking that he was going on vacation on, leaving the last day being the 6th, and his knowing that it was the 3rd and assuming I knew that, he expected me back in there with information from Hexion toward the end of the day on the 3rd. And I have no problem with understanding that he wanted me back in there so he could terminate me before he went on vacation. And so what happened, everything is calm. None of this other stuff that's in these reports about July 3 that he said happened. Later after the fact, he's trying to make it look like I disappeared for the whole day. But, actually, he did not get alarmed at all about anything on July 3 until George Henderson showed up between 4 and 4:30 with sulfuric acid. And then, and I can just imagine that Mr. Wallace is thinking, he'll be back in here by 5 o'clock and we'll take care of things. And all at once he gets notice that someway

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somehow George Henderson has come by with something for me and then, of course, that's when everything starts, after 4 o'clock. Up until then, he had no reason to be not calm and ready to do whatever he was going to do. So that really got him highly concerned that, man, he's not going to be around here for me today. So he starts doing all this stuff. He calls me like 4 whatever, 4:40 or whatever, and gets me on the phone. My cell phone has been on all afternoon. He calls me and he says, "Gary, will you come to my office?" And I said, "Wade, I'm not there." I said, "I'm on my way to Hexion to pick up some acid." Then he flew off the handle like he can do and started, "What do you mean you're not here," and all this. And he said, "I tell you what, I'm putting you on suspension and I don't want you back in here until I'm back from vacation." And there may have been a few more little comments in there thrown in. He asked me to explain something but he flew off the handle. And then we were on the phone and I was driving going out kind of, I guess, where you could get cut off. And then the next thing you know, we don't have a connection. But, anyway, that was the phone call. That was the essence of the phone call that was made to me.
Q: In this telephone call that you described between you and Wade Wallace on July 3 where Wallace telephone you to find out where you had been, no one was on the phone

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other than you and Wallace, right?
A: On our phone call?
Q: Yeah.
A: That's correct.
Q: And it was during that call that Wallace told you you were suspended, correct?
A: That's correct.
Q: Do you know if Wade Wallace told anyone at Tietex that you were suspended?
A: I don't know that for a fact, but based on what happened later, at some point he told some other people I would learn later.
Q: Do you know if Wade Wallace told anyone outside of Tietex that you were suspended?
A: I later learned from the Textile Rubber plant manager that he had passed that information along.
Q: Textile Rubber plant manager. Who is that?
A: In Charlotte. I can't recall his name right now, but he's the guy that headed it up at the time.
Q: And he's in Charlotte?
A: Yes. And it was reported to me that Wade Wallace had told him. I was actually still involved with Textile Rubber and he called and told them I was suspended.
Q: Who reported that to you?
A: I'd have to look. I think it may have --- I

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don't know. It may have been George Henderson. Because George had a very close relationship with them and George was working with me. I was directed to go to Textile Rubber by Wade Wallace and, ultimately, George Henderson got involved with me because he sold some of the key products to Textile Rubber that I needed to change over to for my successful formula. In going to Textile Rubber, another story, I had to totally try to reformulate because they only had certain ingredients they would use. And I believe it was George Henderson that ultimately let me know of that phone call. I'm trying to think of the guy's name as we speak. But he was telling me that this guy told, had been called by Wade Wallace and told this information.
Q: What information do you have to establish that Wade Wallace told this unknown named person from Textile Rubber that you had been suspended?
A: Well, I would have, somewhere I would have knowledge or access to the actual person. I'm just saying today, I believe it was George Henderson. It's logical based on the connections I had with Textile Rubber and who all was involved.
Q: You believe that George Henderson told you that this unknown named Textile Rubber person told Henderson that Wade Wallace had told the person from Textile Rubber that you had been suspended?

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A: Yes. I've got the name now if you want it. Les Davis. Is that okay? Les Davis, Textile Rubber.
Q: It was true that you had been suspended.
A: That's true.
Q: Do you have any information that Wade Wallace told Les Davis at Textile Rubber anything other than the bare fact that you had been suspended?
A: The only information I have is like second hand what George Henderson told me. And as far as giving you any details on what George told me, I don't know exactly. I'm just saying the essence of it was that Wade Wallace told Les Davis that you had been suspended or something to that effect. That's based on memory. And I cannot sit here and give you details on that.
Q: That's what you remember?
A: That's what I remember, yes.
Q: Do you have any evidence or information that anyone outside or Tietex other than Les Davis and George Henderson knew you had been suspended?
A: Well, all of my connections knew I had been suspended.
Q: I'm sorry?
A: The people that I knew that I spoke with frequently or dealt with, they knew I had been suspended.
Q: Is that because you told them?

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A: Partly and who knows. I think there's probably situations, I'd have to go back and dig, but situations where people were aware, even more so than the suspension, was being banned from the lab as far as that kind of thing being a negative matter for me. Once I was banned from the lab, and that was something that was learned, and all the people that I dealt with out in the industry started shying away from me and didn't want to have anything to do with me, in essence, because ultimately they were looking out after themselves and their business and they felt like I was a negative.
Q: Okay. Is it fair to say that you disagree with the statements that Wade Wallace made in the memoranda that we've been examining about your performance?
A: Totally. I totally disagree with what he said about my performance.
Q: And your disagreement is based on your own subjective view of how you performed, correct?
A: No. No. It's based on my view, my objective view as a manager and my understanding of Wade Wallace as a non-technical person and not having a clue about how someone technical is supposed to do things.
Q: All right. Since you gave your deposition in your Federal lawsuit, have you any additional information supporting your view that your performance was adequate?

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A: I'm sure I do, but I cannot, I mean, I'm not in a position today to start naming specifics, but I'm absolutely sure of that that I do.
Q: Do you have any new witnesses or documents to support your contention that the statements made in your performance reviews and warnings were not true?
A: When you say "new," other than what you already have?
Q: Yeah.
A: I would say yes to that.
Q: Who and what?
A: Well, just the first thing that comes to mind is I've got an affidavit that's been taken but never, I mean, been done but never been used.
Q: From whom?
A: I've got one from Van Johnson.
Q: Have you given that to your lawyer?
A: This is very recent. I haven't had an opportunity. This was just done recently.
Q: So you claim you've got an affidavit from Van Johnson that you haven't given to your lawyer?
A: I've got an affidavit from Van Johnson and I haven't, I have not yet given it. It's just fairly recent. And, also, I haven't made a decision to use it or not. I'll be glad to give it to him and do whatever, but at this point

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in time, it's been something, I really haven't even discussed it with him much, you know. I've mentioned a few things ...
MR. LAZENBY: Don't go into what we discussed.
A: Okay. I'm just saying — Okay. I'm just saying that I've got an affidavit. It was done. There's nothing wrong with it, and it may or may not come into play.
Q: Who else do you have affidavits from?
A: As far as not being given to my representation, I don't know of, right now I'm not sure that I have any, any more. I mean, I say that by saying I know there's affidavits, but I'm not sure which ones I have, which ones I've decided to use, which ones I've turned over. As far as I know, the one from Van Johnson is so recent and all. When I say recent, it hasn't been that long ago. I don't remember the date on it, but it was the most recent one and I just haven't — For reasons I cannot go into here, I haven't decided whether I want to even use it or not.
Q: Where is this affidavit?
A: Probably at the house.
Q: Is it in your automobile?
A: It wouldn't be.
Q: I'm sorry?
A: It wouldn't be in my automobile.
Q: What does it say?

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Q: Anybody else?
MR. LAZENBY: Larry what?
A: Starkey.
Q: Lisa Boaz who works, I don't know where she works now. I believe she's with another chemical company.
Q: Anybody else?
A: Where I'm having to produce actual names, you know, I mean, formal names, I don't have any more names right now. There are definitely a couple of other areas that I believe if I had the names, I would give them to you.
Q: Have you talked to Larry Starkey about what he knows?
A: Across the board, I have not, and this is mostly intentional, I have not pursued getting details from the folks once I had what I wanted or near about.
Q: Mr. Harris, have you talked to Larry Starkey about what he knows about the alleged defamatory rumors, yes or no?
A: No. I have talked with Larry Starkey, though, but not about what you said. I want to qualify that.
Q: Have you talked to Jerry Daniels about the allegedly defamatory rumors?
A: No.
Q: Have you talked to Lisa Boaz about the allegedly

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defamatory rumors?
A: That's a broad question. Again, I'm just going to say no because I haven't gotten into details where to me, to answer your question with a yes, but I haven't gotten into some significant details.
Q: You have Exhibit 8 before you?
A: Yes.
Q: Turn to your Answer to Interrogatory 12. It's on the 19th page. You didn't bother to number the pages, so it may be somewhat difficult for you to find, but it's closer to the back than it is to the front.
MR. LAZENBY: Did you say what number it responds to?
Q: Twelve.
A: Okay. I guess that's it.
Q: You got it?
A: Yes.
Q: It doesn't look like it to me.
A: Okay. Maybe it's the wrong one.
Q: First of all, do you have Exhibit 8?
A: Yes. You said 19?
Q: Twelve.
A: Oh, 12. I'm sorry. You said 19th page and at what number. Okay, I was just looking for Item 19. I got you.

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Q: You state in response to Interrogatory 12, "Clearly by legal definition, all written correspondence by Wallace referenced in 9 or 10 were published. The Plaintiff relies on the legal definition." What's the legal definition of published in the context of a defamation case?
A: Well, at the point in time this was written, I was representing myself and it's been more than a year ago and there's no way I can sit here and even come close.
Q: Is your answer I don't know?
A: My answer right now would be a don't remember. Obviously, that information was pertinent at the time I did that.
Q: How does the definition of published apply to documents that are circulated within a business to a limited number of managerial employees?
MR. LAZENBY: I'm going to object to the form of the question.
A: I'm not going to speculate on that. But it was very clear, as I say.
Q: Is your answer you don't know?
A: My answer is I don't remember.
(Defendant's Exhibit 6 was marked for identification).
Q: You recognize Defendant's Exhibit 6 dated June 14, 1994, as the Offer Letter that you received from Tietex?
A: Yes.

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(Defendant's Exhibit 7 was marked for identification).
Q: And do you recognize Exhibit 7 as an Intake Form for when you first started to work at Tietex that's dated July 13, 1994?
A: Yes.
Q: And it says your service date is July 13, 1994, right?
A: Yes.
Q: Take your deposition, please, and turn to page 60.
A: Okay.
Q: Line 3.
A: Okay.
Q: "Now, if you will look, please, at Exhibit 6, the second page, which is Bates Numbered 229 ..."
A: Okay.
Q: So that's the same document you have before you now, which is Bates Numbered 229.
"Do you see the bold underlined language ..."
A: Yes.
Q: "... that's two paragraphs above Mr. Woodward's signature?"
A: Yes.
Q: "Answer: Yes."
A: Yes.
Q: "It says, This letter summarizes our offer.

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Nothing herein should be construed as a contract of employment or as a promise of any specific terms for any determined period of time." Did I read that correctly?
Answer: Yes."
A: Yes.
Q: Line 14.
"Question: So under the terms of your offer, you were employed at will, correct?"
A: Yes.
Q: Line 20.
"Okay. Yes."
Line 21.
"And your employment could be terminated any time for any reason, correct?"
A: Yes.
Q: "Answer: May I add to that?
Question: Sure. Well, give me a yes or no and then qualify it." And you said, "Yes." Qualified it and then said "But I was aware of Tietex being an at will employer."
Correct?
A: Yes.
Q: Line 18, page 61.
"Question: And you knew that you could quit Tietex if you wanted to for whatever reason

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whenever, correct?
Answer: Yes."
A: Yes.
Q: Line 22, page 61, middle of the line.
"... but you didn't have any kind of written Contract of Employment when you were hired, did you?
Answer: Nothing formal that I know of."
25, that's the last line on page 61, the middle of the line.
"... during the time that you worked for Tietex, nobody ever gave you a written Contract of Employment to sign, did they?
Answer: No."
Q: Do you have any information today that you didn't have in July 2009 that would change your answers from when you gave this deposition?
A: **I don't know if it's represented in here, but my answer then, I would have probably tried to steer in the direction of the promises that were made to me which led to my taking the job in the first place.**
Q: Would your answers to these specific questions be different today?
A: No.
Q: Let's look at page 63, line 15.

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"Question: Do you have a copy of that Handbook?
Answer: No. I actually, I'm not sure what year it was, it was around 2005, '6, along in there, there was a call for the manuals to be turned in so they could revise, and I never got a revised copy."
Did I read that correctly?
A: Yes.
Q: Page 64, line 9.
"Question: So would it be fair to say that as of today, as we're talking, you don't know what policies were in the Handbook?
Answer: I do know there was a policy in there that had to do with termination and the steps that were to be taken. I can't cite them or anything, but I knew they were like written warning, verbal warnings, and then written warnings and then termination. I knew that was in there.
Question: All right. Other than that, you don't know what was in the Handbook?
Answer: I mean, I couldn't specifically tell you. I mean, we could sit here and talk and can tell you the kind of things that were in there, but I couldn't tell you a page number or anything.
Question: All right. Well, it would be fair to

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say then, that you don't know what policies in the handbook that you would contend today created a Contract of Employment?
Answer: Yeah, I don't really feel like I could answer that question, so I'll just say I don't know the answer.
Question: You don't know. It's fair. Look, you can say yes, you can say no, you can say yes and no and qualify it, and you can say I don't know.
Answer: I'll say I don't know then.
Question: So you don't know what in the Handbook that you would base your contract claims on?
Answer: I don't know, I mean, I've got my thinking but I don't think it's, again, I don't think it's --- The answer would be, no, I'm not sure. No, I'm not able to put my finger on something right now, but I have my thinking on it. I don't know.
Question: Okay. Now, there is a breach of contract claim in your Complaint which we just talked about. Then there is a second claim that's breach of contract accompanied by a fraudulent act. What do you claim that Tietex did that was fraudulent?
Answer: I'm not exactly sure where that is right

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now. I'll say I'm not sure right now."
Did I read that correctly?
A: Yes.
MR. LAZENBY: I just want to object to the form, that there were several objections in within there that you skipped over.
Q: That's fine. I skipped over them. I confess.
MR. LAZENBY: Well, it is what it is.
Q: The document speaks for itself.
MR. LAZENBY: Right.
Q: Would your answers to those questions that I just read to you be any different today than they were in 2009 when you gave those answers?
MR. LAZENBY: Object to the form.
A: In essence, in other words, the actual being what I would say would probably be essentially the same.
Q: You were never bullied when you worked for Tietex, were you?
MR. LAZENBY: Object to the form.
A: Well, you've got to get into the definition. But the closest thing I would ever, I mean, obviously — well, not obviously, but the way I was treated by everyone else at Tietex in that area was pretty what you would expect. But I would certainly look at what Wade Wallace did to me and the way he did it. In the position that he was in because he

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had control over me, was bullying me around, you know, because he could or whatever.
Q: You claim you were bullied when you worked at Tietex by Wade Wallace?
A: If you want to call it that. I think we've got to get into what that means. But I'm not going to expand on what we first said and then convert it into, yes, I was bullied. Because without knowing what we are talking about in terms of definition. I was pushed around and shown high disrespect. Treated like an animal. If had to put it in terms, I was treated like an animal.
Q: Mr. Harris, how about turn to Exhibit 5, page 8.
A: Okay.
Q: Paragraph 44. This is your claim. "Defendant employee agents, with full knowledge and forethought, using their position of power and authority over Plaintiff, sought to bully Plaintiff to achieve their own ends, knowing the emotional damage they would and did inflect upon Plaintiff." So that's your claim.
A: Now, are you reading 45?
Q: 44.
A: I'm sorry. I mean, I think it's well written.
Q: You claim you were bullied by Wade Wallace?
A: If we're not going to do a definition, yes. In other words, I'm leaving to my interpretation of being

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bullied, I will definitely say yes without question.
Q: All right. How do you claim you were bullied?
A: Anytime, like on February 7, when he had the opportunity with nobody else around, he was two different people in private with me versus out in the middle. Mr. nice guy out in the public and all this. Behind closed doors, different ball game. The threats and the threatening tone of voice. You know, I cannot recall all the language and the way it was said and the tone of voice. It was just incredibly abusive. And then in the final analysis, you know, the end of it would always be get your act in order or we'll find another chemist to hire. In essence, that would be the kind of, those kind of encounters would end up with that kind of a comment.
Q: So these were threats that you were going to get fired if you didn't do your job?
MR. LAZENBY: Object to the form.
A: I mean, as to the reason for them, that was the way they came off to me. As to the reason behind them, I can't sit here and say what his motives were.
Q: All right. Were all the threats threats about what was going to happen to you if you didn't do your job?
A: Yes or no, no.
Q: No?
A: My answer to that question the way you asked it is

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no.
Q: All right. What were the other threats other than threats that you were going to get fired if you didn't do your job?
A: Well, again, you're getting in if you didn't do your job, which, I mean, how broad is that. It had to do with things like specifics like getting those assignments done. That would be one of them. I cannot sit here — I'm just going to stop right now and say that to sit here and just throw stuff out that happens to come to mind. There were other, there were other things said other than get those assignments done or you're out of here type thing.
Q: As we sit here today, can you relate any of them?
A: Relate?
Q: Yeah, tell me any of them, any of the threats that Wallace made other than threats that you were going to get terminated if you didn't do your job.
A: it wasn't so much the wordage as it was — That was important and it was abusive, but it was his mannerisms.
Q: All right. Don't characterize as abusive, tell me what was said.
A: I'm not going to — I can get that information, but I'm not going to sit here today and guess exactly and bring back something very important.

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Q: Where are you going to get that information?
A: I would have it somewhere.
Q: What do you mean?
A: I'm sure with all the stuff I've got, that somewhere along the way, we would have that. Probably from previous testimony.
Q: Do you have any documents you haven't given to your lawyer?
A: Not that I consider — Other than that affidavit that could be important. I'm not aware of anything right now. Now, there's plenty of documents I haven't given him that at this point in time I don't consider part of the case going forward. They could become that. See, when Mr. Wallace banned me and the term I used, confiscated by four filing cabinets and a bunch of boxes in both desks, it was three months before I got probably half of what I had in those back and it was all personal. So I did have documents. So I do have documents, in other words.
Q: All right. Is it true that today you can't tell me about any threat that Wade Wallace made to you other than a threat that you were going to lose your job if you didn't do the projects that he assigned correctly and on time?
A: Well, I can give you an in essence account of it. Do you want me to give you an essence what he said to me or

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just — I can't sit here and verbatim and tell you what he said.
Q: Tell me the best you can.
A: He comes into the office and says, "Mr. Harris." And this is in essence, okay. These are not word for word.
Q: Is this on February 7?
A: This is on February 7. This is that particular day.
Q: I'm sorry?
A: This is that particular day. It's not March 5, which is another day, it's February. And he comes in and, basically, wants to know, "How you doing? Have you done those two projects you were supposed to get that I wanted you to get for I believe it was Jake Butts and get them to him?" And I said, "No, Wade. In fact, I just, I've been working on this, I've been working on that, all these other things that I need to do and you've wanted me to do and all that." "What do you mean you haven't got those? What do you think this is around here?" He said, "I'm getting tired of this. How long is it going to be before you get those? You know, we're going get tired of this kind of crazy thing." I'm not going to throw in the profanity. And then, "I'll tell you what, you better have those and you better have those by Friday or we're going to be looking for

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another chemist." He walks out and slams the door.
Q: And you claim that's an ...
A: That's, in essence, what happened.
Q: And you are giving that as an illustration of being bullied by Wade Wallace and you claim that happened on February 7, 2009, correct?
A: That kind of thing, exact kind of thing happened on the 7th.
Q: All right. And that's recorded, at least Mr. Wallace's opinion of how the conversation went, is recorded in Exhibit 13, which is dated February 9, 2007, correct?
A: Yes.
Q: Is that the only incidence of bullying that you have?
A: Without thinking back of the whole scenario that spring, I would have to rate March 5 and what happened there as in the same category.
Q: And the conversation on March 5 was recorded in the memorandum marked Exhibit 16, correct?
MR. LAZENBY: Object to the form.
A: Yes.
Q: Correct?
A: Yes.
Q: You're going to have to answer verbally so she can take it down.

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A: I'm sorry?
Q: You have to answer verbally so she can take it down.
A: Oh, okay. Yes. I'm sorry.
Q: Tell me why you claim that the conversation that you had with Wade Wallace on March 5, 2009, was bullying of you by Mr. Wallace?
A: First I would say that it was probably more intimidation than bullying. I consider bullying as much stronger and harsh and unnecessary. And I think it was toned down because of the presence of David Wilson. There was certainly not this arrogant, high level arrogant threatening like tone of voice and all that. The things that were said there was I'm sitting in there. Mr. Wilson was sitting away and I was sitting across from Wade, and Mr. Wilson was off to the side. And he starts in with all these things in a very boastful manner and arrogant, really arrogant tone of voice about all these things that I've not done. And I'm sitting there and I can't believe it. First of all, as I said earlier, I was half sick with the flu or something. And I'm sitting there and just, you know, I mean, what's going on here? And I actually looked over for Mr. Wilson as if I wanted, you know, are you kidding me? Can I have some help? And I think, I don't remember any comments, but I think I made some comments to Mr. Wilson

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about this. In the final analysis, after all of that, my comment was, "Wade, would you do me a favor? You're telling me this is stuff I've done and I need to shape up on. Would you please send me an e-mail so I can be sure to know what I need to do to correct it." He said, "Be glad to." But before I said that to him, he had already said, "You've got 30 days to shape up or we're going to be looking for another chemist." And it was done in a tone of voice that was pretty hateful.

Q: The entire conversation on March 5, 2009, occurred in the presence of David Wilson and it was all work related, correct?

A: It was, what he told me I had to do was work related.

Q: Correct.

A: Well, it had to do with my job. It had to do with what he, not my job directly, but my character, conducting myself properly and all that. It had to do with my job in general, if that's what you mean.

Q: Are there any other incidents of bullying other than the incident that you related that you claim happened on February 7 and the incident on March 5, 2009?

A: The whole spring, once all that happened and a long the way the entire spring, I mean, you can look back at everything you've got and you'll see that there's a lot that

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didn't happen. For some reason, there's nothing, not a whole lot showing up in April and May. But I do remember, and I cannot here today sit here and tell you dates or anything, but I do remember there was a time or two after all that and before June 18 that there was an encounter or two but I cannot sit here today and give you dates or information on it.

Q: So the only two events that you can tell me about today that were incidents of bullying occurred on February 7, 2009, and March 5, 2009. Is that correct?

MR. LAZENBY: Object to the form.

A: Maybe we can throw in July 3.

MR. LAZENBY: I think you said 2009. Did you mean 2007?

Q: I said 2007?

MR. LAZENBY: You said 2009.

Q: I meant 2007. Thank you. I wrote 2009. So the only two events I asked you about were February 7, 2007, and March 5, 2007, and your response was, "Well, we can throw in July 3."

A: Yeah, I would consider what he did when he called on the phone totally unnecessary and uncalled for. And he really got carried away when he found out I was not there in the plant.

Q: Tell me what Mr. Wallace said to you on July 3

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that's recorded in Exhibit 19 that you claim is bullying.

A: Again, it was more his tone of voice and yelling type tone of voice. And, you know, "I'm banning you from, I'm banning you from Tietex property until I get back from my vacation." And, you know, that is one thing to say, but to scream it and just really in the questions he's asking, asking them in a hateful manner. Just very disrespectful.

Q: And all of this conversation on July 3 that you claim was evidence of bullying arose from his inquiries about where you had been that day, correct?

A: No. I'll say no to that and say it really arose from the fact I was not in the plant.

Q: That's what really ticked him off. And he thought, he said, "Gary, you come to my office." And then, "What do you mean you're not here?" And then na, na, na. I said, "Well, wait a minute. Wait a minute." And I started trying to tell him what's happened. I'd been to Hexion and this happened. I'm trying to get the project done that he wanted done so I can get the information to him Thursday, on and on and on. And it's somewhere along the way I'm the one that throws in all this quick talk and everything and explanation trying to explain, that I throw in where I've been. So it's after I've said all that that he, you know, says I'm banning you from Tietex. In a hateful, very hateful way, "I'm banning you from Tietex property. I do

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not want you back on the property until I'm back from my vacation." Something to that effect.

Q: You've given me three incidents of bullying. The incident that you claim occurred on February 7, which is recorded in Exhibit 13; the incident that occurred on March 5, 2007, which is also recorded in one of the exhibits; and the incident on July 3, 2009, which is recorded in Exhibit 19. Any other incidences that you claim were bullying?

A: Not at this moment I don't have any to offer.

Q: And the March 5 was Exhibit 16. Now, with respect to February 7, 2007, where did this alleged bullying occur?

A: In a small little, I always describe it as a little dungeon like office in the very back of the Tietex main plant facility, just right off of the Compounding Department.

Q: And the only folks present were you and Mr. Wallace?

A: In that room.

Q: Was somebody nearby?

A: Ricky Miller would have been outside the door there somewhere working.

Q: Any information that Miller heard the exchange between you and Wallace?

A: Not to my knowledge.

Q: After your meeting with Mr. Wallace in February of

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2007, did you discuss the event with anybody?
A: While I was still employed?
Q: Yeah.
A: That probably, I can't — Let me just say that, as I've said before and it's in other documentation, I went to see David Wilson early on after something like February 7 happened and that could have, that could actually have predated, preceded anything that happened regarding the March 5 meeting and the resulting memo. But at some point I met with — If I had to say, I met with David Wilson after that February 7 encounter and that was when I was told by him, I mean, I went to him because what happened was uncalled for. I mean, it was gross. And at one point early on when I was in with Wade Wallace, I went to David Wilson to just say, "Look, you know, this is not necessary. I mean, I'm a human being. You know, I want to be treated like one." And in essence what he told me was, and I realized then I could forget it. There was no help. Something was up. He says to me, in essence again, I don't remember exactly the wordage. But he said, basically, "You know, I'd advise you to go, just go do your job and keep your mouth shut if you want to keep your job." Something to that effect is what David Wilson told me.
Q: Did you complain about the conversation in February with Wade Wallace to anyone other than Mr. Wilson?

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A: I don't think so. I don't recall that.
Q: Did you receive any medical treatment as a result of this conversation with Wade Wallace in February of 2007?
A: I would think not. If I may, the answer is no to that. But I will say this about at the point in time this happened and, actually, when it did happen, before this February 7 incident actually took place, there was a tremendous change that came over me regarding the job situation. It was like I went from hoping things would be corrected at Tietex, mainly by the ownership. I went from hoping that, you know, this guy's going to right the ship and things are going to be what they need to be. There was a lot of negative went on there for years and it hurt the Company. So I'm waiting, it's like I'm going down this rapid river or something approaching a waterfall and I'm hoping something happens before I go over the waterfall. Well, when I was demoted and put under Wade Wallace, I went over the waterfall. And, in essence, it was almost like a relief that, you know, it's like you could quit wondering now, you know what's going to happen. You don't have to worry about what's going to happen anymore. And so as far as any doctor visits and all that — The important thing there is this as far as that medication. Just to answer your question about medicine. The second time around with a sleep bout, I realized what was causing it and was able to

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resolve that issue. And I found out it had to do with medication. As far as trying to address the stress and all that, the medication only made it worse.
Q: With respect to the March 5, 2007, encounter with Mr. Wallace, that occurred in Mr. Wilson's office?
A: March 5 was in Mr. Wilson's office.
Q: Was anybody else present?
A: No.
Q: Did you complain to anyone about that meeting and the resulting memo which is Exhibit 16?
MR. LAZENBY: Object to the form.
A: I don't recall. I mean, I cannot recall that.
Q: Did you discuss that meeting with Mr. Wallace and Mr. Wilson with anyone who had not been present at the meeting?
A: I don't recall, no. I mean, I'd have to answer no, I don't recall.
Q: Did you get any medical treatment as a result of your March 5, 2007, meeting with Mr. Wilson and Mr. Wallace?
A: I would say no and for the same reasons, I would not have. In late '06 I swore off of ever going back on any kind of medication for helping stress and sleep and there's no way I'd ever go back there.
Q: And with respect to the July 3, 2009, phone call, you already said that ...

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A: July 7. I mean, I'm sorry, 2007?
Q: Yes. Thank you. You already said that the only two on the line were you and Mr. Wallace, right?
A: Yes.
Q: Did you complain to anyone about how Mr. Wallace spoke to you during that telephone conversation?
A: I never had a chance.
Q: Did you get any medical treatment as a result of that telephone call?
A: No.
Q: All right. Now, your Complaint also claims that you were intimidated. Would your evidence or is your evidence of intimidation any different from that which you have given me about being bullied?
A: I just put a tone, a tremendous tone of, I don't want to use that word here on the recording, but it was just an incredible arrogance that existed that I would call what you're saying.
Q: Listen to my question. I'm going to let you tell me whatever it is you want to tell me, but there's no sense in me having you repeat if the evidence is the same. And I'm just asking if the evidence of what you claim was intimidation is the same evidence that you just gave me about being bullied? If it's the same say yes. If it's different, tell me what's different.

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A: No.
Q: You never had any traps set for you when you worked at Tietex, did you?
MR. LAZENBY: Object to the form.
A: Yes.
Q: What?
A: All those memos, the whole, the whole conglomeration or whatever you want to call it, that whole accumulation of all that we've gone over was, in essence, a trap to get me out the door for cause if I didn't leave because of being treated like a dog. You know, we'll treat him like a dog and, hopefully, he'll just quit and get out of here. If he doesn't, we'll create cause along the way. It's as clear as a bell the cause created by the policy manual policies. So I would call that a trap. You know, this is the way we're going to do it.
Q: So you would say that your employment was terminated for pretextual reasons, right?
A: Yes.
Q: And you claim that was a trap?
A: Yes.
Q: You were never undermined when you worked at Tietex, were you?
A: Yes. I mean, that's a very broad term. Yes, I was undermined.

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Q: How?
A: Various people taking credit for things I did.
Q: Who?
A: Jake Butts, Gene Pannell, David Westbrooks.
Q: Who was the second name?
A: Gene Pannell.
Q: How do you spell that?
A: Pannell.
Q: How did Jake Butts take credit for what you did that undermined you?
A: Well, let's see, where do we go with that. There's a number of possibilities that would apply. One would be where there was a, Tietex was in a tremendous bind with Sealy and had been threatened that they would lose business if they didn't have a solution to a skidding issue where the one-sided mattresses were too easily sliding on the box springs when they were constructed by I believe it was Sealy. And it was just something that Sealy had been trying to get Tietex to correct for the better part of the year. And Gene Pannell and Jake Butts were working on it. I hadn't been involved in that project. I was called in one day and it was right on top of receiving an ultimatum from Sealy. Jake Butts told me the story. He said Gene Pannell and Mel Flynn had been working on this for close to a year and they've made a little progress, but not a lot. I

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suggest if you, I want to get you involved because we've got to have something to them by next Friday. This was like the end of one week. We had a week to work on it. So in the final analysis, by Tuesday I had fabric in Sealy's hands for evaluation. I believe it was Sealy. It might have been Serta. And they highly approved of the new product. And by Friday we had production on the way to them. And I was working through, I believe it was Dennis St. Louis who handled that account and he was reporting back to me. And he said, "They love it. It looks great." Anyway, in the final analysis — See, these were the kind of things Martin Wildeman never knew about as to who got credit for what. But one year later, approximately, in a meeting — And I didn't go out racing flags and this saved an account. And one year later in a meeting, Jake Butts, he and Gene Pannell take credit for it. That's what I'm talking about. That happened frequently.
Q: Any other incidents of Jake Butts or Gene Pannell undermining you by taking credit for your work?
A: There's another one. You don't want to hear this surely.
Q: If it's an issue in this lawsuit, I want to hear about it. If it's not an issue in this lawsuit, I don't.
A: Well, I mean, I don't see it as a significant issue except it just points to the way Tietex was managed

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and the owner not being involved, but you're just asking me to tell you.
Q: I'm asking you for any evidence that you have that you were undermined. And you said you were undermined by these people taking credit for your work.
A: Okay. This one I believe would have to do with the lawsuit because it involves Wade Wallace. While I was reporting to Wade Wallace, the manager of purchasing, Paul Gam I believe is his name or whatever. But David Westbrooks had gone to him, to Paul, and had this form filled out that I needed to sign to approve purchase of a chemical. And Paul, he gave it to Paul to give to me to sign. I was the person that approved chemicals. And when Paul gave it to me, I refused to sign it because I knew Tietex could buy that product for half the price from the original manufacturer. I knew that the person that David Westbrooks was trying to buy it from actually purchased it from over here and put another label on it and upped the price. And I told Paul that. And later, I'm reporting to Wade Wallace, Wade brings it up. And he says, "Are you going to sign that?" He said, "They're wanting to purchase that chemical." And I told Wade the story. I said, "Wade, I can't do that in all good conscious." I said, "It's not right for the Company when I know we can get the product over here that's made over here at this other company for

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wife. He was a very different person. He was like doing things that somebody else was driving him to do, that it wasn't his idea. Things like I need for you to move down in the plant.
Q: Did you ever hear your ...
MR. SUGGS: Pardon me a minute. I want to make sure I understand. March, April, and May of what year?
Q: 2006
MR. SUGGS: 2006, okay.
Q: Did you ever hear your superiors discussing the amount of medical bills that Tietex had to pay because of your wife?
A: I never heard that discussed.
Q: Did you see a memo to that effect?
A: No, I don't recall seeing a memo. But I do recall somewhere along the way, and without remembering exactly, Jake Butts seemed to be very much interested in that area.
Q: Did you get the impression that your wife's medical bills was a reason for them trying to get rid of you?
MR. SUGGS: I object to the impression.
A: I would say that being an older employee with an older spouse that, generally, that was a take on the way things were going at Tietex, I would think that anything like that that would enable a company to cut costs would be

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a consideration. I mean, if you look at, just real quickly, what I did early on in my career enabled Tietex to hire more employees. It created business.
Q: I just want to talk about this ...
A: That's what I'm going to get to. What was happening then in the time frame you're talking about was causing Tietex — Things like elliminating employees in order to report a profit. Just purely getting rid of employees off a machine so processing improvement could say, "Look how much money we saved the company." Those kind of things which would include, you know, getting rid of people because of high medical bills if they're potentially going to cause the company, were all the kinds of things that were done. Not that they were the right thing to do for the Company, but it was so somebody could make it look like the Company was doing better than it was.
Q: And you had stress and anxiety in 2006 caused by your work that you sought medical treatment for?
MR. SUGGS: Object to the form, leading.
A: All of the issues that I had in 2006 that had to do with going to the doctor I would relate specifically to the way I was done in my job.
Q: I want to talk about your encounters with Wade Wallace. I believe you mentioned there were three different incidents, February 7, March 5, and July 3. On March 5, did

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he raise his voice?
A: I would say there were times when he raised his voice. Again, there was another person in there and he was more controlled than he would have been had we been alone.
Q: I'm sorry, I meant to go in chronological order and start with February 7. On February 7 when y'all were alone, did he raise his voice?
A: Big time.
Q: How would you characterize it?
A: Just what I did earlier where, I guess, gave an example in essence of what came out of him.
Q: Would you characterize it as yelling at you?
A: Oh, absolutely.
Q: Screaming at you?
A: Yelling, screaming, just all over me.
Q: Did he use profanity?
A: I don't recall that specifically. I won't say he did not, because at the time it was happening, I wasn't trying to figure out is he cursing me or not. I don't recall the wordage except I know what he was saying and the essence of what he was saying. But for me to throw a curse word in would probably be acceptable as to what I believe happened.
Q: Was that the first time that he had ever yelled at you?

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A: Yes.
Q: Was that shocking to you?
MR. SUGGS: Object to the form, leading.
A: I mean, I had only been reporting to him for six or seven days.
Q: I'm sorry, I didn't hear your answer. Was that shocking to you?
MR. SUGGS: Leading.
A: Oh, it was a big surprise. It was incredibly. I'd never in my life been done like that.
Q: That's what I was going to ask you next. Has anybody at Tietex ever yelled at you before?
A: Not only not at Tietex, I'd never been treated like that by anyone anywhere and even my parents in my entire life.
Q: Have you ever yelled at any of your employees?
A: Never.
Q: Is yelling at an employee at work something that you would consider acceptable at Tietex?
A: I wouldn't consider it acceptable anywhere.
Q: Do you think Tietex would consider it acceptable?
A: At the time, I mean, I would characterize Tietex, In all the places I've ever worked, as very unprofessional, very mismanaged, and a place that probably should have been shut down because of the laws that were broken.

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Q: And still, no one had ever yelled at you before Mr. Wallace?
A: **Never, nowhere.**
Q: I think you mentioned that he also slammed the door.
MR. SUGGS: Object to the form, leading.
Q: Did he slam the door?
A: **I think he did. I mean, I'm trying to remember that particular day. Yeah, I think he went out and slammed the door.**
Q: Did he do anything else during the meeting or during the incident that was physical in nature?
A: **Not like, you know, like threatened with his fist or something? No, he would never. I don't think he would have done that.**
Q: So did you feel physically intimidated? Did he ever stand up?
MR. SUGGS: Objection, leading.
A: **I never felt physically intimidated by Wade Wallace. It was a matter of, I mean, if I'd wanted to like have a physical battle with Wade Wallace and that was the only issue, that would have never been an issue and I never would have had no problem with it. It was a matter of, actually, knowing I couldn't do that. You know, I've got to take this. I've got to take this treatment. I can't**

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jump the guy, I'd definitely be out the door. But that was never an issue as far as his physically threatening me. He would know better than that.
Q: Is there anything else about the mannerisms of the incident that you haven't discussed here today?
A: **As far as Wade Wallace?**
Q: Yes.
A: **There was something I was going to say that eludes me right now. It's something we didn't get into while ago but came up. You triggered it but I've lost it again.**
Q: And did you complain to David Wilson about this initial incident with Mr. Wallace?
A: **As I've already testified earlier, I'll probably just leave it at that. I believe I did and the response I got was, you know, basically, I just needed to go do my job and keep my mouth shut and everything would work out or I might lose my job if I kept pushing stuff like that. I don't know that there's anything else there. I think I've already testified to that.**
Q: Did you believe that was an acceptable response?
A: **I just saw David Wilson as part of whatever was going on and that I was like, I wasn't surprised necessarily by it. David Wilson was new at Tietex. He was what he had been told. He'd only been there since like 2005, '6, along in that time frame, and he had no clue of what had gone on**

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before that. So he came into a situation and I think he was pretty well man handled and controlled as to the way he was doing. That doesn't excuse it though.
Q: When were you banned from the lab building?
MR. SUGGS: Object to the form, leading.
A: **I was banned from the lab building pretty much the day I started reporting to Wade Wallace on February 1, 2007.**
Q: What was the reason given to you for why you were banned from the lab building?
A: **My health.**
Q: Do you believe that to be truthful?
A: **I know it's not truthful.**
Q: What do you believe the reason was for being banned from the lab?
A: **So I couldn't, in essence, so I couldn't really do the work. It was just a nice little opening that for that to take place and this stuff on the surface looked reasonable. Yeah, we can do that and make it very difficult for him. But it was really to put me in a situation where I would have a very difficult time getting work done.**
Q: Tell me about the, I want to talk about the C237 compound. But let me ask a specific question. How did it come about the issue of your trying to develop a less costly version of that?
A: **I was actually in the technical building one day**

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and Mark Wildeman came in and came to me and told me, in essence, he opened with, "Gary, we've got a serious problem and I want to ask for your help." And he went on to tell me Tietex had good business in the C237 type fabrics programs and there were others other than C237. He said, "We've got really good business." He said, "But we're not making any money and we've got competition coming at us with lower prices and we simply cannot lower prices."
Q: C237 is a fire retardant?
A: **It's a fire retardant fabric for the mattress industry.**
Q: And how was Tietex obtaining C237?
A: **The product consisted of a fabric made by Tietex that was back coated with a compound that came from Novion. And together that was, once that compound was back coated onto the fabric, that was the final product that after inspection and all would ultimately go to the customer.**
Q: Did you tell upper management that you could develop a similar compound?
A: **What I was asked. I mean, I did not go out and in any way shape or form broadcast that, "Hey, look, we're paying too much money. I can do better for us." That was the way things were presented at one time before. But the essence of it was Martin Wildeman came to me and asked me that question. "Is there any way ..." After he did the**

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Q: I want to ask about your vacation time. In general, did you have to ask for vacation time in advance?
A: Generally, that would be the thing to do and I always tried to do that. But like, just like the chain of command thing, the vacation thing. Tietex was a very different company in terms of lax.
Q: Let me just ask you this question. When did you put in for vacation for June 25?
A: I sent an e-mail on like a Saturday. Something came up that had to do with some problems at the house primarily with some rotting wood and windows and work I had started that I needed to complete. It would have been on a Saturday morning before that Monday.
Q: So you requested on Saturday to have vacation approved for the 25th?
A: Yes.
Q: I'm sorry, Saturday, for vacation to be approved that following Monday?
A: Yeah.
Q: And did you ask for a week and then did you also ask for July 2 and 3 at that time?
A: I didn't include that in the e-mail. On Monday, I believe it was the following Monday, I called Wade to be sure it was okay. And then he said, "Well, while I'm at it, I'd like to go ahead and add July 2 and 3 to that.

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Q: This is Monday the 25th, you asked Wallace if you could have the 2nd and 3rd?
A: Based on what I remember, yes.
Q: And was that approved?
A: Yes.
Q: Did it have to be approved in writing or how was that done?
A: Typical. I mean, like I said, the Tietex was very loosely run in those areas, especially for people that were in management. If you needed a vacation, I was told, well, you know, it's pretty open. If you need a day of vacation and you've got vacation coming, if you need it tomorrow, all you've got to do is ask. And if it's not a problem, you can have it.
Q: Was Tietex open during the week of July 4?
A: Tietex was down. As far as I know, they were down for one day, that was the 4th, Wednesday.
Q: The rest of the week they were open?
A: Yes.
Q: How was Mr. Martin Wildeman involved in the management of Tietex when you were there?
A: I think he probably spent more time in the lab piddling around with little things and trying to figure out this, you know, invent things by far and away than he did actually running the company. He relied on whoever was in

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place and in my final days there, which was Reed Cunningham, he relied on them. You go to him and you've got a problem, "Well, as long as Reed Cunningham is okay with it, I'm okay with it." He was out of the loop. He pretty much what he knew was what he was told by those that were, you know, he had his ears.
Q: Finally, you last gave a deposition over three years ago in the summer of 2009 and you've been asked questions about everything. But in general, has your view of this lawsuit changed in the last three years?
A: It has. Back in 2009, well, there's pros and cons. The negative is that with the passage of time, there are definitely some things that I lost feel for and lost memory of. But at the same time, I've gained some information and my, back when Mr. Suggs was asking me questions in July of 2009, purely due to the what I would call subjectivity, it was difficult to answer some of those questions objectively because of the subjectivity. Today versus then, I would say that --- Well, let me just put the statement like this. If I thought there was any doubt about my claim wasn't legitimate and all this in 2009, that doubt is no longer there. I mean, what I thought may have happened, today I know happened. To be able, it's like the projects I worked on to solve a problem, and I've mentioned this before, the only really what I believe to be a decent

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talent I have is to take a few facts and come up with an answer, a solution that's pretty decent and pretty reliable and pretty accurate. And I think I know exactly what happened from, you know, 2007 in February right on up until July, I mean, and the reasons for it.
Q: And have you told us all that here today?
A: I think we've pretty well touched on most of it.
MR. LAZENBY: Okay. All right. Thank you very much. Those are all the questions I have.
MR. SUGGS: I have a statement for the record. I demand immediate production of the Van Johnson Affidavit so that we can evaluate it and determine quickly whether we need to reopen this, the deposition.
MR. LAZENBY: I'll certainly consult with my client and obtain any document and determine whether it's subject to production and let you know as soon as possible.
MR. SUGGS: Well, if it's a statement, we've asked for it a long time ago.
MR. LAZENBY: I'll look at it and see if it's subject to being produced.

(There being no further questions, the deposition adjourned 5:08 p.m.)

Wallace, Wade

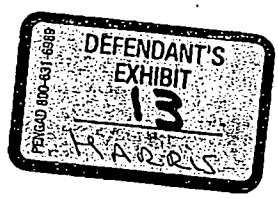
From:	Wallace, Wade
Sent:	Friday, February 09, 2007 8:58 AM
To:	Wilson, David
Cc:	Isbell, Mark
Subject:	Gary Harris

Per our conversation, I'd like to document the discussion I had with Gary Harris on Wed 2/7/07.

Gary called me mid afternoon on Wed and stated that at that moment his personal and emotional problems had overwhelmed him and he was confused, disoriented, and could not function. He did not know what to do. I immediately went out to his office to discuss his problem in person. He explained that his personal life over the last year has made him so fragile emotionally that sometimes he has episodes like the one he was experiencing. As we talked he felt better and mentioned that the project work I had assigned him would be help keep his mind off his personal problems.

I took that opportunity to remind Gary that Tietex is committed to our employees well being and that at any time we would support him if he felt he needed to utilize EAP. He said that that was not necessary and that he could work through it. I also asked him to be open with me if in any case this personal problem interfered with his ability to perform his job as we would need to sit down with HR to find a resolution.

When I left him he assured me that he was OK and thanked me for my support and patience.



TIETEX - SC
000012

ATTACHMENT D

To: David Wilson

From: Wade Wallace

CC: Mark Isbell, Gary Harris

Date: March 5, 2007

Subject: Gary Harris' Transition

During the last thirty days as Gary Harris has transitioned into his new role, several issues relating to his work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

As we discussed these issues are not sustainable and it is mandatory that Gary make significant progress towards resolving these issues within the next 30 days.

DISCUSSED W/ GARY ON 3-5-07
David A. Wilson

TIETEX

To: Gary Harris

From: Wade Wallace

CC: David Wilson, Mark Isbell

Date: June 18, 2007

Subject: Gary Harris Work Perfomance

During the last ninety days some issues relating to Gary Harris' project work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

Of Gary's multiple duties two projects were identified ninety days ago as priorities and he was instructed to give them his most thorough and diligent focus. The first project was the development and qualification of a Tietex coating compound formula as a replacement for the current coating used on C237. Gary actually began work on this project prior to his reporting to me. His lab coating work began in December 2006 so the project has been ongoing for over six months. The second project was to develop a finish formula change and process to enable T602 to be finished with the parabolic applicator instead of a pad application. The project was assigned and work began ninety days ago.

Although the first project has been on going for six months no significant progress has been made toward completion. This project was initiated solely by Gary and he convinced senior management that it was completely feasible in order to gain support. He committed to developing a compound that would cost between $0.60 and $0.62 per pound verses the current product which cost $0.885 per pound. Despite months of lab work in house and at four different chemical supplier locations and numerous production trials he has been unsuccessful in creating a viable product. The formulation which Gary developed has proven to be much more complicated to reproduce commercially than initially promised. Gary exercised poor judgement by making claims and commitments that he could not deliver. This project was included in corporate financial improvement goals. Due to the failure of this project I have personally had to begin parallel project work with other suppliers to develop a suitable replacement to achieve the financial commitment of the project.

The scope of the second project to develop a finish formula and process for parabolic application of T602 was a technical challenge. However, Gary informed me that lab samples were promising and recommended a production trial. Although I was not presented the actual numerical results of the first production trial Gary assured me that the results were comparable to

the current product. From this I approved a scale up run for statistical qualification. The second trial, as well as a third were unsuccessful. These subsequent failures concerned me and I personally recalled samples from the first trial that Gary assured me was a success. I witnessed them being tested and found that the product from that initial trial did not perform comparable. By this I can conclude that Gary did not conduct adequate scientific and numerical analysis of the first trial. This negligence was costly in that two subsequent production trials could have avoided. In addition, this negligence in applying the proper scientific analysis is unacceptable in the work of a Sr. Research Chemist.

Obviously the two issues regarding the C237 project failure and poor analytical practices demonstrated in the T602 project are not sustainable. It is mandatory that Gary make significant progress towards resolving the problems with the C237 project and improving on his analytical practices within the next 30 days.

I have read This
Gary Harris
6/18/07

To: David Wilson

From: Wade Wallace

CC: Mark Isbell

Date: July 18, 2007

Subject: Gary Harris Work Performance

Despite efforts to counsel Gary Harris we continue to have issues with his work practices and performance. These issues are listed in the following paragraphs. On this basis I am recommending that we terminate his employment immediately.

In February 2007 he was reprimanded for the following issues:

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

With the exception or the environmental reporting he continues to have these issues.

In April 2007 he was instructed not to come in and work in the chemical lab areas at nights or on weekends for safety reasons. Gate records and management observation indicate that he has continued to do this.

In June 2007 he was reprimanded for the two following issues and given a thirty-day deadline for resolution. It was made completely clear that failure to complete this task and resolve this issue would jeopardize his employment.

- Failure to complete the project to replace the current C237 coating compound with formula of his design.
- Not conducting and reporting adequate scientific and numerical analysis to substantiate lab and plant trials.

He has not demonstrated any effort to complete the C237 project. Despite the deadline to complete the project within four weeks he took two vacation days the first week, five the second week, and was planning to take five days the fourth week. This would have accounted for more than 50% absenteeism during this time and no effort to complete the project as instructed. None of these days were approved in advance. He left messages the day of the vacation without any

advance notice despite my request that he have them pre-approved. In addition he has not submitted to me any scientific data on any of his other projects.

I recently found out that also in June that Gary missed an important trip to visit a customer and did not inform me. He was scheduled to fly to Indiana on June 14 to visit with United Shade and return on June 15. On the way there he suffered a headache and returned to SC a day early and did not see the customer. He never informed me of this and while I thought he was in Indiana.

In July 2007, prior to the end of his thirty-day deadline several more issues have arisen.

- Only July 3, 2007 he did not show up for work and left me a message that he would be at Hexion in Greenville all day. He did not get permission for this trip. Later I found out directly from the Hexion representative that he did not show up. Although he did see another supplier in Greenville briefly, he has no been able to adequately account to me his whereabouts for the entire day.
- Also on this day he instructed the Hexion representative to deliver sulfuric acid to him at the plant without an MSDS. This is in direct violation of company policy.

In the last three months he has also demonstrated other poor work habits that are affecting his work performance.

- Does not return calls or emails consistently. His co-workers consistently complain of this as it affects their ability to complete their tasks that are contingent on his work.
- Does not keep consistent work hours and often cannot be physically located at the facility. Gate entries indicate an erratic pattern of coming and going that is not approved in advance.

In light of the continued problems with Gary's work practices and performance I am recommending that we terminate his employment at Tietex. Gary has been counseled about these issues, but at this point I have lost confidence in his ability to perform his job in a satisfactory manner.

Attachment E

Affidavit of Pamela Griffin

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

AFFIDAVIT OF PAMELA GRIFFIN

1. I, Pamela Griffin, am of majority age, competent to testify, and make this Affidavit based on personal knowledge of facts I know to be true and correct.

2. I have been employed with Tietex International, LTD, ("Tietex") since December 3, 1990. I currently hold the position of Human Resources Manager and have held that position since January 1, 2008. Prior to holding the position of Human Resources Manager, I held the position of Employee Relations/Benefits Manager.

3. Tietex has never had an employee handbook.

4. I have read the above statement and declare under penalty of perjury that the foregoing is true and correct.

Pamela Griffin

Sworn to and subscribed before me
This 30th day of April, 2013

Lynn N. Bishop
Notary Public for South Carolina
My Commission Expires: MY COMMISSION EXPIRES MARCH 19, 2020

Attachment F

Lowe's Receipt

LOWE'S

LOWE'S HOME CENTERS, INC.
170 RAINBOW LAKE ROAD
SPARTANBURG, SC 29316
(864)573-2771
-SALE-
SALES #: S1986HD1 4231 07-03-07

232219 3# OUTDOOR ANT KILLER GRA	13.94
2 @ 6.97	
250039 ORTHO MAX ANT & ROACH	3.94
2 @ 1.97	
94578 TERRO ANT KILLER 1 OZ.	2.47
SUBTOTAL:	20.35
TAX 38779 :	1.22
INVOICE 14386 TOTAL:	21.57
BALANCE DUE:	21.57
CASH :	22.00
CHANGE :	0.43

1986 TERMINAL: 14 07/03/07 07:36:30

OF ITEMS PURCHASED: 5
EXCLUDES FEES, SERVICES AND SPECIAL ORDER ITEMS

THANK YOU FOR SHOPPING LOWE'S
RECEIPT REQUIRED FOR CASH REFUND.
CHECK PURCHASE REFUNDS REQUIRE
15 DAY WAIT PERIOD FOR CASH BACK.
STORE MGR: EARL WIGFALL

HAVE A COMMENT OR FEEDBACK?
LET US KNOW AT
WWW.LOWES.COM/FEEDBACK

STORE CODE: 19860-70307-14386

Plaintiff **Exhibit # 1** - (2011-CP-42-5538)-01/15/2012

Attachment G

Judgment of the Fourth Circuit

FILED: May 31, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-2319
(7:08-cv-03020-JMC)

GARY G. HARRIS

Plaintiff - Appellant

v.

TIETEX INTERNATIONAL, LIMITED

Defendant - Appellee

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF Spartanburg	)	
	)	CASE NO.: 2010-CP-42-4538
Gary G. Harris, Plaintiff,	)	**MOTION AND ORDER INFORMATION FORM AND COVERSHEET**
vs.	)	
Tietex International, Ltd., Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
D. Alan Lazenby, Bar No. _____ Address: P. O. Box 6099 Spartanburg, SC 29304 Phone: 864-804-5050Fax 864-804-5051 E-mail: alan@lazenbylawfirm.comOther: _____	Fred W. Suggs, Jr., Bar No. 5423 Address: 300 North Main Street, Suite 500, Greenville, SC 29601 Phone: 864-271-1300 Fax864-235-4754 E-mail: fred.suggs@odnss.comOther: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Defendant Tietex's Motion for Protective Order Prohibiting or Limiting Any Further Deposition of Tietex's Executive Vice President Wade Wallace

Estimated Time Needed: 30 min. Court Reporter Needed: ☐ YES/☒ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Fred W. Suggs, Jr. 6/13/13

Signature of Attorney for ☐ Plaintiff ☒ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $_____

☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION
Collected by:_____ Date Filed: _____ ☐ MOTION FEE COLLECTED: $ _____ ☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

15248610.1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

DEFENDANT TIETEX'S MOTION FOR PROTECTIVE ORDER PROHIBITING OR LIMITING ANY FURTHER DEPOSITION OF TIETEX'S EXECUTIVE VICE PRESIDENT WADE WALLACE

COMES NOW Defendant Tietex International, Ltd. ("Tietex"), pursuant to South Carolina Rule of Civil Procedure 26(c), and requests that the Court enter a Protective Order precluding Plaintiff from continuing the deposition of a Tietex representative, Wade Wallace, who has been deposed on two separate occasions for twelve (12) hours on the same issues. Tietex shows as follows in support of its motion:

1. Plaintiff Gary G. Harris ("Harris") originally filed a lawsuit against Tietex in this Court on August 15, 2008—C.A. No. 2008-CP-42-4316 ("First Action").

2. Harris asserted claims against Tietex in the First Action alleging (1) violation of the Age Discrimination in Employment Act ("ADEA"), (2) breach of contract, (3) breach of contract accompanied by a fraudulent act, and (4) defamation.

3. All of Harris' claims in the First Action concerned his employment with Tietex and his separation therefrom.

4. Tietex removed the First Action to the United States District Court for the District of South Carolina based on Harris' assertion of the federal ADEA claim.

5. Both parties engaged in thorough discovery in the First Action upon removal to federal court, including Harris taking the deposition of Tietex Representative Wade Wallace on December 23, 2009, for four (4) hours.

6. After the completion of discovery in federal court, Tietex moved for summary judgment with respect to all of Harris' claims.

7. On October 28, 2010, the Federal Court granted Tietex's motion on Harris' ADEA claims and chose not to address Harris' remaining state law claims, dismissing them without prejudice.

8. Harris filed a *pro se* Complaint in the present action ("Second Action") on October 21, 2011, relying on the same factual allegations he made in the First Action.

9. Harris amended his Complaint in the Second Action. The Amended Complaint alleges identical claims as those alleged in the First Action (except his ADEA claim) and adds a new claim for intentional infliction of emotional distress.

10. Identical to the First Action, all of Harris' claims in the Second Action arise from his employment with Tietex and his separation therefrom.

11. Notwithstanding that Harris has already taken Mr. Wallace's deposition in the First Action for four (4) hours on the same facts on which Harris now relies in the Second Action, and that Harris deposed Wallace for eight (8) hours on Wednesday, June 12, Harris wants to continue to depose Wallace for an indefinite period of time without limitation.

12. Rule 26(c), SCRCP, permits the Court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including . . . (1) that the discovery not be had."

13. Tietex requests that the Court exercise its power under Rule 26(c) and enter a Protective Order prohibiting Harris from continuing to depose Mr. Wallace. There is nothing on the face of the Amended Complaint in the Second Action suggesting that Mr. Wallace would have discoverable information not already provided in his four (4)-hour deposition in the First Action or his eight (8)-hour deposition on Wednesday, June 12.

WHEREFORE, Tietex requests that the Court enter a Protective Order directing that Mr. Wallace's deposition noticed for June 12, 2013, be deemed complete and prohibiting Harris from continuing to depose Mr. Wallace.

Dated this 13th day of June, 2013.

Respectfully submitted,

By: Fred W. Suggs, Jr.
Fred W. Suggs, Jr. (SC Bar # 5423)

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street (29601)
Post Office Box 2757
Greenville, South Carolina 29602
Telephone: (864) 271-1300
Facsimile: (864) 235-4754
Email: Fred.Suggs@ODNSS.com

Attorneys for Defendant Tietex International, Ltd.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2013, a true and correct copy of the above **DEFENDANT TIETEX'S MOTION FOR PROTECTIVE ORDER PROHIBITING OR LIMITING ANY FURTHER DEPOSITION OF TIETEX'S EXECUTIVE VICE PRESIDENT WADE WALLACE** was served by fax, e-mail, and U.S. Mail, postage prepaid, upon Plaintiff at the following address:

D. Alan Lazenby, Esq.
R. Patrick Martin
Lazenby Law Firm, LLC
P.O. Box 6099
Spartanburg, SC 29304

By: Fred W. Suggs, Jr.
Fred W. Suggs, Jr. (SC Bar # 5423)

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street (29601)
Post Office Box 2757
Greenville, South Carolina 29602
Telephone: (864) 271-1300
Facsimile: (864) 235-4754
Email: Fred.Suggs@ODNSS.com

Attorneys for Defendant Tietex International, Ltd.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-42-4538

Gary G. Harris — PLAINTIFF(S)

Tietex International, Ltd. — DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : The Plaintiff may continue the deposition of Tietex Representative Wade Wallace for four (4) more hours on the date scheduled. If four (4) hours is not sufficient then the Plaintiff may petition the Court for an extension of time in which he must specifically set forth the information he wishes to cover. The parties conferred with Judge Couch via a telephone conversation June 13, 2013 at 1:45 pm by agreement of counsel.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Alan Lazenby
PO Box 6099
Spartanburg, SC 29304
ATTORNEY(S) FOR THE PLAINTIFF(S)

Fred Suggs
300 North Main Street, Suite 500
Greenville, SC 29602
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	CASE NO.: 2011-CP-42-4538
	)	
Gary G. Harris	)	**MOTION AND ORDER INFORMATION**
Plaintiff,	)	**FORM AND COVERSHEET**
vs.	)	
	)	
Tietex International, Ltd.	)	
Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
D. Alan Lazenby, Bar No. _____	Fred W. Suggs, Jr., Bar No. 5423
Address:	Address:
P.O. Box 6099, Spartanburg, SC 29304	300 N. Main St., Ste. 500, Greenville, SC 29601
Phone: 864-804-5050 Fax 864-804-5051	Phone: 864-271-1300 Fax 864-235-4754
E-mail: alan@lazenbylawfirm.com Other: _____	E-mail: fred.suggs@odnss.com Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Stay Discovery Pending Ruling on Defendant's Motion for Summary Judgment

Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ July 2, 2013
Signature of Attorney for ☐ Plaintiff /☒ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other: _____	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION TO STAY DISCOVERY PENDING RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant Tietex International, Ltd. ("Tietex"), and requests that the Court enter an Order staying further discovery in this action pending a ruling on Tietex's Motion for Summary Judgment. Tietex shows as follows in support of its motion:

1. Plaintiff Gary G. Harris ("Harris") originally filed a lawsuit against Tietex in this Court on August 15, 2008—C.A. No. 2008-CP-42-4316 ("First Action").

2. Harris asserted claims against Tietex in the First Action alleging (1) violation of the Age Discrimination in Employment Act ("ADEA"), (2) breach of contract, (3) breach of contract accompanied by a fraudulent act, and (4) defamation.

3. All of Harris' claims in the First Action concerned his employment with Tietex and his separation therefrom.

4. Tietex removed the First Action to the United States District Court for the District of South Carolina based on Harris' assertion of the federal ADEA claim.

5. Both parties engaged in thorough discovery in the First Action upon removal to federal court.

6. After the completion of discovery in federal court, Tietex moved for summary judgment with respect to all of Harris' claims.

7. On October 28, 2010, the Federal Court granted Tietex's motion on Harris' ADEA claims and chose not to address Harris' remaining state law claims, dismissing them without prejudice.

8. On May 26, 2011, the United States Court of Appeals for the Fourth Circuit affirmed the award of summary judgment in Tietex's favor.

9. On October 21, 2011, Harris filed a *pro se* Complaint in the present action ("Second Action"), relying on the same factual allegations he made in the First Action.

10. On March 8, 2012, Harris's current counsel entered his appearance.

11. On August 10, 2012, the Court granted Harris's motion to amend his Complaint.

12. On September 5, 2012, Harris amended his Complaint in the Second Action. The Amended Complaint alleges identical claims as those alleged in the First Action (except his ADEA claim) and adds a new claim for intentional infliction of emotional distress.

13. Identical to the First Action, all of Harris' claims in the Second Action arise from his employment with Tietex and his separation therefrom.

14. On January 11, 2013, Tietex moved for a protective order prohibiting Harris from taking the deposition of a Tietex representative (Wade Wallace) whom Harris had already deposed in the First Action.

15. On January 14, 2013, Harris moved for a protective order prohibiting Tietex from taking Harris' deposition in the Second Action.

16. On February 4, 2013, The Honorable J. Derham Cole held a hearing on the cross motions for protective orders and denied both motions. Judge Cole specifically directed both parties not to "re-plow the same ground" as was covered in the depositions in the First Action.

17. On March 14, 2013, Tietex took Harris' deposition in the Second Action, focusing the examination on whether Harris possessed any new evidence to support his claims. Harris' testimony made clear that the Second Action is nothing more than an attempt to re-litigate the same issues on which the Federal Court already ruled in the First Action, under the guise of state law claims rather than the federal ADEA claim.

18. On May 1, 2013, Tietex filed its Motion for Summary Judgment in the Second Action. Tietex's Motion for Summary Judgment relies heavily on the doctrine of collateral estoppel, as the Federal Court has already reached and issued clear conclusions of fact and law regarding the very issues that Harris is attempting to re-litigate in the Second Action.

19. On June 12, 2013, Harris took Mr. Wallace's deposition in the Second Action for eight (8) hours and left the deposition open. Notwithstanding Judge Cole's directions at the hearing on February 4, 2013, the entire eight (8) hours of examination consisted of "re-plowing the same ground" as Mr. Wallace's deposition in the First Action.

20. On June 13, 2013, Tietex moved for a protective order prohibiting Harris from continuing Mr. Wallace's deposition in the Second Action. The Honorable Roger L. Couch entered an Order on the same day in which he limited the continuation of Mr. Wallace's deposition to a maximum of four (4) additional hours.

21. On June 25, 2013, Harris completed Mr. Wallace's deposition in the Second Action, continuing to "re-plow the same ground" that was already covered in Mr. Wallace's deposition in the First Action.

22. After completing Mr. Wallace's deposition, Harris' counsel stated his intent to depose at least six additional individuals, purportedly as fact witnesses: (a) Martin Wildeman, Tietex's owner; (b) Reed Cunningham, Tietex's President; (c) David Wilson, Tietex's former Human Resources Director; (d) Timothy Mark Isbell, Tietex's former Vice President of Manufacturing; (e) Patricia Guzman, a former Tietex employee who absorbed portions of Harris' duties after his separation; and (f) George Henderson, an individual who was deposed in the First Action. Harris's counsel has already issued subpoenas to Mr. Isbell, Ms. Guzman, and Mr. Henderson for depositions to take place on August 1-2, 2013.

23. None of the witnesses Harris intends to depose can alter the undisputed facts on which Tietex relies in support of its Motion for Summary Judgment. Nearly all of the facts on which Tietex relies in its Motion for Summary Judgment come directly from the Federal Court's factual findings in the First Action (and are quoted verbatim from the Federal Court's Orders). All of these facts are conclusively determined and indisputable under the doctrine of collateral estoppel. *See Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). The limited facts that do not come from the Federal Court's factual findings come directly from Harris' testimony and are equally indisputable.

24. Rather than unnecessarily waste the time and resources of the parties and numerous third-party witnesses that Harris intends to depose, Tietex seeks an Order staying further discovery pending a ruling on its Motion for Summary Judgment.

25. Rule 26(c), SCRCP, permits the Court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense."

WHEREFORE, Tietex requests that the Court enter an Order quashing the deposition subpoenas that Harris has already served, staying any further discovery pending a ruling on Tietex's Motion for Summary Judgment, and awarding any additional relief the court deems just and proper.

Dated this 2nd day of July, 2013.

Respectfully submitted,

By: _____
Fred W. Suggs, Jr. (SC Bar # 5423)
Lucas J. Asper (SC Bar # 77902)

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street (29601)
Post Office Box 2757
Greenville, South Carolina 29602
Telephone: (864) 271-1300
Facsimile: (864) 235-4754
Fred.Suggs@ODNSS.com
Lucas.Asper@ODNSS.com

Attorneys for Defendant Tietex International, Ltd.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of July, 2013, a true and correct copy of the above **DEFENDANT'S MOTION TO STAY DISCOVERY PENDING RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** was served by U.S. Mail, postage prepaid, upon Plaintiff at the following address:

D. Alan Lazenby, Esq.
R. Patrick Martin
Lazenby Law Firm, LLC
P.O. Box 6099
Spartanburg, SC 29304

By: _____
Fred W. Suggs, Jr. (SC Bar # 5423)

15396955.1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM SUPPORTING DEFENDANT'S MOTION TO STAY DISCOVERY PENDING RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, SUPPORTING DEFENDANT'S MOTION FOR PROTECTIVE ORDER, AND OPPOSING PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF WITNESSES

COMES NOW Defendant Tietex International, Ltd. ("Tietex"), and submits this memorandum (1) in support of its Motion to Stay Discovery Pending Ruling on Defendant's Motion for Summary Judgment ("Motion to Stay"), (2) in support of its Motion for Protective Order, and (3) in opposition to Plaintiff Gary G. Harris's ("Harris") Motion to Compel Production of Witnesses ("Motion to Compel").

On July 2, 2013, Tietex filed its Motion to Stay because none of the six (6) individuals Harris intends to depose can change the indisputable and conclusive findings of fact the Federal Court has already issued in nearly identical litigation between Harris and Tietex. The Federal Court's Orders preclude the existence of any genuine dispute of material fact in this matter, as an application of the Federal Court's findings to Harris's state law claims in this action makes clear that Harris' claims fail as a matter of law. Tietex's Motion to Stay should be granted to prevent the parties and third-party witnesses from incurring the unnecessary expense and burden associated with Harris's six (6) proposed depositions.

Should the Court grant Tietex's Motion to Stay, Tietex's Motion for Protective Order and Harris's Motion to Compel would become moot. If the Court denies Tietex's Motion to Stay, the Court should grant Tietex's Motion for Protective Order and deny Harris's Motion to Compel in accordance with the apex doctrine. Harris seeks permission to depose Tietex's Owner (Martin Wildeman) and President (Reed Cunningham). However, neither Mr. Wildeman nor Mr. Cunningham possesses any unique or superior personal knowledge of discoverable information. Accordingly, Harris should be prohibited from taking the depositions of Tietex's Owner and President and should be ordered to obtain the discovery he seeks through less intrusive methods. Alternatively, the duration of Mr. Wildeman's and Mr. Cunningham's depositions should be expressly limited to no more than 2 hours to ensure that Harris does not harass, annoy, or unduly burden Mr. Wildeman and Mr. Cunningham through an unnecessarily lengthy deposition.

A. Factual and Procedural Background.

Harris originally filed a lawsuit against Tietex in this Court on August 15, 2008—C.A. No. 2008-CP-42-4316 ("First Action"). Harris asserted claims against Tietex in the First Action alleging (1) violation of the Age Discrimination in Employment Act ("ADEA"), (2) breach of contract, (3) breach of contract accompanied by a fraudulent act, and (4) defamation. All of Harris' claims in the First Action concerned his employment with Tietex and his separation therefrom.

Tietex removed the First Action to the United States District Court for the District of South Carolina based on Harris' assertion of the federal ADEA claim. Both parties engaged in thorough discovery in the First Action upon removal to federal court. After the completion of discovery in federal court, Tietex moved for summary judgment with respect to all of Harris' claims. On October 28, 2010, the Federal Court granted Tietex's motion on Harris' ADEA

claims and chose not to address Harris' remaining state law claims, dismissing them without prejudice. On May 26, 2011, the United States Court of Appeals for the Fourth Circuit affirmed the award of summary judgment in Tietex's favor. On July 26, 2011, the Fourth Circuit denied Harris's petition for rehearing of his appeal.

On October 21, 2011, Harris filed a pro se Complaint in the present action ("Second Action"), relying on the same factual allegations he made in the First Action. On March 8, 2012, Harris's current counsel entered his appearance. On August 10, 2012, the Court granted Harris's motion to amend his Complaint. On September 5, 2012, Harris amended his Complaint in the Second Action. The Amended Complaint alleges identical claims as those alleged in the First Action (except his ADEA claim) and adds a new claim for intentional infliction of emotional distress. Identical to the First Action, all of Harris' claims in the Second Action arise from his employment with Tietex and his separation therefrom.

On January 11, 2013, Tietex moved for a protective order prohibiting Harris from taking the deposition of a Tietex representative (Executive Vice President Wade Wallace) whom Harris had already deposed in the First Action. On January 14, 2013, Harris moved for a protective order prohibiting Tietex from taking Harris' deposition in the Second Action. On February 4, 2013, The Honorable J. Derham Cole held a hearing on the cross motions for protective orders and denied both motions. Judge Cole specifically directed both parties not to "re-plow the same ground" that was covered in the depositions in the First Action.

On March 14, 2013, Tietex deposed Harris in the Second Action, focusing the examination on whether Harris possessed any new evidence to support his claims. Harris' admissions made clear that the Second Action is nothing more than an attempt to re-litigate the

same issues on which the Federal Court already ruled in the First Action, under the guise of state law claims rather than the federal ADEA claim.

On May 1, 2013, Tietex filed its Motion for Summary Judgment in the Second Action. Tietex's Motion for Summary Judgment relies heavily on the doctrine of collateral estoppel, as the Federal Court has already reached and issued clear conclusions of fact and law regarding the very issues that Harris is attempting to re-litigate in the Second Action.

On June 12, 2013, Harris took Executive Vice President Wallace's deposition in the Second Action for eight (8) hours and left the deposition open. Notwithstanding Judge Cole's directions at the hearing on February 4, 2013, the entire eight (8) hours of examination consisted of "re-plowing the same ground" as Mr. Wallace's deposition in the First Action.

On June 13, 2013, Tietex moved for a protective order prohibiting Harris from continuing Mr. Wallace's deposition in the Second Action. The Honorable Roger L. Couch entered an Order on the same day in which he limited the continuation of Mr. Wallace's deposition to a maximum of four (4) additional hours. On June 25, 2013, Harris completed Mr. Wallace's deposition in the Second Action, continuing to "re-plow the same ground" that was already covered in Mr. Wallace's deposition in the First Action.

After completing Mr. Wallace's deposition, Harris' counsel stated his intent to depose at least six additional individuals, purportedly as fact witnesses: (a) Martin Wildeman, Tietex's Owner; (b) Reed Cunningham, Tietex's President; (c) David Wilson, Tietex's former Human Resources Director; (d) Timothy Mark Isbell, Tietex's former Vice President of Manufacturing; (e) Patricia Guzman, a former Tietex employee who absorbed portions of Harris' duties after his separation; and (f) George Henderson, an individual who was deposed in the First Action. Harris's counsel has issued subpoenas to Mr. Isbell, Ms. Guzman, and Mr. Henderson for

depositions to take place on August 1-2, 2013. On July 9, 2013, Harris filed his Motion to Compel the depositions of Mr. Wildeman and Mr. Cunningham. In conjunction with this memorandum, Tietex has filed its Motion for Protective Order and supporting Affidavits seeking to prohibit or expressly limit the depositions of Mr. Wildeman and Mr. Cunningham.

B. Arguments and Authorities.

1. Tietex's Motion to Stay would Promote Judicial Efficiency and Convenience of the Parties and Third-Party Witnesses, as the Court can Rule on Tietex's Motion for Summary Judgment in the Absence of the Depositions Harris Intends to Take.

None of the six witnesses Harris intends to depose can alter the undisputed facts on which Tietex relies in support of its Motion for Summary Judgment. Nearly all of the facts on which Tietex relies in its Motion for Summary Judgment come directly from the Federal Court's factual findings in the First Action and are quoted verbatim from the Federal Court's Orders. All of these facts are conclusively determined and indisputable under the doctrine of collateral estoppel. *See Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). The limited facts that do not come from the Federal Court's factual findings come directly from Harris' sworn depositions and are equally indisputable.

The undisputed and conclusively determined facts on which Tietex relies fully equip the Court to rule upon Tietex's Motion for Summary Judgment. Harris will not be prejudiced by a stay of discovery, as nothing in Harris's proposed discovery can alter the facts that already entitle Tietex to summary judgment. Those facts will remain the same no matter how many depositions Harris takes and no matter how much discovery he conducts. The stay that Tietex seeks would promote judicial efficiency and the convenience of the parties and third-party witnesses that Harris intends to depose. Rather than unnecessarily wasting the time and resources of the parties and numerous third-party witnesses by allowing Harris to continue "re-plowing old ground," Tietex's Motion to Stay should be granted.

2. If the Court Denies Tietex's Motion to Stay, Tietex's Motion for Protective Order Should be Granted and Harris's Motion to Compel Should be Denied under the Apex Doctrine.

Harris's Motion to Compel and Tietex's Motion for Protective Order would both be rendered moot if the Court grants Tietex's Motion to Stay. If the Court denies Tietex's Motion to Stay, the apex doctrine mandates that Tietex's Motion for Protective Order be granted based on Tietex's Owner (Mr. Wildeman) and President (Mr. Cunningham) lacking any unique or superior personal knowledge of discoverable information in this matter.

"The determination of whether to allow the deposition of a high-ranking corporate executive necessarily involves an examination of what some courts have termed the apex deposition rule." *Massachusetts Mutual Life Ins. Co. v. Sanders*, 724 S.E.2d 353, 359 (W. Va. 2012). The rationale for and application of the apex doctrine is stated as follows:

> "Recognizing that the highest positions within a juridical entity rarely have specialized and specific first-hand knowledge of matters at every level of the complex organization, courts have adopted the apex-deposition rule in the corporate context to (1) promote efficiency in the discovery process by requiring that before an apex officer is deposed it must be demonstrated that the officer has superior or unique personal knowledge of facts relevant to the litigation, and (2) prevent the use of depositions to annoy, harass, or unduly burden the parties. Of course, no court has applied the apex-deposition rule to hold that an apex or high-ranking corporate officer cannot be deposed under any circumstances. . . . Rather, courts have applied the rule to ensure that discovery is conducted in an efficient manner and that other methods of discovery have been attempted before the deposition of an apex officer is conducted. Moreover, those cases adopting the apex-deposition rule in the corporate context do not shift the burden of proof, but merely require the party seeking discovery to demonstrate that the proposed deponent has unique personal knowledge of the subject matter of the litigation and that other methods of discovery have not produced the desired information *only after* the party opposing discovery has moved for a protective order and has made a showing regarding the lack of the proposed deponent's personal knowledge and that other discovery methods

> could produce the required information. In other words, after the party opposing the deposition demonstrates by affidavit or other testimony that the proposed deponent lacks personal knowledge or unique or superior information relevant to the claims in issue, then the party seeking the deposition of the high-ranking corporate officer or public official must demonstrate that the relevant information cannot be obtained absent the disputed deposition."

Id. at 359-60 (quoting *Alberto v. Toyota Motor Corp.*, 796 N.W.2d 490, 495 (Mich. Ct. App. 2010) (internal citations omitted).

As Owner and President of Tietex, Mr. Wildeman and Mr. Cunningham are clearly "apex" or "high-ranking" corporate officers. The Affidavits of Mr. Wildeman and Mr. Cunningham demonstrate that neither of them possesses unique or superior personal knowledge of discoverable information related to Harris's claims. Harris's Motion to Compel offers nothing concrete to dispute this fact, as it simply states in a vague and conclusory fashion that Mr. Wildeman and Mr. Cunningham allegedly "have detailed knowledge" regarding this matter. To satisfy the apex doctrine, Harris must come forward with specific information regarding the alleged need for Mr. Wildeman's and Mr. Cunningham's testimony in light of Mr. Wildeman's and Mr. Cunningham's Affidavits, and Harris must show why he cannot obtain the supposed information in the absence of their depositions.

The only discoverable information in Mr. Wildeman's and Mr. Cunningham's possession that relates to Harris's claims involves Wade Wallace and Mark Isbell consulting with them and seeking their approval before terminating Harris's employment. Mr. Wallace has already given 16 hours of deposition testimony in this litigation and the First Action, giving Harris more than ample opportunity to elicit testimony regarding Tietex's reasons for terminating Harris's employment. Thus, the depositions of Mr. Wildeman and Mr. Cunningham would be duplicative and unnecessary with regard to the only discoverable information in their possession.

To the extent Harris is convinced that he somehow needs Mr. Wildeman's and/or Mr. Cunningham's explanation regarding Tietex's reasons for terminating Harris's employment—the only information he can reasonably obtain from them through discovery—Harris can elicit that information through less intrusive means than taking their depositions. For example, Harris can serve interrogatories on Tietex specifically requesting Mr. Wildeman's and/or Mr. Cunningham's explanation regarding Tietex's reason for terminating Harris's employment. This would comport with the rationale for the apex doctrine and protect Mr. Wildeman and Mr. Cunningham from the annoyance, harassment, and undue burden associated with appearing for an unnecessary deposition.

As an alternative to prohibiting the depositions of Mr. Wildeman and Mr. Cunningham in their entirety, the Court should issue an Order expressly limiting the duration of the depositions. Based on Harris doing nothing more than re-plowing old ground during Mr. Wallace's deposition for 12 hours—after a specific direction from Judge Cole not to do so—Tietex is concerned that Harris would similarly attempt to annoy, harass, and subject Mr. Wildeman and Mr. Cunningham to undue burden by stretching their depositions beyond a reasonable time. The extremely limited scope of discoverable information in Mr. Wildeman's and Mr. Cunningham's possession dictates that anything more than 2 hours of deposition testimony would be unreasonable. A 2-hour limit would reduce the probability of Harris engaging in a "fishing expedition" and would further the purpose of Rule 26(c).

C. Conclusion.

Tietex's Motion to Stay should be granted because the undisputed and conclusively determined facts entitle Tietex to summary judgment, and no further discovery can alter those facts. Should the Court deny Tietex's Motion to Stay, Tietex's Motion for Protective Order

should be granted (and Harris's Motion to Compel denied) based on the apex doctrine, with Harris' proposed depositions of Mr. Wildeman and Mr. Cunningham prohibited entirely or limited to a duration of no more than 2 hours.

Dated this 25th day of July, 2013.

Respectfully submitted,

By:_____
Fred W. Suggs, Jr. (SC Bar # 5423)
Lucas J. Asper (SC Bar # 77902)

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street (29601)
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Facsimile: (864) 235-4754
Fred.Suggs@ODNSS.com
Lucas.Asper@ODNSS.com

Attorneys for Defendant Tietex International, Ltd.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 2013, a true and correct copy of the above **MEMORANDUM SUPPORTING DEFENDANT'S MOTION TO STAY DISCOVERY PENDING RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, SUPPORTING DEFENDANT'S MOTION FOR PROTECTIVE ORDER, AND OPPOSING PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF WITNESSES** was served by U.S. Mail, postage prepaid, upon Plaintiff at the following address:

D. Alan Lazenby, Esq.
R. Patrick Martin
Lazenby Law Firm, LLC
P.O. Box 6099
Spartanburg, SC 29304

By: _____
Lucas J. Asper

15527423.1

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Gary G. Harris Plaintiff, vs. Tietex International, Ltd. Defendant.	)	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT CASE NO.: 2011-CP-42-4538 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney:	Defendant's Attorney:
D. Alan Lazenby, Esq., Bar No. ____ Address: P.O. Box 6099 Spartanburg, SC 29304 Phone: 864-804-5050 Fax 864-804-5051 E-mail: alan@lazenbylawfirm.comOther: ____	Lucas J. Asper, Bar No. 77902 Address: Ogletree, Deakins, Nash, Smoak & Stewart, P.C. 300 N. Main St., Ste. 50 Greenville, SC 29601 Phone: 864-271-1300 Fax864-235-4754 E-mail: lucas.asper@odnss.comOther: ____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Protective Order
Estimated Time Needed: 15 Minutes Court Reporter Needed: ☒YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff /☒ Defendant — July 25, 2013 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION FOR PROTECTIVE ORDER

COMES NOW Defendant Tietex International, Ltd. ("Tietex"), and requests that the Court enter a Protective Order prohibiting or expressly limiting Plaintiff Gary G. Harris' ("Harris") proposed depositions of Tietex's Owner (Martin Wildeman) and President (Reed Cunningham). Harris' Motion to Compel Production of Witnesses seeks an order compelling Tietex to produce Mr. Wildeman and Mr. Cunningham for depositions. However, Mr. Wildeman and Mr. Cunningham do not possess any unique or superior personal knowledge of discoverable information in this matter. Harris should be required to obtain the discovery he seeks through less intrusive methods in accordance with the apex doctrine. Alternatively, Harris' depositions of Mr. Wildeman and Mr. Cunningham should be limited to no more than two hours each based on their lack of unique or superior personal knowledge of discoverable information.

Tietex's Motion for Protective Order is supported by the pleadings on file (specifically including its Motion to Stay Discovery Pending Ruling on Defendant's Motion for Summary Judgment), the Memorandum in support of this Motion that is filed contemporaneously, and the Affidavits of Martin Wildeman and Reed Cunningham that are attached.

WHEREFORE, Tietex requests an Order prohibiting or expressly limiting Harris' proposed depositions of Mr. Wildeman and Mr. Cunningham.

Dated this 25th day of July, 2013.

Respectfully submitted,

By:_____
Fred W. Suggs, Jr. (SC Bar # 5423)
Lucas J. Asper (SC Bar # 77902)

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street (29601)
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Greenville, South Carolina 29602
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Fred.Suggs@ODNSS.com
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Attorneys for Defendant Tietex International, Ltd.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

AFFIDAVIT OF MARTIN WILDEMAN

1. I, Martin Wildeman, am of majority age, competent to testify, and make this Affidavit based on personal knowledge of facts I know to be true and correct.

2. I am the Owner of Tietex International, Ltd.

3. I do not have any unique or superior personal knowledge regarding the claims in this matter.

4. I know about the claims in this matter that involve Wade Wallace and Mark Isbell consulting with me and Reed Cunningham, seeking our approval before terminating Gary Harris's employment.

5. I approved the termination of Mr. Harris's employment based on the information that Mr. Wallace provided to me, not based on my own personal knowledge.

6. I did not supervise Mr. Harris or make any employment-related decisions with respect to Mr. Harris other than approving the termination of his employment.

7. I have read the above statement and declare under penalty of perjury that the foregoing is true and correct.

Martin Wildeman

Sworn to and subscribed before me
This 23 day of July, 2013

Notary Public for South Carolina
My Commission Expires: MY COMMISSION EXPIRES MARCH 19, 2020

15530734.1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

AFFIDAVIT OF REED CUNNINGHAM

1. I, Reed Cunningham, am of majority age, competent to testify, and make this Affidavit based on personal knowledge of facts I know to be true and correct.

2. I am the President of Tietex International, Ltd.

3. I do not have any unique or superior personal knowledge about the claims in this matter.

4. I know about the claims in this matter that involve Wade Wallace and Mark Isbell consulting with me and Martin Wildeman, seeking our approval before terminating Gary Harris's employment.

5. I approved the termination of Mr. Harris's employment based on the information that Mr. Wallace provided to me, not based on my own personal knowledge.

6. I did not supervise Mr. Harris or make any employment-related decisions with respect to Mr. Harris other than approving the termination of his employment.

7. I have read the above statement and declare under penalty of perjury that the foregoing is true and correct.

Reed Cunningham

Sworn to and subscribed before me
This 24 day of July, 2013

Notary Public for South Carolina
My Commission Expires: MY COMMISSION EXPIRES MARCH 19, 2020

15531561.1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 2013, a true and correct copy of the above **DEFENDANT'S MOTION FOR PROTECTIVE ORDER** was served by U.S. Mail, postage prepaid, upon Plaintiff at the following address:

D. Alan Lazenby, Esq.
R. Patrick Martin
Lazenby Law Firm, LLC
P.O. Box 6099
Spartanburg, SC 29304

By: _____
Lucas J. Asper

15511399.1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM SUPPORTING DEFENDANT'S MOTION TO STAY DISCOVERY PENDING RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, SUPPORTING DEFENDANT'S MOTION FOR PROTECTIVE ORDER, AND OPPOSING PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF WITNESSES

COMES NOW Defendant Tietex International, Ltd. ("Tietex"), and submits this memorandum (1) in support of its Motion to Stay Discovery Pending Ruling on Defendant's Motion for Summary Judgment ("Motion to Stay"), (2) in support of its Motion for Protective Order, and (3) in opposition to Plaintiff Gary G. Harris's ("Harris") Motion to Compel Production of Witnesses ("Motion to Compel").

On July 2, 2013, Tietex filed its Motion to Stay because none of the six (6) individuals Harris intends to depose can change the indisputable and conclusive findings of fact the Federal Court has already issued in nearly identical litigation between Harris and Tietex. The Federal Court's Orders preclude the existence of any genuine dispute of material fact in this matter, as an application of the Federal Court's findings to Harris's state law claims in this action makes clear that Harris' claims fail as a matter of law. Tietex's Motion to Stay should be granted to prevent the parties and third-party witnesses from incurring the unnecessary expense and burden associated with Harris's six (6) proposed depositions.

Should the Court grant Tietex's Motion to Stay, Tietex's Motion for Protective Order and Harris's Motion to Compel would become moot. If the Court denies Tietex's Motion to Stay, the Court should grant Tietex's Motion for Protective Order and deny Harris's Motion to Compel in accordance with the apex doctrine. Harris seeks permission to depose Tietex's Owner (Martin Wildeman) and President (Reed Cunningham). However, neither Mr. Wildeman nor Mr. Cunningham possesses any unique or superior personal knowledge of discoverable information. Accordingly, Harris should be prohibited from taking the depositions of Tietex's Owner and President and should be ordered to obtain the discovery he seeks through less intrusive methods. Alternatively, the duration of Mr. Wildeman's and Mr. Cunningham's depositions should be expressly limited to no more than 2 hours to ensure that Harris does not harass, annoy, or unduly burden Mr. Wildeman and Mr. Cunningham through an unnecessarily lengthy deposition.

A. Factual and Procedural Background.

Harris originally filed a lawsuit against Tietex in this Court on August 15, 2008—C.A. No. 2008-CP-42-4316 ("First Action"). Harris asserted claims against Tietex in the First Action alleging (1) violation of the Age Discrimination in Employment Act ("ADEA"), (2) breach of contract, (3) breach of contract accompanied by a fraudulent act, and (4) defamation. All of Harris' claims in the First Action concerned his employment with Tietex and his separation therefrom.

Tietex removed the First Action to the United States District Court for the District of South Carolina based on Harris' assertion of the federal ADEA claim. Both parties engaged in thorough discovery in the First Action upon removal to federal court. After the completion of discovery in federal court, Tietex moved for summary judgment with respect to all of Harris' claims. On October 28, 2010, the Federal Court granted Tietex's motion on Harris' ADEA

claims and chose not to address Harris' remaining state law claims, dismissing them without prejudice. On May 26, 2011, the United States Court of Appeals for the Fourth Circuit affirmed the award of summary judgment in Tietex's favor. On July 26, 2011, the Fourth Circuit denied Harris's petition for rehearing of his appeal.

On October 21, 2011, Harris filed a pro se Complaint in the present action ("Second Action"), relying on the same factual allegations he made in the First Action. On March 8, 2012, Harris's current counsel entered his appearance. On August 10, 2012, the Court granted Harris's motion to amend his Complaint. On September 5, 2012, Harris amended his Complaint in the Second Action. The Amended Complaint alleges identical claims as those alleged in the First Action (except his ADEA claim) and adds a new claim for intentional infliction of emotional distress. Identical to the First Action, all of Harris' claims in the Second Action arise from his employment with Tietex and his separation therefrom.

On January 11, 2013, Tietex moved for a protective order prohibiting Harris from taking the deposition of a Tietex representative (Executive Vice President Wade Wallace) whom Harris had already deposed in the First Action. On January 14, 2013, Harris moved for a protective order prohibiting Tietex from taking Harris' deposition in the Second Action. On February 4, 2013, The Honorable J. Derham Cole held a hearing on the cross motions for protective orders and denied both motions. Judge Cole specifically directed both parties not to "re-plow the same ground" that was covered in the depositions in the First Action.

On March 14, 2013, Tietex deposed Harris in the Second Action, focusing the examination on whether Harris possessed any new evidence to support his claims. Harris' admissions made clear that the Second Action is nothing more than an attempt to re-litigate the

same issues on which the Federal Court already ruled in the First Action, under the guise of state law claims rather than the federal ADEA claim.

On May 1, 2013, Tietex filed its Motion for Summary Judgment in the Second Action. Tietex's Motion for Summary Judgment relies heavily on the doctrine of collateral estoppel, as the Federal Court has already reached and issued clear conclusions of fact and law regarding the very issues that Harris is attempting to re-litigate in the Second Action.

On June 12, 2013, Harris took Executive Vice President Wallace's deposition in the Second Action for eight (8) hours and left the deposition open. Notwithstanding Judge Cole's directions at the hearing on February 4, 2013, the entire eight (8) hours of examination consisted of "re-plowing the same ground" as Mr. Wallace's deposition in the First Action.

On June 13, 2013, Tietex moved for a protective order prohibiting Harris from continuing Mr. Wallace's deposition in the Second Action. The Honorable Roger L. Couch entered an Order on the same day in which he limited the continuation of Mr. Wallace's deposition to a maximum of four (4) additional hours. On June 25, 2013, Harris completed Mr. Wallace's deposition in the Second Action, continuing to "re-plow the same ground" that was already covered in Mr. Wallace's deposition in the First Action.

After completing Mr. Wallace's deposition, Harris' counsel stated his intent to depose at least six additional individuals, purportedly as fact witnesses: (a) Martin Wildeman, Tietex's Owner; (b) Reed Cunningham, Tietex's President; (c) David Wilson, Tietex's former Human Resources Director; (d) Timothy Mark Isbell, Tietex's former Vice President of Manufacturing; (e) Patricia Guzman, a former Tietex employee who absorbed portions of Harris' duties after his separation; and (f) George Henderson, an individual who was deposed in the First Action. Harris's counsel has issued subpoenas to Mr. Isbell, Ms. Guzman, and Mr. Henderson for

depositions to take place on August 1-2, 2013. On July 9, 2013, Harris filed his Motion to Compel the depositions of Mr. Wildeman and Mr. Cunningham. In conjunction with this memorandum, Tietex has filed its Motion for Protective Order and supporting Affidavits seeking to prohibit or expressly limit the depositions of Mr. Wildeman and Mr. Cunningham.

B. Arguments and Authorities.

1. Tietex's Motion to Stay would Promote Judicial Efficiency and Convenience of the Parties and Third-Party Witnesses, as the Court can Rule on Tietex's Motion for Summary Judgment in the Absence of the Depositions Harris Intends to Take.

None of the six witnesses Harris intends to depose can alter the undisputed facts on which Tietex relies in support of its Motion for Summary Judgment. Nearly all of the facts on which Tietex relies in its Motion for Summary Judgment come directly from the Federal Court's factual findings in the First Action and are quoted verbatim from the Federal Court's Orders. All of these facts are conclusively determined and indisputable under the doctrine of collateral estoppel. *See Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). The limited facts that do not come from the Federal Court's factual findings come directly from Harris' sworn depositions and are equally indisputable.

The undisputed and conclusively determined facts on which Tietex relies fully equip the Court to rule upon Tietex's Motion for Summary Judgment. Harris will not be prejudiced by a stay of discovery, as nothing in Harris's proposed discovery can alter the facts that already entitle Tietex to summary judgment. Those facts will remain the same no matter how many depositions Harris takes and no matter how much discovery he conducts. The stay that Tietex seeks would promote judicial efficiency and the convenience of the parties and third-party witnesses that Harris intends to depose. Rather than unnecessarily wasting the time and resources of the parties and numerous third-party witnesses by allowing Harris to continue "re-plowing old ground," Tietex's Motion to Stay should be granted.

2. If the Court Denies Tietex's Motion to Stay, Tietex's Motion for Protective Order Should be Granted and Harris's Motion to Compel Should be Denied under the Apex Doctrine.

Harris's Motion to Compel and Tietex's Motion for Protective Order would both be rendered moot if the Court grants Tietex's Motion to Stay. If the Court denies Tietex's Motion to Stay, the apex doctrine mandates that Tietex's Motion for Protective Order be granted based on Tietex's Owner (Mr. Wildeman) and President (Mr. Cunningham) lacking any unique or superior personal knowledge of discoverable information in this matter.

"The determination of whether to allow the deposition of a high-ranking corporate executive necessarily involves an examination of what some courts have termed the apex deposition rule." *Massachusetts Mutual Life Ins. Co. v. Sanders*, 724 S.E.2d 353, 359 (W. Va. 2012). The rationale for and application of the apex doctrine is stated as follows:

> "Recognizing that the highest positions within a juridical entity rarely have specialized and specific first-hand knowledge of matters at every level of the complex organization, courts have adopted the apex-deposition rule in the corporate context to (1) promote efficiency in the discovery process by requiring that before an apex officer is deposed it must be demonstrated that the officer has superior or unique personal knowledge of facts relevant to the litigation, and (2) prevent the use of depositions to annoy, harass, or unduly burden the parties. Of course, no court has applied the apex-deposition rule to hold that an apex or high-ranking corporate officer cannot be deposed under any circumstances. . . . Rather, courts have applied the rule to ensure that discovery is conducted in an efficient manner and that other methods of discovery have been attempted before the deposition of an apex officer is conducted. Moreover, those cases adopting the apex-deposition rule in the corporate context do not shift the burden of proof, but merely require the party seeking discovery to demonstrate that the proposed deponent has unique personal knowledge of the subject matter of the litigation and that other methods of discovery have not produced the desired information *only after* the party opposing discovery has moved for a protective order and has made a showing regarding the lack of the proposed deponent's personal knowledge and that other discovery methods

> could produce the required information. In other words, after the party opposing the deposition demonstrates by affidavit or other testimony that the proposed deponent lacks personal knowledge or unique or superior information relevant to the claims in issue, then the party seeking the deposition of the high-ranking corporate officer or public official must demonstrate that the relevant information cannot be obtained absent the disputed deposition."

Id. at 359-60 (quoting *Alberto v. Toyota Motor Corp.*, 796 N.W.2d 490, 495 (Mich. Ct. App. 2010) (internal citations omitted).

As Owner and President of Tietex, Mr. Wildeman and Mr. Cunningham are clearly "apex" or "high-ranking" corporate officers. The Affidavits of Mr. Wildeman and Mr. Cunningham demonstrate that neither of them possesses unique or superior personal knowledge of discoverable information related to Harris's claims. Harris's Motion to Compel offers nothing concrete to dispute this fact, as it simply states in a vague and conclusory fashion that Mr. Wildeman and Mr. Cunningham allegedly "have detailed knowledge" regarding this matter. To satisfy the apex doctrine, Harris must come forward with specific information regarding the alleged need for Mr. Wildeman's and Mr. Cunningham's testimony in light of Mr. Wildeman's and Mr. Cunningham's Affidavits, and Harris must show why he cannot obtain the supposed information in the absence of their depositions.

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As an alternative to prohibiting the depositions of Mr. Wildeman and Mr. Cunningham in their entirety, the Court should issue an Order expressly limiting the duration of the depositions. Based on Harris doing nothing more than re-plowing old ground during Mr. Wallace's deposition for 12 hours—after a specific direction from Judge Cole not to do so—Tietex is concerned that Harris would similarly attempt to annoy, harass, and subject Mr. Wildeman and Mr. Cunningham to undue burden by stretching their depositions beyond a reasonable time. The extremely limited scope of discoverable information in Mr. Wildeman's and Mr. Cunningham's possession dictates that anything more than 2 hours of deposition testimony would be unreasonable. A 2-hour limit would reduce the probability of Harris engaging in a "fishing expedition" and would further the purpose of Rule 26(c).

C. Conclusion.

Tietex's Motion to Stay should be granted because the undisputed and conclusively determined facts entitle Tietex to summary judgment, and no further discovery can alter those facts. Should the Court deny Tietex's Motion to Stay, Tietex's Motion for Protective Order

should be granted (and Harris's Motion to Compel denied) based on the apex doctrine, with Harris' proposed depositions of Mr. Wildeman and Mr. Cunningham prohibited entirely or limited to a duration of no more than 2 hours.

Dated this 25th day of July, 2013.

Respectfully submitted,

By: _____
Fred W. Suggs, Jr. (SC Bar # 5423)
Lucas J. Asper (SC Bar # 77902)

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Attorneys for Defendant Tietex International, Ltd.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 2013, a true and correct copy of the above **MEMORANDUM SUPPORTING DEFENDANT'S MOTION TO STAY DISCOVERY PENDING RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, SUPPORTING DEFENDANT'S MOTION FOR PROTECTIVE ORDER, AND OPPOSING PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF WITNESSES** was served by U.S. Mail, postage prepaid, upon Plaintiff at the following address:

D. Alan Lazenby, Esq.
R. Patrick Martin
Lazenby Law Firm, LLC
P.O. Box 6099
Spartanburg, SC 29304

By: _____
Lucas J. Asper

15527423.1

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris	)	CASE NO.
☒ Plaintiff	)	2011-CP-42-4538
	)	
v.	)	MOTION AND ORDER INFORMATION
	)	FORM AND COVER SHEET
Tietex International, Ltd.	)	
☐ Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
D. Alan Lazenby, Bar No. 13906	Fred W. Suggs, Jr, Bar No. 5423
Address:	Address:
PO Box 6099, Spartanburg, SC 29304	300 North Main St., Suite 500, Greenville SC 29601
phone: 864-804-5050 fax: 864-804-5051	phone: 864-271-1300 fax: 864-235-4754
e-mail: alan@lazenbylawfirm.com other:	e-mail: fred.suggs@odnss.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Compel
Estimated Time Needed:15 min Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

/s/ Virginia Hopkins

Signature of Attorney for ☒Plaintiff / ☐Defendant

December 23, 2013

Date submitted

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 DEC 27 PM 3:05
JUDE BLACKLEY

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	_____
☐ Other:	JUDGE
	CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

FILED
DEC 21 PM 3:02

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	C.A. No.: 2011-CP-42-4538
Gary G. Harris,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	**MOTION TO COMPEL ENTRY UPON AND**
Tietex International, Ltd.,	)	**INSPECTION OF PREMISES**
	)	
Defendant.	)	
	)	**(PRIORITY MATTER)**

TO: DEFENDANT TIETEX INTERNATIONAL, AND ITS ATTORNEY, FRED SUGGS, JR.:

PLEASE TAKE NOTICE that Plaintiff Gary Harris will move before this Court at such time and place as counsel may be heard for an Order compelling Defendant to allow entry upon and inspection of the premises of Plaintiff's former place of employment pursuant to Rule 34, SCRCP. Plaintiff will show at the motion hearing that Defendant has refused to allow Plaintiff access following a proper discovery request. Defendant's actions under the circumstances also perpetuate a pattern of delay in this case, which is subject to be called to trial on or after February 3, 2013.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 DEC 27 PM 3:05
C. HAYE EACKLEY

On November 18, 2013, Plaintiff's counsel wrote to Defendant's counsel and formally requested a site visit to the premises of Plaintiff's former place of employment. Given that time is of the essence in this case, Plaintiff's counsel specifically asked whether a motion would be necessary, or whether Defendant would respond to the request. (Exhibit 1, November 18, 2013 letter from Lazenby to Suggs).

Counsel for Defendant did not object to the request; rather, he inquired about the scope and purpose of the visit. Counsel for Plaintiff clarified that "[o]ur claims involved several

significant events that occurred in the plant and the separate lab area. I need to see Mr. Harris' old office, the lab, and his new office to better understand and prosecute our claims. I also want to see the grounds and the proximity to the highway." (Exhibit 2, November 18, 2013 emails between Suggs and Lazenby). Counsel for Plaintiff also indicated that he would take photographs, which would be kept confidential. (Exhibit 2).

Plaintiff's counsel followed up on the site visit again by email on November 20, 2013. Defendant's counsel responded that he was "waiting to hear." (Exhibit 3, November 20, 2013 emails between Lazenby and Suggs).

On December 12, 2013, Plaintiff's counsel again requested that Tietex advise when it would make the site visit available. Defendant's counsel responded that he would contact Plaintiff's counsel about the site visit the following week. (Exhibit 4, December 12, 2013 emails between Suggs and Lazenby).

On December 17, 2013 – and for the first time since Plaintiff's request almost 30 days earlier – Defendant's counsel stated that he was not "authorized" to arrange the site visit, and stated that Plaintiff's counsel must submit a "formal" request for consideration. (Exhibit 5, December 17, 2013 email from Suggs to Lazenby). Defendant's counsel first took the position on December 23, 2013 that Plaintiff's request was not proper under the rules. (Exhibit 6, December 23, 2013 email from Suggs to Lazenby).

Rule 34 requires that "[t]he request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts." Plaintiff's request plainly complied with this

standard. Further, the rules of civil procedure should be construed to secure the just, speedy, and inexpensive determination of every action. Rule 1, SCRCP.

This Motion is also made pursuant to Rule 37, SCRCP to compel Defendant to cooperate in the discovery process in this litigation. Additionally, this Motion is made upon the grounds that the interest of justice will not be served by requiring Plaintiff serve yet another request for a site visit, and where Defendant will not be prejudiced by the enforcement of the November 18, 2013 request.

By: _____

D. Alan Lazenby, Esq.
Ginger D. Goforth, Esq.

LAZENBY LAW FIRM, LLC
340 E. Main St, Suite 240 (29302)
Post Office Box 6099
Spartanburg, SC 29304
Phone: (864) 804-5050
Fax: (864) 804-5051
Email: alan@lazenbylawfirm.com
Email: ginger@lazenbylawfirm.com

December 23, 2013

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 DEC 27 PM 3:05
H. HOPE BLACKLEY

20:8 AM 12 SEP 2001

EXHIBIT 1

Harris v. Tietex International Ltd.
In the Court of Common Pleas for Spartanburg County
C.A. No: 2011-CP-42-4538

LAZENBY LAW FIRM, LLC

ATTORNEYS AT LAW

D. ALAN LAZENBY
GINGER D. GOFORTH

POST OFFICE BOX 6099 (29304)
340 E. MAIN ST., SUITE 240
SPARTANBURG, SC 29302
PHONE: 864-804-5050
FAX: 864-804-5051

November 18, 2013

VIA EMAIL & US MAIL
Fred Suggs, Jr. Esq.
Ogletree Deakins Nash Smoak & Stewart, PC
PO Box 2757
Greenville, SC 29602

Re: ***Harris v. Tietex International Ltd.***
In the Court of Common Pleas for Spartanburg County
C.A. No: 2011-CP-42-4538

Dear Fred:

I would like to conduct a site visit of the Tietex facility as soon as possible. Please let me know whether you will agree to this, or whether I need to file a Motion. Also, please let me know with whom in your office we need to schedule this site visit. I would like access to the entire facility and grounds during this site visit.

Very truly yours,

D. Alan Lazenby
alan@lazenbylawfirm.com

DAL:jeh

EXHIBIT 2

Harris v. Tietex International Ltd.
In the Court of Common Pleas for Spartanburg County
C.A. No: 2011-CP-42-4538

Our claims involve several significant events that occurred in the plant and the separate lab area. I need to see Mr. Harris' old office, the lab, and his new office to better understand and prosecute our claims. I also want to see the grounds and the proximity to the highway. I don't know that I can be any more specific without revealing my mental impressions and my trial strategy. I also want to take photos as I mentioned, and I will agree that all photos will be treated as confidential.

Alan

On Mon, Nov 18, 2013 at 4:28 PM, Suggs, Fred wrote:

> Pls be more specific than "to assist in my prosecution of Mr. Harris' claims."
>
>
>
> *From:* Alan Lazenby [mailto:alan@lazenbylawfirm.com]
> *Sent:* Monday, November 18, 2013 4:27 PM
> *To:* Suggs, Fred
> *Subject:* Re: Harris v. Tictex - Site Visit
>
>
>
> Also, I'd like to take photos for use as trial exhibits.
>
>
>
> Alan
>
>
>
> On Mon, Nov 18, 2013 at 4:22 PM, Suggs, Fred <
> Fred.Suggs@ogletreedeakins.com> wrote:
>
> For what purpose? Do you plan to have anyone accompany you?
>
>
>
> *From:* Jessica Holmen [mailto:jessica@lazenbylawfirm.com]
> *Sent:* Monday, November 18, 2013 4:12 PM

EXHIBIT 3

Harris v. Tietex International Ltd.
In the Court of Common Pleas for Spartanburg County
C.A. No: 2011-CP-42-4538

Gary Harris : Harris v. Tietex : Emails : RE: Harris v. Tietex - Site Visit RE: Harris v. Tietex - Site Visit

From: Suggs, Fred

To: Alan Lazenby

Date: Wednesday, November 20, 2013 3:58 PM

Waiting to hear

From: Alan Lazenby [mailto:alan@lazenbylawfirm.com]
Sent: Wednesday, November 20, 2013 4:23 PM
To: Jessica Holmen
Cc: Suggs, Fred; Suggs, Fred; Childress, Sheri M; Gary Harris
Subject: Re: Harris v. Tietex - Site Visit

Fred,

Please advise whether Tietex will voluntarily agree to our site visit so we can work out any limitations in scope or time or otherwise address any concerns y inclined to agree I shall be forced to file an appropriate motion.

Alan

On Mon, Nov 18, 2013 at 4:11 PM, Jessica Holmen > wrote:
Mr. Suggs,

Please see attached correspondence from Attorney Lazenby.

All the best,
--

Jessica Holmen
Paralegal
Lazenby Law Firm, LLC
P.O. Box 6099 (29304)
340 E Main St, Suite 240
Spartanburg, SC 29302
jessica@lazenbylawfirm.com
Office: 864-804-5050
Fax: 864-804-5051

--

EXHIBIT 4

Harris v. Tietex International Ltd.
In the Court of Common Pleas for Spartanburg County
C.A. No: 2011-CP-42-4538

LAZENBY LAW FIRM, LLC

ATTORNEYS AT LAW

D. ALAN LAZENBY
GINGER D. GOFORTH

POST OFFICE BOX 6099 (29304)
340 E. MAIN ST., SUITE 240
SPARTANBURG, SC 29302
PHONE: 864-804-5050
FAX: 864-804-5051

December 12, 2013

VIA EMAIL & US MAIL
Fred Suggs, Jr. Esq.
Ogletree Deakins Nash Smoak & Stewart, PC
PO Box 2757
Greenville, SC 29602

Re: ***Harris v. Tietex International Ltd.***
In the Court of Common Pleas for Spartanburg County
C.A. No: 2011-CP-42-4538

Dear Fred:

I would like to schedule the depositions of Martin Wildeman and Reed Cunningham. Please provide available dates for these witnesses sometime within the next four (4) weeks. We can have these depositions at my office in Spartanburg or at your office in Greenville. I would like to schedule these depositions on two consecutive days, if possible. I believe I will need no more than one day per witness.

Please also let me hear back from you concerning my request to visit the Tietex facility.

Very truly yours,

D. Alan Lazenby
alan@lazenbylawfirm.com

DAL:jeh
cc: Mr. Gary Harris (via email only)

Gary Harris : Harris v. Tietex : Emails : Re: Harris v. Tietex

Re: Harris v. Tietex

From: Suggs, Fred

To: jessica@lazenbylawfirm.com

Cc: alan@lazenbylawfirm.com, Childress, Sheri M

Date: Thursday, December 12, 2013 3:46 PM

Alan, I am out of my office for the remainder of this week. Next week I will attempt to confer with Tietex representatives then contact you. Fred
Sent from my mobile device (please forgive any typos).

From: Jessica Holmen [mailto:jessica@lazenbylawfirm.com]
Sent: Thursday, December 12, 2013 04:32 PM
To: Suggs, Fred; Suggs, Fred
Cc: Alan Lazenby ; Childress, Sheri M; Gary Harris
Subject: Harris v. Tietex

Mr. Suggs,

Please see attached correspondence from Attorney Lazenby.

All the best,
—

Jessica Holmen
Paralegal
Lazenby Law Firm, LLC
P.O. Box 6099 (29304)
340 E Main St, Suite 240
Spartanburg, SC 29302
jessica@lazenbylawfirm.com
Office: 864-804-5050
Fax: 864-804-5051

This transmission is intended only for the proper recipient(s). It is confidential and may contain attorney-client privileged information. If you are not the the sender immediately and delete this message. Any unauthorized review, copying, or use of this message is prohibited.

Unless expressly stated to the contrary herein, nothing in this message was intended or written to be used, nor may be relied upon or used: (a) to avoid any under the Internal Revenue Code of 1986, as amended, or (b) to recommend or support the promotion or marketing of any federal tax transaction or issue discus

EXHIBIT 5

Harris v. Tietex International Ltd.
In the Court of Common Pleas for Spartanburg County
C.A. No: 2011-CP-42-4538

Gary Harris : Harris v. Tietex : Emails : FW: Harris v. Tietex FW: Harris v. Tietex

From: Suggs, Fred

To: Alan Lazenby (alan@lazenbylawfirm.com)

Date: Tuesday, December 17, 2013 3:50 PM

Depos are set. I am not authorized to make an informal agreement for entry onto Tietex's property. You must make a formal Rule 34 request for the Company's c

From: Suggs, Fred
Sent: Thursday, December 12, 2013 4:46 PM
To: 'jessica@lazenbylawfirm.com'
Cc: 'alan@lazenbylawfirm.com'; Childress, Sheri H
Subject: Re: Harris v. Tietex

Alan, I am out of my office for the remainder of this week. Next week I will attempt to confer with Tietex representatives then contact you. Fred
Sent from my mobile device (please forgive any typos).

From: Jessica Holman [mailto:jessica@lazenbylawfirm.com]
Sent: Thursday, December 12, 2013 04:32 PM
To: Suggs, Fred; Suggs, Fred
Cc: Alan Lazenby >; Childress, Sheri H; Gary Harris >
Subject: Harris v. Tietex

Mr. Suggs,

Please see attached correspondence from Attorney Lazenby.

All the best,
--

Jessica Holman
Paralegal
Lazenby Law Firm, LLC
P.O. Box 6099 (29304)
340 E Main St, Suite 240
Spartanburg, SC 29302
jessica@lazenbylawfirm.com
Office: 864-804-5050
Fax: 864-804-5051

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EXHIBIT 6

Harris v. Tietex International Ltd.
In the Court of Common Pleas for Spartanburg County
C.A. No: 2011-CP-42-4538

Gary Harris : Harris v. Tietex : Emails : RE: FW: Harris v. Tietex RE: FW: Harris v. Tietex

From: Suggs, Fred

To: Alan Lazenby

Date: Monday, December 23, 2013 10:40 AM

I disagree that your informal request is proper under the Rules.

From: Alan Lazenby [mailto:alan@lazenbylawfirm.com]
Sent: Monday, December 23, 2013 11:32 AM
To: Suggs, Fred
Cc: Ginger Goforth
Subject: Re: FW: Harris v. Tietex

Fred,

I served you with written correspondence on November 18, 2013, requesting a site visit. I believe this correspondence complies with Rule 34. We will file a 23 unless we hear back from you agreeing to a date and time for the site visit.

Alan

On Tue, Dec 17, 2013 at 4:49 PM, Suggs, Fred > wrote:
Depos are set. I am not authorized to make an informal agreement for entry onto Tietex's property. You must make a formal Rule 34 request for the Company's c

From: Suggs, Fred
Sent: Thursday, December 12, 2013 4:46 PM
To: 'jessica@lazenbylawfirm.com'
Cc: 'alan@lazenbylawfirm.com'; Childress, Sheri M
Subject: Re: Harris v. Tietex

Alan, I am out of my office for the remainder of this week. Next week I will attempt to confer with Tietex representatives then contact you. Fred
Sent from my mobile device (please forgive any typos).

From: Jessica Holman [mailto:jessica@lazenbylawfirm.com]
Sent: Thursday, December 12, 2013 04:32 PM
To: Suggs, Fred; Suggs, Fred
Cc: Alan Lazenby >; Childress, Sheri M; Gary Harris >
Subject: Harris v. Tietex

Mr. Suggs,

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF Spartanburg	)	
	)	CASE NO.: 2011-CP-42-4538
Gary G. Harris, Plaintiff,	)	**MOTION AND ORDER INFORMATION FORM AND COVERSHEET**
vs.	)	
Tietex International, Ltd., Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
D. Alan Lazenby, Bar No. _____ Address: P. O. Box 6099 Spartanburg, SC 29304 Phone: 864-804-5050Fax 864-804-5051 E-mail: alan@lazenbylawfirm.comOther: _____	Fred W. Suggs, Jr., Bar No. 5423 Address: 300 North Main Street, Suite 500, Greenville, SC 29601 Phone: 864-271-1300 Fax864-235-4754 E-mail: fred.suggs@odnss.comOther: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Defendant's Renewed Motion for Summary Judgment
Estimated Time Needed: 30 min. Court Reporter Needed: ☒YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ 1/23/14
Signature of Attorney for ☐ Plaintiff /☒ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

Defendant Tietex International, Ltd. ("Tietex") submits this Renewed Motion for Summary Judgment under Rule 56, SCRCP. There is not a genuine dispute as to any material fact with respect to Plaintiff Gary G. Harris' ("Harris") claims, and Tietex is entitled to summary judgment. Tietex shows as follows in support of this Motion:

1. When Tietex first moved for summary judgment in this action—relying largely on the doctrine of collateral estoppel—Harris' counsel insisted that Tietex's motion was premature given his alleged inability to complete all of the discovery he needed to prove his case.

2. Judge Frank R. Addy, Jr., denied Tietex's motion and granted Harris permission to take the depositions of two Tietex executives.

3. Harris noticed those depositions; however, on January 14, 2014—two days before they were scheduled to take place—his counsel inexplicably cancelled the depositions and made clear that he would not be taking the depositions before trial.

4. Harris has not engaged in any discovery since Judge Addy denied Tietex's first motion for summary judgment.

5. Because no additional discovery has taken place and the trial of this matter is now imminent, Tietex requests that the Court examine the undisputed facts in the record, which make clear that Harris' claims fail as a matter of law.

6. Harris has never identified any contractual obligation with which Tietex was required to comply when terminating his employment, rendering his contract claims insufficient as a matter of law.

7. Even if Tietex were obligated to provide progressive discipline to Harris—though the record demonstrates no such obligation—Tietex did so by giving Harris two written warnings (the second of which Harris himself characterized as his "final written warning") before terminating his employment.

8. Harris' defamation claims fail because (1) Harris has failed to produce any evidence beyond his own conclusory allegations that the allegedly defamatory statements were false, (2) all of the allegedly defamatory statements were internal memoranda from Harris' supervisor to his own supervisor and Human Resources regarding Harris' performance deficiencies, making the statements subject to a qualified privilege, and (3) Harris has not produced any evidence of actual malice or that Tietex otherwise exceeded the scope of the privilege.

9. To the extent Harris' defamation claims are viewed separately, Harris' defamation claims that he did not raise in his federal lawsuit against Tietex must be dismissed as untimely under the statute of limitations and under the doctrine of *res judicata*.

10. While the statute of limitations on the state law claims asserted in his first lawsuit may have been tolled under 28 U.S.C. § 1367(d), no tolling applies to Harris' defamation claims that he did not assert in his first lawsuit.

11. Tietex is entitled to summary judgment on Harris' outrage claim because Harris has failed to allege (and certainly cannot prove) any facts that would permit his outrage claim to proceed to trial.

12. Harris' outrage claim must be dismissed as untimely under the statute of limitations and under the doctrine of *res judicata*, as Harris did not raise his outrage claim in his federal lawsuit against Tietex and first did so on September 5, 2012—more than five years after any event on which the claim could be based.

13. While the statute of limitations on the state law claims asserted in his first lawsuit may have been tolled under 28 U.S.C. § 1367(d), no tolling applies to Harris' outrage claim that he did not assert in his first lawsuit.

In support of this Motion, Tietex relies upon the pleadings already on file as well as the supporting memorandum (and attachments thereto) Tietex is filing with this Motion.

WHEREFORE, Tietex respectfully asks the Court to dismiss Harris' lawsuit in its entirety and to award such further relief as the Court deems just and proper.

Dated this 3rd day of January, 2014.

Respectfully submitted,

By: _____
Fred W. Suggs, Jr. (SC Bar # 5423)
Lucas J. Asper (SC Bar # 77902)

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street (29601)
Post Office Box 2757
Greenville, South Carolina 29602
Telephone: (864) 271-1300
Facsimile: (864) 235-4754
Email: Fred.Suggs@ODNSS.com
Email: Lucas.Asper@ODNSS.com

Attorneys for Defendant Tietex International, Ltd.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 2014, a true and correct copy of the above **DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT** was served by U.S. Mail, postage prepaid, upon Plaintiff at the following address:

D. Alan Lazenby, Esq.
R. Patrick Martin
Lazenby Law Firm, LLC
P.O. Box 6099
Spartanburg, SC 29304

By: _____
Fred W. Suggs, Jr. (SC Bar # 5423)
Lucas J. Asper (SC Bar # 77902)

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street (29601)
Post Office Box 2757
Greenville, South Carolina 29602
Telephone: (864) 271-1300
Facsimile: (864) 235-4754
Email: Fred.Suggs@ODNSS.com
Email: Lucas.Asper@ODNSS.com

Attorneys for Defendant Tietex International, Ltd.

16930062.1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

Defendant Tietex International, Ltd. ("Tietex") submits this Memorandum in Support of its Renewed Motion for Summary Judgment. There is not a genuine dispute as to any material fact with respect to Plaintiff Gary G. Harris' ("Harris") claims, and Tietex is entitled to summary judgment.

Harris' claims are nothing more than an attempt to get a second bite at the apple, as he already lost his first lawsuit against Tietex in which he alleged that Tietex had discriminated against him on the basis of his age. While the Federal Court in Harris' first lawsuit declined to exercise supplemental jurisdiction over and render a decision on Harris' state law claims, the facts on which Harris relies are identical to those from his unsuccessful lawsuit and are equally deficient in this case.

No Contract Claims

Harris has never identified any contractual obligation with which Tietex was required to comply when terminating his employment, rendering his contract claims insufficient as a matter of law. Even if Tietex were obligated to provide progressive discipline to Harris—though the

record demonstrates no such obligation—Tietex did so by giving Harris two written warnings (the second of which Harris himself characterized as his "final warning") before terminating his employment.

No Defamation Claims

Harris' defamation claims fail because (1) Harris has failed to produce any evidence beyond his own conclusory allegations that the allegedly defamatory statements were false, (2) all of the allegedly defamatory statements were internal memoranda from Harris' supervisor to his own supervisor and Human Resources regarding Harris' performance deficiencies, making the statements subject to a qualified privilege, and (3) Harris has not produced any evidence of actual malice or that Tietex otherwise exceeded the scope of the privilege.

No Outrage Claims

Tietex is entitled to summary judgment on Harris' outrage claim because Harris has failed to allege (and certainly cannot prove) any facts that would permit his outrage claim to proceed to trial. Moreover, Harris' outrage claim must be dismissed as untimely under the statute of limitations and under the doctrine of *res judicata*, as Harris did not raise his outrage claim in his federal lawsuit against Tietex and first did so on September 5, 2012—more than five years after any event on which the claim could be based. While the statute of limitations on the state law claims asserted in his first lawsuit may have been tolled under 28 U.S.C. § 1367(d), no tolling applies to Harris' outrage claim that he did not assert in his first lawsuit.

No Premature Motion

When Tietex first moved for summary judgment in this action—relying largely on the doctrine of collateral estoppel—Harris' counsel insisted that Tietex's motion was premature given his alleged inability to complete all of the discovery he needed to prove his case. Judge

Frank R. Addy, Jr., denied Tietex's motion and granted Harris permission to take the depositions of two Tietex executives. Harris noticed those depositions; however, on January 14, 2014—two days before they were scheduled to take place—his counsel inexplicably cancelled the depositions and made clear that he would not be taking the depositions before trial. Harris has not engaged in any discovery since Judge Addy denied Tietex's first motion for summary judgment. Because no additional discovery has taken place and the trial of this matter is now imminent, Tietex requests that the Court examine the undisputed facts set forth below, which make clear that Harris' claims fail as a matter of law.

I. INTRODUCTION AND STATEMENT OF THE CASE

Harris originally filed a lawsuit against Tietex in this Court on August 15, 2008—C.A. No. 2008-CP-42-4316 ("First Action"). Harris' lawsuit included a claim for violation of the Age Discrimination in Employment Act ("ADEA"), and various state law claims.[1] Tietex removed the First Action to the United States District Court for the District of South Carolina based on Harris's ADEA claim. After both parties engaged in thorough discovery in the First Action, Tietex moved for summary judgment on all of Harris's claims. On October 28, 2010, the Federal Court granted Tietex's motion on Harris's ADEA claims but chose not to address Harris's remaining state law claims, dismissing them without prejudice. The Fourth Circuit Court of Appeals affirmed the District Court's decision.

Harris filed a *pro se* Complaint in the present action ("Second Action") on October 21, 2011. Harris's *pro se* Complaint asserted claims against Tietex for defamation and unspecified

[1] Harris asserted claims against Tietex in the First Action alleging (1) violation of the Age Discrimination in Employment Act ("ADEA"), (2) breach of contract, (3) breach of contract accompanied by a fraudulent act, and (4) defamation (consisting of four separate sub-claims). All of Harris's claims in the First Action arose from allegations regarding his employment with Tietex and his separation therefrom.

discrimination, relying on the same general facts alleged in the First Action.

On March 8, 2012, Harris's current counsel entered his appearance. On August 10, 2012, the Court granted Harris's motion to amend his Complaint. On September 5, 2012, Harris filed his Amended Complaint in the Second Action alleging identical claims to those alleged in the First Action (except his ADEA claim) and adding a new claim for intentional infliction of emotional distress ("outrage") based on the same facts.[2] Identical to the First Action, all of Harris's claims in the Second Action arose from allegations regarding his employment with Tietex and his separation therefrom.

On May 3, 2013, Tietex moved for summary judgment in the second action asserting that (1) Harris' claims were barred as a matter of law based on the conclusive findings by the Federal Court in the First Action; (2) Harris' outrage and three new defamation claims were barred by the statutes of limitation and the doctrine of *res judicata*; and (3) Tietex was entitled to summary judgment on the merits because Harris failed to identify a genuine dispute of material fact as to any of his claims.

On September 23, 2013, Judge Frank R. Addy, Jr., denied Tietex's motion for summary judgment, stating his opinion that the doctrine of collateral estoppel did not apply.[3] Judge Addy did not address Tietex's arguments that Harris' outrage and new defamation claims were barred by the statute of limitations or *res judicata*, and did not rule on the merits.

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[2] In addition to the wholly new claim of outrage, Harris's defamation allegations in his *pro se* Complaint added two new defamation claims that he never identified in the First Action, and Harris identified a third new defamation claim during his deposition in the Second Action.

[3] Tietex continues to assert that the doctrine of collateral estoppel precludes Harris from re-litigating any factual findings or legal conclusions set forth in the orders of the Federal Court. While Tietex could not appeal Judge Addy's order denying Tietex's motion for summary judgment, Tietex fully intends to assert its collateral estoppel defense throughout any trial and appeal in this matter.

Presumably, Judge Addy believed any ruling on the merits would be premature given his decision to allow Harris to engage in additional discovery—specifically including the depositions of Tietex executives Martin Wildeman and Reed Cunningham—which Harris' attorney insisted was necessary.[4] Notwithstanding Harris relying on his alleged need for additional discovery in arguing that summary judgment was premature, Harris has failed to engage in any discovery since Judge Addy's ruling. This total lack of discovery makes clear that there are no additional facts on which Harris intends to rely in support of his claims. Tietex now renews its Motion for Summary Judgment, as the undisputed facts in the record lead to only one reasonable conclusion—that Tietex is entitled to judgment as a matter of law on all of Harris' claims.

II. STATEMENT OF FACTS[5]

A. Harris' Employment.

1. Harris Was Employed At-Will and Had No Contract.

Harris began working at Tietex on July 13, 1994, as a Senior Research Chemist. (Harris Dep. 1 at 58-60, Exs. 6-7; Harris Dep. 2 at 140, Ex. 7[6].) Harris accepted an offer of employment;

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[4] Harris' counsel argued as follows during the hearing on Tietex's first motion for summary judgment: "It is clear that I have not had a full and fair opportunity to complete discovery. I would simply argue that just on that record, the – the fact that – the fact that – that we have not been able to complete discovery, should preclude summary judgment on – any factual issue in this case." (Transcript, Aug. 30, 2013 Hearing, at 16.) The relevant excerpts from the transcript of the summary judgment hearing are Attachment A.

[5] The undisputed facts the Federal Court adopted in granting Tietex's motion for summary judgment in the First Action are essentially identical to the Statement of Facts set forth herein.

[6] All excerpts and exhibits from Harris's deposition in the First Action are Attachment B and are referenced as "Harris Dep. 1" followed by the applicable page number(s), exhibit number(s), or both. All excerpts and exhibits from Harris's deposition in the Second Action are Attachment C and are referenced as "Harris Dep. 2" followed by the applicable page number(s), exhibit number(s), or both. Harris acknowledged that all of his testimony from his deposition in the First Action remains true and accurate. (Harris Dep. 2 at 26.)

he knew he was employed at will; knew he could be terminated at any time for any reason; and knew he could leave Tietex at any time, for any reason. (Harris Dep. 1 at 60-61, Ex. 6; Harris Dep. 2 at 140-42.) Harris admits he had no written contract of employment. (Harris Dep. 1 at 61-62; Harris Dep. 2 at 142.)

Harris claims he was given a copy of an employee handbook, which he kept for several years. (Harris Dep. 1 at 62.) Harris does not have a copy of the alleged handbook. (*Id.* at 63; Harris Dep. 2 at 143.) Harris claims employees were asked to turn in the handbooks at some point during his employment.[7] (*Id.*) Harris says he periodically referred to the handbook, but never read it cover to cover. (Harris Dep. 1 at 62.) There was nothing in the handbook that Harris did not understand, and he admits he would have asked if he had any questions about a policy. (*Id.* at 62-63.)

Harris claims there was a progressive discipline policy in the handbook, but cannot give any details about the policy. (*Id.* at 64; Harris Dep. 2 at 143-44.) This is the only policy he specifically recalls from the alleged handbook. (Harris Dep. 1 at 64.)

Harris does not know what policies he contends created a contract of employment upon which he bases his claim of breach of contract. (*Id.* at 64-65; Harris Dep. 2 at 143-45.) Harris admits he cannot state the basis for his breach of contract claim, or his claim for breach of contract accompanied by a fraudulent act. (Harris Dep. 1 at 65; Harris Dep. 2 at 144-45.)[8]

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[7] Tietex has never had an employee handbook. (Griffin Aff. ¶ 3.) The Affidavit of Pamela Griffin is Attachment D.

[8] Harris admits that the his answers to the questions he was asked in his first deposition concerning his contract claims would be the same today as they were at that time. (Harris Dep. 2 at 142, 145.)

2. Harris' Work Hours.

Harris' normal working hours were 8:00 a.m. to 5:00 p.m., but he claims he was often at work by 6:00 or 6:30 a.m. and stayed later than 5:00 p.m. (Harris Dep. 1 at 74-75.) On occasion, Harris stayed until 8:00, 9:00, or 10:00 at night. (Harris Dep. 1 at 77.) Harris admits that he was told by his supervisor, Wade Wallace, not to work in the plant for safety reasons when it was not operating. (Harris Dep. 1 at 124.) At one point, Wallace told Harris that he could work in the plant anytime the plant was operational, and he could come into the facility to do office work when the plant was down. (Harris Dep. 1 at 123-24.) Harris admittedly ignored these directives due to his own opinion that it was safe for him to work with chemicals when the plant was not operating. (Harris Dep. 1 at 75-76, 124.) While his erratic hours had been acceptable to his previous supervisor, they were not acceptable to Wallace, and Harris admits this was a new directive under Wallace's supervision. (Harris Dep. 1 at 125) Harris admits he was the only employee who did lab work after hours. (Harris Dep. 1 at 126-27.)

3. Harris Left Messages at Odd Hours.

Harris admits that he left messages for managers when he knew they would not be answering their phones. (Harris Dep. 1 at 81-82 & Exs. 10 & 14.) The only reasonable conclusion was that Harris was attempting to avoid a two-way conversation.

4. Jake Butts Relocated His Office to More Closely Supervise Harris.

There are four sections in the technical building: an office area; wet lab; physical testing; and an extension of the wet lab for chemists' work, with a burn room.[9] (Harris Dep. 1 at 86.) Harris' former supervisor, Jake Butts, had had difficulty keeping track of Harris due to Harris'

[9] Although the technical building consists of several lab areas and the office area, it is often referred to in the transcript generically as "the lab" as opposed to the production facility, which is referred to as "the plant."

erratic work hours, so Butts relocated his office from the plant to the office areas of the technical building (the lab), where Harris' office was situated, in order to more closely supervise Harris. (Harris Dep. 1 at 83, 86.) Harris admits that Butts' relocation was effective, as he saw Butts infrequently before Butts moved his office, but more often thereafter. (Harris Dep. 1 at 85-86.)

5. Harris' Complaints About the Smell of Mold Resulted in His Reassignment.

Soon after Butts relocated his office, Harris claimed he noticed a mold smell and had symptoms of congestion, sinus headache, and flu. (Harris Dep. 1 at 87.) Harris admitted that he does not recall anyone else complaining about the alleged smell. (Harris Dep. 1 at 88.) Harris claimed that the smell originated from Butts' clothing and the furniture Butts moved into his relocated office. (Harris Dep. 1 at 93-94.) After some time and several visits to doctors, including an ENT and allergist, Harris contended that the smell was the source of his illness due to an allergy to mold. (Harris Dep. 1 at 88-89.) Harris reported his belief to Butts. (*Id.*)

As a result of Harris' allegation that mold in the lab was making him ill, Tietex hired a hygienist to perform testing in the lab. (Harris Dep. 1 at 89.) Harris admits the hygienist reported that there was no mold contamination and that the air in the lab was cleaner than the outside air. (Harris Dep. 1 at 91.) Although Harris claims the testing was flawed, he admits he has no evidence of that. (Harris Dep. 1 at 89-92.) Harris does not know who performed the testing or what kind of testing was performed. (*Id.*) Harris admits he has no first-hand knowledge of how the testing was conducted. (Harris Dep. 1 at 90-91.) Harris' only specific complaint about the testing was that it did not focus solely on the office area of the lab, but tested all four sections of the laboratory. (Harris Dep. 1 at 92.)

At some time in late 2006, Harris established a second office in the main plant. (Harris Dep. 1 at 87-88.) Harris continued to do work in the lab until February 2007. (Harris Dep. 1 at

87.) Effective February 1, 2007, Harris was removed from Butts' supervision and placed under the supervision of Wallace, in part due to Harris' continued complaints about the smell associated with Butts.[10] (Harris Dep. 1 at 101.)

B. Harris Began Reporting to Wade Wallace.

1. Tietex's Resolution of Harris' Complaint About the Mold Smell.

Between February 2 and 5, Harris and Wallace discussed by e-mail whether Harris would be able to continue working in the lab because of Harris' continued complaints about the mold smell. (Harris Dep. 1 at 94, Ex. 12.) Wallace agreed that Tietex would do whatever was necessary to shield Harris from any further exposure to an environment(s) that might negatively impact his health. (Harris Dep. 1 at 95, Ex. 12.) Wallace instructed Harris to wear a mask when he worked in the lab. (Harris Dep. at Ex. 12.) However, Harris decided that the mask would not give him enough protection. (*Id.*[11]) Wallace then told Harris not to enter the lab under any circumstances. (Harris Dep. 1 at 101, Ex. 12.) Thereafter, Harris asked if he could work in the lab if he signed a waiver. (Harris Dep. 1 at 122-23, Ex. 17.) Tietex rejected the waiver stating that a waiver was "unacceptable from an HR/liability perspective since [Tietex] would be allowing [Harris] to come in contact with an environment that might negatively affect [his] health." (*Id.*) Wallace's e-mail communications with Harris made clear that Tietex was more concerned about Harris' health than its own liability. (Harris Dep. 1 at Ex. 12.)

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[10] Harris "believes the reason for the change in his reporting relationship was so that Wallace could assist him in getting more involved with special projects." (Harris Dep. 1 at 101-03.) While this was a factor in the decision, Tietex was also concerned about Harris' health. (Harris Dep. 1 at 95 & Ex. 12.)

[11] Harris acknowledges that he could have left Wallace a message concerning wearing the mask but states he does not remember doing so, and he doesn't know what he said to Wallace about the matter. (Harris Dep. 1 at 99-100.)

Tietex purchased equipment to accommodate Harris' needs outside of the lab. (Harris Dep. 1 at 112-13, Ex. 14.) Tietex provided Harris with an alternative work area because Tietex wanted to protect Harris' health. (Harris Dep. 1 at Ex. 12.) Harris has no contradictory evidence. (Harris Dep. 1 at 123.)

2. February 7, 2007, Discussion Between Wallace and Harris.

On February 7, 2007, Harris told Wallace that he was overwhelmed by personal and emotional problems which had occurred in his personal life over the past year, and he was having difficulty functioning. (Harris Dep. 1 at Ex. 13.) Harris admits that his wife was ill during this time period. (Harris Dep. 1 at 106.) Dealing with his wife's illness left him stressed with major sleep disturbances. (Harris Dep. 1 at 106-07, 111, Exs. 14, 44.) Harris admits he was a "wreck" because of his wife's illness. (Harris Dep. 1 at 107 & Ex. 44.) Wallace told Harris that Tietex "would support him if he felt he needed to utilize EAP," but Harris stated that was not necessary. (Harris Dep. 1 at 111, Ex. 13.)

3. Documentation of Voicemail Complaints from Harris.

On February 22, 2007, Harris left voice mail messages for both Wallace and Tietex's Owner, Martin Wildeman, at 3:00 a.m., complaining about his inability to sleep, and about unspecified work-related issues. (Harris Dep. 1 at 81, Ex. 14.) Wallace documented that Harris expressed concern about being moved from the lab and that he was "still not set up to easily do his bench work." (Harris Dep. 1 at Ex. 14.) Harris asked for a lab pad coater and a vented hood. (*Id.*) Wallace stated that he would take time to locate, acquire, and install the equipment, but stated that in the meantime Harris could use the equipment in the beam/dye area, and/or coordinate to use Robert Culbreth, a chemical technician, to perform work for him in the lab. (Harris Dep. 1 at 111-13, Ex. 14.) Harris believes that Tietex was motivated to keep him out of

the laboratory to avoid liability for any health problems he might experience rather than out of a real concern for his health." (Harris Dep. 1 at 123.) Importantly, Harris does not assert that Tietex was motivated to keep him out of the lab because of any unlawful reason. (*Id.*)

Harris admits he complained about being required to stay involved with environmental reporting and stated he was concerned about completing an environmental report that was due on March 1, given his other projects. (Harris Dep. 1 at 113, Dx. 15.) Wallace saw no reason that Harris' projects would interfere with his ability to get the report done on time and made this clear to Harris. (*Id.*) Harris admits that it was reasonable for Wallace to expect him to complete the environmental report on time. (Harris Dep. 1 at 113.)

Wallace also asked Harris to come to him directly with issues before going to Wildeman. (Harris Dep. 1 at Ex. 14; Wallace Dep. 2 at Ex. 1 ¶ 23.[12]) Harris admits that, at times, he went directly to Wildeman, rather than using the chain of command. (Harris Dep. 1 at 116.) Harris admits it was inappropriate for him to complain to Wildeman about having to do the environmental reporting. (*Id.* at 115.)

C. Harris' Performance Deficiencies.

1. Memorandum Dated March 5, 2007.

On March 5, 2007, Wallace discussed several issues with Harris regarding his performance and documented the discussion at Harris' request in a memorandum to Human Resources Director David Wilson, with a copy to Vice President of Manufacturing, Mark Isbell and Harris. (Harris Dep. 1 at 117-18, Ex. 16.) Wallace noted Harris made emotional and overly vocal accusations and statements without supporting research or data, was not honoring the chain of command, harbored grudges over past grievances and toward the management in general, and

[12] Exhibit 1 from Wallace's deposition in the Second Action is Attachment E and is referenced as "Wallace Dep. 2 at Ex. 1" followed by the applicable paragraph number (¶) from the Exhibit.

complained about ownership of environmental reporting duties. (Harris Dep. 1 at Ex. 16.) The memorandum concluded with the statement, "As we discussed these issues are not sustainable and it is mandatory that Harris make significant progress towards resolving these issues within the next 30 days." (Harris Dep. 1 at 120-21, Ex. 16.)

At the time, Harris did not protest any of the points in the March 5, 2007, memorandum or claim that Wallace's observations were not true. (Harris Dep. 1 at 122.) As noted above, Harris admits he was experiencing emotional stress (Harris Dep. 1 at 106-07, 111 & Exs. 14, 44), circumvented Wallace by going directly to Wildeman (*id.* at 116), and complained about environmental reporting tasks (*id.* at 113). Harris does not deny the statement that he harbored grudges, and admits that he had unresolved issues that existed before he began reporting to Wallace and had discussed those issues with Wallace. (*Id.* at 119-20.)

2. Memorandum Dated June 18, 2007.

On June 18, 2007, Wallace had another discussion with Harris regarding his subpar performance. Wallace documented the discussion in a memorandum to Harris, with a copy to David and Isbell. (Harris Dep. 1 at 128, Ex. 18.) The discussion focused on two projects for which Harris was responsible. (Harris Dep. 1 at 130, Ex. 18.) The first was the development and qualification of a Tietex coating compound as a replacement for the coating that was currently being used on C237 ("C237 Project"). (Harris Dep. 1 at 129, Ex. 18.) The second was the development of a finish formula and process for parabolic application of T602 ("T602 Project"). (Harris Dep. 1 at 129-30.)

a. The C237 Project.

Harris had been working on the C237 Project for about six months. (Harris Dep. 1 at 131, Ex. 18.) Harris had predicted that the C237 Project would result in significant cost savings for

Tietex. (Harris Dep. 1 at 131-32, Ex. 18.) Harris claimed he had a successful trial before he began reporting to Wallace. (Harris Dep. 1 at 132.) Despite Harris' characterization of the compound he created as a success, it was unacceptable to Tietex because it was much more complicated to produce commercially than Harris had initially promised. (Harris Dep. 1 at Ex. 16.) In February, Wallace began working separately on a parallel C237 Project because it appeared that Harris would fail to achieve the cost savings he had predicted. (Harris Dep. 1 at 134, Exs. 16, 18.) Eventually, the situation was resolved by the provider lowering its price. (Harris Dep. 1 at 134.)

b. The T602 Project.

Because of the expense, a plant production trial is only done if laboratory production is successful. (Wallace Dep. 2 at Ex. 1 ¶ 28.) Harris told Wallace that the lab samples for the T602 project were promising and recommended a production trial. (Harris Dep. 1 at 135.) According to Harris, the first plant production trial showed mixed results with some samples that were "not good," but others that were "comparable," depending on the amount of finish. (Harris Dep. 1 at 136.) However, Harris told Wallace that, based on the results, another plant production trial was warranted. (Harris Dep. 1 at 137, Ex. 18.) On Harris' recommendation, a second plant production trial was performed, which was unsuccessful. (Harris Dep. 1 at 137, 295, Ex. 18.) A third trial was similarly unsuccessful. (Harris Dep. 1 at 137-38, 295, Ex. 18.) When the second and third trials failed, Wallace reviewed the results of the first plant production trial himself. (Harris Dep. 1 at Ex. 18; Wallace Dep. 2 at Ex. 1 ¶ 29-31.) Wallace saw "that the results of the first trial had not been as [Harris] portrayed them, so the second and third trials were unwarranted based on the results of the first." (*Id.*)

Wallace cited Harris for his poor analytical practices and instructed him to improve his performance within 30 days. (Harris Dep. 1 at 141, Ex. 18.) Harris considered this his final written warning. (Harris Dep. 1 at 139, Ex. 18.)

D. Final Events Leading Up to Harris' Termination.

Despite being told and understanding that his job was in jeopardy if his performance failed to improve, Harris' poor performance and poor judgment continued. Harris made no effort to complete the C237 project. (Harris Dep. 1 at Ex. 19.) Instead, Harris began taking multiple days of vacation immediately after being given the warning on June 18. (Harris Dep. 1 at 145-48.) These vacation days were frequently taken on short notice. (Harris Dep. 1 at 145-46, Ex. 20.) Sometimes, Harris waited until the day before to notify Wallace. (*Id.*) Other than the environmental reporting, Harris had not improved on the issues cited in the memorandum of March 5, 2007. (Harris Dep. 1 at Ex. 19.) Gate records and management observation showed that Harris continued to ignore the directive not to work in the chemical lab areas at nights or on the weekends. (Harris Dep. 1 at Ex. 19.) The same records showed inconsistent work hours and erratic patterns of entry and exit to and from the facility. (*Id.*) Harris' co-workers complained that he did not return calls or e-mails consistently, disrupting their work patterns. (Harris Dep. 1 at Ex. 19.)

Harris was scheduled to fly to Indiana on June 14 to visit a customer and return on June 15. (Harris Dep. 1 at 148-149, Ex. 19.) After flying the first leg of his trip, Harris turned around and came home because he had a headache. (*Id.*) Harris never told Wallace he had not met with the customer in Indiana. (Harris Dep. 1 at Ex. 19.)

E. Events of July 3, 2007.

On the evening of Monday, July 2, after work, Harris left a voicemail message for Wallace, telling him that he had an ant infestation at his house. (Harris Dep. 1 at 151-52.) Harris

said he would take care of the ants first thing the following morning and then go to Hexion, a chemical facility, and work on a project. (*Id.)* Since Harris left this message after work hours, Wallace did not hear the message until the morning of Tuesday, July 3, 2007. (Harris Dep. 1 at 151-52, Ex. 19; Wallace Dep. 2 at Ex. 1 ¶ 38.)

Harris purchased pesticide chemicals at Lowe's on the morning of July 3, at approximately 7:30 a.m. (Harris Dep. 1 at 251; Attach. F.) Harris called Wallace and left a second voice mail message around 9:00 a.m., saying he had resolved the ant problem and was going to work at Hexion. (Wallace Dep. 1 at Ex. 1 ¶ 39.) Harris did not arrive at Hexion until 1:30 p.m. (Harris Dep. 1 at 154 & Ex. 21.) Harris could not enter Hexion because he could not contact anyone he knew there to gain entry. (Harris Dep. 1 at 152-53, 155-56.) Harris left without performing any work. (*Id.*) There are no witnesses to establish how long Harris was allegedly at Hexion. (*Id.* at 157.) Harris is vague about how long he was at Hexion trying to get in—he estimates he was at Hexion between thirty and ninety minutes.[13] (Harris Dep. 1 at 157-58.)

Harris claims that after leaving Hexion, he drove around for 30 to 45 minutes, looking for Chemurgy, another chemical facility. (Harris Dep. 1 at 159-60.) When Harris located Chemurgy, no one was there, so he did not stay. (*Id.*)

Harris did not telephone Wallace to tell him that he could not get in Hexion and that he was going to Chemurgy or anywhere else. (Harris Dep. 1 at 160.) Harris admits it would have been reasonable for him to call Wallace and tell him that his plans had changed. (Harris Dep. 1 at 165.) Harris understood he needed to let Wallace know his whereabouts, to let him know when

[13] Harris previously testified to the SCESC that he was at Hexion around thirty minutes. (Harris Dep. 2 at 96-97.)

he was away from the plant, and to keep his cell phone on so he could be reached. (Harris Dep. 1 at 117.) Harris acknowledges that it was reasonable for his supervisor to expect to be informed of his whereabouts "at all times." (Harris Dep. 1 at 117.)

George Henderson, the Hexion employee, brought the sulfuric acid to Tietex for Harris.[14] (Harris Dep. 1 at 160.) Wallace was confused, as Harris was supposed to be at Hexion. Wallace later called Henderson and asked if he had seen Harris that day, but Henderson had not. (Wallace Dep. 2 at Ex. 1 ¶ 42-43.) Henderson said that he had a voicemail from Harris saying he needed some sulfuric acid urgently because he was planning to do some work on July 4th. (*Id.*) Wallace was troubled because Harris was not where he said he would be and because it appeared Harris had planned to work with chemicals in the lab on a day the plant was supposed to be closed. (*Id.*) Additionally, having sulfuric acid delivered in this way was against policy.

Harris admits that Wallace had no idea what Harris was doing, or even if Harris was working. (Harris Dep. 1 at 164-65.) Harris claims Wallace called him on his cell phone between 4:30 p.m. and 5:00 p.m. and asked where he was. (Harris Dep. 1 at 162.) Harris told Wallace that he had been to Hexion. (*Id.*) Wallace told Harris that Henderson had been to Tietex and said that Harris had not been at Hexion that day. (Wallace Dep. 2 at Ex. 1 ¶ 44.) Harris then stated he had gone to Hexion, but had been unable to get in or find anyone, so he left. (*Id.*) Harris could not give Wallace an adequate explanation of his whereabouts for the day. (Harris Dep. 1 at 158-59, Ex. 19; Wallace Dep. 2 at Ex. 1 ¶ 44, 47-48.)

Wallace told Harris he was suspended until Wallace returned from vacation. (Harris Dep. 1 at 165.) During the phone call, Harris and Wallace were disconnected, and Wallace could not reach Harris again by telephone. (Harris Dep. 1 at 165-66; Wallace Dep. 2 at Ex. 1 ¶ 45.)

[14] Harris admits he needed the acid and had asked Hexion for it, but claims he intended to pick it up, rather than have Mr. Henderson deliver it. (Harris Dep. 1 at 161.)

Wallace believed Harris had hung up on him, although Harris denies it. (*Id.*) Wallace talked to Wilson about what transpired, and a voice mail message was left for Harris reiterating that he was suspended with pay and should not return to work until contacted by Tietex. (Wallace Dep. 2 at Ex. 1 ¶ 45.)

F. Wallace Recommended the Termination of Harris' Employment.

Wallace conducted an investigation of the events of July 3 when he returned from vacation, but could not establish Harris whereabouts for most of the hours between 9:00 a.m. and 4:00 p.m. on July 3. (Harris Dep. 1 at Ex. 19; Wallace Dep. 2 at Ex. 1 ¶ 47.) Wallace recommended Harris' employment be terminated, and the decision to do so was made by Wallace, Wilson, Wildeman, Cunningham, and Isbell. (Wallace Dep. 2 at Ex. 1 ¶ 49.) Harris was told he was not being terminated for one specific deficiency, but for many shortcomings that "added up," including the issues Wallace had addressed with him in the March 5, 2007, memorandum. (Harris Dep. 1 at 142, Ex. 16.) These issues were also documented in a memorandum dated July 18, 2007. (Harris Dep. 1 at Ex. 19.) Harris' employment was terminated on July 19, 2007. (Harris Dep. 1 at 167, Ex. 22.) Harris admits his employment was terminated for unsatisfactory performance. (*Id.*)

III. ARGUMENT

Tietex is entitled to summary judgment on all of Harris' claims. Harris has not established that he had any contract of employment with Tietex; therefore, Tietex could not have breached a contract, with or without fraudulent intent. Harris has not established that Tietex published any defamatory statements about him to any third party, as all allegedly defamatory statements were substantially true and covered by a qualified privilege that Harris cannot overcome. Harris has failed to allege (and certainly cannot prove) any set of facts that would permit his outrage claim to proceed to trial. Finally, Harris' failure to assert three of his seven

defamation claims and his outrage claim in the First Action bar those claims under the applicable statutes of limitation and the doctrine of *res judicata*. Accordingly, Harris' Amended Complaint should be dismissed in its entirety.

A. **Summary Judgment Standard.**

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 541, 730 S.E.2d 340, 347 (Ct. App. 2012) (citations omitted). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." *D.R. Horton*, 398 S.C. at 541, 730 S.E.2d at 347.

The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). The moving party may discharge this responsibility "by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim." *D.R. Horton*, 398 S.C. at 542, 730 S.E.2d at 347. "Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings." *Id.* (citing *inter alia* Rule 56(e), SCRCP). "[T]he nonmoving party

must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.'" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (quoting *Baughman*, 306 S.C. at 107, 410 S.E.2d at 545).

"Where a verdict is not '*reasonably possible* under the facts presented, summary judgment is proper.'" *Id.* (quoting *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000)) (emphasis in original). Harris has failed to present any facts demonstrating the presence of a genuine issue for trial. Accordingly, "[t]his case illustrates well the utility of summary judgment in disposing of a meritless claim." *Cox & Floyd Grading, Inc. v. Kajima ConsDep. Svcs., Inc.*, 356 S.C. 512, 517, 589 S.E.2d 789, 792 (Ct. App. 2003).

B. Harris Has Not Identified a Genuine Dispute of Material Fact with Respect to Any of His Claims, and Tietex is Entitled to Summary Judgment on the Merits.

1. Harris' Contract Claims Fail Due to the Complete Absence of Contractual Obligations and or any Breach of Alleged Contractual Obligations.

"To recover for a breach of contract, the plaintiff must prove: (1) a binding contract; (2) a breach of that contract; and (3) damages proximately resulting from the breach." *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 146, 697 S.E.2d 644, 655 (Ct. App. 2010) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). "To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: (1) *a breach of contract*; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002) (emphasis added). Both of Harris' contact claims fail because he has not identified any contractual obligations that Tietex allegedly owed to him.

"South Carolina has long recognized the doctrine of employment at-will." *Grant v. Mt. Vernon Mills, Inc.*, 370 S.C. 138, 145, 634 S.E.2d 15, 19 (Ct. App. 2006) (citing *Conner*, 363 S.C. at 471, 611 S.E.2d at 910-11). "This doctrine allows either party to terminate the employment 'for any reason or no reason' without being subject to a claim for breach of contract, subject to narrow exceptions and prohibitions against illegal discrimination which are not present here." *Id.* at 146, 634 S.E.2d at 19 (quoting *Horton v. Darby Elec. Co.*, 360 S.C. 58, 67, 599 S.E.2d 456, 460 (2004)). "The at-will employment doctrine is essentially an economic incentive that provides critically needed flexibility in the marketplace." *Id.* (citing *Prescott v. Farmers Tel. Co-op., Inc.* 335 S.C. 330, 334-35, 516 S.E.2d 923, 925 (1999)). In order to rebut the presumption of at-will employment, the burden is on Harris to establish that "all of the elements of a contract" are present. *Prescott*, 335 S.C. at 336, 516 S.E.2d at 926. Harris cannot meet his burden of proving that a contract existed, as he admits that he was an at-will employee and cannot point to anything that altered that relationship.

Harris admits that he "was aware of Tietex being an at will employer." (Harris Dep. 1 at 61; Harris Dep. 2 at 141-42.) Harris further acknowledges that "under the terms of [his employment] offer [with Tietex], [he] w[as] employed at will." (Harris Dep. 1 at 60; Harris Dep. 2 at 141.) Based on his status as an at-will employee, Harris fully understood (1) that his "employment could be terminated any time for any reason," and (2) that he "could quit Tietex if [he] wanted to for whatever reason whenever." (Harris Dep. 1 at 60-61; Harris Dep. 2 at 141-42.)

Harris admits that he "didn't have any kind of written contract of employment when [he] w[as] hired" and that "during the time that [he] worked for Tietex, nobody ever gave [him] a written contract of employment to sign." (Harris Dep. 1 at 61-62; Harris Dep. 2 at 142.) Harris'

lone attempt to claim that a contract allegedly existed consists of his entirely unsupported contention that an employee handbook contained a progressive discipline policy.[15] (Am. Compl. at 5; Harris Dep. 1 at 64; Harris Dep. 2 at 143.) However, Harris has not produced a copy of this alleged employee handbook and admits that he does not have a copy. (Harris Dep. 1 at 63; Harris Dep. 2 at 143.) Harris' inability to produce a copy of the alleged handbook (and the fact that he cannot remember anything in the handbook other than the purported progressive discipline policy[16]) stems directly from the fact that Tietex has never had an employee handbook. (Griffin ¶ 3.)

Even assuming Harris' claims that he had an employee handbook for several years are true, Harris has testified that at some point during his employment, Tietex required all employees to turn in their copies of the alleged handbook "so [Tietex] could revise [it], and [he] never got a revised copy." (Harris Dep. 1 at 63; Harris Dep. 2 at 143.) Under the principles of unilateral contract (which apply to all cases in which employees attempt to show contractual obligations based on handbooks), Tietex rescinded any "offer" that allegedly existed in the non-existent handbook when it demanded that employees turn in that handbook. Tietex then made a new "offer" to continue working in an at-will status with no handbook, and Harris accepted that offer by continuing to perform his job duties. Harris admits that he "never got a revised copy" of the alleged handbook after he turned in his copy. (*Id.*) Even if there had been an employee

[15] While Harris' Amended Complaint specifically identifies the alleged progressive discipline policy as the basis for his contract claims, Harris acknowledged during his deposition in the First Action that he did not "know what policies in the handbook . . . created a contract of employment" and that he did not "know what in the handbook [he] would base [his] contract claims on." (Harris Dep. 1 at 64-65; Harris Dep. 2 at 143-44.)

[16] Harris cannot give details about any of the policies in the alleged handbook, or even recall the existence of any policy other than a progressive discipline policy. (Harris Dep. 1 at 64; Harris Dep. 2 at 143-44.)

handbook—though there was not—it clearly had no bearing on Harris' terms and conditions of employment at the time of his termination.

Harris has failed to produce any evidence beyond his unsupported and conclusory allegations that Tietex owed him any contractual obligations with respect to his employment or separation therefrom. In the absence of any such evidence, Tietex is entitled to summary judgment on both of Harris' contract claims.

Even if Tietex was obligated to provide Harris progressive discipline prior to terminating his employment—though there is no evidence of such a requirement—Harris has all but admitted that Tietex did just that. The March 5, 2007 memorandum documented a verbal counseling/warning that Wallace had given to Harris and made clear that "it [wa]s mandatory that [Harris] make significant progress towards resolving the[] issues within the next 30 days." (Harris Dep. 1 at Ex. 16.) Next, the June 18, 2007 memorandum built upon the March 5 memorandum and provided further warning/counseling to Harris. (Harris Dep. 1 at Ex. 18.) Harris has testified that he understood the June 18 memorandum to be his "final written warning." (Harris Dep. 1 at 139.) Then, in July 2007—after first giving him a verbal warning and a "final written warning"—Tietex terminated his employment. Tietex thus provided Harris progressive discipline whether it had to or not. Harris' contract claims fail for this reason as well.

2. Harris' Defamation Claims Fail Because All Statements Harris has Identified as Allegedly Defamatory were True and were Covered by a Qualified Privilege that Harris cannot Overcome, and Tietex was Not Negligent in Making the Alleged Statements.

Harris must "prove the following four elements to state a claim for defamation: '(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of

special harm or the existence of special harm caused by the publication.'" *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012) (quoting *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006)).

The truth of an alleged defamatory statement "is a complete defense to an action based on defamation and evidence establishing a statement is substantially true is a sufficient defense." *Haulbrooks v. Overton*, 295 S.C. 380, 383, 368 S.E.2d 676, 679 (Ct. App. 1988) (citing *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 221 S.E.2d 770 (1976)). "It is not necessary to establish the literal truth of the precise statement made." Restatement (Second) of Torts § 581A (1977).

The United States Supreme Court has made clear that there can be no strict liability for defamation. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Some level of fault is required to establish liability for defamation, even when the plaintiff is a private figure. *Id.*; Restatement (Second) of Torts § 580B, cmt. c. The Restatement notes that negligence is likely the lowest fault threshold permissible under the *Gertz* standard.[17] *Id.*

South Carolina courts have neither expressly accepted nor rejected the prevailing view that negligence is the appropriate standard to apply to alleged defamation of a private figure. *See Erickson*, 368 S.C. at 475-76, 629 S.E.2d at 670 (applying negligence standard because the parties assumed it applied). However, given the constitutional imperative established in *Gertz*, the South Carolina Supreme Court has suggested that the negligence standard should apply. *See, e.g., Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C 502, 523, 506 S.E.2d 497, 508-09 (1998) (Toal, J., concurring) (opining that South Carolina should join most jurisdictions in

[17] Notably, the drafters of the Restatement have recognized that the fault requirement essentially eliminates the common law burden on defendants to prove truth. Restatement (Second) of Torts § 580B, cmt. j.

requiring a private-figure plaintiff to prove negligence to recover for defamation); *see also* Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil § 14-11 (2009) (requiring proof of negligence to recover for defamation).

Under the negligence standard, Harris must prove that declarants of the alleged defamatory statements he has identified were negligent in making the statements—that the speaker breached a duty to exercise due care to refrain from making statements about Harris that are false and defamatory. *See* Anderson, South Carolina Requests to Charge – Civil § 20-1.

"One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (citing *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999)). "'The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.'" *Id.* (quoting *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 32, 315 (Ct. App. 1987)). "There is a basis for applying a qualified privilege to situations in which an employee's job performance is properly evaluated." *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989); *see also Bell v. Bank of Abbeville*, 211 S.C. 167, 44 S.E.2d 328 (1947) (attaching a qualified privilege to communications between an employer and employee during the employer's inquiry into the employee's alleged misconduct).

"Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." *Swinton Creek Nursery*, 334 S.C. at 484-85, 514

S.E.2d at 134. To prove actual malice, Harris must show that Tietex was activated by ill will, intending to causelessly and wantonly injure Harris, or that the statements were published with such recklessness as to show a conscious disregard for Harris' rights. *Id.* at 485, 514 S.E.2d at 134.

Whether an occasion gives rise to a qualified privilege is a question of law for the court. *Id.* "'While abuse of privilege is ordinarily an issue for the jury, . . . in the absence of a controversy as to the facts . . . it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.'" *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (quoting *Woodward v. S.C. Farm Bureau Ins. Co.*, 297 S.C. 29, 32-33, 292 S.E.2d 599, 601 (1981)) (emphasis in original); *see also* Restatement (Second) of Torts § 619, cmt. b (court decides if privilege has been abused where only one conclusion can reasonably be drawn).

While Harris' Amended Complaint includes only one cause of action for defamation, he has identified seven separate allegedly defamatory statements or incidents on which he is attempting to rely. (Harris Dep. 2 at 27-30.) Separate allegations of defamation are analyzed as independent claims. *See, e.g., George v. Fabri*, 345 S.C. 440, 456-61, 548 S.E.2d 868, 876-79 (2001) (analyzing defamation allegations separately in affirming grant of summary judgment); *McBride v. School Dist. of Greenville County*, 389 S.C. 546, 559-63, 698 S.E.2d 845, 851-54 (Ct. App. 2010) (analyzing alleged defamatory statements individually). Each of Harris' seven defamation claims fails as a matter of law due to his inability to prove several requisite elements for each of his claims.

a. February 9, 2007 E-mail from Wallace to Wilson.

Harris' first defamation claim is based on a February 9, 2007 e-mail that Wallace (his supervisor) sent to David Wilson (Human Resources Director) with a copy to Mark Isbell (Wallace's supervisor). (Harris Dep. 2 at 27-28, Ex. 13.) In this internal e-mail between

managerial employees at Tietex, Wallace simply summarized a discussion he had with Harris two days earlier regarding personal and emotional problems Harris was experiencing that were impacting his performance. (Harris Dep. 2 at Ex. 13.) Harris claims this e-mail was defamatory because he alleges that it was false and that it "showed a definite disregard for [his] stability mentally and that kind of thing." (*Id.* at 27.)

This defamation claim fails because the content of the February 9 e-mail was substantially (if not completely) true. Harris has admitted as much on more than one occasion—during his unemployment hearing (*id.* at 38), and during his deposition in the First Action (*id.* at 34-37). This defamation claim also fails because the February 9 e-mail clearly gives rise to a qualified privilege, and Harris has not presented any evidence showing that Wallace acted with actual malice or otherwise abused the privilege. In fact, Harris has admitted that he has no evidence of malice on Wallace's part, stating that he did not think Wallace was trying to "get rid of him," and has no idea about Wallace's motivation. (Harris Dep. 1 at 196, 337-338.)[18] Similarly, Harris cannot show that Wallace was negligent in making the statements set forth in the February 9, e-mail, as the facts make clear that he did nothing more than accurately recount a conversation to his own supervisor and Tietex's Human Resources Manager—both of whom

[18] In his prior lawsuit, Harris alleged Isbell, Wallace's supervisor, was the one who wanted to terminate Harris' employment. In the context of his age discrimination lawsuit, this narrative supported Harris' vague claims that Isbell was motivated to replace him with a younger female acquaintance. Now that Harris' claim is defamation based on written documents authored by Wallace, he has shifted the blame to point directly to Wallace. While Harris previously testified he did not think Wallace was out to sabotage him, and did not have any evidence regarding any improper motivation on Wallace's part, Harris now claims Wallace acted maliciously in creating lies about Harris' poor performance in order to terminate Harris' employment. In the First Action, Harris clearly stated he did not believe Wallace wanted to terminate his employment (Harris Dep. 1 at 196, 337-38). Harris is simply shifting blame in a self-serving effort to support his only surviving claims, in direct contradiction to his prior testimony. The Federal Court rejected Harris unsupported suppositions regarding any individual or conspiratorial effort to terminate Harris' employment.

Harris admits "had legitimate business need to know about and discuss" the issues in the e-mail. (Harris Dep. 2 at 55-56.) Therefore, summary judgment is proper on this claim.

b. March 5, 2007 Memorandum from Wallace to Wilson.

Harris' second defamation claim focuses on the March 5, 2007 memorandum that Wallace sent to Wilson with copies to Isbell and Harris. (Harris Dep. 2 at 28, Ex. 16.) Like the February 9, e-mail, this memorandum simply documented a performance-related discussion that Wallace had with Harris. (*Id.* at Ex. 16.) In fact, Harris admits that Wallace only generated the March 5 memorandum because Harris requested that he do so. (*Id.* at 60.)

This memorandum cannot constitute actionable defamation because Harris has admitted that each of the points Wallace made in the memorandum was substantially true. (Harris Dep. 1 at 106-07, 111, 113, 116, 119-20.) The truth of the memorandum is further shown by the fact that, during the performance discussion referenced in the memorandum, Harris did not protest any of the listed deficiencies or claim they were inaccurate. (*Id.* at 122; Harris Dep. 2 at 65.) Additionally, South Carolina precedent establishes that this type of performance-related discussion regarding an employee is entitled to a qualified privilege, and Harris cannot show that Wallace acted with actual malice in drafting the memorandum (particularly since Harris himself specifically requested that Wallace prepare it). Neither could Wallace have acted negligently in preparing this memorandum, as it accurately summarizes the meeting and lists only deficiencies that Harris has acknowledged to be accurate. Accordingly, Tietex is entitled to summary judgment.

c. June 18, 2007 Memorandum from Wallace to Harris.

Harris' third defamation claim relates to the June 18, 2007 memorandum that Wallace provided to Harris (with copies to Wilson and Isbell), which Harris has described as his "final

written warning." (Harris Dep. 2 at 28, Ex. 18.) The June 18 memorandum focuses exclusively on Harris' performance issues with respect to the C237 and T602 projects.

Harris' own testimony leaves no room for Harris to claim that the June 18 memorandum was false and defamatory, as he admits the statements in the memorandum are substantially true. Harris admits he had been working on the C237 project for six month and projected significant savings for Tietex (Harris Dep. 1 at 131-32, Ex. 18.) Although Harris claims he had a successful trial before reporting to Wallace, he admits the direction of the project shifted. (Harris Dep. 1 at 132.) Tietex was convinced Harris' compound was too complicated to produce commercially, and, therefore, unacceptable. (Harris Dep. 1 at Ex. 18.) Harris admits that Wallace began working separately on a parallel C237 project in February. (Harris Dep. 1 at 134, Ex. 18.) Harris admits his compound was never used by Tietex. (Harris Dep. 1 at 134.) Harris admits the first trial of the T602 project was not completely successful, with mixed results, but he recommended a production trial anyway. (Harris Dep. 1 at 135-37, Ex. 18.) Harris admits the two subsequent trials, run on his recommendation, were unsuccessful. (Harris Dep. 1 at 137-38, Ex. 18.) Accordingly, the June 18 memorandum is substantially true, according to Harris' own testimony.

Harris failed to perform up to Tietex's legitimate expectations with respect to the C237 and T602 projects. This very performance issue is what Wallace documented in the June 18 memorandum, and the truth of the memorandum is thus established according to Harris' own testimony.[19] Here again, the June 18 memorandum was also subject to a qualified privilege, and

[19] Harris' subjective perception of these undisputed facts in a self-serving way is irrelevant. Although Harris blames others for his failures and perceives that he was successful in his endeavors, the bottom line is that he failed to create a compound that was acceptable for Tietex's needs. It is the perception of Tietex that matters, not the subjective perception of Harris' own view of his performance. *See Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 217 (4th Cir. 2007) ("[U]ltimately, '[i]t is the perception of the decisionmaker which is relevant.'" (quoting *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 444 (4th Cir. 1998))).

Harris cannot in good faith argue that Tietex abused that privilege or was negligent. Thus, Harris' claim fails as a matter of law.

d. July 18, 2007 Memorandum from Wallace to Harris.

The final actual statement on which Harris relies in making his defamation claims is the July 18, 2007 memorandum from Wallace to Wilson (with a copy to Isbell) in which Wallace summarized Harris' pattern of poor performance and recommended the termination of his employment. (Harris Dep. 2 at 28-29, Ex. 19.) This claim fails for reasons similar to Harris' first three defamation claims.

The July 18 memorandum truly and accurately summarized Harris' performance deficiencies between February 2007 and July 2007. The accurate nature of the memorandum is clear based on Harris' own testimony. (Harris Dep. 1 at 106-07, 111, 113, 116-17, 119-20, 131-32, 134-38, 145-49, 151-60, 165; *see also* Section II *supra*.). There can be no doubt that an internal memorandum to an employee's supervisor and Human Resources recommending the employee's termination based on performance issues is entitled to a qualified privilege. Harris acknowledges that Wallace did not abuse the privilege and acted reasonably in providing the memorandum to Wilson and Isbell, as he admits that both Wilson and Isbell "would have had a need to know" about the subject matter of the memorandum. (Harris Dep. 2 at 100.) Harris cannot meet his burden with respect to this claim, mandating the entry of summary judgment.

e. Rumors in the Industry.

Harris' fifth defamation claim surrounds his contention that there were "rumors in the industry that [he] w[as] terminated from Tietex for falsifying a test report." (Harris Dep. 2 at 29.) However, Harris has never identified a single actual statement that Tietex allegedly made with respect to these mysterious "rumors." Rather, Harris has simply contended that he spoke to two former Tietex employees who allegedly informed him that they had heard about rumors

being spread about him. (*Id.* at 114-24.) Harris has never even alleged that Tietex was the actual source of these alleged "rumors," and he has certainly never produced a witness to testify about what Tietex supposedly said. In the absence of any such allegations or testimony, this defamation claim is far from adequate to overcome Tietex's motion for summary judgment. Rule 56(e), SCRCP, plainly requires that a party desiring to oppose summary judgment with testimony must "set forth such facts as would be admissible in evidence." Harris' claim regarding "rumors in the industry" is based on nothing more than inadmissible hearsay. Thus, Harris cannot even establish that there was a statement or that Tietex published the statement, let alone prove the remaining elements of this claim.

f. Harris' July 2007 Suspension with Full Pay.

Harris' sixth defamation claim alleges that Tietex somehow defamed him by suspending his employment—with full pay and benefits—in July 2007. (Harris Dep. 2 at 29.) The only statements Harris has identified with respect to this claim are (1) Wallace's telephone call to Harris in which he informed Harris of the suspension, and (2) Wallace allegedly informing an individual at another company (Textile Rubber) that Harris was suspended. (*Id.* at 124-30.)

With respect to the telephone call between Wallace and Harris, there was obviously no publication to a third party, as Harris admits that they were the only parties on the call. (*Id.* at 126-27.) Regarding Wallace's alleged statement to the Textile Rubber employee, Harris once again is relying on nothing more than inadmissible hearsay. Beyond being unable to specify any details regarding the alleged statement, Harris admits that "[t]he only information [he] h[as] is like second hand what George Henderson told [him]." (*Id.* at 129.) Thus, Harris cannot establish that any statement was published for the purposes of this motion. Even assuming Wallace had informed this individual that Harris was suspended, that statement is 100% true and cannot be defamatory as a matter of law. Therefore, Tietex is entitled to summary judgment.

g. Harris' February 2007 Ban from the Laboratory.

Finally, Harris contends that being "banned from going to the laboratory building" in February 2007 was defamatory. (Harris Dep. 2 at 29-30.) The only "statement" that Tietex can infer from this allegation is when Wallace told Harris "not to enter the lab under any circumstances." (Harris Dep. 1 at 101, Ex. 12.) While Wallace did make that statement, Tietex is unable to determine how it could even potentially be defamatory with respect to Harris.

First, the statement was not even about Harris—it was a work directive. Second, Wallace only made that statement (and Tietex only prohibited Harris form entering the lab) after Harris complained that the work conditions in the lab were detrimentally impacting his health. Tietex and Harris jointly attempted to find a solution that would have allowed Harris to continue working in the lab without harming his health, but they were unable to do so. After "banning" Harris from the lab, Harris admits that Tietex made special purchases of equipment to allow him to set up a work area in a different location that would be better for his health. Harris' claim regarding this statement must be dismissed accordingly.

3. Harris' Outrage Claim Fails To Allege Any Facts that Rise to the Level of Extreme and Outrageous Conduct or Severe Emotional Distress that South Carolina Courts Require for Such a Claim.

Harris is obligated to prove all of the following elements to recover under his outrage claim: (1) that Tietex "intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from [its] conduct"; (2) that Tietex's conduct "was so 'extreme and outrageous' so as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious and utterly intolerable in a civilized community'"; (3) that Tietex's actions caused Harris' emotional distress; and (4) that "the emotional distress suffered by [Harris] was 'severe' such that 'no reasonable man could be expected to endure it.'" *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007) (quoting *Ford*

v. Hutson, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981)). The South Carolina Supreme Court has "emphasized the heightened burden of proof articulated in the second and fourth elements of the tort, insisting that in order to prevail in a tort action alleging damages for purely mental anguish, the plaintiff must show both that the conduct on the part of the defendant was 'extreme and outrageous,' and that the conduct caused distress of an 'extreme or severe nature.'" *Id.*, 650 S.E.2d at 71 (quoting *Ford*, 276 S.C. at 161, 276 S.E.2d at 778).

"In order to prevent claims for intentional infliction of emotional distress from becoming 'a panacea for wounded feelings rather than reprehensible conduct,' the court plays a significant gatekeeping role in analyzing a defendant's motion for summary judgment." *Id.* at 358, 650 S.E.2d at 72 (quoting *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 171, 321 S.E.2d 602, 611 (Ct. App. 1984)). Thus, "the court must determine that a genuine issue of material fact exists for each essential element of the plaintiff's claim." *Id.*, 650 S.E.2d at 71. A brief review of the facts alleged by Harris quickly demonstrates that he cannot come close to meeting his "heightened burden of proof" with respect to "the second and fourth elements of" of his outrage claim. *Id.* at 356, 650 S.E.2d at 71 (quoting *Ford*, 276 S.C. at 161, 276 S.E.2d at 778).

Harris' outrage claim relies solely on his contentions that (1) Tietex somehow set him up for failure in his position (Am. Compl. at 3-4, 8), (2) Wallace allegedly used a "disrespectful tone of voice" a Harris on three occasions (Harris Dep. 2 at 146-56), and (3) Wallace allegedly yelled at Harris on those same three occasions (*id.* at 218-21). South Carolina appellate courts have made clear that allegations similar to Harris'—and even allegations far more egregious than Harris'—do not qualify as "extreme and outrageous" as a matter of law.

In *Wright*, the plaintiff made allegations that were nearly identical to Harris' contention that Tietex set him up for failure in an effort to "be rid of" him. *See* 298 S.C. at 472, 381 S.E.2d

at 505. Specifically, the plaintiff alleged that the employer "set out on a course . . . to 'build a case' to justify firing her. She allege[d] he loaded her with responsibility while stripping her of authority. She also allege[d] he would change the manner of performing duties and then accuse her of not following his directions." *Id.* The Court of Appeals held that, while the plaintiff and her employer disagreed about her job performance, the employer's "actions were not so extreme and outrageous as to exceed all possible bounds of decency." *Id.* at 473, 381 S.E.2d at 506.

In *Shipman v. Glenn*, the plaintiff alleged a set of facts that was plainly and palpably more outrageous than Harris' allegations about Wallace using a disrespectful tone of voice and yelling at him. *See* 314 S.C. 327, 328-29, 443 S.E.2d 921, 922 (Ct. App. 1994). There, the Court of Appeals was confronted with the following facts:

> (1) [the plaintiff] suffer[ed] from cerebral palsy, a condition that limit[ed] her speech and her physical movements; (2) [the employer] verbally abused and threatened her on the day in question with the loss of her job because she had discussed with others her concerns that she was the victim of intentional discrimination through a reduction in the school's work force; (3) [the employer] ridiculed her speech impediment; and (4) [the employer's] actions caused her to become emotionally upset, distressed, and worried, caused her to be physically ill to the point that she had to leave work early that day, caused her to live in constant fear of [her employer] and what he might do to injure her or harm her career, and adversely affected her personal life and her ability to function in her job.

Id. While the Court of Appeals recognized that the employer's conduct was "both callous and offensive," the Court held that the conduct "cannot provide the basis for an action for intentional infliction of emotional distress." *Id.*

If the conduct alleged in *Wright* and *Shipman* does not rise to the level of "extreme and outrageous" as a matter of law, there is simply no possibility that Harris' allegations could even approach that heightened threshold. Harris' claim is merely an attempt to accomplish what our courts have noted a "'widespread reluctance . . . to permit'" the conversion of "'the tort of

outrage [into] a panacea for wounded feelings rather than reprehensible conduct.'" *Hansson*, 374 S.C. at 357, 650 S.E.2d at 71 (quoting *Todd*, 283 S.C. at 171, 321 S.E.2d at 611).

Even assuming Harris could establish the presence of "extreme and outrageous" conduct, he cannot meet his heightened burden of proving that he suffered emotional distress so severe that "'no reasonable man could be expected to endure it.'" *Id.* at 356, 650 S.E.2d at 70 (quoting *Ford*, 276 S.C. at 162, 276 S.E.2d at 778). All Harris has offered with respect to his alleged "distress" is his own conclusory allegations. This is insufficient as a matter of law. *Id.* at 358, 650 S.E.2d at 72 ("Under the heightened standard of proof for emotional distress claims . . . , a party cannot establish a prima facie claim for damages resulting from a defendant's tortious conduct with mere bald assertions."). To survive summary judgment, Harris was required to provide "something 'more' – in the form of third party witness testimony and other corroborating evidence – in order to make a prima facie showing of 'severe' emotional distress." *Id.* Harris has made no such showing. In fact, Harris has admitted that he received absolutely no medical treatment as a result of the incidents he alleges to have been "extreme and outrageous." (Harris Dep. 2 at 158-60.) Thus, any alleged "emotional distress" that Harris purportedly suffered was far from "severe" under the well-established legal framework. Because Harris cannot make even a prima facie showing of the second or fourth elements of his outrage claim, Tietex is entitled to summary judgment.

C. Harris' Outrage Claim and Three of His Defamation Claims are Barred by the Statutes of Limitation and the Doctrine of *Res Judicata*.

Harris admits that his First Action did not in any way allege the following claims: (1) his outrage claim (Harris Dep. 2 at 17); (2) his defamation claim based on the February 9, 2007 e-mail from Wallace to Wilson (*id.* at 33); (3) his defamation claim based on Tietex suspending his employment in July 2007 (*id.* at 33-34); or (4) his defamation claim based on Tietex "bann[ing]

him from the laboratory" (*id.* at 34). Rather, he first asserted these claims on the following dates: (1) his outrage claim first appeared in his Amended Complaint in the Second Action, which he filed on September 5, 2012; (2) he first pleaded his defamation claim based on the February 9, 2007 e-mail from Wallace in his *pro se* Complaint in the Second Action, which he filed on October 21, 2011; (3) he first alleged his defamation claim based on Tietex suspending his employment in his *pro se* Complaint in the Second Action; and (4) he only identified his defamation claim based on being banned from the lab in his deposition in the Second Action, which occurred on March 14, 2013. Even assuming that Harris has properly pleaded all of these claims in the Second Action and that they relate back to the filing of his *pro se* Complaint on October 12, 2011, these claims are barred by the applicable statutes of limitation. Due to Harris failing to in any way plead these claims in the First Action, they are also barred by the doctrine of *res judicata*.

The statute of limitations applicable to Harris' cause of action for outrage is three years. S.C. Code Ann. § 15-3-530. July 19, 2007—the date on which Tietex terminated his employment—is the latest date that any event on which Harris could be basing his outrage claim took place. That date is approximately four years and four months before the date on which Harris filed his *pro se* Complaint in the Second Action (which did not even include the outrage claim). Accordingly, the three-year statute of limitations on Harris' outrage claim had long passed when Harris filed his *pro se* Complaint, and the claim is barred under S.C. Code Ann. § 15-3-20. While Harris asserts that the statute of limitations for his outrage claim should have been tolled under 28 U.S.C. § 1367(d) while his First Action was pending, he misreads the plain language of that statute. Section 1367(d) is limited on its face to "any claim asserted under [a federal court's supplemental jurisdiction], and for any other claim in the same action that is

voluntarily dismissed at the same time as or after the dismissal of the claim under [a federal court's supplemental jurisdiction]." Harris did not plead his outrage claim in the First Action, and his outrage claim was not dismissed from the First Action. Thus, it is plainly excluded from the tolling provision of section 1367(d).

The statute of limitations applicable to Harris' defamation claims is two years. S.C. Code Ann. § 15-3-550. The two-year statute of limitations runs from the date on which the allegedly defamatory statement was published, not from the time the statement was allegedly discovered. *Jones v. City of Folly Beach*, 326 S.C. 360, 369, 483 S.E.2d 770, 775 (Ct. App. 1997) ("[S]ummary judgment [should be granted] because South Carolina has not adopted the discovery rule in libel and slander cases."). Harris' defamation claims based on (1) the February 9, 2007 e-mail from Wallace, (2) Tietex suspending his employment in July 2007, and (3) Tietex banning him from the lab in February 2007 are all based on "statements" that Tietex allegedly made in February and July 2007. Harris first alleged these claims in the Second Action, which he did not file until October 12, 2011. (Harris Dep. 2 at 33-34.) Thus, each of these three defamation claims must be dismissed based on Harris' failure to bring them with the two-year statute of limitations.

The complete absence of these three defamation claims and the outrage claim in the First Action also implicates the doctrine of *res judicata*. "The doctrine of *res judicata* bars a litigant from raising any issues which were adjudicated in the former suit [between the parties] and any issues which might have been raised in the former suit." *Pye*, 325 S.C. at 432, 480 S.E.2d at 458 (emphasis added) (citing *Hilton Head CDep. v. Public Serv. Comm'n*, 294 S.C. 9, 362 S.E.2d 176 (1987)); *see also id.* ("'*Res judicata* also bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action

between those parties.'") (quoting *Riedman Corp. v. Greenville Steel Structures, Inc.* 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992)).

Harris cannot dispute that these three defamation claims and his outrage claim arose out of the same transaction or occurrence that was the subject of the First Action—his employment with Tietex and separation therefrom. Harris could have raised these claims in the First Action, but he chose not to do so. Based on Harris' failure to assert these claims in the First Action, the doctrine of *res judicata* precludes him as a matter of law from asserting the claims in the Second Action. Accordingly, Tietex is entitled to summary judgment on these claims.

III. CONCLUSION

For all of the foregoing reasons, Tietex is entitled to summary judgment on all of Harris' claims against it. Accordingly, Tietex respectfully asks the Court to dismiss Harris' lawsuit in its entirety.

Dated this 23rd day of January, 2014.

Respectfully submitted,

By: _____
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Lucas J. Asper (SC Bar # 77902)

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Attorneys for Defendant Tietex International, Ltd.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 2014, a true and correct copy of the above **MEMORANDUM IN SUPPORT OF DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT** was served by U.S. Mail, postage prepaid, upon Plaintiff at the following address:

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Spartanburg, SC 29304

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16936013.1

Attachment A
Transcript of Record of Hearing
August 30, 2013

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG 2011-CP-42-4538

Gary G. Harris,

Plaintiff,

-vs-

Tietex International, LTD,

Defendant.

TRANSCRIPT OF RECORD

August 30, 2013
Spartanburg, South Carolina

Ordered: November 20, 2013

Delivered: January 5, 2014

BEFORE:

THE HONORABLE FRANK R. ADDY, JR., Presiding Judge.

APPEARANCES:

Mr. D. Alan Lazenby,, Esquire
Attorney Appearing for the Plaintiff

Mr. Frederick Suggs, Esquire
Mr. Lucas Asper, Esquire
Attorneys Appearing for the Defendant

Pamela Faucette, CVR-M
Circuit Court Reporter

THE COURT: We're getting into the merits now. Is the only thing that you've got to prove outrage that he got yelled at?

MR. LAZENBY: Okay. As far as — as far as the — the merits of the case, Your Honor, I've taken one deposition in this case.

THE COURT: Okay.

MR. LAZENBY: I had to fight to get that. After I deposed the – the representative for six hours and we even continued till the next day, Defendant fought that; filed a motion to — to keep me from deposing him again. We finally got that done.

I, then, noticed around five depositions. And Defendant immediately filed a motion to stay discovery until this summary judgment could be heard.

It is clear that I have not had a full and fair opportunity to complete discovery. I would simply argue that just on that record, the — the fact that — the fact that — that we have not been able to complete discovery, should preclude summary judgment on — on any factual issue in this case.

What I did in my brief, Your Honor, is cite to the testimony of — of Mr. Harris. And it wasn't — it wasn't raising his voice which I think is what Counsel said it was. My client described it as berating and yelling and that my client was scared. And it was — it was bad conduct.

And — and so, substantively, we would disagree with that. But we would also say we — we need more time to — to develop this. It's premature to grant summary judgment on any factual basis.

THE COURT: All right. I understand your position.

MR. SUGGS: Judge, may I be heard?

THE COURT: Sure. Please.

REPORTER'S CERTIFICATE

I, the undersigned **PAMELA FAUCETTE**, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 24, were transcribed by me and represent a true and accurate transcript of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

December 31, 2013

Pamela S. Faucette
Official Court Reporter
Seventh Judicial Circuit

Attachment B
Excerpts and Exhibits from First Deposition of Gary Harris

Transcript of the Testimony of:

Gary G. Harris

July 13 & 15, 2009

In the Matter of

Gary G. Harris v. Tietex International, LTD
7:08-3020-HFF-WMC

G. W. Coleman Associates
P. O. Box 9177
Greenville, South Carolina 29604
Phone: 864-233-2341
Fax: 864-233-5534
Email: SueHAPS@AOL.com

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Q: Do you have any significant debts?
A: Not right now.
Q: Other than your mortgage?
A: No. Everything right now is in reasonably good shape. The only debt I guess would be significant is one of the cars there's probably $3,000 owed on it thereabouts.
Q: You don't have any big credit card debts?
A: Since this bankruptcy, I have gotten credit cards back and I probably got, I don't know, six or eight. I'll use two and put those away, use two more. But I will not let a, if a get a statement, I pay it immediately.
Q: You were telling me and I stopped you, about getting a call when you were at Chatham about the job at Tietex. Tell me about that. How did you find out about the job at Tietex?
A: I received a phone call and I think it would have been from some agency that they had hired to find someone would be my, based on what I remember of the situation.
Q: All right. And then you went for an interview, correct?
A: I did in April.
(Defendant's Exhibit 5 was marked for identification).
Q: And Exhibit 5 is your letter back to Tietex, essentially, thanking them for the interview.
A: Okay.

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Q: Correct?
A: Yes.
Q: And you interviewed, according to this letter, with Martin Wildeman and the HR Manager, Don Woodward, and the Printing and Finishing Manager, Dave Hughston, and then John somebody. Who's John?
A: John Broughton.
Q: Spell that, please.
A: B-r-o-u-g-h-t-o-n.
Q: Who actually hired you?
A: John Broughton along with Dave Hughston, but John was the key figure.
Q: And you see on this Exhibit 5, the fourth paragraph where you talk about Tietex having a very clean, modern facility. Do you see that?
A: Uh-huh (affirmative response).
Q: And would you agree that the facility stayed clean throughout your employment?
A: Yes.
(Defendant's Exhibit 6 & 7 were marked for identification).
Q: I'm going to give you two together. Exhibit 6 is an Offer of Employment to you and Exhibit 7 is looks like your New Hire sheet. According to these documents, you began working at Tietex on July 13, 1994. Any reason to dispute that?

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A: No.
Q: And your salary at hiring was $55,000. Any reason to dispute that?
A: No.
Q: And you were hired as a Senior Research Chemist. Any reason to dispute that?
A: That was the job title, but it did not cover what I was hired for.
Q: All right. And that Senior Research Chemist position was in the Printing and Finishing Department of Tietex, correct?
A: As far as the pay for that position, yes.
Q: As far as the what?
A: The pay.
Q: Well, it says, looking at Exhibit 6, it says in that first paragraph, second line, I'm sorry, first line, "We are pleased to offer you the position of Senior Research Chemist in our Printing and Finishing Department." Do you see that?
A: Yes, sir. That's what it reports to, but it doesn't spell out the responsibilities were plant wide.
Q: Okay. So Exhibit 6 is not a job description, right, it just states the name of the job?
A: Yes.
Q: And you reported to Dave Hughston, the Plant

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Manager of Printing and Finishing?
A: Yes.
Q: Now, if you will look, please, at Exhibit 6, the second page, which is Bates Numbered 229. Do you see the bold underlined language that's two paragraphs above Mr. Woodward's signature?
A: Yes.
MR. STEWART: Objection to form.
Q: It says, "This letter summarizes our offer. Nothing herein should be construed as a Contract of Employment or as a promise of any specific terms for any determined period of time. Did I read that correctly?
A: Yes.
Q: So under the terms of your offer, you were employed at will, correct?
MR. STEWART: Objection to form. You can answer, I'm objecting for the record.
Q: Remember what we said, that he might object but you go ahead and answer.
A: Okay. Yes.
Q: And your employment could be terminated any time for any reason, correct?
A: May I add to that?
Q: Sure. Well, give me a yes or no and then qualify it.

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A: Yes. I'm not sure time wise how long it was after I started the job, but Dave Hughston brought a paper in one day for me to sign. And, basically, it said, spelled out Tietex being an at will employer and so forth, and then it went on to say, you know, specifically that I could leave for any reason at any time and Tietex could ultimately do the same. It was both ways. And I told Dave, I said, "I don't think I want to sign this," something to that effect. And something to the effect of what happens if I don't sign. And he, essentially, told me that if you don't sign it, you'll probably lose your job, so that's when I signed it, but I was aware of Tietex being an at will employer.

Q: Do you have a copy of that document?

A: I do not.

Q: Well, you had quit other work, right, during your career before Tietex?

A: Sure.

Q: And you knew that you could quit Tietex if you wanted to for whatever reason whenever, correct?

A: Yes.

Q: And you told me about this document that Mr. Hughston brought you, but you didn't have any kind of written Contract of Employment when you were hired, did you?

A: Nothing formal that I know of.

Q: And during the term, well, during the time that

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you worked for Tietex, nobody ever gave you a written Contract of Employment to sign, did they?

A: No.

Q: Did you go through an orientation?

A: I don't recall.

Q: Do you ever recall anybody explaining and reviewing the Employee Handbook with you?

A: I do not recall that.

Q: Do you ever recall being given a copy of the Employee Handbook?

A: I definitely was given a copy. I do not know how early on it was, but I had one in my possession for several years.

Q: Did you read it?

A: I periodically would reference it regarding, say, one of the folks that reported to me had a question or anything of that nature, I would use it as a reference manual to try to answer questions or for my own.

Q: But you never read it cover to cover?

A: No.

Q: Do you recall any part of the Handbook that you read not understanding?

A: The only thing I can remember, and this is really too vague to be bringing up, but I do remember some things in there that I felt like were either outdated, a lot of

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outdated stuff that didn't really apply. And the thought there is, you know, this manual needs to be revised. That's the only thing I can recall that I didn't understand.

Q: Do you remember what they were?

A: No, I don't.

Q: Do you recall asking questions for clarification about the Handbook?

A: I don't recall it, but I'm sure if I was trying to get an answer for someone and I, just to back up my interpretation, I'm sure I probably did that, but I don't recall it.

Q: That would be in giving an answer for someone else who came to you, correct?

A: Most likely.

Q: Do you have a copy of that Handbook?

A: No. I actually, I'm not sure what year it was, it was around 2005, '6, along in there, there was a call for the manuals to be turned in so they could revise, and I never got a revised copy.

Q: I'm going to, if I may, read you the question and answer which is Interrogatory 13. "Interrogatory. Identify the specific statements, policies, or procedures which Harris claims were expressed in mandatory terms and formed a contract of employment." "Answer. Plaintiff beliefs that Tietex had an employment handbook when he was first hired

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which laid out responsibilities and duties of the employee and the employer. However, he does not currently have a copy of this handbook. It is believed that the Defendant would have a copy of this handbook and Plaintiff will formally request it. Therefore, the Answer to this Interrogatory will be supplemented as discovery progresses." Did you hear all that?

A: Yes.

Q: So would it be fair to say that as of today, as we're talking, you don't know what policies were in the Handbook?

A: I do know there was a policy in there that had to do with termination and the steps that were to be taken. I can't cite them or anything, but I knew they were like written warning, verbal warnings, and then written warnings and then termination. I knew that was in there.

Q: All right. Other than that, you don't know what was in the Handbook?

MR. STEWART: Object to the form.

A: I mean, I couldn't specifically tell you. I mean, we could sit here and talk and can tell you the kind of things that were in there, but I couldn't tell you a page number or anything.

Q: All right. Well, it would be fair to say then, that you don't know what policies in the handbook that you

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would contend today created a Contract of Employment?
MR. STEWART: Object to the form.
A: Yeah, I don't really feel like I could answer that question, so I'll just say I don't know the answer.
Q: You don't know. It's fair. Look, you can say yes, you can say no, you can say yes and no and qualify it, and you can say I don't know.
A: I'll say I don't know then.
Q: So you don't know what in the Handbook that you would base your contract claims on?
MR. STEWART: Same objection.
Q: Correct?
A: I don't know, I mean, I've got my thinking but I don't think it's, again, I don't think it's — The answer would be, no, I'm not sure. No, I'm not able to put my finger on something right now, but I have my thinking on it. I don't know.
Q: Okay. Now, there is a breach of contract claim in your Complaint which we just talked about. Then there is a second claim that's breach of contract accompanied by a fraudulent act. What do you claim that Tietex did that was fraudulent?
A: I'm not exactly sure where that is right now. I'll say I'm not sure right now.
(Defendant's Exhibit 8 was marked for identification).

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Q: Can you identify Exhibit 8 as the Equal Employment Opportunity Policy from the Tietex Policy Manual?
A: That's what I'm looking at, that's what it says.
Q: All right. And it says, "It is the policy of the Company to provide equal opportunity to all employees and applicants. No person shall be discriminated against because of race, religion, color, sex, age, national origin, handicap, or veteran status." Do you see that?
A: Yes.
Q: Did I read it correctly?
A: Yes.
Q: Now, remember when we were talking about your Offer Letter and you said, well, you know, that describes my title, but it doesn't really describe the job? Do you remember that?
A: Yes.
(Defendant's Exhibit 9 was marked for identification).
Q: I'm going to give you Exhibit 9, which is a Job Description for the job title that you had, Senior Research Chemist. Is Exhibit 9 an accurate description of the job that you had as Senior Research Chemist?
A: One second, please.
Q: All right. And let me just invite your attention to the second page which is marked 344. You can see it was written by Jake Butts, and he dated it January 6, 1998.

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A: Yeah, but, I mean, this is the first time I've ever seen this so that's why I'm ...
Q: Go ahead and take your time.
(Reviewing document).
A: I mean, most of the things on it are things that I was involved in, but there are some things that are not here.
Q: All right. Well, tell me what you would add.
A: Well, I can't, I mean, I could take this home and, you know, do some recall and come up with several I'm sure, but I'm looking for environmental stuff right now and I'm not seeing it. Maybe I'm overlooking it.
Q: Okay. So you say you had some environmental duties that aren't listed in the 16 job duties?
A: I would have to say, in all fairness to me, that I had the greatest degree of responsibility with regard to all EPA and environmental work and reporting.
Q: And your point is that to the extent that you had those environmental or EPA duties, they're not listed on Exhibit 9?
A: They're not listed. I don't believe I've overlooked them.
Q: No, I read it, I didn't see them either. Jake Butts is who you reported to, right?
A: At that time.

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Q: And he was the QA and Environmental Manager?
A: According to this.
Q: Now, you were first hired as a Senior Research Chemist, correct?
A: There was a job open and the title was Senior Research Chemist that within the, within the framework of that particular job that was open or duties that had been vacated by a gentleman who had gone elsewhere.
Q: So when you went to work for Tietex, we've already established that your job title was Senior Research Chemist, correct?
A: The title was because that was what was what was available, but the discussions I had with John Broughton and Dave Hughston at the time we were considering me or they were considering me, it was clear that I was over qualified for the job as written.
Q: And the last day you worked at Tietex, your job title was still Senior Research Chemist, wasn't it?
A: It was newly created, I believe it was like February of '07, it was newly created. It was a newly created position for me. It was advertised as a newly created, posted job, posted as a newly created whatever.
Q: All right. This is the transcript of your testimony before the Appeal Hearing on September 12, 2007.
A: Okay.

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A: I can't answer that. I was having to take, as far as environmental goes, I was having to take things home with me and do them, because I wasn't allowed to work overtime, that kind of thing, and I was carrying stuff home with me to do records keeping and reporting, so I don't know. I don't know.
Q: Okay. If you don't know, that's fair. Did you ever supervise employees? Did you ever have people reporting to you ...
A: A few.
Q: ... so that they looked at you as their supervisor.
A: Let me just throw this in. It's important, I think. When I first went to work there, Dave Hughston, the plant manager, gave me responsibility over all department managers. I had that responsibility over all of them. They would listen to me. That was a given. As far as actual folks reporting to me, I just had a few in the laboratory area.
Q: Who were they?
A: It would be Judy Cramer. What was the Quinn lady's ...
MS. DAVIS: Jean.
A: Jean Quinn, Rhonda Blanchard, Robert Culbreth, Gene Panell.

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Q: Last name?
A: Panell, P-a-n-e-l-l.
Q: Is that a male or a female?
A: It's a man. And what's the girl that had so many difficulties that worked with Rhonda who is another technician? Kay Ward.
Q: So all of these employees that you just named reported to you at some time or another?
A: Yes.
Q: All right. How many usually reported to you at once?
A: I guess at a minimum over the time I was there until I started reporting to Wade Wallace, maybe at any given time a minimum of three or four.
Q: Three or four at a time?
A: Yeah.
Q: What were your normal hours of work?
A: Let me just say that during an approximate six, seven year span, I would say that I averaged a minimum of 70 hours on the job site.
Q: I think my question wasn't clear. On the normal day, what time would you go to work and what time would you leave? What was your expected time to be at work?
A: The expected time, I believe, was 8 o'clock, and I believe the expected time we could leave was 5 with an hour

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for lunch. Most of the time, I'm talking about when I was actually involved and this other stuff hadn't started, I would be there 6, 6:30.
A: A.M.?
A: Uh-huh (affirmative response). And stay there for as long as I needed to to get as much done as possible. It wasn't unusual to stay there till 6, 6:30.
Q: Were there safety reasons for you to be at work during regular business hours?
A: Since I was the key person regarding safety, are you talking about chemicals and things I worked with?
Q: Yes.
A: I was the person, the person that made decisions as to what was safe, what was not, maintain the MSDS books for the most of the time I was there and oversaw a lot of that without title, I was the one that was relied upon for making those kind of decisions. And in the first, before I reported to Wade Wallace, there was never one instance where anyone came to me and said you shouldn't be in here on Saturday or Sunday.
Q: Were there reasons that you shouldn't be working alone with chemicals and lab equipment?
A: No.
Q: You claim it would have been safe for you to work alone with chemicals and lab equipment?

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A: No. I'm a professional in that area and I know what precautions to take. It would have actually been, I mean, take a scenario where I'm there and the plant's running and I'm working with chemicals, which I didn't do a lot of that, I mean, talking about hazardous chemicals, if I'm working with hazardous chemicals which, again, did not occur but fairly infrequently, I don't want, I'm not going to allow anyone else to be around me because then they would be, if something happened, then they would be exposed to it. There's no one any safer with regard to those kind of things than I. And it gets into the same area I was talking about earlier about being concerned for employee health.
Q: All right. If you had one of these employees that you named working under your supervision, would you permit them to work in the lab not during business hours but work back there by themselves?
A: Well, they did.
Q: Okay. Did part of your duties include working with production personnel in the testing processes?
A: I'm sorry.
Q: When you were working on tests and trials and so forth, things like that, did you need to work with production personnel?
A: That's a pretty broad question. There were times when I did and there were times when I didn't need to.

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There were other things more important that I needed to be doing that had to do with that trial.
Q: Were there times when you did not work from 8 to 5 or from 6 to 6 but worked irregular hours?
A: The only time I worked 8 to 5 was when I worked for Wade Wallace.
Q: And why was that?
A: Well, the main basic reason was I was not allowed to work after hours, weekends, or whatever.
Q: Wade Wallace was trying to keep track of you?
A: No, I would not classify it as that, no. There was no point in that.
Q: Did you ever report to work at 10 p.m. at night?
A: Now, when you say that, the first thing that comes to mind is one of the plant trials early on was going to have to be done on third shift which started, say, at 11 o'clock and I needed to go in at 10 in order to be there for the trial. Other than that, with me not being a night person, there's no reason I would go in to do work at 10 o'clock at night. Now, I may have been in there finishing up something at 8, 9, or 10, but there's no reason I'd show up at 10 other than for something like a plant trial.
Q: Did you ever work those hours like coming in on third shift before you reported to Wade Wallace?
A: Oh, I mean, the hours I had, again, I want to

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minimize those few years leading in to reporting to Wade Wallace since the last few years, because things were going on that was changing what I could do. But when you look at the heart of the matter going back I want to say 2003 and back, maybe part of '4 and back, I worked a lot of hours. It included the regular hours plus overtime.
Q: Did Jake Butts ever complain to you that he couldn't keep track of where you were?
A: No one, not Jake, not John, not anyone I ever reported to ever said the first negative about my job performance and they had plenty of good to say.
Q: Do you know if Jake ever complained to other people within Tietex management that he couldn't keep track of you?
A: The only thing I've heard about that, it was at the ESC Hearing and that's the extent of what I've — But other than that, no, never.
Q: Now, in our Requests to Admit that you responded to, you said that in order to have access to equipment and materials at other labs, you had to work at those other labs when the employees who were regularly employed there weren't present?
A: No.
Q: Not true?
A: No. Actually, what that probably stems from, I

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had an opportunity, and I was banned from the lab building, period, when I went to work for Wade. There was a section in the main plant that had some lab equipment. It was a, call it a finishing department lab or whatever, but it was a small lab that employees working in those departments used and they used it everyday. That was their job. I couldn't do anything in there when they were there, but had I been given permission to work overtime when they weren't there, I could have utilized that equipment. That was where that's coming from.
Q: Okay. What other labs were you working at?
A: Probably the main one during — You're talking about when I was reporting to Wade, obviously?
Q: Right. Right.
A: It would have been Rohm and Haas would be the big one.
Q: Any others besides Rohm and Haas?
A: Hexion.
Q: Okay.
A: And Rohm and Haas was a long way off, Charlotte. Hexion, I was beginning to get bad fibs there so there was one or two more in the works that I, as things had have gone on, I probably would have been able to do some work there.
Q: For Rohm and Haas you had to go all the way to

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Charlotte?
A: Yes. And the reason for it being Rohm and Haas is one of the projects I was working on, they had an employee, a strong, strong technical guy with regard to back coating, and he was assisting me. He was assisting me in the back coating project that was primary importance.
Q: Whose idea was it for you to work at these other labs like Rohm and Haas and Hexion?
A: I was given a substantial number of assignments and no place to do them. And I'm still a little bit puzzled about this, except I got my take of it now, but why would a manager really disable me. There's no doubt in my mind I was disabled. But yet, allow me to go to other places to try to get a job done. So it was my idea in order to try to get the work done.
Q: And who gave you permission to do Tietex's work at these other labs?
A: Wade.
Q: Did you leave a voice mail message for coworkers in the middle of the night?
A: Specifically, I woke up, when I knew I was going to be terminated and I couldn't sleep, then I woke up, I don't know, it was 2 or 3 in the morning and I knew my only hope — I mean, this was a very traumatic time for me. I can't describe how traumatic it was. And I, I mean, I knew

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Martin wasn't at work, Martin Wildeman wasn't at work at 2 or 3 in the morning. I left a message and told him I'd like to meet with him if I could.

Q: So you left a message for Mr. Wildeman in the middle of the night?

A: I don't know that it mattered when I left it, because I knew he wasn't at work.

Q: Would it have been like 3 o'clock in the morning?

A: It could have been. It could have been 4, it could have been 2. It was when I woke up and all was on my mind was getting terminated.

Q: So you admit you called Mr. Wildeman like 3 or 4 o'clock in the morning?

A: No. I did not call him, I left a message on his work phone knowing he was not there.

Q: This is Attachment 5 to your communications to the EEOC.

MR. STEWART: Fred, can I see these before you hand them over?

MR. SUGGS: Sure. Sure. Let me show you. Look at the C part which is the last paragraph.

Q: See C part it says, "Tietex stated that Gary Harris made phone calls and left messages in the middle of the night when he knew no one would be there to answer them. Of course, that's a malicious lie."

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A: Yeah. What that, the intent of the way that's said, no. Yeah, that's a lie based on the way it's worded and what it's trying to convey. That's not what happened. Can I see that again, please?

Q: Sure. That was Document Tietex 284. Do you recall leaving messages for Wade Wallace in addition to Martin Wildeman at non-business hours?

A: On the, I guess it was the evening of July 2 when I went home and saw this serious ant problem and non-business 7 o'clock ...

Q: PM or AM?

A: PM. You know, those are all non-business hours. I'm sure that I left messages that would have fallen outside of 8 to 5, but they were necessary or reasonable. I never left an unreasonable message.

(Defendant's Exhibit 10 & 11 were marked for identification).

Q: I'm going to show you these two together, and you've already seen one of them. Exhibit 10, that's Attachment 3 for the EEOC. And Exhibit 11, that's Attachment 5 for the EEOC. So if you're looking at Exhibit 10 and you go to the top of the page and then you come down to the third paragraph, you see it where it says, "One night I woke up about 3:00 a.m."?

A: Yeah.

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Q: Now, is this a document that you gave to the EEOC?

A: I would think so. It looks like it.

Q: And then if you look at Exhibit 11 and go down to paragraph C, that's the paragraph that says it's a malicious lie, right?

A: Yeah, that's correct. And may I add?

Q: Sure.

A: I had information already that in one of our former hearings that it was stated in a way that I routinely did that, and it included more than one person and it included Wade Wallace. That's the reason I call it a malicious lie because it's just not true and the person that said that wasn't true.

Q: And who said it, Wade Wallace?

A: In one of our ESC Hearings, maybe the last one, it was brought up. I don't know who to attribute it to.

Q: All right. Now, before Wade Wallace, you said Jake Butts was your immediate supervisor?

A: Yes, sir.

Q: And at some time did Butts move his office from the plant to the lab?

A: He did.

Q: Would that have been about June 2006?

A: Yes.

Q: Do you know why Butts moved his office from the

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plant to the lab?

A: I know that he and I had discussions over a period of time and I encouraged him because he was in this huge room and one desk in it. Well, there was another desk that was used sometimes for doing some, when the filing person was filing. And he and I would talk about it and he had occasionally periodically over time said, you know, things like I might move up here or whatever, but I encouraged him to move up there because for a lot of reasons. It just made sense. So why he moved, I don't know how much, if anything, but I certainly wasn't against it.

Q: Did Butts tell you that he was moving his office to the lab because he had difficulty keeping track of you and he thought he could have more direct supervision over you if he moved to the lab?

A: Absolutely not. In fact, Jake Butts was already encouraging me to establish a place down in the plant. So based on the scenario that you just mentioned, it would be more likely that he was, it was something in the works for him to go ahead and get up there and for me to be moved down to the plant so, no.

Q: How often did you see Mr. Butts before he moved from the plant to the lab?

A: Jake made a statement to me that I think's important with regard to your question. This goes back to

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the first time I started reporting to him. He essentially said that he had no abilities with regard to what I did, that he didn't understand the things I did. He didn't understand anything in the area, any chemistry or nothing, but he knew that my record was very good and, basically, he said to me, "You're your own supervisor. I know you'll do the right things and you have been doing the right things." And so that, to answer your question, we didn't see a lot of each other.

Q: So you saw him infrequently before he moved to the lab?

A: Yes. If he had something that he wanted done, most likely he would go directly to a technician, like a test or whatever. He didn't really, even the environmental part of it, I was really doing most of that and even though he had the title there. And we would, of course, get our things together when it came down to do a report or something and he would actually provide me with something he had accumulated so that it would enable me to do the complete report.

Q: And after Jake Butts moved to the lab, did you see him everyday?

A: After he moved to the lab? It didn't change anything I was doing at the time.

Q: Did you see him everyday after he moved to the

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lab?

A: I can't say yes or no to that. I don't know.

Q: All right. Did you see him just about everyday?

A: I don't know.

Q: Did you see him more often than you had seen him before he moved to the lab?

A: I would have had to have.

Q: Okay. That's what I thought. Did you object to Jake Butts supervising you more closely after Butts moved to the lab?

A: He never supervised me more closely.

Q: Now, when Butts moved to the lab, was your office in the lab?

A: Oh, yeah. There's four sections to the technical building and I was considered to be the Technical Center Manager, an accredited lab area. One section was the office area, another section was the wet lab, another section physical testing, and another section was sort of an extension of the wet lab, but it was where a real chemist would work, and we had a burn room. So, yes. He, obviously, moved into the office area which was huge and the area I had encouraged him to move to.

Q: And at some point did you move your office out of the lab?

A: Yes.

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Q: Where did you move it to?

A: Now, let me qualify that and say I didn't move it out of the lab, I just established another office, you might say, we'll call it an office, in the main plant.

Q: Do you know when that was?

A: It was — I'm going to take a stab at this, maybe December, November, December of 2006.

Q: Did you continue working in the lab up until, say, February 2007?

A: Yes.

Q: When do you claim you began to smell mold?

A: The middle of June '06. Well, whenever the furniture was moved in and that would have been in June.

Q: And what impact do you claim that these mold smells had on you?

A: I'm going to just, I'm going back to an area that I haven't looked at in more than two years as far as anything in writing, but I do remember being stopped up and, occasionally, it would go on to the point if like a, sort of like flu symptoms almost. But stopping up is one of the big things and occasionally that might lead to like a sinus headache or something, but really getting stopped up and couldn't breathe very well.

Q: Did anyone else voice complaints about the mold besides you?

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A: I can say this about that. The technicians that reported to me were very careful about anything they said. They were highly concerned for their job and had they had an opinion, in my mind, they would not have expressed it.

Q: Well, is the answer no?

A: I don't recall.

Q: You don't recall anybody else voicing a complaint to you about the mold?

A: I do not recall that, no.

Q: Did you complain about the mold smells and the stopping up and the flu like symptoms?

A: It took some time. It was not until I went to a second doctor and he was asking me a lot of questions and things and he's the one that led me to believe that it had to do with work.

Q: Who is this doctor?

A: Weir, Dr. Weir.

Q: Where is he?

A: In Spartanburg.

Q: Is that W-e-i-r?

A: I think it is, David Weir.

Q: What kind of doctor is he?

A: Ear, nose, and throat.

Q: ENT. Okay. Did you complain to anybody at Tietex?

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A: After — Oh, it became, I mean, things evolved to the point, which I can't remember all the details, but I'm sure that after I was convinced that that was what was going on, I don't recall saying anything to anyone, but it wouldn't have surprised me if hadn't have said something to like a nurse or somebody. I even brought it to Jake's attention, I know that.
Q: You did bring it to Jake's attention?
A: Absolutely.
Q: What did you say?
A: I don't recall what I said. I just recall that well into it and after, this is after I had put up, something triggered it that he said or whatever, but this was after I put up an office down in the plant and I believe it was after I went to an allergy specialist where they stick all these things in you and they determined I was allergic to mold.
Q: Did Tietex have a hygienist check the lab?
A: I was told that that occurred.
Q: Do you know what type of testing was performed?
A: I saw at some point, I forgot how, I managed to get a hold of an after the fact report and, I mean, I'm a strong technician and I know how to, I know how to do projects, I know how to get from point A to point B in the shortest time possible. Based on what I saw, it was a

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pathetic evaluation. They spent very little time and they did not concentrate on the area where the complaint was, which was the office area, and they did a little bit of dabbling around in several different sections of the laboratory when they should have been spending their time, all of it, concentrated wise in the office area.
Q: Do you know who performed the testing?
A: I do not.
Q: Do you know whether mold testing was performed?
A: No.
Q: No, you don't know or, no, it wasn't?
A: Oh, did you say where it was performed?
Q: Mold testing.
A: And where?
Q: Well, I just asked you if you knew whether mold testing was performed?
A: If I remember correctly, I believe the report said something to the effect that there's nothing — In order for it to have been tested for mold, it would have had to have stated what it did, which was, you know, it was very clear that kind of thing.
Q: So you believe mold testing was performed?
A: The paper showed it, but if I had to qualify it as being performed, I would say no, being a technician.
Q: Do you know whether mildew testing was performed?

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A: I do not know.
Q: So you claim that the testing that was done was flawed, correct?
A: Yes.
Q: But you admit that the hygienist reported finding no evidence of mold contamination, correct?
A: Yes. Yes.
Q: Well, and you were shown a copy of the report?
A: I don't remember how — I did see a copy, but I'm not sure if I had to go looking or what, but it was well after it was done that I was told it had been done and it may have been David Wilson. I'm not sure.
Q: And the hygienist said that the air in the lab was cleaner than the outside air, correct?
A: Yeah, that's the same thing these employees in the nickel bath were told, the situation I mentioned earlier.
Q: So you draw a parallel between the nickel bath situation at — What company was that?
A: Cherokee Finishing.
Q: At Cherokee Finishing and the mold at Tietex?
A: With regard to that kind of a statement. I think that's really an irresponsible statement.
Q: But you don't have any firsthand knowledge about how the hygienist's tests were conducted, right?
A: I do not, but I do know, also another thing I'll

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add to this, that all the furniture was sprayed, in the general area where it was was sprayed with Lysol periodically and it would have had to have been on weekends and after hours, so it would had to have been — If they were tested early in the week, it's a good possibility it was right on top of Lysol treatment.
Q: And you weren't present during the test?
A: No, sir.
Q: What information do you have to support your contention that the test was somehow faulty or unreliable?
A: The magnitude or degree of attention paid to the area of complaint, which was the office area. They had so much time to do testing, they had so much equipment to do it with, and they, it looks like to me, from memory, it looks like to me they delegated equal time to each of the four sections of the laboratory rather than concentrated on that one key area.
Q: So do you have any other information to support your contention that the testing was faulty other than the fact that they did not concentrate on the office?
A: No.
Q: Did you continue to complain about the mold smell after the testing?
A: I don't recall.
Q: Do you claim that Jake Butts was the cause of the

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smell?
A: Yes. I did have other employees concur with me there. I don't recall names or anything, but regarding what I envisioned, because I've seen this before and I certainly don't fault Jake, but a house that's, you know, real shaded or a older house, moisture problems, I've walked into houses like that like looking for a house, when you're looking at houses for sale, and you could smell that musty mildew. And if one hangs their clothes in there, you know, it's just going to, it's no way around the clothes smelling like that.
Q: So you claim that Jake Butts wore clothes that smelled like mildew?
A: Yes. Without question, yes. I'm not saying everything he wore everyday, but many times.
Q: Did anybody, did you ever discuss that with anybody at Tietex?
A: I'm sure I probably did, but not as a casual thing. It would have been with maybe the plant nurse or someone. And after Jake was aware of it, I wouldn't have, I don't think I would have handled it unprofessionally as far as going out and just, you know, making a joke of it or something. I don't recall any details.
Q: And you claim his office furniture smelled like mildew?

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A: Yes.
(Defendant's Exhibit 12 was marked for identification).
Q: Exhibit 12 is a series of e-mails beginning at the bottom with an e-mail from Wade Wallace to you and then it goes on with a message from you to Wade and then from Wade to you all in early February, between the 2nd and the 5th. Would you take a moment to look over that, please.
A: Okay.
(Reviewing document).
A: Okay.
Q: All right. You ready?
A: Yes.
Q: And would you agree with me that Exhibit 12 shows that Tietex moved you from the lab to remove you from the source of mold that you were complaining about?
A: I would prefer using the term banned, because I was already situated in the plant and they just didn't want me going back up there to do work anywhere in the building.
Q: And that was because you had complained about the mold, right?
A: In my opinion, no.
Q: All right. What evidence do you have to support your opinion?
A: Now, I cannot, I cannot say what David Wilson

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discussed. Obviously, David was only at Tietex for a few years. I think he came in 2005, so he was totally unaware of what occurred before then, only what he would be told. I don't know his relationship with Wade and how this, why this occurred. I don't know who was the stronger person. Was Wade purely doing what David Wilson required because of what he had experienced in his previous employment? That's possible. But it also fits very well with, you know, hindsight being 20/20 and my being able to get away from the situation and become more objective and not so subjective, it also fits in with a lot of other things that was a malicious thing. If Wade were in control of this actually happening just to get me away from being able to do the work because they knew that was my lifeline. They knew the laboratory building and everything in there was key for me to be able to do my job.
Q: All right. Looking at Exhibit 12 and the e-mail to you from Wade Wallace, it says, "I received your voice mail this morning. As we discussed yesterday, we will do whatever is necessary to shield you from any further exposure to an environment(s) that might negatively affect your health." Do you see that?
A: Yes.
Q: And then he goes on to say, "As David Wilson directed, please do not enter the lab or any other work

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areas that Jake occupies unless it is an approved exception (see the next paragraph)." See that?
A: On this?
Q: Yeah, right at the — Here, let me show you. Right down here.
A: Okay. Yes, I see that.
Q: All right. So you complained that the smell was coming from Jake, Jake's clothes and his furniture, so the company said, well, if it's impacting your health, don't go in the lab, correct?
MR. STEWART: Object to the form of the question.
A: There's one thing I would say about that. When this was being discussed and all, I said, "Okay. If you believe that my exposure to Jake will take care of, and my getting away from exposure to Jake will take care of the problem, then going forward, I do not want Jake Butts coming to see me nor in my office areas down here." He came when he wanted to and he stayed as long as he wanted to.
Q: But weren't you removed from being supervised by Jake so that you wouldn't have to interact with him?
A: He was still environmental and I was still doing environmental.
Q: But that was part of the reason for removing you from Jake Butts' supervision was so that you wouldn't have to interact with him, right?

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MR. STEWART: Object to the form.
A: I mean, my opinion, no.
Q: Well, the result would be of saying, well, you're no longer going to be supervised by Jake Butts, you wouldn't have to encounter him, right?
A: I think that would mean being that we both were key people at Tietex that, obviously, we would have to have encounters sometime.
Q: Sometime, but you wouldn't have the routine sustained encounters that you would have with your supervisor, correct?
A: But I'd already solved that problem before I went to work for him. There was no problem when I started reporting to Wade Wallace. My I finish?
Q: Let me ask you a question and then you can.
MR. STEWART: No, let him finish. No, let him finish his ...
Q: Sure. Go ahead.
A: When I established the office in the plant in like November, December of '06, that took me away from Jake as far as being in that bad room. I continued to have access to the work areas up there where I needed to have access and there was no contamination in those areas if that were a problem, okay. So everything had already been resolved in that area when I went to work.

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Q: But you just said you didn't want to encounter Jake anywhere else, so you were taken out from under Jake's supervision, correct?
MR. STEWART: Object to the form.
A: No, no. Actually, I was already reporting to Wade Wallace when this all was, this was when I was already reporting to him. This was all being discussed with regard to not going to the lab and not being exposed to Jake. And, really, just to counter what they were saying here, I said, "Okay, if you're not going to allow me to go up there because of my health and being exposed to Jake, then it makes sense that I don't be exposed to Jake anywhere." And I made it clear that I did not want Jake coming to my areas.
Q: And nobody disagreed with that, did they?
A: They did not — I was told, okay, we will take care of that, it never happened. So I would say all that to say this. It shows that they really, the premise that they were stating this on, it sounds great but they really didn't care about my health.
Q: All right. If you look at the second paragraph, the paragraph at the bottom of the page, middle of that paragraph it says, "Therefore, you will need to enter the lab to do so." Are you with me?
A: Yes.

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Q: "In these situations, always wear proper respiratory protection in the form of a mask with sufficient coverage and filtration to keep out any potential irritants." Go up and read to yourself the paragraph at the top of the page where Wade Wallace is sending you this e-mail.
(Reviewing document).
A: Okay.
Q: So did you leave Wade Wallace a voice mail and saying, "Wade, I've been thinking about this and I don't think I ought to go into the lab even with a mask"?
A: I mean, this makes no sense right now, reading it right now. I do remember, now that we've gotten back into this, this being an issue about I had to do — I was working on a key project that required doing flame testing in just the burn section of the lab and I don't know why this says what it says. I don't understand it.
Q: It says, "Thanks. I got your voice mail this morning where you mentioned that your original thoughts on wearing a mask may have been wrong and that it may still not be enough protection." Do you see that?
A: I do, and I have to consider who wrote the e-mail. I don't know what I said.
Q: Do you recall leaving Wade Wallace a voice mail message saying you didn't think you ought to go in the lab

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even wearing a mask?
A: Absolutely not.
Q: Do you know why Wade Wallace would have written the e-mail referencing your voice mail if you hadn't left him one?
A: I could have left him a message but it doesn't necessarily mean that that's what I mentioned in the message, because like I said, looking at this, that makes no, this doesn't ring any kind of bell and it's really illogical.
Q: There's no e-mail that we have where you responded to Wade Wallace and said, "You've got it wrong. I didn't mean to say that I couldn't go in the lab even wearing a mask," is there?
A: Not that I remember. But I will say real quickly on this, that my time to actually be able to go to the burn room part of the lab didn't last very long at all. Soon after this, I was totally banned from the lab. I mean, just like no real explanation, you know.
Q: Well, it says right here on February 5, "Please do not enter the lab under any circumstances, even if you're wearing a mask."
A: Okay.
Q: "Give me the list of items you need and I will have them relocated without any need for you to go up

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there."
A: Okay. So it was just a few days really, that was the 2nd of February and then the 5th.
Q: So you were told not to enter the lab because, (A) of the mildew smell which you associated with Jake Butts, his clothes and his furniture, and you didn't think that even a mask would be sufficient protection, correct?
A: There was no need for a mask. Let me just say this. If a mask would keep mold spores from getting into one's nose or sinuses or whatever, there was no need for a mask in the other three areas of the lab, only in the office area. That was a huge room with a door that closes and all the other rooms were separate with closing doors.
Q: All right. Is it fair to say that you began reporting to Wade Wallace around February 1, 2007?
A: I think, if I remember correctly, it was the 1st, because that's come up a lot and I think it was.
Q: And the reason Wade Wallace became your supervisor is because that you were complaining about Jake Butts and not wanted to have any interaction with him because of the smell you associated with him, right?
A: Probably not. I would say that it really stemmed from a conversation I had with the owner several years earlier when there was a lot of things that I was to be working on and a lot of trivial stuff coming my way that

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took a lot of time, but it wasn't necessarily stuff that I should have been doing. The owner was discussing with me the situation about getting me more involved. And I think it was all triggered when one day he said to me, he said, "Gary, I don't understand what's going on." He said, "There are a number of projects over the last few years that you should have been involved with." And I was physically separate from the plant as far as an office goes, the main plant, but not that I didn't go down there. I spent time down there. But he said, "I don't understand why you're not involved in some of these key projects and you should be. In fact, you should be heading up some of them. What's going on?" And I said, "Well, Martin, I don't know what you're talking about, but in my opinion, they're projects I don't even know about." Later we got back together and he talked with another person in the plant that was actually overseeing a lot of these projects and he said, "Well, they tell me, Gary, they said that they have approached you on a number of occasions when a key project is coming up and that you always tell them that you have other things to do, that you don't have time." And that was never the case.
Q: I'm a little lost. My question had to do with Wade Wallace becoming your supervisor because you complained about Jake Butts.
A: All right, this is what I'm getting to.

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Q: Okay.
A: Because the reason for that goes back to Martin. Right after that, Martin and I also talked about the trivial stuff I was doing. He saw what all crazy stuff I was doing as far as things that were taking a lot of time and taking me away from some key technical areas. So he then set things in motion for me to get more involved in the plant. And this Technical Finishing Manager arose from that and I was in the process of getting relocated in the plant so that I could do what he wanted, be closer to everything and get away from a lot of the day-to-day stuff where you don't even expect and it comes. That's how that happened.
Q: Was Wade Wallace supposed to assist in that regard, getting you closer to these projects?
A: Ultimately, in my opinion, it just took a long time to happen, but that was the end result of what I had discussed with Martin.
(Off the Record for Lunch from 12:08 p.m. to 12:58 p.m.)
Examination Resumed by Mr. Suggs:
Q: Remember when I asked you about lawsuits that you had been involved in?
A: Yes.
Q: I was going to ask you about whether your wife had been involved in a lawsuit. Did your wife file a claim against a hospital and doctors or both relating to some

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surgery that she had?
A: It never got that far.
Q: Never got that far? Was it settled?
A: No. Nothing was — We were encouraged to do so and it was looked into, but for several reasons, including her health, we opted to not go along, but it never got to where there was claims or anything like that or specifics.
Q: Okay. Just to make sure you told me everything that you intended to before we broke for lunch, you were telling me about why you thought that you were changed from reporting to Jake Butts to reporting to Wade Wallace and that had to do in part with Mr. Wildeman wanting you to be closer to projects. Did I summarize it correctly?
A: I would say that that's certainly a good possibility. I don't know all the details, but I think that certainly is one of the viable reasons that it happened.
(Defendant's Exhibit 13 was marked for identification).
Q: Okay. I'll show you what's been marked as Exhibit 13 and it is an e-mail from Wade Wallace to David Wilson and you are the subject of the e-mail. Would you take a moment and review that, please.
A: Yeah, I just saw that recently so I'm familiar with it.
Q: Okay. February 7 was about six days after you

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started reporting to Wade Wallace, correct?
A: Yes.
Q: And you told Mr. Wallace that you were overwhelmed with personal or emotional problems to the point that you couldn't function?
A: No.
Q: Tell me what happened.
A: There were two things that Wade Wallace wanted me to do. And as time wore on and I'm able to look back now too. Anything that I was doing that was a significant function were being removed from me. There was two of those in the very beginning when I started reporting to Wade that he wanted me to get the information to Jake Butts so he and whoever else could do those and I needed to train them and give them whatever they needed so they could do those. That was in the very beginning and that was paramount for Wade for me to do that. Then I was in the midst of trying to sort things out, find a place to work, and all this, and he comes in on this particular day and the first question he asked, "Have you completed those assignments that I gave you a few days ago to do for Jake Butts?" And I said, "No, I haven't. In fact, I've started on one of them, haven't completed it, and I haven't even started the other." Then he cut loose on me. I had never been talked down to in a demeaning way in my life. It was unbelievable. And I said

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to him, I said, this is basically what I said, I'm paraphrasing based on a very poor memory, but I said something to him to the effect, I said, "Look, Wade, I've got enough stress as it is and all that and all you're doing now is there's no point in you talking to me," things like that. You know, I don't remember the gist of it, but I do know that's what this is. Then he goes back at some point and creates this on the 9th, two days later, and sends it. I never know about it until we start having the ESC things.
Q: All right. Now, you see in the third line of that second paragraph where it says, "He explained that his personal life over the last year has made him so fragile emotionally, that sometimes he has episodes like the one he was experiencing." The last year in this context would have been 2006, right?
A: That's correct.
Q: Was it 2006 that your wife was ill?
A: That's correct.
Q: Did that take a toll on you nerve wise and make you kind of a wreck?
A: I got into a major sleeping problem caused mainly by stress and it did not happen until I went back to work and the way I was done after I got back to work.
Q: Would you say that your wife's condition

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contributed to how you were feeling?
A: What she went through was horrific and anything she goes through negative, I suffer along with her big time because we're so close. But this here is not what happened that day. It did not happen.
Q: Let me just invite your attention to page 155 of the hearing before the Employment Security Commission on March 28. I've got it highlighted here. It says, "At this time I was kind of, you know, nerve wise kind of a wreck because of what my wife went through." Do you see that?
A: Uh-huh (affirmative response). That's still not what happened here. And, also, I will say this about that transcript, I put no credence, zero credence in that because of when I went back and reviewed it and I got a copy of it, they didn't send me a copy, what I was attributed to saying and what I really said, there were so many fallacies it was unbelievable.
Q: Tell me what was the matter with your wife in 2006.
A: She had a colonoscopy in late '05 and the doctor that did the colonoscopy did a pre-exam and said he picked up on a cyst on one of her ovaries. Anyway, he does the colonoscopy and I went home one day and she was frantically on the phone with the doctor. I got home about six. It could have been that I would have gotten there later and

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she'd been dead. But right after I got home, she actually lost consciousness and when I got her to the hospital, she had bled so much all day long. I didn't know about it, but she was calling the doctor, what I would find out later, and he was telling her it would stop, it would stop, don't worry about it, and she was continuing to bleed to death. So, anyway, they basically saved her life at the emergency room. They were waiting for her when I got her there.
Q: She had an ovarian cyst?
A: No, this was a colonoscopy. This was purely from the colonoscopy.
Q: Oh, I see.
A: Then after she got through that hospital stay and started feeling somewhat better, it took weeks, then she wanted to handle the ovarian cyst and she actually went to a doctor that the guy that did the colonoscopy recommended. She goes to him and during the course of the surgery which ultimately came about, he severed a uterer connecting the kidney to her bladder and she was in the hospital for three days, two or three days blowing up while they were walking her for gas and the whole time her abdomen was full of urine and she had a side drain that they put in as a precaution, just a normal part of surgery. That was filling up very irregularly fast. And the nurse kept saying, "This ain't right." And the doctor that did the surgery came in and he

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said, "Aw, it's normal." But, anyway, surgery was on Monday. On Wednesday afternoon, evening I should say, they found that a stent that had been put in to put the top and lower part of the ureter back together, a temporary stent, and then they sewed and they would take that out later. That when the ureter was severed in the early part of the surgery, then they had to call in a urologist, Dr. Kinard, and he did a great job. And then when they went back in to finish sawing her up and everything, they moved the stent out of place so that the lower part of the stent was down under the gallbladder and it had a "J" shape to it and it was against the wall and urine could not go through that and it was actually going through the severed area of her ureter down into her abdomen.

Q: So that was all in 2006?

A: That was back to back.

Q: In 2006?

A: Yep.

Q: So that was quite a concern to you?

A: Oh, absolutely.

Q: Did you ever tell Wade Wallace that you were overwhelmed with personal and emotional problems?

A: No, not in those --- Those are, I don't know what I said, but I would never say anything like that.

Q: Did you ever tell Mr. Wallace that you were

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confused and disoriented?

A: Never.

Q: Did you say anything like that?

A: No.

Q: Did you tell him that your personal experiences over the last year had made you fragile emotionally?

A: I don't know what I could have said that would have triggered that. I think his words and whatever words I might have used are quite different.

Q: Well, would you confess that you had been made fragile emotionally because of your wife's condition like it says in the transcript?

A: Not emotionally.

Q: Sir?

A: No, not emotionally.

Q: Have you ever had panic attacks?

A: I don't know what for sure one is. I was told I had one and I don't agree with it when I was in Thailand.

Q: Was that working for Tietex?

A: Yeah. That's what it was described as and I don't agree with it being a panic attack.

Q: Have you ever been told you had a nervous breakdown?

A: No.

Q: During the time that your wife was experiencing

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these difficulties having to do with the colonoscopy and related surgery and so forth, did the physician give you medication to help you sleep and cope with her situation?

A: I actually, when I went back to work and realized what was going on and I started having this serious sleeping problem, I would literally stay up a night or two at a time. I went back to the doctor. I'm not sure what the time frame is relative to her being in the hospital, but I actually went back to him to get his help or whatever.

Q: Did you seek help from the EAP as Mr. Wallace suggested that you do in Exhibit 13?

A: No.

(Defendant's Exhibit 14 was marked for identification).

Q: All right. Have you had a chance to review Exhibit 14?

A: I've seen all I need to see.

Q: Okay. Well, in the first paragraph he just talks about that 3 a.m. call and how Martin Wildeman forwarded it to Wade Wallace, correct?

A: It also says that I left Wade Wallace a phone message and I doubt that seriously. I don't know why I would have and don't recall it.

Q: Did Mr. Wallace commit to you as this e-mail says, to get you a lab pad coater and vented hood?

A: Of course, I mean, Wade's aware of all this, so he

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could have — Oh, okay, so the second paragraph is not necessarily related to the phone call, is that correct?

Q: Correct.

A: It wasn't mentioned in the phone call in other words. I will say this about any and all equipment. There were several pieces of equipment that Wade Wallace agreed to purchase and, in fact, requisitions were done and they were actually purchased. There were several pieces of equipment in particular that I, one being a lab pad, tried my best to get installed for a period of weeks and I guess months. And this all started in probably maybe March. I'm not sure. But there was always something wrong with where it was going to go. Like the lab pad that was never installed. The bum equipment was never put together. Because always someone would find, no, we can't put it there, we can't put it there. And I just finally arrived at the point it's not going to be anywhere. But I stayed with it the entire time I was there trying to get stuff installed. Anything that was bought was never put in place. I'll just put it that way. It was a matter of and to make things look and certain way if I had to say now.

Q: But the equipment was purchased?

A: Some equipment was purchased, yes.

Q: And it was purchased to accommodate you because you couldn't go in the lab?

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A: That would have been the reason.
Q: And the third paragraph, you said you had read enough, I wanted to make sure you read the third paragraph.
A: Yeah, but the thing there was not so much a being bothered or anything. It was more taking a stand that why am I, I'm down here, you've dumped all these key manufacturing projects on me, why am I going to stay involved with this environmental reporting which made no sense. So I was really, let's get it to the guy that's getting paid for it, even though I knew he couldn't do it. That's what I was I was really after there. Why am I going to have to do this, all these other major plant projects you've given me. It didn't make sense.
Q: But Wade Wallace thought you had time to do it?
A: He did, apparently.
(Defendant's Exhibit 15 was marked for identification).
Q: Take a look, please, at Exhibit 15. And Exhibit 15 is just an e-mail from Wade Wallace telling you he expected you to get the environmental report done on time, right?
A: Yes.
Q: Was that reasonable?
A: For him to expect that, yes.
Q: And whose responsibility did you think it ought to be?

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A: The person in the job title of Environmental Manager.
Q: Do you know who that was?
A: Over the period of my being there, it could have been Jake Butts at that time, but Jake had it, John Knox had it. There was a guy that was hired back in the early 2000s that was hired specifically for that and he left the company, so at that time I'm not sure who it was.
Q: And didn't you voice mail to Mr. Wildeman protesting having to do the environmental report?
A: No. No. Are you talking about the one I left in the middle of the night?
Q: Yeah, Exhibit 14. It says, basically, Wallace says that Martin Wildeman forwarded your voice mail to him and two things were bothering you. One was lack of equipment and two was environmental reporting.
A: I wouldn't have — I'm not seeing that. I'm just seeing, "He was distraught over all that's been going on."
Q: All right, look here. Exhibit 14, "Gary left voice mail messages for both me and Martin one morning this week ta 3 a.m. Martin forwarded me the one he received. Both messages consisted of him complaining about his inability to sleep due to being distraught over 'all that's been going on.'" The first thing, the equipment. The

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second thing, environmental reporting.
A: I think those other paragraphs are taken out of context. Those were not left on any message to anyone. It was a general message that I left to Martin requesting a meeting with him and it wouldn't have got specific. It would have mentioned the problems I was having with sleep for sure.
Q: So you agree that it would not have been appropriate for you to leave Martin Wildeman a message about not wanting to do the environmental report?
A: I'll agree with that, yes. I mean, I don't see why that would even be necessary.
Q: Do you recall Mr. Wallace telling you to bring these issues to him before going to Mr. Wildeman?
A: First of all, the relationship I had with Martin, most of the time when we got together was a casual encounter and he would say, "Come on in here," and it would involve a project or something and he'd want to know how it was going. And that meeting, that spur of the moment extemporaneous meeting might evolve into our getting into other stuff, how is it going for you and all that, and then some stuff happening like that. But we've had a relationship that, I mean, it's just there. It's just the way Martin was. He never, you know, he never had a problem with it and he never said, you know, you need to bring this. Anything he

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suggested I do, I did it though, if it meant bringing something up with whomever, I would always do that.
Q: Would you ever go around Wade Wallace to talk to Mr. Wildeman about work related issues?
A: No. No. I say that. I probably need to qualify that because if there were things happening that I saw were dishonest or that kind of thing, regardless of who it was, Wade or whomever it might be, I'm not going to go and, I mean, you do what you have to do. It's sort of like your house is on fire and you need to mow the grass, you're not going to cut the grass, you do what you've got to do. But, basically, generally I followed the chain of command. Within reason I followed it and it's just the way things were at Tietex with regard to what we had evolved to as far as my relationship with Martin.
Q: But you admit going directly to Mr. Wildeman?
A: I don't remember enough about any specific circumstances. I do know that I did that some, but I would say most of the time it had to do with like barrier fabric projects and things of that nature where he was wanting to know about it. It was nothing unusual for Martin to grab up somebody and start talking with them about something.
Q: When you began reporting to Wade Wallace, what did Mr. Wallace tell you about his expectations for your reporting to him?

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A: I really don't recall to be honest.
Q: Did Mr. Wallace tell you he expected you to let him know your whereabouts?
A: I don't think that came up that way, because at the stage of the game, you might say, I mean, that was like an understood thing. It was not like kindergarten or something.
Q: So you understood you were supposed to let Wade Wallace know where you were?
A: Our agreement was if I were, as far as where I was, that to me would mean away from the plant, and our agreement was keep the cell phone on was our agreement.
Q: But you agree with me that it's reasonable for a supervisor to want to know the whereabouts of the employees under his supervision, right?
A: At all times.
(Defendant's Exhibit 16 was marked for identification).
Q: You have before you Exhibit 16, which is a memo from Wade Wallace to David Wilson.
(Reviewing document).
Q: You got that?
A: Yes, sir.
Q: Okay. Now, it's from Wallace to Wilson with a copy to you and Mark Isbell, right?
A: Yes.

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Q: Do you have any evidence that this memorandum was seen by anyone other than you, David Wilson, Wade Wallace, and Mark Isbell?
A: I mean, right off the cuff, I don't know, I don't know that I have an answer for that.
Q: Do you have any evidence that the memo, which is Exhibit 16, was seen by anyone outside of Tietex or in the context of this lawsuit and your claims against Tietex?
A: I really don't, I don't know.
Q: Okay. If you examine the memo, it's dated March 5, 2007. Did Wade Wallace have a conversation with you on or about March 5 about the items listed in this memo?
A: Actually, I triggered this memo by requesting it. And the way that happened, Mr. Wallace called me to his ...
Q: Pardon me for interrupting and I'm going to let you say whatever you want to. But my question was simply did Wade Wallace have a conversation with you on March 5 about the items mentioned in the memo? And that's a yes or no answer.
A: Yes.
Q: Okay. Now, with respect to the items listed in the memo, tell me any parts of it that believe are not true?
A: All of it. We're talking in degrees when I say that, but my assessment to make a strong statement is either

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one of those by itself is and I disagree with all of them.
Q: All right. Taking the first one that you become emotional and overly vocal about problems before researching the situation. What evidence do you have to support your contention that that statement is not true?
A: It's just not me. Never done it.
Q: All right. "Not honoring the chain of command." What evidence do you have to support your contention that that statement is not true?
A: I can't go back and recreate everything, but I'll say this, I think most of the time if there was a formal get together with Martin Wildeman and one where we didn't just run into each other, I would have run it by Wade.
Q: It says in the third bullet, "He harbors negativity over past grievances with management." Did you have some unresolved grievances with management at the time that Wade Wallace began supervising you?
A: I'm not sure what he's referencing there. The only thing I can say about this is this stems from some discussion I had with him, so with that said, I feel like for him to take and broadcast it this way was certainly way out of line.
Q: Okay. My question was, when Wallace started supervising you, did you have some unresolved issues with the company that existed prior to his undertaking the

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supervision of you?
A: Oh, I had, I had a lot of concern about the things that had been going on since 2003.
Q: So you had those concerns when Wallace took over?
A: Well, this is all, anything he said here is because he and I talked about some things and not anything that he gathered otherwise. We would have had to have discussed it.
Q: What kind of things did you tell Mr. Wallace?
A: I don't remember. I do not remember.
Q: And then the last bullet is, "He complains about his ownership of environmental reporting." Now, that's true, isn't it?
A: You know, again, that falls in the category, here's a guy that I'm supposed to be reporting to and he's going, anything I say to him he broadcasts it. What kind of manager is that?
Q: When you say broadcast it, he sends it to David Wilson, Mark Isbell, and you?
A: Why would I ever say anything else to him again. Like I'm just having a discussion with him about something I'm concerned about and then the next thing you know, he's holding it against me and threatening me, basically.
Q: And he told you in this memo that you needed to make significant progress within 30 days, correct?

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A: Yes.
Q: Did he tell you that when he sat down with you?
A: Without taking a lot of our time, this day was the anniversary of like my 30 days or so and he calls me and says, "Gary, we need to talk," to have a 30 day review. Go to his office and he said, "Let's go down to David Wilson so he can sit in on this." I had what seemed to be the flu coming on and I felt, I mean, really, really terrible that day. I do remember that. And he hits me with these things here and it's purely verbal. There's no written, anything written. And when I finished I said, "Wade, would you do me a favor? Would you send me an e-mail covering what we just talked about so I'll know what I need to improve on?" And that's the e-mail that came.
Q: All right. Did you ever fail to attend meetings, meaning that a meeting was scheduled that you were supposed to be present for and you just didn't show up?
A: Never.
Q: Did you ever fail to return voice mails?
A: I'm sure over the years that everyone does that, but it's not malicious or intentional. I never intentionally ignored voice mails.
Q: And would that be the same for e-mails?
A: And same for e-mails. I'll just add this. I don't spend a lot of time at the computer, didn't then.

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(Defendant's Exhibit 17 was marked for identification).
Q: I'm going to give you Exhibit 17. Before we get to 17. You've told me that with respect to 16, at least the first three bullets were not true in your opinion. At the time that you talked to Wade Wallace, did you protest that these things were not true?
A: When we were talking in our meeting when David Wilson was present?
Q: Yes, sir.
A: I'm not sure what I said. I know I didn't feel like contesting anything that day, so I don't recall how I handled it.
Q: But those present in the meeting would have been you, David Wilson, Wade Wallace, and nobody else?
A: That's correct.
Q: All right. Let's take a look at Exhibit 17, which is April 4, 2007, e-mail from Wade Wallace to you and it's talking about working in the lab. Just let me know when you've read it.
(Reviewing document).
A: Yes, I've read it.
Q: Did you ask if you could work in the lab if you signed a waiver?
A: Yes.
Q: And you were told that Tietex thought that the waiver might not be good.
A: Yes.
Q: Do you agree that Tietex was trying to protect you from a negative impact to your health and from itself being liable for negatively impacting your health?
MR. STEWART: Object to the form.
A: The second part I'd say yes.
Q: You don't agree that Tietex was trying to protect you from a negative impact to your health?
A: I don't feel that way, no.
Q: What evidence do you have that supports your belief that Tietex was not trying to protect your health?
A: We could talk a long time there on my thinking of that, so I'll just, if I may, leave it at that.
Q: All right. Did you ask if you could work in the plant on Saturday and Sunday?
A: Absolutely.
Q: And were you told that you could only work when the plant was operational?
A: There was one time I was told that and I don't remember which came first, but I was later told that I couldn't go in at all unless — I'm sorry. Okay, I just confused something in my own mind. Yes, I was told if it were operational, then I could go in on like a weekend or whatever.

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Q: And if the plant was down, you could go in but you could only do office work, not lab bench work, right?
A: That was what I was going to say. One would supersede the other. I was told at one time I couldn't go in at all, even with the plant, I mean, if the plant were not running, I couldn't go in at all.
Q: And that was changed to you could go in and do office work.
A: One way. I don't know which came first. I don't remember.
Q: But at one point you could go in and do office work?
A: That's correct.
Q: And that lasted until your last day of work?
A: I don't know. Again, I don't know which came first, that particular document or the other verbal. It could have been verbal, it could have been written where I couldn't go in at all unless the plant were running.
Q: But you understood that by Wade Wallace saying you could not operate lab equipment or production equipment or handling of dyes or chemicals when the plant was down and there weren't any other employees there was for safety reasons, right?
MR. STEWART: Object to the form.
A: Well, it could be done under that pretense but I

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knew. I had done all those things without question and I was the key person as far as all the issues of doing those things and the safety issues related to them and I had done so for 12 1/2 years without ever being told I couldn't come in on weekends, I couldn't come in at night, I couldn't come in when people weren't there. That was never an issue until I started reporting to Wade Wallace.

Q: Do you dispute that it was for safety reasons?

A: For a yes or no, I'll say yes.

Q: All right. And what do you claim the real reason was?

A: To keep me from doing the projects I was assigned.

Q: And why would Wade Wallace want to do that?

A: Well, we've talked about all that before in other meetings and things, but it's involved.

Q: Tell me.

A: As I've said before, I mean, hindsight being 20/20 and I don't have a lot going for me except I do have an analytical mind and I can put pieces of puzzles together and it's clear to me that entire time I was working for him, it was an effort to create cause so I could be terminated.

Q: And what evidence do you have to support your belief?

A: All the things put together. To make me fail at projects. Keep projects that were assigned and be sure I

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failed at them, couldn't do them, and so forth.

Q: Do you have any evidence that any other employees were allowed to work when the plant was not operational?

A: During my entire time at Tietex, and you could go back to the records kept by the gatekeepers that when they did have folks on the gates and kept records of those coming in, you will see that I was — The only other person I ever saw in there, two people I ever saw in there when the plant wasn't running that I remember would be Robert Fontaine, a key grey mill guy, and Martin Wildeman, the owner. And I was there many weekends trying to do work and ...

Q: Do you claim you actually did lab work when the plant was down before Wade Wallace became your supervisor?

A: I did. Again, there was a couple of years leading up to that that were kind of dead years, but going back before, say, 2004 and back, I did most of my lab work when the plant, outside of the 8 to 5 hours, I'll put it that way. Because I was so involved with running my other jobs 8 to 5, that I had to do these other things outside hours.

Q: Was the plant operational?

A: Most of the time not. If it were weekends, not, not at all.

Q: But you were the only employee who did that?

A: For the most part. For the most part.

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Q: Can you identify anybody else other than the two you just named, Martin Wildeman and the other guy?

A: I would periodically see someone from information services that worked in like the computers' area in to do something, but otherwise, no. I mean, the other manufacturing folks that were salaried and all and the department managers, no, they worked normal hours.

(Defendant's Exhibit 18 was marked for identification).

Q: Well, I guess there's something I don't understand and that is why couldn't you do the lab work during, say, 8 to 5 and if other work was to be done and needed to be done after 5 o'clock, make that your office work?

A: The other stuff had to do with managing people and running the laboratories and stuff like that, which had to be done when they were there. In other words, if I went off on, and we're talking about some high level projects in many cases that require a good ability to concentrate and so forth and might be interrupted, and any time I attempted to take on something like that, if I had time to do it, between regular hours ...

Q: Excuse me. You could have done your environmental reporting and prepared those documents as office work if the plant wasn't running, couldn't you?

MR. STEWART: Object to the form.

A: Most of the environmental stuff was done hours

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wise, time wise, was done outside of the 8 to 5. Much of that was done at home. Things like that, there was no point, some of it was no point in going to work to do. I carried it home with me.

Q: Take a look at Exhibit 18, please. And that has to do with the C237 and T602 projects and it's dated June 18, 2007. See that?

A: Yes, sir.

Q: And that memo is addressed to you from Wade Wallace with a copy to David Wilson and Mark Isbell just like the other one, right?

A: Yes.

Q: Did you receive a copy of it about the time it was written?

A: Yes.

Q: Do you have any evidence that this memorandum was seen by anyone else other than the addressees?

A: Not offhand I don't.

Q: Do you have any evidence that this memorandum has been seen by anyone outside of Tietex or outside the scope of this lawsuit or the other claims that you have made?

A: I'm sure my wife has seen it.

Q: Because you showed it to her?

A: Yeah.

Q: Okay. Anybody else?

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A: I don't know. I don't recall.
Q: You don't have any other evidence?
A: Not right now, no. Nothing comes to mind.
Q: All right. C237 was the development and qualification of a Tietex coating compound formula to replace the current coating formula, is that right?
A: It was a mattress fire barrier fabric, Tietex fabric coated with a chemical compound. At the time it was purchased outside and applied at Tietex and was sold to your mattress manufacturers as a barrier fabric.
Q: Okay. And T602 was a finish formula change. Is that right?
A: T602 was a product that I jointly came up with with a guy named Zhiping Ni. He came up with the fabric.
Q: With who?
A: Z-h-i-p-i-n-g and his last name is N-i, Chinese. He invented the fabric and I came up with a formula to put on the fabric and it evolved into a Tietex product called T602.
Q: Did Mr. Ni work for Tietex?
A: Yes.
Q: Okay.
A: And, anyway, the product was originally run on a pad finish, on one pad finish, and that particular finish was more suited for running window fabrics, finishing window

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fabrics. And so we were doing this on that, a unit with the goal of taking it elsewhere. Wade came to me one day and wanted to know if I could create a foam finish so we could, instead of running it through just an old watery pad finishing and padding it on, could I create a foam finish because we had, I don't know, three other machines there that were equipped with foam finish units. He said, "If we can do that, then we can free up this number ten range we're needing for window fabrics." So ultimately, what that led to was that project where I was investigating doing a foam finish on T602 instead of a pad finish.
Q: So these two assignments were made to you?
A: Absolutely. These two projects no one else there could have taken them on. I was the only one that could have even come close to ...
Q: And they were priority projects?
A: Big time. Well, I would say that the C237 was definitely big time priority.
Q: Were you working on 237 before you started working with Wade Wallace?
A: I had done work on weekends and had come up with a formula that would come close to but not, I hadn't gone far enough with it, to replace the business that was currently coming from a company called Noveon.
Q: Was the answer yes?

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A: Yes. Yes.
Q: At the time this memo was written, which is Exhibit 18, had you been working on the 237 project for about six months?
A: Yes.
Q: Had you made any progress?
A: Oh, yeah. Had actually on January 26 ran a trial that, effectively, gave us what we needed.
Q: And you say you initiated the project?
A: Not really. Martin Wildeman would be the one that prompted it and I was reporting to Jake Butts at the time. This would have been November, December '06 when Martin came to me and — He accosted me. He came over to me in a meeting and he says, "Gary, we've got a major problem and need your help." Basically what he said was, "We've got this barrier business that's only going to grow. We've got good volume now, we're not making any money, because we can't be cost effective." And he said, "The biggest part of it is this compound we're buying from Noveon and I understand you've been doing some work and that you might can help us come up with a cheaper compound." So that started it.
Q: Did you tell the management of Tietex that developing the C237 coating would result in significant cost savings to the company?

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A: Yes.
Q: And that was versus the compound that Tietex was using at the time, right?
A: Yes.
Q: Did Tietex project the savings that you predicted into the budget?
MR. STEWART: Object to the form.
A: No.
Q: Do you know?
A: At the time I started working on the project — On January 26, real quickly, January 26, '07, we had the successful trial. I was not reporting to Wade Wallace. Six days later after having the successful trial, I was reporting to Wade Wallace. And the direction we were going with this and the way we were going to do it was totally changed.
Q: Now, you say you ran a successful trial before reporting to Wade Wallace?
A: Yes.
Q: Were you successful in developing a compound that could be produced commercially?
A: Yes.
Q: And who would be a witness to that?
A: Harry Sparrow.
Q: Say again.

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A: Harry Sparrow, like the bird.
Q: Anybody else?
A: He was integrally involved in it. I don't know if there was anyone else involved. He and I were the key people that worked on this.
Q: Do you know if Wade Wallace started a parallel project to develop a replacement because you hadn't made sufficient progress?
A: He did not.
Q: Do you know if he worked toward doing that on a parallel basis?
A: I'm looking, I'm able to look back now and I know there was a lot of resentment in my getting involved with Martin, even though I did not cause it. When Martin came to me and Mark Isbell and Wade Wallace would find out about this later, they highly resented it based on things that would happen because they felt like, first of all, that was casting a real bad light on what they had already done because the areas that were being complained about were theirs. It was their responsibility. Wade Wallace was the key person at Tietex that called on Noveon and the lady there. He was the key liaison and going all the way back to months before I started reporting to Wade and Martin coming to me, he was that person and we were getting overcharged by Noveon big time. And, anyway, as it moves along, this

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relationship was continuing. When I started to reporting to Wade in February of '07, that relationship continued and since that ...
Q: Mr. Harris, I'm going to let you tell me whatever, but I don't understand how what you're telling me relates to the question about whether you know if Wade Wallace was successful in his endeavor to develop a project, a product like 237.
A: I thought I said no.
Q: Okay.
A: Then I was explaining why.
Q: All right. Well, do you want to give me some more explanation?
A: Only that there is, you know, there's this stuff that happened in February that shows he was, he and I both were working on C237 in tandem separately.
Q: So you agree he was working along a parallel course with you?
A: It was put down that way.
Q: But you claim he was not successful?
A: I'm claiming that he wasn't working on it. I'm claiming that all that ultimately would happen would be Noveon lowered their price and then it was passed off as an advanced product or something when all they did was lower their pricing.

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Q: Okay. T602, did you tell Wade Wallace that the lab samples for this project were promising?
A: Oh, absolutely they were promising. They were well above my expectations.
Q: Did you recommend a production trial?
A: Yes.
Q: Who was present at that trial?
A: Ron Simms would have been the key figure. Ron Simms oversaw all plant trials. If there was going to be a plant trial in finishing, Ron would be the one to put it together.
Q: Ron Simms. Who else?
A: Grady Corbin would have been the department manager.
Q: All right. C-o-r-b-i-n?
A: Yes, sir.
Q: Who else?
A: That's all I can come up with right now.
Q: So it was you, Simms, and Corbin?
A: Yes.
Q: Wade Wallace was not present?
A: Wade was not --- Now, we had more than one trial.
Q: Well, let's talk about the production trial. Is that the first trial?
A: I'd have to go back and review it. Now, I've got

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good notes on all this, but I'd have to go back. I'm sorry, I don't, I can't answer that, but I have good notes if I need to later.
Q: Do you recall Wade Wallace being present?
A: I recall Wade Wallace dropping in and then dropping out.
Q: So he wasn't present the whole time?
A: No.
Q: Did you tell Wade Wallace that the results of the trial were comparable to the current product?
A: Well, we actually reviewed the results. You know, there was no — I did show him the lab results where they were tested and we had some samples that were not good where we put a certain amount of finish on and we had some samples that comparable where we put more finish on, which led us to believe, hey, we can vary the amount of finish and maybe we've got something. But I had no expectations going into this trial as far as it being something we'd be able to do.
Q: All right. I'm just reading it from the bottom of page 336 of Exhibit 18. "Although I was not presented the actual numerical results of the first production trial, Gary assured me that the results were comparable to the current product." And my question is did you give that assurance to Wade Wallace that the results were comparable to the current product?

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A: No.
Q: What did you tell him?
A: I said based on the results, in effect now, this is in effect, based on the results, another plant trial was warranted.
Q: And did you do another trial?
A: Yes.
Q: Was it successful?
A: I think we tried two more trials and, again, I'd need to go back and really read to get all the details, but I believe it was the second trial when there was a bent bar that was an integral part of the machinery and this would have been Ron Simms' operator, something for them to pick up on. You'd have to have been there and seen what I had to do as my part of it to know that I couldn't have picked up on it. But they ran, we only had a small amount of yardage to run, and all the yardage was run with a bent bar. All the finish was on one side or the other and the middle of the fabric had no finish, so it was a mechanical malfunction that should have been caught.
Q: The second trial for various reasons was not successful?
A: That's correct.
Q: And how about the third trial, it wasn't successful either, was it?

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A: The third trial was a failure because of Mark Isbell. We were prepared. We had the bar fixed and we were prepared to run the trial on the machine we had run the first two on. And the word comes to the management and department level, Mark Isbell says we need to run this over on number three instead of two, and two totally different machines. And anyone that, you know, to know what I know, I know, and Ron said right away, said, "You know, that's a mistake. We can't do this," because of the variables that are introduced. And there were several things that we were set up to do on two that we couldn't do on three. And we, essentially, had the same kind of fabric come off of that trial as we did on the second one, a very uneven finish. And I could go back in my notes and give you a good, clear explanation of that, but I don't recall otherwise.
Q: Did you do anything wrong or make any mistakes with regard to either the T602 or the C237 projects?
A: No. No. When I say that, I mean I did what I was supposed to do and would have done under any circumstances. And these kind of projects are highly involved and technical and it's where my expertise is and I was very aware of everything I needed to do and did my best to see that it was done.
Q: But Wade Wallace told you that he thought your performance on these two projects was unacceptable, correct?

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A: One quick comment.
Q: Just tell me whether Wade Wallace said that or not, then you can explain.
A: Oh, yes. May I explain now?
Q: Yes.
A: On or about June 15, 14, 15, Mark Isbell, Wade's boss, went to Martin Wildeman. This is what he told him pretty much. And so I didn't know about that. And then on the 18th, three of four days later, I'm called to Wade's office and I see this.
Q: "This" meaning Exhibit 18?
A: Yes, sir. All right. Then, and this was at a time when, you know, I knew I was going to terminated. It was just a matter of when then. And, you know, it didn't matter about procedure or anything, but I went to see Martin and I showed him this and he said to me, he looks at it and he reads it. He said, "That's the same thing that Mark Isbell talked with me about back a week, a week and a half ago."
Q: Do you think that Mark Isbell prompted Wade Wallace to give you this warning to pave the way for you getting fired?
MR. STEWART: Objection to form.
A: I mean, I would classify it as, you know, could be a final written warning.

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Q: That wasn't my question. My question is do you think Mark Isbell was behind it to pave the way for your termination?
A: Yes.
MR. STEWART: Same objection.
Q: And do you think that he was behind it because he wanted to see you replaced by his friend, Guzman?
A: I don't think that.
Q: This is Tietex document 314 and I'm going to show your lawyer the last paragraph of it. This is Attachment 10 for the EEOC, Gary G. Harris, April 24, 2008.
A: Uh-huh (affirmative response).
Q: See that. "Importantly, the report was prompted by Mark Isbell when it went to the owner just a few days before." That's what you just told me, right?
A: It is.
Q: "The trip appears to have been directly related to paving the way for termination of Harris and bringing someone else on board. (See attachment 9)." And that someone else was Guzman, right?
A: Yeah. The key word there is appears.
Q: Okay. Which that's what you thought?
A: I thought it was a possibility. I mean, again, that's hindsight. Obviously, I didn't know anything about Ms. Guzman until the fall. That's all looking back.

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Q: But you knew that Isbell and Guzman were friends, right?
A: That's what I was told.
Q: And on June 18, Wallace told you you had 30 days to improve, correct?
A: Yes.
Q: Did you have any conversations with Mark Isbell about either C237 or T602?
A: Not the I recall.
(Defendant's Exhibit 19 was marked for identification).
Q: You have before you Exhibit 19. Have I given you plenty of time to read it?
A: I'm fine if you're going to just ask specific questions because it's quite voluminous.
Q: Well, are you familiar with it?
A: Yes.
Q: Now, this memo is addressed like the others to David Wilson from Wade Wallace to CC: Mark Isbell, so it's Wilson, Wallace, and Isbell, right?
A: Yes.
Q: Now, you weren't addressed on the memo, were you?
A: No.
Q: Did you get a copy of this document on or about the time that you were terminated?
A: I don't remember. I may have but I don't

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remember.
Q: Okay. Do you have any evidence that this document was seen by anyone else other than perhaps you, David Wilson, Wade Wallace, and Mark Isbell?
A: No.
Q: Who informed you of the termination of your employment?
A: David Wilson.
Q: Were you told that you were being terminated for failing to improve on the issues that had been addressed to you in the two former meetings and memoranda?
A: Generally what I was told was it's not one specific thing, but just a whole lot of things that have added up.
Q: Well, Wade Wallace claims in the second paragraph that you still had the issues that he had pointed out back in March, right?
A: Yes, he does.
Q: With the exception of the environmental reporting. I mean, see that at the bottom of that paragraph? He says, "With the exception of the environmental reporting." So I take it what he means by that is environmental reporting was no longer an issue. Do you agree?
A: I take it that he says I wasn't complaining about it.

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Q: Okay. And you contend that these other things weren't true anyway at the time, right?
A: I do.
Q: After being told not to do so, did you continue to come in and work in the chemical lab areas late at night and on weekends?
A: Never once.
Q: It says here, "Gate records and management observation indicate that he has continued to do this." See that?
A: That's a lie. Let me just say this. If there were any gate records that showed I came in the plant at any time, it was at a time when it was okay to be there. Otherwise, I'm smart enough to know I could have gone in and out of the plant, I could have gone in and out of the lab building, if I had have wanted to, and they would have never known it. There was no need to use the gate, the main gate and the card that's required. I could have parked outside and gone into the lab building, which was outside. It wasn't in the main gate enclosure. And, also, there was a gate going from the lab building into the main plant, so had I wanted to violate what he had asked me to do, he would have never known it and that is just an untruth. And I'll say again, I never once, not just in that area, in no area did I go against anything he asked me to do. I did

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everything he required, no question.
Q: And then the bottom part of it says that on the C237 and T602 projects, that you didn't get them done and that you instead of working on the projects, you took vacation.
A: Those projects ended on the 18th of June. I can't go into the details, it's just too cumbersome again. But, no, as of June 18, those projects were dead. And I can tell you why if you'd like to know, but ...
Q: Okay, tell me why.
A: Okay. On the C602 [sic], per my recommendation ...
Q: Whoa, whoa, whoa. On the T602?
A: Yes, that's one of them, one of the two. I was going to give you both of them.
Q: Okay, go ahead.
A: As of the 18th of June when that final written I call came out, I had made a recommendation to Wade back when he wanted me to investigate foam finishing the project, I said, "Why don't we take ..." There was an available pad that wasn't being used. I said, "Why don't we take this pad and move it over and put it on the front of the number two tenner frame where we've been doing the foam finishing trials." As of the 18th of June, the decision had been formalized and made and in the works to start doing T602

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on a new pad, I mean, a used pad that was being installed. So that project was killed because of that decision. We're not going to foam finish anyway, no need to go forward with it.

Q: All right.

A: The C237, the Noveon folks had already reduced their price by about, I don't know, 20 or 25 cents a pound, and was further working on getting it on down. And the word was rather than go to and continue on with this and have to go to another vendor or whatever, let's just continue to deal with folks we're used to and they'll get our price in order. So that's ultimately what happened. They lowered the price on down into the seventies. So the direction I was going in both cases were brought to a halt.

Q: Let me ask you some questions about your vacation. You agree that you took multiple vacation days between Monday, June 18, and Wednesday, July 18, don't you?

A: I remember putting in for a week vacation in June. I don't remember anything else. And then asking to add two days to that.

Q: Okay. You don't dispute that you left a voice mail message on the morning of Tuesday, June 19, asking to be out that day, June 19, and the next day, June 20?

A: I don't recall that. I may have, but I don't recall it.

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Q: All right. And on Saturday, June, 23, you requested a week of vacation beginning the next Monday, June 25, correct?

A: I did request a week of vacation and I followed that up with a phone call requesting that I add July 2 and 3 to that. I was going to have seven consecutive working days for vacation.

Q: So you left a voice mail message on the afternoon of July 3 indicating that you would be taking the entire week beginning Monday, July 9 through 13?

A: No.

Q: What evidence do you have to dispute that?

A: On the afternoon of July 3, I had received a phone call and been put on administrative suspension or whatever you call it.

Q: Before your suspension, you called in and said you wanted to be off July 9 through July 13.

A: I don't recall that, I don't at all.

Q: None of these vacation days were approved in advance were they?

MR. STEWART: Object to the form.

A: If advance is before the vacation, actually was what happened, yes.

Q: Well, the day of is not before, is it?

A: No. No, I'm talking about like the week,

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requested a week and the two days that followed. No, those were all advanced then. Those weren't the day of.

Q: Well, when you call in on Saturday, which is not a traditional work day, and ask for vacation beginning the next Monday, that's not in advance, is it?

MR. STEWART: Object to the form.

A: And Saturday what date?

Q: The 23rd of June.

A: That was covered with an e-mail. That week of vacation was covered with an e-mail.

Q: You agree that you were required to request vacation days in advance don't you?

A: I think that's pretty normal and I think I was one of those that followed pretty close the way we did things there.

Q: Well, let me just be clear. You agree that you were supposed to request vacation in advance, don't you?

A: Certainly.

Q: And you say that this vacation didn't interfere with the projects because as far as you were concerned, those projects were over on June 8, is that correct?

MR. STEWART: Object to the form.

A: The projects were over, yes.

Q: And you took the vacation days immediately after being given a warning on June 18, which is Exhibit 19.

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MR. STEWART: Object to the form.

A: That's correct.

Q: Now, during the period from June 18 to July 18, did you submit any data to Wallace about these two projects, C237 or T602?

A: Not that I remember.

Q: Now, you were scheduled to fly to Indiana on June 14 to visit a customer and return on the 15th, right?

A: If the dates are correct, yes.

Q: And you flew to Indiana?

A: I'm not sure where I flew to.

Q: You flew toward Indiana?

A: Somewhere, Detroit or somewhere. I'm trying to remember, but the next leg was to go into Indiana.

Q: So you turned around and came home?

A: Yes.

Q: And you did not visit with the customer?

A: No.

Q: You claimed you had got a headache on the plane?

A: In fact, this trip was arranged by Wade Wallace through the sales manager who wanted me to go and I was not to visit a customer.

Q: Was that Steve Acker?

A: Yes.

Q: The sales manager was?

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A: Right.
Q: And you were to meet Acker and the customer in South Bend?
A: For lunch.
Q: I'm sorry?
A: He was having meetings in the morning and I was going to meet them for lunch.
Q: And you returned to the plant without having met with the customer.
A: That's correct.
Q: And you did not tell Wade Wallace that you had aborted the trip.
A: You know, that's an area that I can't say for sure anything on right now, but when I got back in, I'm confident that I would have called him. But Steve Acker, when I called him, I told him the situation I was having and he and I together decided it best that I wait, I waited as long as I could before the flight was to leave for South Bend, and nothing had let up and we decided it best that I either spend the night there or come on back.
Q: You don't have any evidence that you told Wade Wallace that you had aborted this trip, do you?
A: I mean, I have no records of any kind in writing or anything.
Q: And you don't recall doing it?

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A: I know I would have. I know I would have called him and left a message if I didn't get him and told him the — It was toward the end of, I don't remember, it was sort of toward the end of the week. I was in pretty sick shape when I got back.
Q: You see in the memo it says, "He never informed me of this and while I thought he was in Indiana."
A: I disagree with that. I think he may have ignored anything I may have informed him on there and used that like that. But I think the most important thing in that particular scenario is his approving me to go there for no good reason and I didn't even know about and wasn't in on it.
Q: Hexion, July 3. Are you with me?
A: I know Hexion.
Q: July 3?
A: Yes.
Q: Did you leave a message for Wade Wallace telling him that you would be at Hexion in Greenville all day on July 3?
A: I left — You say in Greenville?
Q: Yes, Hexion in Greenville.
A: No, they're not in Greenville.
Q: Where are they?
A: They're in, they're near Spartanburg. Roebuck.

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Q: All right, Roebuck. Did you leave a message for Wade Wallace telling him you would be at Hexion in Roebuck on July 3 and that you would be at Hexion all that day?
MR. STEWART: Object to the form.
A: No. No.
Q: Did you leave him a message at all?
A: Yes.
Q: What did the message say?
A: It said that — Let me just real quickly say it had to do with a project that I was going to work on that I couldn't work on at the plant and could work on it at Hexion and other places. So the message was that there was a serious ant problem at my house that I encountered when I got home and my wife was literally berserk with ants in two or three different places coming into the house and she's highly allergic to them, fire ants. Now, I don't know at what point before that I had left Wade any message, but at that point I left Wade a message and said, "Wade, I've got a serious problem. First thing in the morning I'm going to do my best to get it taken care of and as soon as I finish, I'm going to go on over to Hexion and work on the project." And he knows the project that I was referencing.
Q: What time did you leave that message?
A: My guess, I think it was early, in early evening after I got home from work.

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Q: On what date?
A: This would have been the 2nd.
Q: So you say you didn't leave him a message on the 3rd?
A: The 3rd is the day I was at Hexion.
Q: Did you ever get permission from Wade Wallace to go work at Hexion?
A: Oh, yes.
Q: When?
A: The same permission I had to go to Rohm and Haas or any ...
Q: Sort of standing permission in your mind?
A: And let him know I was going and when and cell phone on.
Q: Did you go to Hexion?
A: Yes.
Q: What time did you get there?
A: I'm going to use a little wider — Well, it would have been around 12:30.
Q: But you didn't do any work at Hexion?
A: I couldn't get in.
MR. STEWART: Object to the form.
A: Couldn't get in.
Q: So the answer to my question is, no, you did not do any work?

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A: That day, no. No.
Q: What time did you leave Hexion?
A: I would say and, again, I'm looking back and guesstimating, 1:15 to 2:00 or something like that.
(Defendant's Exhibit 20 was marked for identification).
Q: How about take a look at Exhibit 20.
(Reviewing document).
Q: Do you have any reason to dispute the entries on Exhibit 20?
A: The thing that's written here, I don't recall.
Q: Which thing?
A: Received voice mail on the 19th.
Q: "Left voice mail on morning of June 19"?
A: Yeah, to be out 19th and 20th. I don't remember that.
Q: Okay.
A: "left voice mail on afternoon of July 3 ... was suspended."
Q: "... before he was suspended."
A: And without question, that's not true. I mean, it makes no sense is the reason I say that. I can't imagine that.
Q: Well, you would agree with me that June 9 through 13 should have been July 9 through 13, right?
MR. STEWART: Object to the form.

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A: I don't know.
(Defendant's Exhibit 21 was marked for identification).
Q: Let me show you what's been marked as Exhibit 21. Do you contend that this is the Hexion Visitors' Register?
A: Absolutely.
Q: How did you get it?
A: I got it from a girl named Pam Westmoreland. She copied this for me right out of the manual.
Q: Out of the what?
A: Out of the, whatever you call it, register. I call it a manual.
Q: What do you contend that this Visitors' Register proves?
A: Well, it shows that I signed it.
Q: It says, "7/3 Gary Harris, Tietex, 1:30."
A: 1:30.
Q: Is that 1:30 p.m.?
A: So I guess I got there at 1:30.
Q: Is that 1:30 p.m.?
A: Yes.
Q: And your work day doesn't typically begin at 1:30, does it?
A: My work day begins usually when I get up.
Q: So not 1:30 p.m.?
A: This was not a typical day. No.

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Q: So your work day doesn't normally begin at 1:30 p.m., right?
A: When I was with Tietex, no.
Q: The most this document shows is that you stopped by Hexion and signed in, correct?
MR. STEWART: Object to the form.
A: I mean, if you take it for what's here, yes, that's true.
Q: And you had told Mr. Wallace that you would be at Hexion all day?
A: I didn't say that, no.
Q: What did you say?
A: What I said earlier, I had an ant problem that had to be fixed and as soon as I took care of it, I was going to Hexion.
Q: All right.
A: No time given.
Q: And there was nobody at Hexion to let you in so you left?
A: There were people at Hexion that I later would find out that they were having a meeting that included the technicians, the people I would normally call and spoken with and gotten to come to the door. It included key management and everything. They have several buildings and that particular building, they were having a meeting and I

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made phone calls one after another to everyone I knew there over a period of time, waited and tried it again, waited and tried it again.
Q: You couldn't get in?
A: Couldn't get in.
Q: So you left?
A: Yes.
Q: And you didn't see a living sole at Hexion?
A: At that time I did not know of a procedure that they had ...
Q: Just please answer the question. Did you see a living sole at Hexion?
A: Yes.
Q: Who?
A: I don't know their names. I saw folks at Hexion. I mean, to answer your question, I saw, physically saw people there, here and there, but they weren't the people I was there to see. They weren't in that building.
Q: You didn't see anybody you knew the name of?
A: No.
Q: Or who knew you?
A: No.
Q: So this sign in sheet that's Exhibit 21 is the only proof that you have that you were at Hexion?
A: Probably some phone calls.

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Q: I'm sorry?
A: I mean, we don't have it here, but I suspect some phone calls will validate I was there as well during some time.
Q: Oh, you mean phone calls that you claim you made from the lobby ...
A: Yeah.
Q: ... to the interior of the plant?
A: Yeah. And also some other records.
Q: What other records?
A: Phone calls.
Q: But there aren't any individuals who can substantiate your being there?
A: That's correct. Not that they saw me or anything like that, that's correct.
Q: And you admit that you were at Hexion at most for about 30 minutes?
A: No. I mean, earlier when you asked me and, again, I haven't looked at this since, what's it been, a year and a half or so, but just trying to recall a time, I said 12:30, getting there at 12:30 and leaving, what 1:15 to 2:00 or something to that effect. Well, now that I see that I was actually there at 1:30 because I forgot, probably would have left more like 2:15 to 3:00 o'clock.
Q: All right. Let me invite your attention to the

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ESC transcript March 28, 2008, page 171. "Question. And you stayed there for about 30 minutes." "Claimant." That's you. "My guess is 30 minutes." "Question. Pardon me?" "My guess is 30 minutes." "Question. Thirty?" "Claimant. An estimate, from memory, an estimate."
A: Okay.
Q: Do you agree with 30 minutes?
A: About 30 minutes because I don't know, I didn't keep a record of it. I would say, probably now I would change that to at least 30 minutes because of what I did. Because I was fairly, it was a time when I was concerned about getting in and finishing the project. I'll put it that way.
Q: And you agree with me that Wade Wallace, based on your phone call, expected you to be at Hexion?
MR. STEWART: Object to the form.
A: Yes.
Q: What did you do when you left Hexion?
A: What I did after Hexion was probably, in my mind anyway, it was like I was at a loss. I had tried to get this project done. And let me say this, I've never mentioned this before, but in the back of my mind, I knew that there were places other than Hexion and I chose Hexion because they were close. I could have just as easily gone to Rohm and Haas or somewhere else or to one of these new

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places I hadn't been before. With that said, I called this guy that I knew that he had told me of two different places that he could get me a place to work, to do lab work, because he was aware of my situation as far as needing a place to work and so forth. And he wasn't a friend, he was an acquaintance from chemical sales. He and I met, I don't ...
Q: Can you just tell me where you went?
A: All I know is he and I met somewhere, I don't remember. I cannot call where we met but it was for him for the purpose, he couldn't go with me to tell me how to get to Chemurgy and all that. And we met for a period of time, I don't know how long, and when I left him I went looking for Chemurgy and to see if the folks were there and all this and I was going to go ahead and introduce myself and see if what their schedule was the balance of the week and I was going to go ahead and just break that ice and get in with those guys.
Q: So you went to Chemurgy about 4:30 p.m.?
A: No, it would have been before then. Maybe. I probably was leaving there about that time. I don't remember. Because it probably took me, I don't know, 30 or 45 minutes of driving.
Q: You didn't see anybody at Chemurgy, did you?
A: No.

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Q: And the guy you met, was it Dean Roberts?
A: Dean Roberts.
Q: So on July the 3rd you went to Hexion for about 30 minutes and you went to Chemurgy but didn't speak to anybody.
A: That's correct.
Q: And how long do you claim you were at Chemurgy?
A: I'm going to guess and say it probably took, for me to find the place, between 30 minutes to an hour maybe.
Q: How long did you actually stay on the premises there?
A: There was no sign of anybody there.
Q: Did you telephone Wade Wallace and tell him you couldn't get into Hexion and you were going to go somewhere else?
A: No, I did not.
Q: Did you instruct a Hexion employee to bring sulfuric acid to you at the Tietex plant?
A: No, I did not.
Q: Did a Hexion employee bring you sulfuric acid at the Tietex plant?
A: I was told he did.
Q: And that was George Henderson?
A: Yes.
Q: And did you, in fact, want sulfuric acid, you have

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some need for it?
A: The sulfuric acid would have been used, had I been able to get into Chemurgy, it would have been used as — Like I said, I didn't feel welcome at Hexion, and if I could just get the chemical then I was going to go, if they were open at the end of the week, I was going to go over and finish the project. I did not tell Hexion to bring any acid, period. What I told Hexion was, if you will get some acid together — and if I remember correctly, I'll pick it up, leave it at the guard house or something. I don't remember the details exactly, but I can come back by and get it. They got a guard house that stays open. And I don't remember the details.
Q: It would have been against Tietex's procedure to have George Henderson bring you a beaker of sulfuric acid, wouldn't it?
A: Well, again, going back to earlier, those are the kind of procedures I would have put together. And it depends on how he brought it and how it was — it would have had to have been wrapped properly, MSDS. It had to be a safe container and so forth. It wasn't a beaker, by the way. I was told later, I talked with George and he said it was a sealed container that was proper for acid.
Q: And Wade Wallace told you that he had been trying to get in touch with you all day on July the 3rd, didn't he?

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A: No.
Q: And didn't Wade Wallace finally reach you on your cell phone about 3 in the afternoon?
A: No.
Q: When did he reach you?
A: First of all, I would object to the finally because I'm confident I had my cell phone on the whole time, and I received a phone call from him between 4:30 and 5 o'clock. He wanted to know where I was.
Q: Did you tell him that you had been at Hexion?
A: I told him exactly what had happened, which is what we've already talked about.
Q: Did you tell Wade Wallace that you had been to Hexion?
A: Yes.
Q: Did Wade Wallace tell you he knew you hadn't been at Hexion?
A: I don't — No, he didn't say that to me when we were talking on the phone.
Q: Did Mr. Wallace tell you he knew you hadn't been at Hexion because George Henderson, the lab manager from Hexion, had brought sulfuric acid to the Tietex plant looking for you?
A: I don't know that we discussed that or not. I don't recall discussing that in our phone call. May I —

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Just a key part of that phone call was, he gets in touch with me, wants to know where I am. And I tell him, I give him, I spend time telling him the events, and then he says, "Well, I'm putting you on administrative suspension. I don't want you back in the plant until when I'm back from vacation on July 8th, whatever, July 18 or something.
Q: Will you agree with me that it would look suspicious to a reasonable person for them to have an employee who was supposed to be at Hexion, and then a Hexion lab manager shows up at Tietex looking for him?
MR. STEWART: Object to the form.
A: I would say no.
Q: You don't think that looks suspicious?
A: Not under the circumstances. I mean, if a person's looking for something, trying to create something, yes.
Q: All right. You tell Wallace you're going to be at Hexion. Henderson shows up at Tietex looking for you. He's from Hexion. Now, don't you think that looks suspicious?
A: What time did Mr. Henderson, may I ask what time he came?
Q: I don't know.
A: See, that's the key. Wade Wallace said he came right after lunch when, in fact, George Henderson came at

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the end of the day when he was on his way home from work. And all he announced was Gary Harris had come by and needed acid, left a message, left a message he needed acid.
Q: Well, didn't you say that the call to you was between 4:30 and 5:30?
A: Yes.
Q: Well, that would have been consistent with the time that you say Henderson went by there, right, at the end of the day?
A: Yeah, but inconsistent with when Wade said he came by. Wade said he came by like 1:30.
Q: But Henderson asked the people at Tietex where you were, and they said, well, he's supposed to be at Hexion.
A: I don't believe he, I don't believe he asked that question.
Q: You don't believe who asked what question?
A: I don't think George Henderson asked where I was. All he was doing, he knew that I was going to come back at some point and pick up acid, and he decides — that's the way George is — as a courtesy he decided, well, on my way home I'll just drop this acid off to Gary and he won't have to pick it up. And he didn't call me or anything and say he was going to do that.
Q: Well, for all Wade Wallace knew you could have been fishing or cutting the grass or anything else other

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than working, right?
A: That's true.
Q: And wouldn't it have been reasonable for Wallace to expect you to call him and say, look, my plans have changed. I can't go in to Hexion. I'm going to make other arrangements?
MR. STEWART: Object to the form.
A: I think that's one of those marginal questions that could go either way. I mean, I'll agree but then again I think I could give a reason that it's okay.
Q: During this conversation did Wade Wallace ever say, well, tell me where you've been all day?
A: Well, when he called me he wanted to know where I was, and I explained to him about what had transpired and, I mean, just right on top of that — we probably talked no more than, I want to say three minutes. He said, "Well, I'm going to put you on administrative leave or suspension," whatever it's called, "and I don't want you back in here." Now, the other part that I had a problem with there, why did he not want me to come on back in right then and talk with him. Why did he ban me then? I mean, that still bothers me and I don't understand that.
Q: Did you hang up on Wade Wallace?
A: No.
Q: Did the telephone get disconnected?

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A: No, we were talking and it was after he had told me all that and everything, and I don't know if it's where I was driving or what, but we got cut off.
Q: Do you know what Wade Wallace did to investigate?
A: No, I don't.
Q: Do you know who he talked to?
A: Oh, I do. I think he called both those fellows, George Henderson and Dean Roberts. Word was he called them.
Q: Do you know if he talked to anyone else?
A: Not to my knowledge.
Q: Do you know the content of Wallace's conversation with Henderson?
A: No, but I will say this, that it was pretty strong according to what George said. George said he felt it to be highly unprofessional, the way it was handled because it made me look kind of, maybe something I didn't need to be made to look like.
Q: Well, what do you claim that Wade Wallace said to George Henderson that you object to?
A: I can't recall that, I'm sorry.
Q: So you don't have any evidence that Wade Wallace said anything to George Henderson that would have been defamatory towards you. It was just unprofessional, is that what you're saying?
A: Probably more so unprofessional, yeah, if I had to

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say one or the other.
Q: And what you know about that conversation you learned from who, Wade Wallace or George Henderson?
A: From George. George actually called me about it.
Q: And does Dean Roberts work for Spartan Chemical?
A: He works for — he did, I'm not sure. I haven't talked with him in a long time, but he was with Spartan Chemical at the time.
Q: And you said that you have some information that Wallace called Roberts.
A: Right, yeah, Dean and Wade Wallace were reasonably close and they had a, I mean, I don't know if it was a friendship relationship but they were pretty close.
Q: Do you know what Wade Wallace said in that conversation?
A: I don't.
Q: So you don't have any claims that Wade Wallace made any remarks about you to Dean Roberts that were defamatory.
MR. STEWART: Object to the form.
A: I don't know. I don't know of any right now, no.
Q: Now, your employment was terminated on July 19, 2007, for unsatisfactory performance, correct?
A: Yes.
Q: Do you know who made the decision to terminate

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your employment?
A: No.
Q: Do you know how old David Wilson is?
A: No.
Q: Do you know how old Wade Wallace is?
A: When I went to work for him, I think he was 33.
Q: Do you know how old Martin Wildeman is?
A: Well, I think he was like around 30, 31 in '94, so do the math, whatever that is, mid-forties?
Q: How about Reed Cunningham, do you know how old he is?
A: I do not know.
Q: How about Mark Isbell?
A: Mark is, I'd say he's somewhere mid to upper forties, I don't know.
Q: And then you're just basing your best guess on how these gentlemen appear?
A: I mean, there's a lot of stuff out there that I could go by, but I'm just giving you an off-the-cuff general answer based on trying to answer.
Q: Reed and David's about as old as you are.
A: I doubt that.
Q: Close.
A: I doubt that.
(Defendant's Exhibit 22 was marked for identification.)

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performed any of the duties that you once performed?
A: Yes.
Q: Which ones?
A: For certain she, she tried to deal with chemical vendors and get chemicals less costly. She tried to change formulations, get them done differently, less costly, that kind of thing, which was an area specific to me and what I did.
Q: Anything other than those two that you claim that she did that you once did?
A: When I say I have information, it has to do with actual documents. I don't have anything here or like that, but documents that actually show that she did that, I don't have any documents that show anything else.
Q: Have you produced those in Discovery?
A: I think so, yes, yes, yes.
Q: Do you claim that Ms. Guzman had some sort of personal relationship with Mark Isbell before she was hired by Tietex?
A: I am the last person that's going to blame anyone or accuse anyone like that. I'm not, no. I would not, without knowing, and I don't know whether I'd do anything then, because I think that's wrong. I would not do that. I've been down that way before and I know what it's like.
Q: This is attachment 9 to the EEOC, page 312. This

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is written by you. It says, "In June, Patricia Guzman would go to work at Terry's Tap Room, a local Spartanburg beer bar, owned by R.J. Rockers Brewery, in which Mark Isbell of Tietex, Wade Wallace's boss, has had a long-standing interest. In June, Mark Isbell goes to the Tietex owner, Martin Wildeman, and attempts to convince him that Gary Harris needs to be terminated because he failed in two projects, T602 and C237. After Gary Harris was terminated, Guzman was hired as the Tietex chemist by Mark Isbell." Now ...
MR. STEWART: What are you reading from? I missed it, excuse me.
MR. SUGGS: 312.
Q: That's what you told the EEOC.
A: That's true, and I agree with it. And I didn't say it because I was making something up.
Q: Well, are you claiming that Mark Isbell wanted you gone so his friend, Patricia Guzman, could be hired?
A: No, I'm not claiming that.
Q: Okay, what are you ...
A: It could have happened.
Q: What are you saying?
A: With regard to that, what am I saying? I think that one can look at it and gather what they want from it, but I was told by David Wilson that — and this was during

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the course of some conversation right after I was terminated and he was telling me about this, and I didn't know about it until he told me about it — and he said Wade Wallace was highly bothered because Mark hired her without actually getting his blessings or whatever. I'm not sure exactly, but I'm not — it looks, it's in that category of looking a certain way you might say, but I, as far as, I mean, who knows, a friend or whatever. I don't know, and I'm not claiming anything there.
Q: I want to make sure I understand. You say that the reasons for your termination were a pretext, meaning they were not true, correct? That's what you say.
A: Yes.
Q: Now, you say that they were not true because you think you were doing a good job and that you, in fact, had done a good job on the two projects, C237 and T602, correct?
A: No, I wouldn't say that.
Q: What would you say?
A: I wouldn't say I did a good job. I'd say I tried to and I was prevented from really accomplishing what needed to be accomplished there. No, I'm not claiming that I did a good job and the next thing you know I'm terminated, no.
Q: Well, that's why I'm just trying to clarify. And you're saying that it wasn't appropriate to terminate you for not being at Hexion when you said you would be because

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the sign-in sheet shows you were there, right?
A: Absolutely.
Q: Any other reasons that you claim that the points that Tietex makes for your termination were phoney?
MR. STEWART: Object to the form.
A: Just real quickly, looking back, hindsight 20/20, I'm convinced that the day I went to work for Wade Wallace there's no question my days, in my mind the days were numbered. The one hurdle they had to overcome because Martin Wildeman knew that I could potentially do some things for the company that were important. And even though over the years he hadn't been in on a lot of stuff I had done, because I had a supervisor always between me and Martin for the most part, but in the final analysis, it was a big hurdle for those guys to convince Martin that I should be terminated.
Q: Why do you claim Wade Wallace wanted to get rid of you?
A: I don't think Wade did, necessarily.
Q: Well, who do you claim did?
A: I would have to say Mark Isbell.
Q: But you didn't work for Mark.
A: Indirectly I did.
Q: Who did Wade report to?
A: Mark Isbell. And the day I went to work for Wade

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Q: You mean how many depositions we're going to take and so forth.
A: Yes.
Q: Now, there are a number of documents that we got from the EEOC that you gave the EEOC, but when it came time to respond to our Request for Production, we didn't get those documents from you. Do you know why?
A: No.
Q: You don't know why you would have given the EEOC documents you didn't give to us?
A: I guess, you know, are you saying that if I gave EEOC a document at any time that I was supposed to give it to other people?
Q: Well, here's the deal. We made a Freedom of Information Act to the EEOC to give us everything in their file on you, and they did that. And it contained documents that when it came time for, when we compared what we got from the EEOC with what we got from you, we got things from the EEOC that we didn't get from you.
A: But you did get them.
Q: From the EEOC, not from you.
A: Well, you know, I'm obviously not an attorney and I don't really — I'm sure there's something there I don't understand, okay? I'm sorry.
Q: Well, I just want to make sure that we've gotten

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all there is to have, that you don't have other documents like these recordings that you told us about that we haven't gotten yet.
A: In other words, any documents that may show up that I have at some point, at a deposition or whatever, which this is the, you know, this is really the, I guess the first time we've met like this other than ESC ...
Q: Right. If the document is relevant to your case.
A: So in other words, I can give you all my documents. I would love to.
Q: Okay, well, that's what we want. Do you have documents you haven't given your lawyer yet?
A: Yes. I've got plenty of documents.
Q: That are relevant to this case?
A: I don't know. Some of them are and — I'm not the expert there. But there's like all this accumulated crap I got.
Q: Can we have an agreement that you will give those documents to your lawyer and if he decides they're relevant, he can give them to us?
A: If that's the way you want to do it, yes.
MR. SUGGS: Do you agree with that?
MR. STEWART: I agree with that, yes.
A: That said, that said, one of the key documents that I have is a document that shows — and I've mentioned

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this before, I think, in the hearing — but I have a document that shows where I purchased chemicals on the morning of July 3 from Lowe's. It spells out chemicals, it spells out the time that I checked out and all that. Is that the kind of thing we're talking about?
Q: Yeah.
A: Okay.
Q: Absolutely.
A: Anything I got like that I'll give to my attorney. I've got, I mean, I'd love to share it.
MR. STEWART: I'll look over it and try to get it to you in an expedited fashion.
A: One quick question, if I have, like, for example, going back to February of '07 following a visit to my office by Mr. Wallace, and I made a series of notes and comments and dated it, and that kind of thing, would that be considered a document that you would want?
Q: Uh-huh (affirmative response), absolutely. Look at these. This is Tietex 266 to 272, and show them to your lawyer so he can see them, too. And 274, 275, and 277, 278.
A: Yes, sir.
Q: Now, do those documents have anything to do with your lawsuit?
A: I suspect what this has to do with is simply demonstrating that, in fact, I did have something to do with

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the environmental at Tietex because I got a call from Mark Delledone and I made notes on what he said. This was, this ended up being a crude way of investigating and not meeting somewhere like at Tietex, but we did it by phone. And one of the things that he said — and I've got notes about five or six different things he said about Tietex — he said Tietex claims that you did not have any employees reporting to you or has had none reporting to you and he said Tietex also complains that you haven't had anything significant to do with the EPA OSHA stuff at Tietex. And so this would be, you know, this is something I kept. These are records I gathered and then I produced quarterly reports for EPA and that kind of thing. That's all that is, just to show in fact — and let me say this. What I have in that area versus what I produced is very, very limited because most of the stuff that I had in forms of memos and documents and things were left at Tietex.
Q: Well, 266 is a document on Tietex letterhead, right?
A: That's correct, yes.
Q: Signed by you as Gary Harris, Senior Research Chemist.
A: Yes.
Q: This is Tietex document, isn't it?
A: A Tietex document?

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MR. SUGGS: Object to the form, leading.
Q: Do you have a reason as to your beliefs?
A: Well, as I said before, and part of this was hindsight because I went into the situation in spite of any negatives when I started reporting to Wade, in spite of knowing my qualifications versus his, I went in with an open mind and ready and willing to give him 110 percent and do everything possible to make it a good situation. But after those first instances where he, like on around February 5 or 6, after I'd been with him for less than a week he comes in and just unloads on me when no one else is around, and then out in public he's Mr. nice guy when everyone else is around. And then he did that again later. I knew then that this would not, nothing that I had to do with Tietex going forward was going to pass because I was out, I would soon be out the door. I mean ...
Q: Let me stop you. That's not a good question to ask. Why do you think they did not want your C237 project to make this stuff internally succeed? Why?
A: I don't know.
Q: Do you have any ideas?
A: Well, first of all, I know Mark Isbell — a lot of this is hindsight — resented me highly. And if you look back, I can now look back and see all the pieces of the puzzle and being a technician and a highly technical person,

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that's easy for me to take the pieces now after getting away from the situation and becoming very objective, for me to look back and put all the pieces together and see that the guy just hated me ....
Q: Let me ask ...
A: ... and I was an adversary ...
Q: Let me ask ...
A: ... in his opinion.
Q: ... about Noveon now. Does Tietex still get this formula that they listed at .885 cents per pound at the time of this memo from Noveon?
MR. SUGGS: Object to the form in that there's no basis for this witness's answer to that question.
Q: You can answer. To the best of your knowledge.
A: I would learn that they dropped the price further and, as I said before, it was my understanding that ultimately they lowered the price and gave the product another name. I don't, in my opinion, based on some stuff I saw, I don't think they really came up with another product. They simply just lowered the price. At this time I don't, I haven't kept up with what's going on over there, so I don't know what they're doing now. I don't know if they're buying from Noveon or whomever. I don't, you know, and if you'd have asked me probably a year ago, I couldn't have told you because I haven't really ...

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Q: Let me ask you this. Last time you heard or you knew, how much were they getting the product from Noveon for?
MR. SUGGS: Object to the form, requires speculation and an answer based totally on hearsay.
Q: You can answer.
A: I remember something to the tune of the mid seventies based on a friend of mine who he and I had a conversation and he was, and we'd spent some time together, and he was still working at Tietex at the time.
Q: What was the name of the ...
MR. SUGGS: Whoa, whoa, whoa. Move to strike. Speculation, hearsay.
Q: What was the name of the salesperson from Noveon that Wade Wallace dealt with?
A: Lisa Bowes.
Q: If you will, tell me how many inaccuracies you see in this memo, Defendant's Exhibit Number 18, as it relates to the T602 formula.
A: The second trial as well as the third trial is a correct statement. They were unsuccessful. But, okay, they were unsuccessful. The test results that he, of course, he generalizes a lot and he doesn't, he basically is highly misleading as to what really happened. He doesn't spell out that the second trial was a failure because of a significant

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machine problem with regard to a bar being bent and this was overlooked by the machine operator as well as the technician that was overseeing the trial. And they ran the allotted yardage with a bent bar causing uneven distribution of the finish, and therefore an unsuccessful trial. And he does not say in here that his boss, Mark Isbell, is directly responsible that the third trial was unsuccessful in that he chose to at the last minute move the trial to a machine totally different from the machine that the trial was and the mix was made for, and all the adjustments and everything that were already learned that needed to be made from the early trial, first trial, that we didn't get to try in the second trial because the bar, and we had them tried but we didn't get good results because of the bent bar, we couldn't assay or whatever any accomplishments that were made with these changed settings to fine tune. And finally in the third trial, and the — one thing I'll add, the reason Mark Isbell changed to the other machine, in my opinion, either he was highly ignorant and incompetent or it was malicious in order to undermine the trial. It's one of the two, there's no other option. He just didn't know what he was doing, or if he did, he was highly malicious. That said, he already at the point in time he made that decision had made another decision that we weren't going to go forward with any more attempts to foam finish that product anyway because

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Tietex who has stepped in and fulfilled the responsibilities you had before you got terminated?
MR. SUGGS: Object to the form, leading.
A: Probably some of the things were split off because, I mean, like some of the things I was doing and the volume of the things I was doing, in particular before Wade Wallace, there's no way that a person unless they were highly dedicated and working 80 hours a week could do them. I suspect she's got part of them, a key part of them, and other folks --- and I suspect a lot of them have been let go, like the key things of maintaining formulas and all. It's sort of like you've got a car and if you don't maintain it, you can still drive it.
Q: Let me ask you this.
MR. SUGGS: Whoa, whoa, whoa, whoa. Move to strike, speculation, lack of foundation.
Q: Do you know if Ms. Guzman is allowed to use the primary laboratory?
A: I would suspect so, but I cannot say anything about Tietex in that area because I haven't been there and I don't know.
Q: You testified yesterday that you don't know if Wade Wallace wanted to get rid of you or not. Is that correct? Do you remember that?
A: That would be, as I said, I think I would have

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felt it would be more Mark Isbell working through Wade Wallace. But I certainly am not going to in any way, shape or form condone anything that Wade Wallace did that I feel was wrong and highly negative. It's the last thing I want to do.
Q: That's fine. That's beyond my question.
A: Okay.
Q: You don't know what Wade Wallace was thinking or trying to do, is that fair?
A: Fair.
Q: Do you believe you were treated fairly by Mr. Wallace?
A: Absolutely not.
Q: Was he the person responsible for the written report, which I believe is labeled as Defendant's Exhibit Number 18, which talks about your last key projects and called them failures?
A: That was prompted by Mark Isbell and he simply put it together.
MR. SUGGS: Object to the form, speculation, lack of foundation, move to strike.
Q: Let's take a look at it, Defendant's Exhibit Number 18. That's the report I'm referring to. Who's it by?
A: Wade Wallace.

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Q: Who's it to?
A: Gary Harris.
Q: And who's copied on it?
A: David Wilson, Mark Isbell.
Q: Have you seen any documents at any point in time that have been written by Ms. Guzman that went out to vendors?
A: Yes.
Q: What did she describe her position as in those documents?
A: It was twofold. One of those was chemist.
Q: And is that fairly similar to the position you held prior to being terminated?
A: Very similar in what the document involved as to why it was sent was directly what I was doing. There was no way around it, it was exactly one of the areas I covered.
MR. SUGGS: Move to strike, lack of foundation.
Q: You were shown some documents today. I don't recall the exhibit numbers, I don't know that I need to. But you were shown by Mr. Suggs. They were reports, I guess statements, written statements by you to DHEC and to OSHA. Do you recall those?
A: Yes, I do.
Q: Okay. I believe the one to the DHEC occurred in

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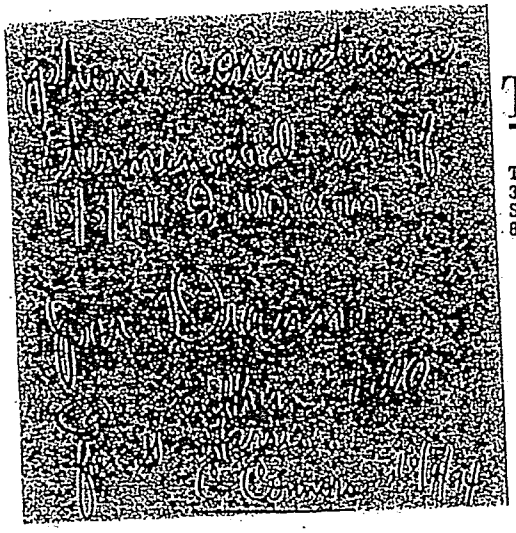
early 2002, does that sound right?
MR. SUGGS: Incorrect. Not 2002.
MR. STEWART: Can we go off the record for a second?
(Off the record.)
Examination Resumed by Mr. Stewart:
Q: Defendant's Exhibit Number 30 that you were provided today by Mr. Suggs appears to be a written statement to you to DHEC which has a date on it of July 31, 2007, is that right?
A: That's right.
Q: I think you were asked if you provided DHEC with any statements prior to that date regarding violations. Do you remember that?
A: I remember that, yes.
Q: What was your answer?
A: I think I said I'd made a visit but didn't recall any written correspondence.
Q: And so you didn't provide any written correspondence when you were an employee there, is that right?
MR. SUGGS: Object to the form.
A: Based on memory, I don't recall doing it.
Q: Do you know if that's because you didn't want to be retaliated against?



TIETEX

TIETEX CORPORATION
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Spartanburg, SC 29304
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CONFIDENTIAL

June 14, 1994

Mr. Gary Harris
309 Fox Run Drive
Galax, Virginia 24333

Dear Gary:

We are pleased to offer you the position of Senior Research Chemist in our Printing and Finishing Department. This position reports to Dave Hughston, Plant Manager, Printing and Finishing.

The purpose of this letter is to provide you with a summary of the offer, as follows:

1. Your base salary will be $55,000 per year. As an exempt employee, you will be paid monthly, and paychecks are issued on the 25th of each month. For information, we provide direct payroll deposit. To begin the direct deposit process, you will need to provide us with a deposit slip for your banking account.

2. We have provided you with handouts which outline our fringe benefits package. Each of these will be explained in greater detail to you on your first day of employment. In the meantime, however, if you have any questions, please let me know.

3. We will provide you with certain relocation-related benefits. These include:

   a) We will pay all costs associated with the move of your household goods, clothing, furniture, etc. from Galax, Virginia to Spartanburg, South Carolina.

   b) We will provide reasonable temporary housing for you for a period of up to sixty days. This will consist of a furnished apartment plus utilities.

   c) We will pay you the equivalent of one month's salary ($4,583.33 gross amount) for incidental relocation-related expenses. Payment

DRH 9/9/94 extend 30 additional days at Tietex expenses to Oct. 15, 1994

1/14* Advised Gary of conversation w/ Amber @ Timberlane. To extend lease 1 more month @ Tietex expense. He's to advise Amber of ...

will be made on your request following the closing of the purchase of your Spartanburg residence or the lease of an apartment by you as your permanent address.

d) We will pay up to $5,000 toward closing costs associated with the purchase of your Spartanburg residence. (This does not apply to rental of property.) This benefit will be available to you for a period of up to twelve months following the date of your employment.

e) Any other requests for assistance during the pre-relocation period must be reviewed and approved in advance.

f) All items listed above which relate to relocation shall be handled in accordance with all applicable state and federal tax laws. You are encouraged to consult with your tax advisor to make the necessary plans.

We remind you that on the first day you report to work you will need to bring with you certain documents which will be used for form I-9 purposes. Suggested documents are a valid driver's license and a birth certificate or social security card.

This letter summarizes our offer. Nothing herein should be construed as a contract of employment or as a promise of any specific terms for any determined period of time.

We have enjoyed meeting with you and hope that you will accept our offer to join Tietex. We will be available to help you get settled in Spartanburg and to help you in any way as you begin your career with us.

Sincerely,

TIETEX CORPORATION

Don Woodward

Donald P. Woodward
Human Resources Manager

DATE: 7-13-94

TIETEX CORPORATION

Salaried X
Non-Exempt
Hourly

NAME Gary G. Harris (First Middle Last) — DEPT. 08 — EMP. NUMBER 3335

ADDRESS Timberlane Apts. # 316 — HIRE DATE 7-13-94

106 Kensington Drive — SOC. SEC. NO.

Spartanburg SC 29301 (city state Zip) — SEX M MARITAL STATUS M

PHONE 587-8959 — DATE OF BIRTH

JOB TITLE Senior Research Chemist — JOB CODE — JOB SERV. DATE 7-13-94

SALARY

ANNUAL RATE $55,000.00

WEEKLY RATE

HOURLY RATE — SHIFT 1

*DIRECT DEPOSIT
(*attach authorization agreement)

TAX DATA

FEDERAL TAX -2-

STATE TAX -2-

ADD'L. TAX 0

DEDUCTIONS

	AMOUNT		AMOUNT
GROUP INSURANCE	Eligible 60 days from H.D.	MISC.	
LIFE INSURANCE	" " " " "		
401(K)	After 3 months of service		
UNITED WAY	0		
SAVINGS	0		

DEFENDANT'S EXHIBIT D

EMPLOYEE SIGNATURE Gary G. Harris DATE July 13, 1994

PERSONNEL Cynthia H. Connors

COPY TO PAYROLL 7/18/94

TDW 7/18/94

TIETEX
000215

Attachment # 3 for EEOC

Tietex Statement that: *Gary Harris made phone Calls In the Middle of the Night....*

This is from where that came: I had already been to the Tietex owner, Martin Wildeman, regarding what was happening, how grossly I was being treated. I was deeply concerned for my job. *Although I knew in my heart that I was being terminated, my mind could not accept that.* Stress was beginning to cause great difficulty in my sleeping at night.

My wife and I are very close and when I have problems, she has problems. I was starting to really get concerned for her.

One night I woke up about 3:00 a.m... with the bad problems at work on my mind. I immediately called and left a message for Martin Wildeman (obviously, I knew he would not be at work; why, I could have even waited to place the call at 7:30 a.m. when I knew that he still would not be there to answer. The call was simply a message to announce a serious problem that I was having that was being caused by highly irresponsible management at Tietex and I wanted to further discuss the matter ASAP!

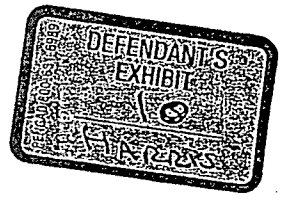
Since the Tietex lawyer, Fred Suggs, is not just the Tietex lawyer but has a business relationship with the owner, Martin Wildeman, as well, it stands to reason that the owner is probably going to see the lawyer quite often and is probably going to tell the lawyer everything (negative) that he can about me. In fact, some of what I heard from Tietex during Employment Security Commission hearings could have come only from the Tietex Owner in whom I have confided about some issues.

I went to the Tietex owner many times about many crucial issues that truly needed his attention. It is fair to say that the Tietex owner never did anything to help me, he either typically "stuck his head in the sand" and I suppose figured that the problem would go away or he even worse went to the "foxes guarding the hen houses" and "ratted" on me.

In fact, everyone that I ever spoke with regarding the owner's *handling or not handling* said that he needed to be more "hands on" that he "turned his head" to far too many significant problem issues and areas.

They said that he would *never* go against his top manager. That is a fine approach if one has a reliable, competent top manager in place (not the case at Tietex). Otherwise, it can be an approach that is devastating to the company. I feel confidently (my strongest of opinions) that the records will show that poor management over a period of about 8-9 years caused great harm to Tietex.

GH 4/24/08



Wallace, Wade

F: Wallace, Wade
Se: Monday, February 05, 2007 1:42 PM
To: Harris, Gary
Cc: Wilson, David; Isbell, Mark
Subject: RE: Acceptable work areas

Thanks. I got your voice mail this morning where you mentioned that your original thoughts on wearing a mask may have been wrong and that it may still not be enough protection. I spoke with David Wilson and we do not want to take any chances with your health. Please do not enter the lab under any circumstances, even if you are wearing a mask. Give me a the list of items you need and I will have them relocated without any need for you to go up there.

—Original Message—
From: Harris, Gary
Sent: Monday, February 05, 2007 10:18 AM
To: Wallace, Wade
Cc: Wilson, David; Isbell, Mark
Subject: RE: Acceptable work areas

Wade:

As I stated in a phone message earlier today, I am working on a list of needed equipment, etc. for the new work area. This is a very important undertaking and I want to be sure that it is handled correctly and thoroughly in the beginning on my part.
I hope to have this completed by the end of the week.

Gary 2/5/07

—Original Message—
From: Wallace, Wade
Sent: Friday, February 02, 2007 11:53 AM
To: Harris, Gary
Cc: Wilson, David; Isbell, Mark
Subject: Acceptable work areas

Gary,

I received your voicemail this morning. As we discussed yesterday we will do whatever is necessary to shield you from any further exposure to an environment(s) that might negatively affect your health. As David Wilson directed please do not enter the lab or any other work areas that Jake occupies unless it is an approved exception (see next paragraph). In addition, we will protect your new work areas from any potential exposure by directing Jake not to enter those areas. You have set up a temporary work place in the office/lab in the compounding area so this area will be protected. Also, you are free to utilize or permanently relocate your work area to the color shop area and this area will be protected as well. Both of these locations have ample countertop and sink space for laboratory bench work. If there are any tools, supplies, or equipment in the lab that you need for your work, please make a list and I will have them moved to your new work area.

As we discussed by phone today there may be exceptions to entering the lab in order to perform your job duties. One specific example is that your project work will require you to witness testing on the bench burn apparatus. It is neither practical or economical to relocate the bench burn testing outside of the lab due to the smoke venting and ambient room conditioning needed. Therefore you will need to enter the lab to do so. In these situations always wear proper respiratory protection in the form of a mask with sufficient coverage and filtration to keep out any potential irritants. You have indicated that you have tried this approach and feel it will work fine for periods of limited exposure. If you encounter any more job functions where it is not practical or economical to move the equipment, please let me know and we will consider the same procedure for these situations.

Thanks for you cooperation,

TIETEX
000329

ATTACHMENT B

Wallace, Wade

From:	Wallace, Wade
Sent:	Friday, February 09, 2007 8:58 AM
To:	Wilson, David
Cc:	Isbell, Mark
Subject:	Gary Harris

Per our conversation, I'd like to document the discussion I had with Gary Harris on Wed 2/7/07.

Gary called me mid afternoon on Wed and stated that at that moment his personal and emotional problems had overwhelmed him and he was confused, disoriented, and could not function. He did not know what to do. I immediately went out to his office to discuss his problem in person. He explained that his personal life over the last year has made him so fragile emotionally that sometimes he has episodes like the one he was experiencing. As we talked he felt better and mentioned that the project work I had assigned him would be help keep his mind off his personal problems.

I took that opportunity to remind Gary that Tietex is committed to our employees well being and that at any time we would support him if he felt he needed to utilize EAP. He said that that was not necessary and that he could work through it. I also asked him to be open with me if in any case this personal problem interfered with his ability to perform his job as we would need to sit down with HR to find a resolution.

When I left him he assured me that he was OK and thanked me for my support and patience.

Wallace, Wade

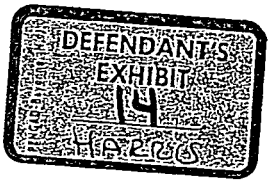
From:	Wallace, Wade
Sent:	Thursday, February 22, 2007 4:16 PM
To:	Wilson, David; Isbell, Mark
Subject:	Voicemails from Gary this week

Gary left voicemail messages for both me and Martin one morning this week at 3am. Martin forwarded me the one he received. Both messages consisted of him complaining about his inability to sleep due to being distraught over "all that's been going on."

The first thing that was bothering him this week have been that his work area has been moved from the lab and he is still not set up to easily do his bench work. I have covered this with him several times and he has asked for a lab pad coater and a vented hood. I have committed to both but he must understand it will take some time to locate, acquire, and install the equipment. In the meantime he is to make do with the pad in the beam dye area and/or seek chemical tech resource time from Robert Culbreth in the lab (coordinating with Jake). Robert is qualified and trained to do this and can help if Gary needs something done on the pad in the lab since he cannot go up there.

The second thing bothering him is his responsibilities regarding environmental reporting. He has a report due March 1 and is concerned about having to do it due to his project work. I have reviewed his project work and it does not consume all of his time. Unless he convinces me otherwise, I see no reason that his projects would interfere with his ability to get this report done on time. I made this clear to him. Although his environmental reporting duties have not changed, he does not think this should continue to be his responsibility. Regardless I have made it clear to him that it still is his responsibility and must be done.

I will update Martin as he was confused by Gary's email. I will also encourage Gary to bring his problems to me first since I am his immediate manager.



Wallace, Wade

From: Wallace, Wade
Sent: Thursday, February 22, 2007 4:04 PM
To: Harris, Gary
Subject: Environmental reporting

Gary,

You left me a voicemail this week expressing concerns over the upcoming environmental report(s) due March 1st. As we discussed when you transitioned into the Development/Improvement department, your environmental reporting duties have remained unchanged. There is a possibility that we could transition these duties to the engineering department at a later date. However, this may take some time and you will need to continue with it until it happens.

You expressed concern about getting it done. Please be sure to complete this on time. If you have difficulty managing this task and your project work, please see me tomorrow when I am back in the office so that I may understand the situation better.

Thanks,

TIETEX

To: David Wilson

From: Wade Wallace

CC: Mark Isbell, Gary Harris

Date: March 5, 2007

Subject: Gary Harris' Transition

During the last thirty days as Gary Harris has transitioned into his new role, several issues relating to his work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

As we discussed these issues are not sustainable and it is mandatory that Gary make significant progress towards resolving these issues within the next 30 days.

ATTACHMENT F

TIETEX

To: Gary Harris

From: Wade Wallace

CC: David Wilson, Mark Isbell

Date: June 18, 2007

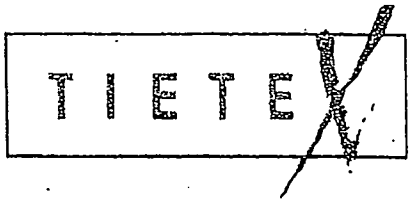
Subject: Gary Harris Work Perfomance

During the last ninety days some issues relating to Gary Harris' project work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

Of Gary's multiple duties two projects were identified ninety days ago as priorities and he was instructed to give them his most thorough and diligent focus. The first project was the development and qualification of a Tietex coating compound formula as a replacement for the current coating used on C237. Gary actually began work on this project prior to his reporting to me. His lab coating work began in December 2006 so the project has been ongoing for over six months. The second project was to develop a finish formula change and process to enable T602 to be finished with the parabolic applicator instead of a pad application. The project was assigned and work began ninety days ago.

Although the first project has been on going for six months no significant progress has been made toward completion. This project was initiated solely by Gary and he convinced senior management that it was completely feasible in order to gain support. He committed to developing a compound that would cost between $0.60 and $0.62 per pound verses the current product which cost $0.885 per pound. Despite months of lab work in house and at four different chemical supplier locations and numerous production trials he has been unsuccessful in creating a viable product. The formulation which Gary developed has proven to be much more complicated to reproduce commercially than initially promised. Gary exercised poor judgement by making claims and commitments that he could not deliver. This project was included in corporate financial improvement goals. Due to the failure of this project I have personally had to begin parallel project work with other suppliers to develop a suitable replacement to achieve the financial commitment of the project.

The scope of the second project to develop a finish formula and process for parabolic application of T602 was a technical challenge. However, Gary informed me that lab samples were promising and recommended a production trial. Although I was not presented the actual numerical results of the first production trial Gary assured me that the results were comparable to



the current product. From this I approved a scale up run for statistical qualification. The second trial, as well as a third were unsuccessful. These subsequent failures concerned me and I personally recalled samples from the first trial that Gary assured me was a success. I witnessed them being tested and found that the product from that initial trial did not perform comparable. By this I can conclude that Gary did not conduct adequate scientific and numerical analysis of the first trial. This negligence was costly in that two subsequent production trials could have avoided. In addition, this negligence in applying the proper scientific analysis is unacceptable in the work of a Sr. Research Chemist.

Obviously the two issues regarding the C237 project failure and poor analytical practices demonstrated in the T602 project are not sustainable. It is mandatory that Gary make significant progress towards resolving the problems with the C237 project and improving on his analytical practices within the next 30 days.

To: David Wilson

From: Wade Wallace

CC: Mark Isbell

Date: July 18, 2007

Subject: Gary Harris Work Performance

Despite efforts to counsel Gary Harris we continue to have issues with his work practices and performance. These issues are listed in the following paragraphs. On this basis I am recommending that we terminate his employment immediately.

In February 2007 he was reprimanded for the following issues:

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

With the exception or the environmental reporting he continues to have these issues.

In April 2007 he was instructed not to come in and work in the chemical lab areas at nights or on weekends for safety reasons. Gate records and management observation indicate that he has continued to do this.

In June 2007 he was reprimanded for the two following issues and given a thirty-day deadline for resolution. It was made completely clear that failure to complete this task and resolve this issue would jeopardize his employment.

- Failure to complete the project to replace the current C237 coating compound with formula of his design.
- Not conducting and reporting adequate scientific and numerical analysis to substantiate lab and plant trials.

He has not demonstrated any effort to complete the C237 project. Despite the deadline to complete the project within four weeks he took two vacation days the first week, five the second week, and was planning to take five days the fourth week. This would have accounted for more than 50% absenteeism during this time and no effort to complete the project as instructed. None of these days were approved in advance. He left messages the day of the vacation without any

DEFENDANT'S EXHIBIT 19

advance notice despite my request that he have them pre-approved. In addition he has not submitted to me any scientific data on any of his other projects.

I recently found out that also in June that Gary missed an important trip to visit a customer and did not inform me. He was scheduled to fly to Indiana on June 14 to visit with United Shade and return on June 15. On the way there he suffered a headache and returned to SC a day early and did not see the customer. He never informed me of this and while I thought he was in Indiana.

In July 2007, prior to the end of his thirty-day deadline several more issues have arisen.

- Only July 3, 2007 he did not show up for work and left me a message that he would be at Hexion in Greenville all day. He did not get permission for this trip. Later I found out directly from the Hexion representative that he did not show up. Although he did see another supplier in Greenville briefly, he has no been able to adequately account to me his whereabouts for the entire day.
- Also on this day he instructed the Hexion representative to deliver sulfuric acid to him at the plant without an MSDS. This is in direct violation of company policy.

In the last three months he has also demonstrated other poor work habits that are affecting his work performance.

- Does not return calls or emails consistently. His co-workers consistently complain of this as it affects their ability to complete their tasks that are contingent on his work.
- Does not keep consistent work hours and often cannot be physically located at the facility. Gate entries indicate an erratic pattern of coming and going that is not approved in advance.

In light of the continued problems with Gary's work practices and performance I am recommending that we terminate his employment at Tietex. Gary has been counseled about these issues, but at this point I have lost confidence in his ability to perform his job in a satisfactory manner.

TIETEX™

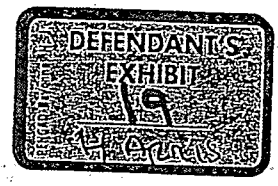
To: David Wilson

From: Wade Wallace

CC: Mark Isbell

Date: July 18, 2007

Subject: Gary Harris Work Performance



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Wallace, Wade

F: Wallace, Wade
Sent: Monday, June 25, 2007 8:03 AM
To: Harris, Gary
Subject: RE: Vacation

Gary,
I do not have a problem with you taking vacation this week. However, in the future please try to communicate this kind of time off further in advance.

-----Original Message-----
From: Harris, Gary
Sent: Saturday, June 23, 2007 9:47 AM
To: Wallace, Wade
Subject: Vacation

Wade:

As a result of an important situation, I need week of June 25 for vacation. There are several key work related issues that need attention which I will arrange to cover.

Thanks,
Gary

Left Voice mail on morning of June 19 to be out June 19 & 20.

Left Voice mail on afternoon of July 3 before he was suspended indicating he would take vacation entire week of June 9 – 13.

TIETEX

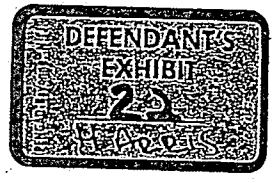
ATTACHMENT J

000340

VISITORS REGISTER

ADDRESS	TIME	REMARKS
Woodruff Conv Center		
[illegible]		
[illegible]		
[illegible]

ATTACHMENT K



TIETEX
000342

TIETEX INTERNATIONAL, LTD.
3010 North Blackstock Road; P.O. Box 6218
Spartanburg, SC 29304
(864) 574-0500 FAX (864) 574-9440

* Paid → 7/31/07
Do Not owe 1.32 Hr. Vacation
✓ RJO Heyer

EMPLOYEE TERMINATION

Effective Date 7-19-07 Employee No. _____ Employee Name GARY HARRIS
W/E Date _____ Hire Date 7-13-94 Social Security No. _____
Termination Date 7-19-07 Dept. No. 55 Shift D Department PRODUCT DEV & PROCESS IMP.
Rehire: Yes ___ No ✓ Termination Type (V/I/M) I (V = VOLUNTARY, I = INVOLUNTARY, L = LAYOFF, M = MEDICAL (LTD))
Comments GARY IS NOT CONSIDERED TO BE A GOOD MATCH FOR TIETEX'S NEEDS. Supervisor N/A Date _____
Dept. Mgr. Approval _____ Date _____
Plant Mgr. Approval _____ Date _____
HR Approval David A. Wh Date 7-19-07

CHECKLIST

A. ID Card	✓	F. Payroll Deductions		L. Vacation Years Service	13
B. Uniforms	N/A	1.	N/A	1. Hours Taken	88
C. Keys/Tools/Equipment	✓ (3)	2.	N/A	2. Hours Accrued	89.32
D. Manuals/Guides		G. Garnishments	N/A	3. Hours Vacation Due	* 0 (1.32)
1. Policy Manual	N/A	H. Computer Access	✓ (5G)	M. 401K	
_____	N/A	I. Voice Mail	✓	N. Pension	
E. Credit Cards		J. Tuition, Classes, etc.	N/A	O. Insurance/COBRA	✓
1. _____	N/A	K. Miscellaneous	N/A	P. Co. Agreement	✓

Reason for Leaving AFTER EVALUATING COUNSELING GARY CONCLUDED HIS UNSATISFACTORY WORK PERFORMANCE, THE COMPANY HAS LOST CONFIDENCE IN GARY'S ABILITY
Comments _____ Exit Interview By David A. Wh Date 7-19-07
HUMAN RESOURCE DEPT

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
631 Hampton Street
Post Office Box 995
Columbia, South Carolina 29202

Date: March 28, 2008

NOTICE OF HEARING BEFORE THE COMMISSION

APPEAL NO 13018

CLAIMANT: HARRIS GARY G
473 CRESTHAVEN DRIVE
BOILING SPRINGS SC 29316

CLAIMANT'S SSN:

APPEAL NO 13018

LIABLE EMPLOYER: TIETEX INTERNATIONAL LTD
P O BOX 6218
SPARTANBURG SC 29304

SEPARATING EMPLOYER:

A hearing has been scheduled in this matter for Thursday, April 10, 2008 at 10:20 a.m. All hearings are held at the offices of the Commission.

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
C. LEM HARPER, SR., CENTRAL OFFICE ANNEX BUILDING
631 HAMPTON STREET, ROOM 350, COLUMBIA, SC

The Commission acts as a Board of Review, and hearings are heard solely on the record, no further evidence is admissible. Parties may appear in person or be represented by counsel. Parties may also submit written argument that deals with the record. Failure to appear may result in your interests considered abandoned.

Commission Appeals Unit
Legal Department
(803) 737-2668
(803) 737-0124 FAX

cc: Claimant
Claimant Attorney – Richard Stewart, Esquire
Liable Employer
Separating Employer
Employer Attorney – Fred Suggs, Esquire
Local Office – Spartanburg
File

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION

Columbia, South Carolina

Transcript of Testimony

Before
Natasha Pauling, Administrative Hearing Officer

Gary G. Harris 473 Cresthaven Drive Boiling Springs, SC 29316 Claimant SSN: xxx-xx-7868	)	**CLAIMANT**
Tietex International, LTD PO Box 6218 Spartanburg, SC 29304	)	**LIABLE EMPLOYER**

PLACE OF HEARING: SC Employment Security Commission
440 South Church Street
Spartanburg, South Carolina

DATE OF HEARING: February 5, 2008

APPEARANCES:

For Claimant: In Person
Attorney

For Employer: Attorney
Two Witnesses

TESTIFYING WITNESSES

CLAIMANT:

Gary G. Harris

Richard Stewart, Esq.

EMPLOYER WITNESSES:

David Wilson, Human Resources Director

Wade Wallace, Director of Sales and Marketing

Fred Suggs, Esq.

daughter and she said, "Gosh, he invented everything at Tietex" and this is the most incredible thing I ever seen. And they said, "not one time did he ask how she was." That turned out to be a huge hospital bill and so I'm thinking, you know ... I don't know. Maybe I shouldn't say that. It ... it's all a mess in that time and when he tried to get me to move down to the plant, I said, "Jake, all of my stuff is up here. There is nothing down there for me to work with." And at this time, I was kind of, you know, nerve-wise, kind of a wreck because of what my wife went through. He said, "No, you need to move down there." So, I forgot why I prohibited ... I ran into the owner and I literally ran into him somewhere in ... and I told him, "if they want me to move down there" and he said, "That doesn't make any sense to me." So I went back and so I ... I stayed up there. And Jake, at that time, had moved up there, but several months later he literally moved up.

HEARING OFFICER: Okay.

CLAIMANT: But I mean this is just ... it could go on and on and stuff like that. I wouldn't want to inconvenience you with nothing else, so. I can say that concerning new procedures regarding chemicals and all, initially, in the beginning, when we did the ... what we call a "QAF Program" for describing how we need things, I actually wrote and signed off how we bring in chemicals and off. So, I was very familiar with how we did it. And so, you know, if I'm in there ... I'm aware of a ... so I taught it, I very much understood. In fact, when Mr. Wilson came to work for us, we had had this [INAUDIBLE] that had been involved in ... in ... in the safety area and whatever. And it was his responsibility to do the MS/DS codes and weed out ... that responsibility became Mr. Wilson's when he ... he came in at Tietex, I think he said "2005" and our lab kept him maybe two hours to get the MS/DS notes from a mess to at least workable. And in his hands ... we had stumbled upon that. I just say that the March 5th get together was sort of like the February occurrence when Mr. Wallace came into the office and ... and it what was awesome, it was out of the blue, he really stoned at me verbally, but in ... in a way that was really mean. But March 5th, was the situation where Mr. Wallace called me and said, "Gary, you will come to my office at this time for a 30-day review." And I go to his office and he says, "We need to go down to Mr. Wilson's office" and we went to his office ... of Mr. Wilson and conduct this meeting so he ... he'd be a part of it. And then when we get down there, it's like all this stuff. And by the way, this is how my employer was: That day, I had the

Attachment C
Excerpts and Exhibits from Second Deposition of Gary Harris

Transcript of the Testimony of

Gary G. Harris

Date: March 14, 2013

In the Matter of:

Gary G. Harris v. Tietex International, Ltd.

2011-CP-42-5538

Irveta J. Shouse / GWC
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A: They did not rehear it if that's what you mean. They refused to rehear it.
Q: So that the decision of the District Court stood.
A: That's correct.
Q: And the District Court refused or I should say declined, the District Court declined to rule on your State claims of breach of contract, breach of contract accompanied by fraud, and defamation, correct?
A: That was my understanding.
Q: And there was no claim in your previous lawsuit filed in 2008 for intentional infliction of emotional distress, correct?
A: I do not recall.
Q: You don't recall whether there was or not?
A: I do not recall that. It may have been. I haven't looked at these documents in a while.
Q: Okay. All right. Let's go back to Exhibit 1.
A: Okay.
Q: And show me any claim in that Complaint for intentional inflection of emotional distress.
A: Are you telling me it's not in there?
Q: Yes, sir.
A: Okay, then I'm going to concur with you and not even waste our time.
Q: All right.

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(Defendant's Exhibit 4 was marked for identification).
Q: I'll show you what's been marked as Exhibit 4. And that's the Complaint in Spartanburg County, South Carolina, that you filed pro se on October 21, 2011, isn't it?
A: Yes.
(Defendant's Exhibit 5 was marked for identification).
Q: And Exhibit 5 is the Amended Complaint filed in Spartanburg County that Mr. Lazenby filed for you, right?
A: Yes.
Q: Now, in your pro se Complaint, which is Exhibit 4, you didn't allege intentional infliction of emotional distress, did you?
A: No.
Q: But it is raised in the Amended Complaint that Mr. Lazenby filed for you, isn't it?
A: Yes.
Q: Now, you brought suit against Pioneer Chemical, right?
A: I did, yes.
Q: And you sued Pioneer Chemical in Circuit Court in Spartanburg County, correct?
A: I really don't recall where that was filed. I know that attorney David Alford, it was his idea, in essence, to do it. We were into another situation and I

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don't know if he did it in Greenville or in Spartanburg.
(Defendant's Exhibit 17 was marked for identification).
Q: Let me show you Exhibit 17 and invite your attention to the second paragraph which says, "WHEREAS, THE RELEASOR ..."
A: Uh-huh (affirmative response).
Q: And then it refers to Gary Harris versus Jerry Campbell, Pioneer Chemicals. And it talks about being filed in the Court of Common Pleas for Spartanburg County. See that?
A: Yes.
Q: And it says "venue later transferred to Greenville County." See that?
A: Yes.
Q: And you settled that lawsuit with Jerry Campbell and Pioneer Chemicals for $9,000?
A: I settled it for — I don't want to waste our time here today, but just to get away from it, I settled it for an amount of money he owed me, outright owed me.
Q: Look at paragraph 1.
A: Okay.
Q: Now, that paragraph recites a figure of $9,000. Is that what you settled for?
A: You're talking about $9,000 on this?
Q: Yeah, on Exhibit 17, paragraph 1 on the first

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page.
A: I don't, maybe I'm overlooking something. I don't see $9,000 on that.
Q: Let me show you.
A: You said paragraph 1, that's paragraph ...
Q: Paragraph numbered 1.
A: Oh, okay. Yes. It says $9,000.
Q: And that's what you settled for?
A: That's correct.
(Defendant's Exhibit 20 was marked for identification).
Q: I'll show you what's been marked as Exhibit 20. You brought a FINRA claim against Wachovia and Jeremy Bishop in May 2009?
A: Yes.
Q: And FINRA is the Financial Industry Regulatory Authority?
A: It has to do with regulating the securities industry, and I'm not sure about what the letters mean.
Q: And your case was arbitrated?
A: It turned out that way.
Q: And the Arbitrator ruled for Wachovia?
A: I would say mostly.
Q: The Arbitrator assessed hearing fees against you in the amount of $1,575?
A: There were hearing fees. I don't recall that

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litigation with Tietex, have you been sued?
A: **Not to my knowledge. I'm having to think about it a little bit because the questions are, you know, it's somewhat broad and I have to kind of, well, is that being sued or is it not. But I don't recall of anything that would be considered a lawsuit against me.**
Q: Okay. I don't mean any disrespect by this question, but since the earlier deposition that you gave, have you been arrested?
A: **Not to my knowledge.**
Q: Have you been convicted of a crime?
A: **No.**
Q: Since your earlier deposition, have you had any major physical illnesses or injuries?
A: **I mean, I've got things that I probably should see a doctor for, but I haven't been to the doctor since I think the last time was 2008. I've got some problems that definitely need attention, but for obvious reasons I could go into, they'll just have to keep needing attention.**
Q: Do you have any physical limitations?
A: **Again, that's a broad question. I apologize for taking it that way. I think what you mean is, relative to what I think you mean, I don't. But, I mean, I've got like a major hernia. Does that matter?**
Q: Does it limit what you can do?

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A: **I don't let it.**
Q: And so you haven't seen a doctor since 2008?
A: **I'm thinking that it was, I remember I had a situation that I felt like I couldn't handle myself and it looked like a serious eye infection or something and that was the last time I recall going to the doctor.**
Q: Do you know when that was?
A: **I think it was the summer of 2008.**
Q: Are you taking any medications now?
A: **No.**
Q: When you gave your deposition in the Federal lawsuit that you brought against Tietex and were put under oath, did you tell the truth?
A: **My deposition?**
Q: Yeah.
A: **Yes.**
(Defendant's Exhibit 8 was marked for identification).
Q: I'll show you what's been marked as Exhibit 8. Do you recognize Exhibit 8 as your Responses to Tietex's First Interrogatories in this case that was submitted January 20, 2012?
A: **I mean, that's what it appears to be without reading all through it.**
Q: All right. The pages aren't numbered, but look if you will at the last page before the Certificate of Service.

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A: **Okay.**
Q: That's it, the one that bears the signature, the next page down.
A: **Oh, okay.**
Q: Do you recognize your signature and the date, 20th of January 2012?
A: **Yes.**
Q: Now, take a look at Exhibit 4.
A: **Okay.**
Q: Now, in your pro se Complaint, which is Exhibit 4, you allege that certain communications were defamatory. And one of those was the February 9, 2007, e-mail from Wade Wallace to David Wilson. And that's in your Complaint at paragraphs 19 and 38.
A: **Okay.**
Q: In this lawsuit, do you claim that e-mail was defamatory?
A: **I definitely think it was. For a third party reading that and believing it, would have to be. It showed a definite, to me, it's my thinking on that, it showed a definite disregard for a person's stability mentally and that kind of thing. I mean, the memo was so farce and whatever.**
Q: Is your answer yes?
A: **Ask me again, please.**

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Q: In this lawsuit, do you claim that the February 9, 2007, e-mail from Wade Wallace to David Wilson was defamatory?
A: **Yes.**
Q: Now, let's do it that way. I'm not going to cut you off, but if you'll give me a yes and if you want to continue and explain, I'm not going to cut you off. Okay.
A: **Okay.**
Q: But it's going to be clearer. Now, the March 5, 2007, memo from Wade Wallace to David Wilson with a carbon copy to Mark Isbell and you is referenced in your Complaint, Exhibit 4, at paragraph 20 and at paragraph 39.
A: **I remember that. Okay.**
Q: Do you claim in this lawsuit that the March 5, 2007, memo from Wallace to Wilson was defamatory?
A: **Yes.**
Q: The June 18, 2007, memo from Wallace to you with a cc: to David Wilson and Mark Isbell is mentioned in your Complaint, Exhibit 4, at paragraphs 26, 27, 28, and 40. Do you claim in this lawsuit that the June 18, 2007, memo was defamatory?
A: **Yes.**
Q: All right. July 18, 2007, memo from Wade Wallace to David Wilson with a carbon copy to Mark Isbell is mentioned in your pro se Complaint, Exhibit 4, at paragraph

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41. Do you claim the July 18, 2007, memo from Wallace to Wilson was defamatory?
A: Yes.
Q: In your Complaint at paragraph 36, you refer to "rumors in the industry" that you were terminated from Tietex for falsifying a test report. Do you claim that those rumors in the industry were defamatory?
A: Yes.
Q: All right. That's a claim in this lawsuit?
A: Yes.
Q: In your Complaint, Exhibit 4, paragraphs 35 and 42, you refer to your ban from the premises on July 3, 2007, by Wade Wallace. Do you claim in this lawsuit that ban from the premises was defamatory?
A: Yes.
Q: All right. These are the only written or verbal statements or actions that you are claiming are defamatory?
MR. LAZENBY: Object to the form of the question.
A: That includes whatever may be, but without, obviously, not having the time to expand on that here — There's another issue that was just right on the tip of my tongue that you didn't mention. There was the issue of being banned on July 3, which I say was defamatory. Also, and I don't recall exactly what you said there, the detailed wording, but the fact that I was banned from going to the

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laboratory building in itself, I'm considering that defamatory, very much so. When I was banned from going to the lab building on February 1, 2007, when I was assigned to report to Wade Wallace.
Q: Okay. In addition to the list of items that we went through and you said were issues in this lawsuit, you would add to that your banning from the laboratory during the time that you worked for Tietex?
A: That's correct.
Q: Is there anything else that you claim was defamatory that's an issue in this lawsuit?
A: As far as what's in that what you've got there?
Q: No, what we're going to litigate in this case. I'm asking you what your claims are. That's what we're here for.
A: I don't think there's something off the cuff I want to start speculating on that may be out there that I've overlooked.
MR. SUGGS: All right, counselor. You want to get your witness to answer the question.
MR. LAZENBY: I think he's answered the question.
MR. SUGGS: I don't think he's answered it at all.
Q: Mr. Harris, I'm asking you right now, do you have any other claims of defamation other than what we've gone through? If you do, I want to know what they are.

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A: I may have, but they don't come to mind right now. I cannot — We can sit here for a week and I can probably come up with a bunch of stuff that should have been mentioned that's going to be possible. But I will just simply say this, I reserve the right to anything that has happened that's not on there since the time to be, you know, be able to include that as defamation. But to sit here today and say that what you've listed is the only considerations as far as defamation go and that's going to be it, I don't think that's proper. I can't sit here and under the whatever, the duress of what we're doing and start trying to think and, you know, speculate on it. We don't have the time.
Q: I've got all the time there is. If you've got any other claim, let's hear it right now.
MR. LAZENBY: I'm going to object to the form.
A: Well, right now, being, you know, a poor amount of sleep and everything, there's just not a lot coming to mind in that area. I mean, I can start thinking, but gain, it's going to be things that, well, probably that or probably not that type thing. But I'm not — In other words, let me just word it this way. I'm not hiding anything from you. I'm being open with you on the question. And right now there's just nothing that I can add.
MR. LAZENBY: Can we take a short break?

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MR. SUGGS: Sure.
(Off the Record)
Examination Resumed by Mr. Suggs:
(Defendant's Exhibit 9 was marked for identification).
Q: Mr. Harris, I'm going to give you Exhibit 9, which are your Answers to Tietex's First Interrogatories in the United States District Court suit that was filed back in September 2009.
(Defendant's Exhibit 10 was marked for identification).
Q: And then I'm going to give you Exhibit 10, which are your Responses to Tietex's First Request to Admit that was submitted in this lawsuit.
A: Okay.
Q: Now, you claimed in your Federal lawsuit, which was the earlier lawsuit, that the March 5, 2007, memo and the June 8, 2007, memo — I'm sorry — June 18. March 5, 2007, memo, June 18, 2007, memo and the rumors about the reason for your termination were defamatory, correct?
A: Without looking, I'll agree with that. Yeah, it sounds truthful.
Q: All right. And you also claimed in your Federal lawsuit that statements Wade Wallace made to George Henderson and Dean Roberts on July 3, 2007, were defamatory, correct?
A: Based on what I was told, yes.

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Q: Now, you're not making that claim in this lawsuit are you?
A: No.
Q: Now, in your earlier United States District Court lawsuit, you didn't claim that the February 9, 2007, e-mail was defamatory, correct?
A: I don't recall doing that, no.
Q: So the claim about the February 9, 2007, e-mail being defamatory is a new claim made for the first time in this lawsuit, correct?
A: Yes, and if I may add to that. That's not that it should have not been part of the first one.
Q: Okay.
A: It was an oversight or a mistake or whatever on the part of my representation.
Q: Okay. And in your earlier lawsuit in Federal Court, you didn't claim that the July 18, 2007, memo from Wallace to Wilson was defamatory, did you?
A: For the same reason that I just said to the previous question. The same reasons, no, I did not.
Q: So that your claim that the July 18, 2007, memo was defamatory is a claim being made for the first time in this lawsuit?
A: That's correct.
Q: And in your earlier Federal lawsuit, you didn't

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claim that your ban from the premises on July 3, 2007, was defamatory, did you?
A: No, not that I recall. I don't think so.
Q: So being banned from the premises is a new claim being made for the first time in this lawsuit?
A: As far as I know, yes.
Q: And you didn't claim in your earlier lawsuit that being banned from the laboratory was defamatory, did you?
A: As far as I know, that's correct.
Q: And that's being made for the first time in this lawsuit.
A: As far as I know, yes.
(Defendant's Exhibit 13 was marked for identification).
Q: Mr. Harris, you have before you Exhibit 13?
A: Yes.
Q: And that's the February 9, 2007, e-mail from Wade Wallace to David Wilson?
A: Yes.
Q: And in your prior deposition, you talked about stress and emotional issues around the time this memorandum dated February 9, 2007, was written, didn't you?
A: There were questions asked of me, in your records in our under oath deposition and previous testimony, there were questions that were asked regarding that. And if you can go back and look at my deposition, you'll see that at

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this point in time here that referenced emotional stress and all had actually occurred mostly six months to a year earlier that was referenced. It was done in a way to make it appear, I don't know if it was made to appear that way, but it did appear in the testimony that it was going on at this time and, actually, the biggest issues I had with stress had to do with work related and my wife's hospitalization related issues that all occurred back in the spring of 2006 primarily. And then as time wore on, that gradually, you know, improved or whatever, went away.
Q: Well, in your conversation with Mr. Wallace that led to Wade Wallace preparing this memorandum dated February 9, 2007, you said to Mr. Wallace, "Look, Wade, I've got enough stress as it is," correct?
A: That was probably something to the effect of testimony. But I think, also, if you look, you will see that — And he references February 7, he references my calling him to come down, that I was having troubles. When, in fact, the real story was he came to my office that morning and asked me, the leading question was, "Have you done these two assignments that I requested you get done?" I hadn't even had time to do them. And I said, "Well, no, Wade, I haven't had time. I've been working on ...." And that led to an explosion. And so this memo, I don't know when this memo was done. According to this, it was done two

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days later and I never saw it until we started having our, after I was terminated later is when this shows up and I never was copied on it. So all this showed up, and I'm starting to ramble a little bit, but in the conversation I had with Mr. Wallace, in essence, it was after he was really verbally abusing me and "We can find another chemist," and all that kind of talk. Which is the way he typically operated if nobody was around to hear it. And it was, "Look, Wade, you don't have to talk to me like that." You know, I'd never been talked about, no one in my life had ever had reason to even talk like that to me. And it was incredible. It was amazing. And I think I might have said this before, but if there were any doubt about my going to be terminated, it was removed that day. And I'd only been reporting to him for, well, in essence, less than a week.
Q: In the course of this conversation that you were having with Mr. Wallace that led to the February 9, 2007, memo, you admit that you said, "Look, Wade, I've got enough stress as it is."
A: I think I said that, yes.
Q: And you admitted that in 2006, which was the year prior to this e-mail, your wife was ill and you had stress and sleep issues arising from her illness, correct?
A: The sleep issues, actually, arose directly from

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work stress, the way I was done after I went back to Tietex from her situation. I was, obviously, as anyone would be, very concerned about my wife and what she went through. That's pretty normal stuff that we can deal with. But when you throw in work stress, a place you're giving 60 and 70 hours a week into it, it becomes a different ball game.

Q: All right. I'm going to read from your deposition, page 106, line 18.

MR. LAZENBY: Hold on. Let me get there so he can read along.

Q: Ready?

MR. LAZENBY: He's there, yes.

Q: Okay. All right. Line 18, you with me?

A: Yes.

Q: "Question: Was it 2006 that your wife was ill?"

"Answer "That's correct."

A: Yes.

Q: Question, "Did that take a toll on you nerve wise and make you kind of a wreck?"

Answer "I got into a major sleeping problem caused mainly by stress and it did not happen until I went back to work and the way I was done after I got back to work."

That was your prior testimony, right?

A: Yes.

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Q: And you told the South Carolina Employment Security Commission that you were a nervous wreck, correct, because of what your wife went through.

MR. LAZENBY: Object to the form.

A: I think it's very broad and general. It could be for a lot of reasons, that happened to be part of it. I don't recall what I told them. But I would say that, I mean, someone could make a statement like that. That could be a very opinionated statement.

Q: All right. This is the Employment Security Commission transcript, February 5, 2008, see that?

A: Uh-huh (affirmative response).

Q: This is your testimony on page 55, that runs over from prior pages starting on 152. Just read what's highlighted there, please, sir.

A: You want me to read it?

Q: Yes.

(Reviewing document).

A: "Answer: And at this time I was kind of, you know, nerve wise, kind of a wreck because of what my wife went through."

Q: That's what you told the Employment Security Commission under oath, right?

A: Yeah. Taking that out of context, out of that total picture there, that was said.

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Q: So you admitted in your prior deposition and to the Employment Security Commission that around the time that this memorandum that Wade Wallace wrote on February 9, 2007, that you were emotional due to personal stresses.

MR. LAZENBY: Object to the form.

A: No, I don't agree with that. I think that any references I made to emotional stress that had to do with my wife had to have been talking about 2006 and, in particular, early in 2006. That was what I intended to have said.

Q: And you claim Mr. Wallace came to your office and asked you if projects had been completed and you told him, no, that they had not been completed. And then you assert that when you told Mr. Wallace that they hadn't been completed, that he verbally abused and threatened you that if they were not completed by a certain date, your employment would be terminated?

A: He told me something to the effect, "If you don't have those done by like Friday, we'll find another chemist."

Q: Did that mean to you your employment would be terminated?

A: Yes.

Q: So Wade Wallace was warning you that you had to complete your projects timely or your job was in jeopardy?

MR. LAZENBY: Object to the form.

A: Those two particular projects he wanted, for some

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reason, done and done right away. He wanted me to drop everything else.

Q: Was Mr. Wallace warning you that you had to complete these projects in a timely fashion or your job was in jeopardy?

MR. LAZENBY: Object to the form.

A: Those two projects, yes. May I add, those two projects had nothing to do with, they in particular had to my moving two areas of my responsibility to another employee so I would no longer — It was something Tietex needed done that he didn't want me being the person they had to depend on. He wanted me to move those two assignments to another area to someone else so that if something happened to me, I assume, later, you know. This is looking back at it later. That they wouldn't have to worry about knowing how to do that stuff. It was too, just to procedural projects that only I could do.

Q: Wade Wallace was your supervisor, right?

A: That's correct.

Q: And it was Mr. Wallace's job to make sure that you completed assigned projects in a timely fashion, wasn't it?

A: That would be true.

Q: And warning you to finish projects on time is not abusing or harassing, is it?

A: No. That in itself, no.

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guess when did he show up at your office, I think it was probably early in the morning. Because if he came to see me, typically, it was early in the morning just to come around and see what was going on. And he would come in and just say hey or that kind of thing. And so I would have had to have said that what really happened happened early in the morning. So you disagree on who initiated the conversation and the time of day, right?

A: I disagree not so much with the time of day as who initiated the conversation and what was said, what really took place in that conversation.

Q: And you say during the conversation that his primary focus was these projects that hadn't been completed?

A: They weren't — Let me just say this. They were more, I would put them — I see a project as something kind of big. It was more of an assignment.

Q: These assignments that hadn't been completed.

A: Okay.

Q: All right. is there anything else about the memo, which is Exhibit 13, that you claim is incorrect?

A: I mean, I think I've pretty well covered it by just saying generally, this doesn't represent what happened that morning or that afternoon or whenever. It is not representative of what took place.

Q: Well, did you tell Mr. Wallace that the

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assignments hadn't been completed in part because of your personal and emotional issues?

A: No.

Q: During the course of the conversation, did Mr. Wallace suggest that you go to Tietex's EAP?

A: No.

Q: Is there any part of this memo, which is Exhibit 13, that you agree was said?

MR. LAZENBY: You can take your time and look at the entire document.

A: Okay.

(Reviewing document).

A: I can't recall specifically everything, but my answer is, no, I don't agree with any of that. What I'm basing it on is, like I said, I cannot recall February 7, 2007, but I can look at those things that are said there and know whether or not I would have said them. I mean, whether they fit or not. And my answer is no. I think all of it is totally representative of what took place, totally non-representative of what took place.

Q: So your opinion is that what Mr. Wallace wrote in Exhibit 13 is not representative of what was said?

MR. LAZENBY: Object to the form.

A: That's correct.

Q: You don't have any evidence or other information

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to show that this e-mail, which is marked Exhibit 13, was ever seen by anyone other than Wade Wallace and David Wilson except for this litigation, do you?

A: No, I don't.

Q: And that February 9, 2007, e-mail that's dated Exhibit 13, was an internal Tietex communication between two Tietex managerial employees, right?

A: Yes.

Q: One of them was Wade Wallace, who was your supervisor, correct?

A: That's correct.

Q: And the other one was David Wilson who was the Human Resource Manager?

A: Yes.

Q: So both Wallace and Wilson had legitimate business need to know about and discuss personal and emotional problems that you might have been facing that would have impacted your job performance or suggested that it would be prudent to refer you to EAP, correct?

MR. LAZENBY: Object to the form.

A: In the big picture, yes, that certainly should have been proper or would have been.

Q: Well, if you were under stress in performing your job duties, that would be a legitimate issue for your supervisor and HR to discuss, wouldn't it?

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A: Normally, yes.

Q: And your struggles with anxiety, depression, insomnia, and stress had previously resulted in you missing work time, right?

MR. LAZENBY: Object to the form.

A: I had no depression. I've never had any depression.

Q: Well, these mental and emotional issues resulted in you taking a two week medical leave, right?

MR. LAZENBY: Object to the form.

A: I was approved for that, and I only took a few days.

Q: You didn't take two weeks?

A: No.

Q: Were you approved for two weeks?

A: Yes. Well, I believe it was two weeks based on memory. But I only took a few days and realized that I think I was kind of addicted to work.

Q: Look back at Exhibit 11, page 185.

A: Okay.

Q: Entry for 4/7/2006, second to the last sentence in that block, "After discussion, will give two weeks medical leave of absence from work to taper off his Klonopin gradually over a two week period." See that?

A: Yes.

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Q: And is it your claim that you were approved by the doctor for two weeks of medical leave after having been treated for anxiety and depression and insomnia, but you didn't take it?

A: I took, I don't remember how many days, but it was less than a week. And as far as, I mean, I'm just trying to, you know, think and remember some of this as we talk and you ask questions. But my problem that I conveyed to the doctor had to do with work stress primarily and I do not recall going to him asking for time off. It's my opinion, based on memory, that he wanted to know if I thought that would do me some good or whatever. I may be wrong. It could have been — I do not recall, in other words, going to him. I was going to him just for my problem with sleep primarily. The sleep was very difficult and, of course, anxiety, stress, to me that's the same thing. But, in essence, that's it. I did not take the full two weeks.

Q: Are you suggesting that you didn't go to him asking for two weeks off, that the doctor recommended you take two weeks off?

A: I cannot recall the conversation we had. But my memory is that we were talking about options and that's something that I don't even know that I would have been aware of as something as a remedy or potential help. Again,

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I'm not going to sit here and just pure speculation, because I cannot recall what we talked about. But that would be my thinking, that he was looking to help me and may have come up with that as a suggestion.

Q: All right. Your lawyers got those in a nice stack for you, so find Exhibit 2 if you will.

A: Okay.

Q: And turn if you will to page 4.

A: Okay.

Q: And Exhibit 2 is the Magistrate Judge's Order and Report, isn't it?

A: It is.

Q: And if you will look with me on page 4 at that paragraph that begins, "On February 7, 2007," just read that to yourself.

(Reviewing document).

A: Okay.

Q: The Magistrate Judge found that you told Wade Wallace that you were overwhelmed by personal emotional problems, that your wife was ill during this period of time, and that you were stressed, sleepless, and a wreck due to your wife's illness, didn't he?

A: For the record, I disagree with a lot of what's in here. And I, to say that he found that, I don't know. I'm not a lawyer. That's what it says. What you read is what

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it says. But not being an attorney, I'm just simply saying that the stuff in here that really represents what we've already talked about that I disagree with.

Q: And the Magistrate Judge found that Mr. Wallace offered you assistance through the Employee Assistance Program, didn't he?

A: For what I just said, I mean, I cannot, I mean, there are things in here that I know to be wrong, and I cannot ...

Q: Well, look, it's fine with me if you say, yes, he found that but I disagree with him.

A: Okay. I'll just say yes and know that I probably disagree with it.

Q: Okay.

A: I'll just say yes.

(Defendant's Exhibit 16 was marked for identification).

Q: I'll show you what's been marked as Exhibit 16, and that's the March 5, 2007, memo from Wade Wallace to David Wilson with a copy to Mark Isbell and you, correct?

A: That is correct.

Q: And you see the handwriting at the bottom, it says, "Discussed with Gary on 3/5/2007"?

A: Yes.

Q: And that signature, do you recognize as David Wilson's?

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A: It appears. I don't know his signature, but that does say David something, W.

Q: Do you remember discussing this memorandum which is marked Exhibit 16 with Mr. Wilson?

A: I do not.

Q: But you don't deny that he discussed it with you?

A: I recall discussing something with him regarding some issues and, in essence, his telling me, if you want to keep your job, I would recommend you just go do it and keep your mouth shut. And that may have been after this if, in fact, and apparently I did discuss it with him. But since the — Now, what I'm taking this to mean, Mr. Suggs, is that he and Wade Wallace discussed it with me and then it was on 3/5 that we discussed it. And then I requested that Wade Wallace send me an e-mail to document all these things so I would know what I needed to improve on. So I think I'm responsible for the e-mail having been sent.

Q: Well, now, when you say e-mail, you mean Exhibit 16, right?

A: That is correct.

Q: So you admit that Exhibit 16 was prepared at your request to document the meeting regarding Tietex's 30-day review of your progress after you were transferred to Wade Wallace's supervision?

A: Yes.

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admitted that you had failed to return voicemails and e-mails, but you said that your failure was not malicious or intentional, correct?
A: It was normal.
Q: Sir?
A: It was normal. You know, it was like a situation where I didn't do it.
Q: You agree that you said that earlier?
A: I would think I would have.
Q: And in your earlier deposition, you admitted that you didn't contest the first three bullets on Exhibit 16 during the meeting, but you said in your opinion, the points were not true, correct?
A: During the course of our meeting, I recall having ...
Q: Hold on a minute. I said I wouldn't interrupt you, but give me a yes or no and then go on your ...
A: Yes. I mean, no, I did not directly contest them during the meeting. You're right.
Q: Okay. Did you want to say something else?
A: I was just going to simply say, I was sick that day. I actually had what I believe was the flu and I didn't' feel like contesting anything or I may have.
Q: All right. And you admitted that at times you went directly to Mr. Martin Wildeman rather than using the

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chain of command, correct?
A: Well, there were times when I went to Mr. Wildeman. In my training and all at Tietex, there was no chain of command. That was the normal Tietex. People all the time went directly to my technicians and bypassed me, which included Wade Wallace, and told them what they wanted done. On the other hand, my technicians went to whomever they wanted to, whether it be Mr. Wildeman or personnel or to Wade Wallace or whomever. They didn't tell me, they would go do it. That's just the way things were at Tietex.
Q: But you admit that you did go directly to Mr. Wildeman?
A: I don't recall going directly to him. I recall leaving a phone message wanting to meet with him. But mostly those, any encounters I had with Mr. Wildeman generally were coincidental.
Q: Look at your prior deposition, page 116, line 16.
A: Okay.
Q: "Question: But you admit going directly to Mr. Wildeman?
Answer: I don't remember enough about any specific circumstances. I do know that I did that some ..."
Did I read that correctly?

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A: Yes.
MR. LAZENBY: Fred, when we get to a good stopping point, can we just take another short break?
MR. SUGGS: Sure. I'll ask a few more questions, but if you say let's do it now, that's fine. I've just got a few more in this line to ask.
MR. LAZENBY: Sure, that's fine.
Q: You admitted it was not appropriate for you to complain to Mr. Wildeman about having to do the environmental reporting, correct?
A: I would have thought that would have, had I done that, that would have been not appropriate.
Q: Are you claiming you didn't do it?
A: I'm claiming I didn't do it.
Q: Sir?
A: Yes, I'm claiming I did not complain to him about having to do, nor did I complain in the true sense to anyone about having to do the environmental reporting, Mr. Wildeman, Mr. Wallace.
Q: And you admit that the only folks in the meeting about Exhibit 16, which is the March 5, 2007, memorandum, were you, Mr. Wallace, and Mr. Wilson, right?
A: That's correct.
Q: And this was an internal Tietex communication between Tietex management employees?

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A: Yes.
Q: And the e-mail was between your supervisor, Mr. Wallace, and David Wilson who was the Human Resource Manager, correct?
A: As far as I know.
Q: And Mark Isbell was Wade Wallace's boss?
A: That's correct.
Q: So all three of these individuals were management employees at Tietex who had a legitimate business need to discuss the issues listed in Exhibit 16, weren't they?
MR. LAZENBY: Object to the form.
A: I as a manager would have never handled it like that. I would have, in private. If I had these kind of problems, I wouldn't wait till 30 days were up. Each accusation by itself is a major problem. I would have, had I had a major problem with the people that reported to me, it would have been in private and head-to-head and I would have never gone and for some reason spread it in and around that this stuff happened and it didn't.
Q: Well, all three of the individuals, Wallace, Isbell, and Wilson were managerial employees at Tietex, right?
A: That's correct.
Q: And if you had issues with your supervisor or with the Company, they had a legitimate reason to discuss those

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talked a little bit before June 18 about could we get into that. And on June 18, I mean, it was like do this, and then the next thing, I get this June 18, what I call a final written warning. And then the next thing I know, Mr. Wallace wants me to do the triblend. So for this to say that I ignored the C237, I was doing exactly what Mr. Wallace had asked me to do, which was start on and prioritize the triblend project. That's exactly what he told me.

Q: All right. You admit you failed to visit a customer in Indiana and did not tell Mr. Wallace about you not meeting with that customer, correct?

A: I will just say yes, but may I add to that?

Q: Sure.

A: I did not recall whether or not I had told Mr. Wallace about having to abort the trip. But I left it in the hands of Steve Acker who was with me. And I almost can say without, it's a knowing without knowing, that I said, "Would you call Mr. Wallace and tell him what has happened, that I've got to fly back?" So I would have thought that Mr. Acker would have handled that for me. Anyway, with that said, I'm still looking for an itinerary which will show that Wade Wallace and Steve Acker got together and planned this trip for me to play golf. Fly up, on the same morning that I would fly up, be picked up by Steve Acker. We would

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have lunch, go play golf with a customer, and then he would take me back to the airport. Now, that was really strange to me on June 14 with all this negative going on that it's okay for me to fly and play golf. But I am confident had that trip not been aborted and I had gone and played golf, then what we would have been looking at today would have been a report where Gary Harris claimed he was going to visit and customer and told me he was going to do that and instead he was going to play golf. That was orchestrated, in my estimation, to really add to all the other. And it was, it was a, it just happened, thank God, that, I mean, I thought I was having a hemorrhage or something in my brain on the airplane. It was tremendous. And, ultimately, breaking out in sweat. And discussed this with Mr. Acker after the first landing when before I flew on to where he was. And it was his and I decision that it was best I didn't continue the trip.

Q: Turn with me, please, to Exhibit 2, page 7.

A: Okay.

Q: And come down to the last full paragraph, which is the paragraph before "On the evening of Monday, July 2 ..."

A: Okay.

Q: Got it. Read that to yourself.

A: You're talking about the Indiana thing?

Q: Yeah.

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A: Okay, I have.

Q: All right. And the Magistrate Judge credited Mr. Wallace that the plaintiff never told Mr. Wallace he had not met with the customer in Indiana, correct?

A: That's what it says, yes.

Q: And you admit you were supposed to go to Hexion, but claim you couldn't get in?

A: No, July 2 and 3, if I wanted to go to Hexion, it was up to me. It wasn't like I was supposed to. I was on vacation July 2 and 3. That's never been a big issue, but it should have been.

Q: Well, you admit that you told Mr. Wallace that you were going to Hexion?

A: Out of pure courtesy, not that I had to.

Q: And that you went there, you claim, but you couldn't get in?

A: That's correct.

Q: And you admit you didn't do any work at Hexion?

A: No. I mean, yes, I admit I didn't do any work at Hexion that day.

MR. LAZENBY: I'm going to object to the form. I don't know what day you're referring to.

A: July 3.

Q: We're referring to ...

A: July 3.

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Q: ... July 3, 2007. Correct, Mr. Harris?

A: That's correct.

Q: So you admit you didn't do any work at Hexion on July 3, 2007?

A: That's correct.

Q: And you admit you told Mr. Wallace you were going to Hexion as soon as you took care of an ant problem at your home?

A: Out of pure courtesy, yes.

Q: And you admit that when you couldn't get in Hexion, you left?

A: After some time of trying to get in, I left a message for one of the technicians and then I left.

Q: And you admit there was no one who saw you at Hexion who could substantiate you being there?

A: As far as I know.

Q: And you admit you were only at Hexion for about 30 minutes?

A: Thirty or 45, I don't remember exactly. I'd say 30 to 45.

Q: Look at your deposition at page 158.

A: Okay.

Q: All right. This actually starts at 157, last line.

A: Uh-huh (affirmative response).

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Q: 157, the last line. You there?
A: Yes.
Q: Okay.
"Question: All right. Let me invite your attention to the ESC transcript March 28, 2008, page 171. 'Question. And you stayed there for about 30 minutes.' 'Claimant.' That's you. 'My guess is 30 minutes.' 'Question. Pardon me?' 'My guess is 30 minutes.' 'Question. Thirty?' 'Claimant. An estimate, from memory, an estimate.'
Answer: Okay.
Question: Do you agree with 30 minutes?
Answer: About 30 minutes because I don't know, I didn't keep a record of it. I would say, probably now I would change that to at least 30 minutes because of what I did."
A: Okay. That's consistent.
Q: And you admit that Mr. Wallace expected you to be at Hexion?
A: No. Wait a minute. Let me just say that he was aware that at some point I was going to be going to Hexion. I was on vacation. I had no intention, I had no intention of going to Hexion, finishing a project, and going back to Tietex.

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Q: Then look at your deposition, page 158.
A: Okay.
Q: Line 14.
"Question: And you agree with me that Wade Wallace, based on your phone call, expected you to be at Hexion?
Answer: Yes." Did I read that correctly?
A: "Object to the form." Yes, that's what it says. But ...
Q: Did I read it correctly?
A: You did. You know, that's an opinion.
Q: And you claim that you tried to get into work somewhere else but admitted you never notified Mr. Wallace that you were not going to be at Hexion?
A: That was not in our way of doing things. I was required to keep a cell phone on when I was not at Tietex.
Q: You claim that you tried to get into work somewhere else but you admit that you never told Mr. Wallace that you were not going to be at Hexion, correct?
A: I had not — Let me just answer it this way, because I think that's a difficult way of, the way it's worded is difficult. I had told Mr. Wallace, again, out of courtesy, just to let him know what I was doing, something I did not need to do. I was on vacation. I was coming off of vacation to help him out. And I was just letting him know where I was as if I were at work, but I wasn't. And I let him know that I was going to Hexion. And there was no reason in our scheme of things and the way we had arranged things, there was no reason that when I couldn't get in at Hexion that I would need to call him and just every little detail.
Q: Pick up your deposition, please, and turn to page 160.
A: Okay.
Q: Line 13.
"Question: Did you telephone Wade Wallace and tell him you couldn't get into Hexion and you were going to go somewhere else?
Answer: No, I did not."
Did I read that correctly?
A: Yes.
Q: And you admit that when Wallace telephoned you on your cell phone to ask where you had been and you explained that at that point Mr. Wallace suspended your employment?
A: Yes.
Q: And he suspended your employment with pay, correct?
A: I would later find out, yes.
Q: And Exhibit 19 was an internal Tietex communication between Tietex managerial employees, right?

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A: Yes.
Q: Wade Wallace who was your supervisor and David Wilson who was the Human Resource Manager?
A: Yes.
Q: And a copy to Mark Isbell who was Wade Wallace's supervisor and in your chain of command?
A: Yes.
Q: And this was a recommendation for termination, right?
A: Yes.
Q: Exhibit 19 recommended that your employment be ended, right?
A: That's correct, yes.
Q: So Mr. Wilson in Human Resources would have had a need to know that, right?
A: Yes.
Q: And Mark Isbell, who was Wade Wallace's boss would have had a need to know that Wade Wallace was recommending that one of his employee's employment be ended, right?
A: In a normal situation, yes.
MR. SUGGS: This is probably a good time to take a break if you're ready.
MR. LAZENBY: Sure, that's fine.
(Off the Record)
Examination Resumed by Mr. Suggs:

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was not telling the truth and could not be relied on. In summary judgement, it's very important. If there's any conflicts with whether someone is not telling the truth, that comes in question. That's what that was all about. It wasn't a matter of showing whether it happened in May of February, it was about showing somebody not telling the truth.

Q: Okay.

A: If he said this one time and he said that the other time.

Q: Look back at the paragraph we looked at previously on page 14 of Exhibit 2.

A: Okay.

Q: And you can see the citation in the middle of that paragraph to Exhibits 16, 18, and 19. See that?

A: Yes.

Q: And then read the sentence to yourself that is right before that citation to those exhibits.

(Reviewing document).

A: I think I've read what you asked me to.

Q: Okay. The Magistrate Judge found that Tietex had legitimate reasons for terminating your employment based on the employment deficiencies noted in Exhibits 16, 18, and 19, correct?

A: That's correct.

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Q: And let's go to Exhibit 3 and go to the bottom of page 3.

A: Okay.

Q: And look at page 3 through page 5.

(Reviewing document).

A: Okay.

Q: And the District Court in reviewing the evidence and the Magistrate's Report found as fact that the performance deficiencies cited by Tietex, which are listed in the memoranda in Exhibits 16, 18, and 19 were true, right?

A: Yeah, they concurred with the Magistrate Judge, yes.

Q: Right. Okay. Now, let me invite your attention to your claim about rumors in the industry.

A: Okay.

Q: Are you with me? And you claim it was reported to you that a former Tietex employee who had previously worked in sales for Tietex told you there were rumors about you in the market, right?

A: Yes.

Q: And you don't recall the name of this former Tietex sales employee?

A: Yes.

Q: Yes, you don't?

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A: I do.

Q: You do. Who is that?

A: Ann Weaver.

Q: Who?

A: Ann Weaver.

Q: Who is she?

A: All I know her as is Ron Weaver's wife and both of them worked at Tietex and they eventually got married. She was Ann someone else.

Q: Does she still work at Tietex?

A: No.

Q: Where does she work now?

A: I don't know.

Q: Do you have any contact information on her?

A: No.

Q: Tell me what you claim Ann Weaver said.

A: She told me that there were things being said and she thought I ought to know about them. And I didn't really pursue it that much. She said, "I'm just going to tell you that. There's been some things spread out there about you. You need to know about them." And I said, "Do you think the Tietex folks ..." She wasn't at Tietex then. I said, "Do you think any of the sales folks at Tietex would know?" She said, "It might be that. It might be that they would, they should. They're apparently involved in it."

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Q: Okay. Did Ann Weaver tell you what was being said?

A: No.

Q: She just said generally there were rumors?

A: She said some bad — I don't remember exactly. But it was obviously negative what she implied to me, or actually said was that it was negative stuff, general stuff. And I'm not the kind of person to start digging for details and I didn't really pursue it with her. I didn't ask her for much.

Q: When did you have this conversation with Ann Weaver?

A: I don't remember. It would have been, obviously, after I was terminated. And it could have been, I mean, maybe somewhere there's some where I was asked this same kind of a question, there may be some record when it was. But my thinking right now just based purely on memory is that it was probably in the fall of 2007. It could have been 2008 sometime, but it wasn't that long, not that far out from my termination.

Q: Where did the conversation with Ann Weaver take place?

A: It would have been probably by telephone.

Q: Who called whom?

A: I do not recall the reason why I was talking with

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her. There was several times we talked with each other, by the way, because at that time I was trying to restart a career and I knew Ann fairly closely.
Q: At the time of the conversation with you, who did Ann Weaver work for?
A: I don't know. I don't remember. Oh, at the time. Oh, you were saying now while ago. At the time, I believe it's something like Clama, Lava, Clama. I know there's a Lava and there's a Clama, but it was either Lava or Clama.
Q: If I set out to find Ann Weaver, where would I start looking?
A: Probably go to Pam. I mean, if I were you, Pam, I'm sure, she knows a lot of people who's worked at Tietex and the sales folks. She could trace it down for you. I mean, I'm being serious.
Q: When's the last time you talked to Ann Weaver?
A: Probably three years. Let me see. At least three years ago.
Q: When did it occur to you that Ann Weaver was the person who reported these rumors in the industry?
A: That she reported them?
Q: Yes.
A: In other words, saying when did we first talk?
Q: No, no. When I took your deposition in the Federal case, I asked you who it was that told you about

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these rumors and you said you didn't know.
A: Well, maybe I didn't at the time. I was still in a lot of — If I told you that, I meant it.
Q: And I'm asking you now when did it occur to you that it was Ann Weaver?
A: Well, I know it was Ann Weaver. I mean, it didn't occur to me. I know it and it's just a matter of when did it happen. Did it happen before July of 2009 or after? But at the time, if I in fact said what you said I said there, I meant it. If I'd have known it was Ann Weaver when you asked me the question, you would have gotten her name. There's no reason not to give it to you.
Q: Look at page 217 of your deposition.
A: Okay.
Q: All right. We'll just start at the top. This is part of your answer.
"-- and I'm not 100 percent sure about the person that told me, but they did work at Tietex and they're out in the sales force, and they said they had heard a rumor about me out in the market.
Question: You don't know the name of this person?
Answer: The one that alerted me first, I don't recall."
A: Well, I'll just tell you right now, there's absolutely no reason had I known it was Ann Weaver at that

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time, I would not have told you. There's absolutely no reason why I wouldn't have mentioned that. So, you know, I'd need to go do some digging now to figure out when I first learned it was Ann Weaver.
Q: At the time you had the conversation ...
A: But I ... I'm sorry.
Q: At the time you had the conversation with Ann Weaver, what was she doing? What was her job?
A: She was in sales, mattress fabric sales.
Q: But you're not sure of the name of her employer?
A: Not right now, no, absolutely not. That's been, like I said, three plus years since I talked with her.
Q: Okay. As a result of Ann Weaver telling you about rumors in the market, you telephoned Tietex employee Jimmy Fleming who worked in Tietex's color shop?
A: No. At that time Jimmy Fleming was in sales when I made the phone call.
Q: Look at page 216 of your deposition, line 13.
A: Okay.
Q: "Question: Tell me who Jimmy Fleming is.
Answer: He's a young fellow that was working in the color shop, just various jobs in the color shop ..."
Is that ...
A: Yes. Please, can I ask you to read the rest of it

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and you'll see what I'm talking about.
Q: "... right before I left there he ended up getting some sort of a degree from, I don't know if it was a community college or what but once he got that he was given a job in ticking sales, working in the sales marketing area for ticking fabrics. Fairly young fellow."
A: Yes.
Q: So where did he work?
A: He was in sales at the point in time I was terminated and he was going into sales pretty much right about that time. So by the time I was calling him on the phone whenever it was later, he was actually out there in the sales force. And I knew Jimmy. He and I had a fairly close relationship.
Q: Okay. As a result of your conversation with Ann Weaver, you called Jimmy Fleming?
A: I called him because I had his cell phone number and I knew him and I knew he would tell me the truth.
Q: Is it true that you called him as a result of your conversation with Ann Weaver?
A: Yes.
Q: And Jimmy Fleming told you that a ticking manufacturer's representative in Texas asked him if it were true your employment had been terminated for preparing a

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false testing report.
A: Yes.
Q: And you don't know the name of the person who allegedly asked Fleming if your employment had been terminated at Tietex for falsifying test results, do you?
A: I do not and did not pursue getting it. I intentionally did not pursue getting that information.
Q: And you don't know for what company that person worked?
A: I do not. I can't sit here and say I know exactly where the person works. But it was like a knowing without knowing. I just didn't bother pursuing it. I didn't, for a lot of reasons, I didn't want to start opening a can of worms and digging in and scaring people off and all that. I had all I needed and wanted.
Q: You've never spoken to this unknown person?
A: Not at this time, no.
Q: Do you know what Jimmy Fleming told this unknown person about whether Tietex had terminated your employment for falsifying test results?
A: I cannot sit here and say that we brought that up. The only thing I can remember about ...
Q: Is the answer yes or no? Do you know what Jimmy Fleming told him in answer to his questions?
A: No.

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Q: Now go ahead.
A: He did, I don't know if I asked him this, I probably did. Was there anyone else there that heard that from Tietex? And he said Kenny Parrish knew about it. So both he and Kenny Parrish knew about it.
Q: Did he say definitely that Kenny Parrish was present?
A: Yes. They were together. In fact — Well, let me just say, I gathered from what we discussed in that phone conversation that Kenny Parrish was with him that particular moment when that occurred.
Q: All right. Turn with me to page 217 of your deposition.
A: Okay.
Q: Line 22.
"Question: And you don't know the name of this person that was talking to Fleming?
Answer: No, I do not. He would if he remembers. And anyway it was, and anyway once I was told what I was told; and I asked him if anybody else was there and I think he mentioned that Kenny Parrish, who worked at Tietex at the time was also present there on that particular assignment."
A: I mean, I agree that you've read what I'm reading, yeah.

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Q: All right. Well, back when you gave your deposition in the Federal case, you said that you thought that Fleming said Kenny Parrish was present.
A: And I think it today. You know, I mean, just simply saying ...
Q: What evidence do you have that Parrish was there?
A: Based on what Jimmy Fleming told me.
Q: Did you ever talk to Kenny Parrish?
A: Not specifically about that.
Q: Now, when do you claim this conversation occurred?
A: I can't, because I'm not sure. I'm just simply saying, obviously, it had to have been after I was terminated. And if were putting out a guess, it would have ranged some time between the fall of 2007 on up into possibly some time in 2008.
Q: Could it have been summer of 2007?
A: No, it had to have been after I was terminated to have made sense that I would have been told all this in a phone call and then that Ann Weaver would have called me or I called her, whatever, that we talked. Because at the time we talked, I was actually trying to restart a career.
Q: So just so we're clear, I'm talking about when Jimmy Fleming's conversation with the ticking manufacturer's representative occurred. Do you know when that was?
A: No.

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Q: And you don't have any evidence that any representative of Tietex made any statements to this unknown named ticking manufacturer representative about you, do you?
A: Not at this time, no.
Q: Do you have any evidence that any representative of Tietex made any statement to anyone in the industry about the reasons for your termination?
A: Only that I have evidence, not evidence but — Well, I guess you could call it evidence that may have occurred, but to say that I have evidence that absolutely that occurred, I don't.
Q: Now, when you refer to your ban from the premises on July 3, 2007, you're talking about Wade Wallace suspending you until he returned from vacation, correct?
A: Yes.
Q: And I think you said earlier you were suspended with pay.
A: That's what happened.
Q: And that was on the day, that suspension was on the day that you had told Mr. Wallace you were going to be working at Hexion, correct?
A: That was the day that I was going to be doing work at Hexion, July 3.
Q: And Wade Wallace telephoned you on July 3 to learn where you had been because he had information that you were

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not at Hexion, right?
MR. LAZENBY: Object to the form.
A: I will say yes, but I'd like to add something to that. In real life when this happened, and this is my speaking today when I know a lot more than I knew in 2009. I've forgotten information, obviously, with the passage of time, but I've also been able to become less subjective to the matter. And it's pretty clear to me today that what happened on July 3 was that Wade Wallace expected, based on our miscommunication, my thinking that he was going on vacation on, leaving the last day being the 6th, and his knowing that it was the 3rd and assuming I knew that, he expected me back in there with information from Hexion toward the end of the day on the 3rd. And I have no problem with understanding that he wanted me back in there so he could terminate me before he went on vacation. And so what happened, everything is calm. None of this other stuff that's in these reports about July 3 that he said happened. Later after the fact, he's trying to make it look like I disappeared for the whole day. But, actually, he did not get alarmed at all about anything on July 3 until George Henderson showed up between 4 and 4:30 with sulfuric acid. And then, and I can just imagine that Mr. Wallace is thinking, he'll be back in here by 5 o'clock and we'll take care of things. And all at once he gets notice that someway

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somehow George Henderson has come by with something for me and then, of course, that's when everything starts, after 4 o'clock. Up until then, he had no reason to be not calm and ready to do whatever he was going to do. So that really got him highly concerned that, man, he's not going to be around here for me today. So he starts doing all this stuff. He calls me like 4 whatever, 4:40 or whatever, and gets me on the phone. My cell phone has been on all afternoon. He calls me and he says, "Gary, will you come to my office?" And I said, "Wade, I'm not there." I said, "I'm on my way to Hexion to pick up some acid." Then he flew off the handle like he can do and started, "What do you mean you're not here," and all this. And he said, "I tell you what, I'm putting you on suspension and I don't want you back in here until I'm back from vacation." And there may have been a few more little comments in there thrown in. He asked me to explain something but he flew off the handle. And then we were on the phone and I was driving going out kind of, I guess, where you could get cut off. And then the next thing you know, we don't have a connection. But, anyway, that was the phone call. That was the essence of the phone call that was made to me.
Q: In this telephone call that you described between you and Wade Wallace on July 3 where Wallace telephone you to find out where you had been, no one was on the phone

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other than you and Wallace, right?
A: On our phone call?
Q: Yeah.
A: That's correct.
Q: And it was during that call that Wallace told you you were suspended, correct?
A: That's correct.
Q: Do you know if Wade Wallace told anyone at Tietex that you were suspended?
A: I don't know that for a fact, but based on what happened later, at some point he told some other people I would learn later.
Q: Do you know if Wade Wallace told anyone outside of Tietex that you were suspended?
A: I later learned from the Textile Rubber plant manager that he had passed that information along.
Q: Textile Rubber plant manager. Who is that?
A: In Charlotte. I can't recall his name right now, but he's the guy that headed it up at the time.
Q: And he's in Charlotte?
A: Yes. And it was reported to me that Wade Wallace had told him. I was actually still involved with Textile Rubber and he called and told them I was suspended.
Q: Who reported that to you?
A: I'd have to look. I think it may have — I

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don't know. It may have been George Henderson. Because George had a very close relationship with them and George was working with me. I was directed to go to Textile Rubber by Wade Wallace and, ultimately, George Henderson got involved with me because he sold some of the key products to Textile Rubber that I needed to change over to for my successful formula. In going to Textile Rubber, another story, I had to totally try to reformulate because they only had certain ingredients they would use. And I believe it was George Henderson that ultimately let me know of that phone call. I'm trying to think of the guy's name as we speak. But he was telling me that this guy told, had been called by Wade Wallace and told this information.
Q: What information do you have to establish that Wade Wallace told this unknown named person from Textile Rubber that you had been suspended?
A: Well, I would have, somewhere I would have knowledge or access to the actual person. I'm just saying today, I believe it was George Henderson. It's logical based on the connections I had with Textile Rubber and who all was involved.
Q: You believe that George Henderson told you that this unknown named Textile Rubber person told Henderson that Wade Wallace had told the person from Textile Rubber that you had been suspended?

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A: Yes. I've got the name now if you want it. Les Davis. Is that okay? Les Davis, Textile Rubber.
Q: It was true that you had been suspended.
A: That's true.
Q: Do you have any information that Wade Wallace told Les Davis at Textile Rubber anything other than the bare fact that you had been suspended?
A: The only information I have is like second hand what George Henderson told me. And as far as giving you any details on what George told me, I don't know exactly. I'm just saying the essence of it was that Wade Wallace told Les Davis that you had been suspended or something to that effect. That's based on memory. And I cannot sit here and give you details on that.
Q: That's what you remember?
A: That's what I remember, yes.
Q: Do you have any evidence or information that anyone outside or Tietex other than Les Davis and George Henderson knew you had been suspended?
A: Well, all of my connections knew I had been suspended.
Q: I'm sorry?
A: The people that I knew that I spoke with frequently or dealt with, they knew I had been suspended.
Q: Is that because you told them?

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A: Partly and who knows. I think there's probably situations, I'd have to go back and dig, but situations where people were aware, even more so than the suspension, was being banned from the lab as far as that kind of thing being a negative matter for me. Once I was banned from the lab, and that was something that was learned, and all the people that I dealt with out in the industry started shying away from me and didn't want to have anything to do with me, in essence, because ultimately they were looking out after themselves and their business and they felt like I was a negative.
Q: Okay. Is it fair to say that you disagree with the statements that Wade Wallace made in the memoranda that we've been examining about your performance?
A: Totally. I totally disagree with what he said about my performance.
Q: And your disagreement is based on your own subjective view of how you performed, correct?
A: No. No. It's based on my view, my objective view as a manager and my understanding of Wade Wallace as a non-technical person and not having a clue about how someone technical is supposed to do things.
Q: All right. Since you gave your deposition in your Federal lawsuit, have you any additional information supporting your view that your performance was adequate?

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A: I'm sure I do, but I cannot, I mean, I'm not in a position today to start naming specifics, but I'm absolutely sure of that that I do.
Q: Do you have any new witnesses or documents to support your contention that the statements made in your performance reviews and warnings were not true?
A: When you say "new," other than what you already have?
Q: Yeah.
A: I would say yes to that.
Q: Who and what?
A: Well, just the first thing that comes to mind is I've got an affidavit that's been taken but never, I mean, been done but never been used.
Q: From whom?
A: I've got one from Van Johnson.
Q: Have you given that to your lawyer?
A: This is very recent. I haven't had an opportunity. This was just done recently.
Q: So you claim you've got an affidavit from Van Johnson that you haven't given to your lawyer?
A: I've got an affidavit from Van Johnson and I haven't, I have not yet given it. It's just fairly recent. And, also, I haven't made a decision to use it or not. I'll be glad to give it to him and do whatever, but at this point

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in time, it's been something, I really haven't even discussed it with him much, you know. I've mentioned a few things ...
MR. LAZENBY: Don't go into what we discussed.
A: Okay. I'm just saying — Okay. I'm just saying that I've got an affidavit. It was done. There's nothing wrong with it, and it may or may not come into play.
Q: Who else do you have affidavits from?
A: As far as not being given to my representation, I don't know of, right now I'm not sure that I have any, any more. I mean, I say that by saying I know there's affidavits, but I'm not sure which ones I have, which ones I've decided to use, which ones I've turned over. As far as I know, the one from Van Johnson is so recent and all. When I say recent, it hasn't been that long ago. I don't remember the date on it, but it was the most recent one and I just haven't — For reasons I cannot go into here, I haven't decided whether I want to even use it or not.
Q: Where is this affidavit?
A: Probably at the house.
Q: Is it in your automobile?
A: It wouldn't be.
Q: I'm sorry?
A: It wouldn't be in my automobile.
Q: What does it say?

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Q: Anybody else?
MR. LAZENBY: Larry what?
A: Starkey.
Q: Lisa Boaz who works, I don't know where she works now. I believe she's with another chemical company.
Q: Anybody else?
A: Where I'm having to produce actual names, you know, I mean, formal names, I don't have any more names right now. There are definitely a couple of other areas that I believe if I had the names, I would give them to you.
Q: Have you talked to Larry Starkey about what he knows?
A: Across the board, I have not, and this is mostly intentional, I have not pursued getting details from the folks once I had what I wanted or near about.
Q: Mr. Harris, have you talked to Larry Starkey about what he knows about the alleged defamatory rumors, yes or no?
A: No. I have talked with Larry Starkey, though, but not about what you said. I want to qualify that.
Q: Have you talked to Jerry Daniels about the allegedly defamatory rumors?
A: No.
Q: Have you talked to Lisa Boaz about the allegedly

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defamatory rumors?
A: That's a broad question. Again, I'm just going to say no because I haven't gotten into details where to me, to answer your question with a yes, but I haven't gotten into some significant details.
Q: You have Exhibit 8 before you?
A: Yes.
Q: Turn to your Answer to Interrogatory 12. It's on the 19th page. You didn't bother to number the pages, so it may be somewhat difficult for you to find, but it's closer to the back than it is to the front.
MR. LAZENBY: Did you say what number it responds to?
Q: Twelve.
A: Okay. I guess that's it.
Q: You got it?
A: Yes.
Q: It doesn't look like it to me.
A: Okay. Maybe it's the wrong one.
Q: First of all, do you have Exhibit 8?
A: Yes. You said 19?
Q: Twelve.
A: Oh, 12. I'm sorry. You said 19th page and at what number. Okay, I was just looking for Item 19. I got you.

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Q: You state in response to Interrogatory 12, "Clearly by legal definition, all written correspondence by Wallace referenced in 9 or 10 were published. The Plaintiff relies on the legal definition." What's the legal definition of published in the context of a defamation case?
A: Well, at the point in time this was written, I was representing myself and it's been more than a year ago and there's no way I can sit here and even come close.
Q: Is your answer I don't know?
A: My answer right now would be a don't remember. Obviously, that information was pertinent at the time I did that.
Q: How does the definition of published apply to documents that are circulated within a business to a limited number of managerial employees?
MR. LAZENBY: I'm going to object to the form of the question.
A: I'm not going to speculate on that. But it was very clear, as I say.
Q: Is your answer you don't know?
A: My answer is I don't remember.
(Defendant's Exhibit 6 was marked for identification).
Q: You recognize Defendant's Exhibit 6 dated June 14, 1994, as the Offer Letter that you received from Tietex?
A: Yes.

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(Defendant's Exhibit 7 was marked for identification).
Q: And do you recognize Exhibit 7 as an Intake Form for when you first started to work at Tietex that's dated July 13, 1994?
A: Yes.
Q: And it says your service date is July 13, 1994, right?
A: Yes.
Q: Take your deposition, please, and turn to page 60.
A: Okay.
Q: Line 3.
A: Okay.
Q: "Now, if you will look, please, at Exhibit 6, the second page, which is Bates Numbered 229 ..."
A: Okay.
Q: So that's the same document you have before you now, which is Bates Numbered 229.
"Do you see the bold underlined language ..."
A: Yes.
Q: "... that's two paragraphs above Mr. Woodward's signature?"
A: Yes.
Q: "Answer: Yes."
A: Yes.
Q: "It says, This letter summarizes our offer.

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Nothing herein should be construed as a contract of employment or as a promise of any specific terms for any determined period of time." Did I read that correctly?
Answer: Yes."
A: Yes.
Q: Line 14.
"Question: So under the terms of your offer, you were employed at will, correct?"
A: Yes.
Q: Line 20.
"Okay. Yes."
Line 21.
"And your employment could be terminated any time for any reason, correct?"
A: Yes.
Q: "Answer: May I add to that?
Question: Sure. Well, give me a yes or no and then qualify it." And you said, "Yes." Qualified it and then said "But I was aware of Tietex being an at will employer."
Correct?
A: Yes.
Q: Line 18, page 61.
"Question: And you knew that you could quit Tietex if you wanted to for whatever reason

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whenever, correct?
Answer: Yes."
A: Yes.
Q: Line 22, page 61, middle of the line.
"... but you didn't have any kind of written Contract of Employment when you were hired, did you?
Answer: Nothing formal that I know of."
25, that's the last line on page 61, the middle of the line.
"... during the time that you worked for Tietex, nobody ever gave you a written Contract of Employment to sign, did they?
Answer: No."
Q: Do you have any information today that you didn't have in July 2009 that would change your answers from when you gave this deposition?
A: **I don't know if it's represented in here, but my answer then, I would have probably tried to steer in the direction of the promises that were made to me which led to my taking the job in the first place.**
Q: Would your answers to these specific questions be different today?
A: No.
Q: Let's look at page 63, line 15.

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"Question: Do you have a copy of that Handbook?
Answer: No. I actually, I'm not sure what year it was, it was around 2005, '6, along in there, there was a call for the manuals to be turned in so they could revise, and I never got a revised copy."
Did I read that correctly?
A: Yes.
Q: Page 64, line 9.
"Question: So would it be fair to say that as of today, as we're talking, you don't know what policies were in the Handbook?
Answer: I do know there was a policy in there that had to do with termination and the steps that were to be taken. I can't cite them or anything, but I knew they were like written warning, verbal warnings, and then written warnings and then termination. I knew that was in there.
Question: All right. Other than that, you don't know what was in the Handbook?
Answer: I mean, I couldn't specifically tell you. I mean, we could sit here and talk and can tell you the kind of things that were in there, but I couldn't tell you a page number or anything.
Question: All right. Well, it would be fair to

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say then, that you don't know what policies in the handbook that you would contend today created a Contract of Employment?
Answer: Yeah, I don't really feel like I could answer that question, so I'll just say I don't know the answer.
Question: You don't know. It's fair. Look, you can say yes, you can say no, you can say yes and no and qualify it, and you can say I don't know.
Answer: I'll say I don't know then.
Question: So you don't know what in the Handbook that you would base your contract claims on?
Answer: I don't know, I mean, I've got my thinking but I don't think it's, again, I don't think it's — The answer would be, no, I'm not sure. No, I'm not able to put my finger on something right now, but I have my thinking on it. I don't know.
Question: Okay. Now, there is a breach of contract claim in your Complaint which we just talked about. Then there is a second claim that's breach of contract accompanied by a fraudulent act. What do you claim that Tietex did that was fraudulent?
Answer: I'm not exactly sure where that is right

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now. I'll say I'm not sure right now."
Did I read that correctly?
A: Yes.
MR. LAZENBY: I just want to object to the form, that there were several objections in within there that you skipped over.
Q: That's fine. I skipped over them. I confess.
MR. LAZENBY: Well, it is what it is.
Q: The document speaks for itself.
MR. LAZENBY: Right.
Q: Would your answers to those questions that I just read to you be any different today than they were in 2009 when you gave those answers?
MR. LAZENBY: Object to the form.
A: In essence, in other words, the actual being what I would say would probably be essentially the same.
Q: You were never bullied when you worked for Tietex, were you?
MR. LAZENBY: Object to the form.
A: Well, you've got to get into the definition. But the closest thing I would ever, I mean, obviously — well, not obviously, but the way I was treated by everyone else at Tietex in that area was pretty what you would expect. But I would certainly look at what Wade Wallace did to me and the way he did it. In the position that he was in because he

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had control over me, was bullying me around, you know, because he could or whatever.
Q: You claim you were bullied when you worked at Tietex by Wade Wallace?
A: If you want to call it that. I think we've got to get into what that means. But I'm not going to expand on what we first said and then convert it into, yes, I was bullied. Because without knowing what we are talking about in terms of definition. I was pushed around and shown high disrespect. Treated like an animal. If had to put it in terms, I was treated like an animal.
Q: Mr. Harris, how about turn to Exhibit 5, page 8.
A: Okay.
Q: Paragraph 44. This is your claim. "Defendant employee agents, with full knowledge and forethought, using their position of power and authority over Plaintiff, sought to bully Plaintiff to achieve their own ends, knowing the emotional damage they would and did inflect upon Plaintiff." So that's your claim.
A: Now, are you reading 45?
Q: 44.
A: I'm sorry. I mean, I think it's well written.
Q: You claim you were bullied by Wade Wallace?
A: If we're not going to do a definition, yes. In other words, I'm leaving to my interpretation of being

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bullied, I will definitely say yes without question.
Q: All right. How do you claim you were bullied?
A: Anytime, like on February 7, when he had the opportunity with nobody else around, he was two different people in private with me versus out in the middle. Mr. nice guy out in the public and all this. Behind closed doors, different ball game. The threats and the threatening tone of voice. You know, I cannot recall all the language and the way it was said and the tone of voice. It was just incredibly abusive. And then in the final analysis, you know, the end of it would always be get your act in order or we'll find another chemist to hire. In essence, that would be the kind of, those kind of encounters would end up with that kind of a comment.
Q: So these were threats that you were going to get fired if you didn't do your job?
MR. LAZENBY: Object to the form.
A: I mean, as to the reason for them, that was the way they came off to me. As to the reason behind them, I can't sit here and say what his motives were.
Q: All right. Were all the threats threats about what was going to happen to you if you didn't do your job?
A: Yes or no, no.
Q: No?
A: My answer to that question the way you asked it is

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no.
Q: All right. What were the other threats other than threats that you were going to get fired if you didn't do your job?
A: Well, again, you're getting in if you didn't do your job, which, I mean, how broad is that. It had to do with things like specifics like getting those assignments done. That would be one of them. I cannot sit here — I'm just going to stop right now and say that to sit here and just throw stuff out that happens to come to mind. There were other, there were other things said other than get those assignments done or you're out of here type thing.
Q: As we sit here today, can you relate any of them?
A: Relate?
Q: Yeah, tell me any of them, any of the threats that Wallace made other than threats that you were going to get terminated if you didn't do your job.
A: It wasn't so much the wordage as it was — That was important and it was abusive, but it was his mannerisms.
Q: All right. Don't characterize as abusive, tell me what was said.
A: I'm not going to — I can get that information, but I'm not going to sit here today and guess exactly and bring back something very important.

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Q: Where are you going to get that information?
A: I would have it somewhere.
Q: What do you mean?
A: I'm sure with all the stuff I've got, that somewhere along the way, we would have that. Probably from previous testimony.
Q: Do you have any documents you haven't given to your lawyer?
A: Not that I consider — Other than that affidavit that could be important. I'm not aware of anything right now. Now, there's plenty of documents I haven't given him that at this point in time I don't consider part of the case going forward. They could become that. See, when Mr. Wallace banned me and the term I used, confiscated by four filing cabinets and a bunch of boxes in both desks, it was three months before I got probably half of what I had in those back and it was all personal. So I did have documents. So I do have documents, in other words.
Q: All right. Is it true that today you can't tell me about any threat that Wade Wallace made to you other than a threat that you were going to lose your job if you didn't do the projects that he assigned correctly and on time?
A: Well, I can give you an in essence account of it. Do you want me to give you an essence what he said to me or

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just — I can't sit here and verbatim and tell you what he said.
Q: Tell me the best you can.
A: He comes into the office and says, "Mr. Harris." And this is in essence, okay. These are not word for word.
Q: Is this on February 7?
A: This is on February 7. This is that particular day.
Q: I'm sorry?
A: This is that particular day. It's not March 5, which is another day, it's February. And he comes in and, basically, wants to know, "How you doing? Have you done those two projects you were supposed to get that I wanted you to get for I believe it was Jake Butts and get them to him?" And I said, "No, Wade. In fact, I just, I've been working on this, I've been working on that, all these other things that I need to do and you've wanted me to do and all that." "What do you mean you haven't got those? What do you think this is around here?" He said, "I'm getting tired of this. How long is it going to be before you get those? You know, we're going get tired of this kind of crazy thing." I'm not going to throw in the profanity. And then, "I'll tell you what, you better have those and you better have those by Friday or we're going to be looking for

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another chemist." He walks out and slams the door.
Q: And you claim that's an ...
A: That's, in essence, what happened.
Q: And you are giving that as an illustration of being bullied by Wade Wallace and you claim that happened on February 7, 2009, correct?
A: That kind of thing, exact kind of thing happened on the 7th.
Q: All right. And that's recorded, at least Mr. Wallace's opinion of how the conversation went, is recorded in Exhibit 13, which is dated February 9, 2007, correct?
A: Yes.
Q: Is that the only incidence of bullying that you have?
A: Without thinking back of the whole scenario that spring, I would have to rate March 5 and what happened there as in the same category.
Q: And the conversation on March 5 was recorded in the memorandum marked Exhibit 16, correct?
MR. LAZENBY: Object to the form.
A: Yes.
Q: Correct?
A: Yes.
Q: You're going to have to answer verbally so she can take it down.

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A: I'm sorry?
Q: You have to answer verbally so she can take it down.
A: Oh, okay. Yes. I'm sorry.
Q: Tell me why you claim that the conversation that you had with Wade Wallace on March 5, 2009, was bullying of you by Mr. Wallace?
A: First I would say that it was probably more intimidation than bullying. I consider bullying as much stronger and harsh and unnecessary. And I think it was toned down because of the presence of David Wilson. There was certainly not this arrogant, high level arrogant threatening like tone of voice and all that. The things that were said there was I'm sitting in there. Mr. Wilson was sitting away and I was sitting across from Wade, and Mr. Wilson was off to the side. And he starts in with all these things in a very boastful manner and arrogant, really arrogant tone of voice about all these things that I've not done. And I'm sitting there and I can't believe it. First of all, as I said earlier, I was half sick with the flu or something. And I'm sitting there and just, you know, I mean, what's going on here? And I actually looked over for Mr. Wilson as if I wanted, you know, are you kidding me? Can I have some help? And I think, I don't remember any comments, but I think I made some comments to Mr. Wilson

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about this. In the final analysis, after all of that, my comment was, "Wade, would you do me a favor? You're telling me this is stuff I've done and I need to shape up on. Would you please send me an e-mail so I can be sure to know what I need to do to correct it." He said, "Be glad to." But before I said that to him, he had already said, "You've got 30 days to shape up or we're going to be looking for another chemist." And it was done in a tone of voice that was pretty hateful.

Q: The entire conversation on March 5, 2009, occurred in the presence of David Wilson and it was all work related, correct?

A: It was, what he told me I had to do was work related.

Q: Correct.

A: Well, it had to do with my job. It had to do with what he, not my job directly, but my character, conducting myself properly and all that. It had to do with my job in general, if that's what you mean.

Q: Are there any other incidents of bullying other than the incident that you related that you claim happened on February 7 and the incident on March 5, 2009?

A: The whole spring, once all that happened and a long the way the entire spring, I mean, you can look back at everything you've got and you'll see that there's a lot that

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didn't happen. For some reason, there's nothing, not a whole lot showing up in April and May. But I do remember, and I cannot here today sit here and tell you dates or anything, but I do remember there was a time or two after all that and before June 18 that there was an encounter or two but I cannot sit here today and give you dates or information on it.

Q: So the only two events that you can tell me about today that were incidents of bullying occurred on February 7, 2009, and March 5, 2009. Is that correct?

MR. LAZENBY: Object to the form.

A: Maybe we can throw in July 3.

MR. LAZENBY: I think you said 2009. Did you mean 2007?

Q: I said 2007?

MR. LAZENBY: You said 2009.

Q: I meant 2007. Thank you. I wrote 2009. So the only two events I asked you about were February 7, 2007, and March 5, 2007, and your response was, "Well, we can throw in July 3."

A: Yeah, I would consider what he did when he called on the phone totally unnecessary and uncalled for. And he really got carried away when he found out I was not there in the plant.

Q: Tell me what Mr. Wallace said to you on July 3

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that's recorded in Exhibit 19 that you claim is bullying.

A: Again, it was more his tone of voice and yelling type tone of voice. And, you know, "I'm banning you from, I'm banning you from Tietex property until I get back from my vacation." And, you know, that is one thing to say, but to scream it and just really in the questions he's asking, asking them in a hateful manner. Just very disrespectful.

Q: And all of this conversation on July 3 that you claim was evidence of bullying arose from his inquiries about where you had been that day, correct?

A: No. I'll say no to that and say it really arose from the fact I was not in the plant.

Q: That's what really ticked him off. And he thought, he said, "Gary, you come to my office." And then, "What do you mean you're not here?" And then na, na, na. I said, "Well, wait a minute. Wait a minute." And I started trying to tell him what's happened. I'd been to Hexion and this happened. I'm trying to get the project done that he wanted done so I can get the information to him Thursday, on and on and on. And it's somewhere along the way I'm the one that throws in all this quick talk and everything and explanation trying to explain, that I throw in where I've been. So it's after I've said all that that he, you know, says I'm banning you from Tietex. In a hateful, very hateful way, "I'm banning you from Tietex property. I do

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not want you back on the property until I'm back from my vacation." Something to that effect.

Q: You've given me three incidents of bullying. The incident that you claim occurred on February 7, which is recorded in Exhibit 13; the incident that occurred on March 5, 2007, which is also recorded in one of the exhibits; and the incident on July 3, 2009, which is recorded in Exhibit 19. Any other incidences that you claim were bullying?

A: Not at this moment I don't have any to offer.

Q: And the March 5 was Exhibit 16. Now, with respect to February 7, 2007, where did this alleged bullying occur?

A: In a small little, I always describe it as a little dungeon like office in the very back of the Tietex main plant facility, just right off of the Compounding Department.

Q: And the only folks present were you and Mr. Wallace?

A: In that room.

Q: Was somebody nearby?

A: Ricky Miller would have been outside the door there somewhere working.

Q: Any information that Miller heard the exchange between you and Wallace?

A: Not to my knowledge.

Q: After your meeting with Mr. Wallace in February of

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2007, did you discuss the event with anybody?
A: While I was still employed?
Q: Yeah.
A: That probably, I can't — Let me just say that, as I've said before and it's in other documentation, I went to see David Wilson early on after something like February 7 happened and that could have, that could actually have predated, preceded anything that happened regarding the March 5 meeting and the resulting memo. But at some point I met with — If I had to say, I met with David Wilson after that February 7 encounter and that was when I was told by him, I mean, I went to him because what happened was uncalled for. I mean, it was gross. And at one point early on when I was in with Wade Wallace, I went to David Wilson to just say, "Look, you know, this is not necessary. I mean, I'm a human being. You know, I want to be treated like one." And in essence what he told me was, and I realized then I could forget it. There was no help. Something was up. He says to me, in essence again, I don't remember exactly the wordage. But he said, basically, "You know, I'd advise you to go, just go do your job and keep your mouth shut if you want to keep your job." Something to that effect is what David Wilson told me.
Q: Did you complain about the conversation in February with Wade Wallace to anyone other than Mr. Wilson?

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A: I don't think so. I don't recall that.
Q: Did you receive any medical treatment as a result of this conversation with Wade Wallace in February of 2007?
A: I would think not. If I may, the answer is no to that. But I will say this about at the point in time this happened and, actually, when it did happen, before this February 7 incident actually took place, there was a tremendous change that came over me regarding the job situation. It was like I went from hoping things would be corrected at Tietex, mainly by the ownership. I went from hoping that, you know, this guy's going to right the ship and things are going to be what they need to be. There was a lot of negative went on there for years and it hurt the Company. So I'm waiting, it's like I'm going down this rapid river or something approaching a waterfall and I'm hoping something happens before I go over the waterfall. Well, when I was demoted and put under Wade Wallace, I went over the waterfall. And, in essence, it was almost like a relief that, you know, it's like you could quit wondering now, you know what's going to happen. You don't have to worry about what's going to happen anymore. And so as far as any doctor visits and all that — The important thing there is this as far as that medication. Just to answer your question about medicine. The second time around with a sleep bout, I realized what was causing it and was able to

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resolve that issue. And I found out it had to do with medication. As far as trying to address the stress and all that, the medication only made it worse.
Q: With respect to the March 5, 2007, encounter with Mr. Wallace, that occurred in Mr. Wilson's office?
A: March 5 was in Mr. Wilson's office.
Q: Was anybody else present?
A: No.
Q: Did you complain to anyone about that meeting and the resulting memo which is Exhibit 16?
MR. LAZENBY: Object to the form.
A: I don't recall. I mean, I cannot recall that.
Q: Did you discuss that meeting with Mr. Wallace and Mr. Wilson with anyone who had not been present at the meeting?
A: I don't recall, no. I mean, I'd have to answer no, I don't recall.
Q: Did you get any medical treatment as a result of your March 5, 2007, meeting with Mr. Wilson and Mr. Wallace?
A: I would say no and for the same reasons, I would not have. In late '06 I swore off of ever going back on any kind of medication for helping stress and sleep and there's no way I'd ever go back there.
Q: And with respect to the July 3, 2009, phone call, you already said that ...

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A: July 7. I mean, I'm sorry, 2007?
Q: Yes. Thank you. You already said that the only two on the line were you and Mr. Wallace, right?
A: Yes.
Q: Did you complain to anyone about how Mr. Wallace spoke to you during that telephone conversation?
A: I never had a chance.
Q: Did you get any medical treatment as a result of that telephone call?
A: No.
Q: All right. Now, your Complaint also claims that you were intimidated. Would your evidence or is your evidence of intimidation any different from that which you have given me about being bullied?
A: I just put a tone, a tremendous tone of, I don't want to use that word here on the recording, but it was just an incredible arrogance that existed that I would call what you're saying.
Q: Listen to my question. I'm going to let you tell me whatever it is you want to tell me, but there's no sense in me having you repeat if the evidence is the same. And I'm just asking if the evidence of what you claim was intimidation is the same evidence that you just gave me about being bullied? If it's the same say yes. If it's different, tell me what's different.

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wife. He was a very different person. He was like doing things that somebody else was driving him to do, that it wasn't his idea. Things like I need for you to move down in the plant.
Q: Did you ever hear your ...
MR. SUGGS: Pardon me a minute. I want to make sure I understand. March, April, and May of what year?
Q: 2006
MR. SUGGS: 2006, okay.
Q: Did you ever hear your superiors discussing the amount of medical bills that Tietex had to pay because of your wife?
A: I never heard that discussed.
Q: Did you see a memo to that effect?
A: No, I don't recall seeing a memo. But I do recall somewhere along the way, and without remembering exactly, Jake Butts seemed to be very much interested in that area.
Q: Did you get the impression that your wife's medical bills was a reason for them trying to get rid of you?
MR. SUGGS: I object to the impression.
A: I would say that being an older employee with an older spouse that, generally, that was a take on the way things were going at Tietex, I would think that anything like that that would enable a company to cut costs would be

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a consideration. I mean, if you look at, just real quickly, what I did early on in my career enabled Tietex to hire more employees. It created business.
Q: I just want to talk about this ...
A: That's what I'm going to get to. What was happening then in the time frame you're talking about was causing Tietex — Things like eliminating employees in order to report a profit. Just purely getting rid of employees off a machine so processing improvement could say, "Look how much money we saved the company." Those kind of things which would include, you know, getting rid of people because of high medical bills if they're potentially going to cause the company, were all the kinds of things that were done. Not that they were the right thing to do for the Company, but it was so somebody could make it look like the Company was doing better than it was.
Q: And you had stress and anxiety in 2006 caused by your work that you sought medical treatment for?
MR. SUGGS: Object to the form, leading.
A: All of the issues that I had in 2006 that had to do with going to the doctor I would relate specifically to the way I was done in my job.
Q: I want to talk about your encounters with Wade Wallace. I believe you mentioned there were three different incidents, February 7, March 5, and July 3. On March 5, did

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he raise his voice?
A: I would say there were times when he raised his voice. Again, there was another person in there and he was more controlled than he would have been had we been alone.
Q: I'm sorry, I meant to go in chronological order and start with February 7. On February 7 when y'all were alone, did he raise his voice?
A: Big time.
Q: How would you characterize it?
A: Just what I did earlier where, I guess, gave an example in essence of what came out of him.
Q: Would you characterize it as yelling at you?
A: Oh, absolutely.
Q: Screaming at you?
A: Yelling, screaming, just all over me.
Q: Did he use profanity?
A: I don't recall that specifically. I won't say he did not, because at the time it was happening, I wasn't trying to figure out is he cursing me or not. I don't recall the wordage except I know what he was saying and the essence of what he was saying. But for me to throw a curse word in would probably be acceptable as to what I believe happened.
Q: Was that the first time that he had ever yelled at you?

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A: Yes.
Q: Was that shocking to you?
MR. SUGGS: Object to the form, leading.
A: I mean, I had only been reporting to him for six or seven days.
Q: I'm sorry, I didn't hear your answer. Was that shocking to you?
MR. SUGGS: Leading.
A: Oh, it was a big surprise. It was incredibly. I'd never in my life been done like that.
Q: That's what I was going to ask you next. Has anybody at Tietex ever yelled at you before?
A: Not only not at Tietex, I'd never been treated like that by anyone anywhere and even my parents in my entire life.
Q: Have you ever yelled at any of your employees?
A: Never.
Q: Is yelling at an employee at work something that you would consider acceptable at Tietex?
A: I wouldn't consider it acceptable anywhere.
Q: Do you think Tietex would consider it acceptable?
A: At the time, I mean, I would characterize Tietex, In all the places I've ever worked, as very unprofessional, very mismanaged, and a place that probably should have been shut down because of the laws that were broken.

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Q: And still, no one had ever yelled at you before Mr. Wallace?
A: Never, nowhere.
Q: I think you mentioned that he also slammed the door.
MR. SUGGS: Object to the form, leading.
Q: Did he slam the door?
A: I think he did. I mean, I'm trying to remember that particular day. Yeah, I think he went out and slammed the door.
Q: Did he do anything else during the meeting or during the incident that was physical in nature?
A: Not like, you know, like threatened with his fist or something? No, he would never. I don't think he would have done that.
Q: So did you feel physically intimidated? Did he ever stand up?
MR. SUGGS: Objection, leading.
A: I never felt physically intimidated by Wade Wallace. It was a matter of, I mean, if I'd wanted to like have a physical battle with Wade Wallace and that was the only issue, that would have never been an issue and I never would have had no problem with it. It was a matter of, actually, knowing I couldn't do that. You know, I've got to take this. I've got to take this treatment. I can't

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jump the guy, I'd definitely be out the door. But that was never an issue as far as his physically threatening me. He would know better than that.
Q: Is there anything else about the mannerisms of the incident that you haven't discussed here today?
A: As far as Wade Wallace?
Q: Yes.
A: There was something I was going to say that eludes me right now. It's something we didn't get into while ago but came up. You triggered it but I've lost it again.
Q: And did you complain to David Wilson about this initial incident with Mr. Wallace?
A: As I've already testified earlier, I'll probably just leave it at that. I believe I did and the response I got was, you know, basically, I just needed to go do my job and keep my mouth shut and everything would work out or I might lose my job if I kept pushing stuff like that. I don't know that there's anything else there. I think I've already testified to that.
Q: Did you believe that was an acceptable response?
A: I just saw David Wilson as part of whatever was going on and that I was like, I wasn't surprised necessarily by it. David Wilson was new at Tietex. He was what he had been told. He'd only been there since like 2005, '6, along in that time frame, and he had no clue of what had gone on

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before that. So he came into a situation and I think he was pretty well man handled and controlled as to the way he was doing. That doesn't excuse it though.
Q: When were you banned from the lab building?
MR. SUGGS: Object to the form, leading.
A: I was banned from the lab building pretty much the day I started reporting to Wade Wallace on February 1, 2007.
Q: What was the reason given to you for why you were banned from the lab building?
A: My health.
Q: Do you believe that to be truthful?
A: I know it's not truthful.
Q: What do you believe the reason was for being banned from the lab?
A: So I couldn't, in essence, so I couldn't really do the work. It was just a nice little opening that for that to take place and this stuff on the surface looked reasonable. Yeah, we can do that and make it very difficult for him. But it was really to put me in a situation where I would have a very difficult time getting work done.
Q: Tell me about the, I want to talk about the C237 compound. But let me ask a specific question. How did it come about the issue of your trying to develop a less costly version of that?
A: I was actually in the technical building one day

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and Mark Wildeman came in and came to me and told me, in essence, he opened with, "Gary, we've got a serious problem and I want to ask for your help." And he went on to tell me Tietex had good business in the C237 type fabrics programs and there were others other than C237. He said, "We've got really good business." He said, "But we're not making any money and we've got competition coming at us with lower prices and we simply cannot lower prices."
Q: C237 is a fire retardant?
A: It's a fire retardant fabric for the mattress industry.
Q: And how was Tietex obtaining C237?
A: The product consisted of a fabric made by Tietex that was back coated with a compound that came from Novion. And together that was, once that compound was back coated onto the fabric, that was the final product that after inspection and all would ultimately go to the customer.
Q: Did you tell upper management that you could develop a similar compound?
A: What I was asked. I mean, I did not go out and in any way shape or form broadcast that, "Hey, look, we're paying too much money. I can do better for us." That was the way things were presented at one time before. But the essence of it was Martin Wildeman came to me and asked me that question. "Is there any way ..." After he did the

DATE: 7-13-94

TIETEX CORPORATION

Salaried X
Non-Exempt
Hourly

NAME Gary G. Harris (First Middle Last) — 08 (DEPT.) — 3335 (EMP. NUMBER)

ADDRESS Timberlane Apts. # 316
106 Kensington Drive
Spartanburg SC 29301 (City State Zip)

HIRE DATE 7-13-94

SOC. SEC. NO

SEX M MARITAL STATUS M

PHONE 587-8959

DATE OF BIRTH

JOB TITLE Senior Research Chemist

JOB CODE — JOB SERV. DATE 7-13-94

SALARY

ANNUAL RATE $55,000.00

WEEKLY RATE

HOURLY RATE SHIFT 1

TAX DATA

FEDERAL TAX -2-

STATE TAX -2-

ADD'L. TAX 0

*DIRECT DEPOSIT
(*attach authorization agreement)

DEDUCTIONS

	AMOUNT		AMOUNT
GROUP INSURANCE	Eligible 60 days from H.D.	MISC.	
LIFE INSURANCE	" " " " "		
401(K)	After 3 months of service		
UNITED WAY	0		
SAVINGS	0		

DEFENDANT'S EXHIBIT 7 IDENTIFIED

DEFENDANT'S EXHIBIT 7 IN EVIDENCE

EMPLOYEE SIGNATURE Gary G. Harris DATE July 13, 1994

PERSONNEL Cynthia H. Connors

COPY TO PAYROLL 7/18/94

DPW 7/18/94

TIETEX
000215

Wallace, Wade

From: Wallace, Wade
Sent: Friday, February 09, 2007 8:58 AM
To: Wilson, David
Cc: Isbell, Mark
Subject: Gary Harris

Per our conversation, I'd like to document the discussion I had with Gary Harris on Wed 2/7/07.

Gary called me mid afternoon on Wed and stated that at that moment his personal and emotional problems had overwhelmed him and he was confused, disoriented, and could not function. He did not know what to do. I immediately went out to his office to discuss his problem in person. He explained that his personal life over the last year has made him so fragile emotionally that sometimes he has episodes like the one he was experiencing. As we talked he felt better and mentioned that the project work I had assigned him would be help keep his mind off his personal problems.

I took that opportunity to remind Gary that Tietex is committed to our employees well being and that at any time we would support him if he felt he needed to utilize EAP. He said that that was not necessary and that he could work through it. I also asked him to be open with me if in any case this personal problem interfered with his ability to perform his job as we would need to sit down with HR to find a resolution.

When I left him he assured me that he was OK and thanked me for my support and patience.

TIETEX

To: David Wilson

From: Wade Wallace

CC: Mark Isbell, Gary Harris

Date: March 5, 2007

Subject: Gary Harris' Transition

During the last thirty days as Gary Harris has transitioned into his new role, several issues relating to his work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

As we discussed these issues are not sustainable and it is mandatory that Gary make significant progress towards resolving these issues within the next 30 days.

DISCUSSED W/ GARY ON 3-5-07
David A. Wilson

TIETEX - SC
000169

TIETEX

To: Gary Harris

From: Wade Wallace

CC: David Wilson, Mark Isbell

Date: June 18, 2007

Subject: Gary Harris Work Perfomance

During the last ninety days some issues relating to Gary Harris' project work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

Of Gary's multiple duties two projects were identified ninety days ago as priorities and he was instructed to give them his most thorough and diligent focus. The first project was the development and qualification of a Tietex coating compound formula as a replacement for the current coating used on C237. Gary actually began work on this project prior to his reporting to me. His lab coating work began in December 2006 so the project has been ongoing for over six months. The second project was to develop a finish formula change and process to enable T602 to be finished with the parabolic applicator instead of a pad application. The project was assigned and work began ninety days ago.

Although the first project has been on going for six months no significant progress has been made toward completion. This project was initiated solely by Gary and he convinced senior management that it was completely feasible in order to gain support. He committed to developing a compound that would cost between $0.60 and $0.62 per pound verses the current product which cost $0.885 per pound. Despite months of lab work in house and at four different chemical supplier locations and numerous production trials he has been unsuccessful in creating a viable product. The formulation which Gary developed has proven to be much more complicated to reproduce commercially than initially promised. Gary exercised poor judgement by making claims and commitments that he could not deliver. This project was included in corporate financial improvement goals. Due to the failure of this project I have personally had to begin parallel project work with other suppliers to develop a suitable replacement to achieve the financial commitment of the project.

The scope of the second project to develop a finish formula and process for parabolic application of T602 was a technical challenge. However, Gary informed me that lab samples were promising and recommended a production trial. Although I was not presented the actual numerical results of the first production trial Gary assured me that the results were comparable to

the current product. From this I approved a scale up run for statistical qualification. The second trial, as well as a third were unsuccessful. These subsequent failures concerned me and I personally recalled samples from the first trial that Gary assured me was a success. I witnessed them being tested and found that the product from that initial trial did not perform comparable. By this I can conclude that Gary did not conduct adequate scientific and numerical analysis of the first trial. This negligence was costly in that two subsequent production trials could have avoided. In addition, this negligence in applying the proper scientific analysis is unacceptable in the work of a Sr. Research Chemist.

Obviously the two issues regarding the C237 project failure and poor analytical practices demonstrated in the T602 project are not sustainable. It is mandatory that Gary make significant progress towards resolving the problems with the C237 project and improving on his analytical practices within the next 30 days.

I have read this
Gary Harris
6/18/07

TIETEX™

To: David Wilson

From: Wade Wallace

CC: Mark Isbell

Date: July 18, 2007

Subject: Gary Harris Work Performance

Despite efforts to counsel Gary Harris we continue to have issues with his work practices and performance. These issues are listed in the following paragraphs. On this basis I am recommending that we terminate his employment immediately.

In February 2007 he was reprimanded for the following issues:

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

With the exception or the environmental reporting he continues to have these issues.

In April 2007 he was instructed not to come in and work in the chemical lab areas at nights or on weekends for safety reasons. Gate records and management observation indicate that he has continued to do this.

In June 2007 he was reprimanded for the two following issues and given a thirty-day deadline for resolution. It was made completely clear that failure to complete this task and resolve this issue would jeopardize his employment.

- Failure to complete the project to replace the current C237 coating compound with formula of his design.
- Not conducting and reporting adequate scientific and numerical analysis to substantiate lab and plant trials.

He has not demonstrated any effort to complete the C237 project. Despite the deadline to complete the project within four weeks he took two vacation days the first week, five the second week, and was planning to take five days the fourth week. This would have accounted for more than 50% absenteeism during this time and no effort to complete the project as instructed. None of these days were approved in advance. He left messages the day of the vacation without any

advance notice despite my request that he have them pre-approved. In addition he has not submitted to me any scientific data on any of his other projects.

I recently found out that also in June that Gary missed an important trip to visit a customer and did not inform me. He was scheduled to fly to Indiana on June 14 to visit with United Shade and return on June 15. On the way there he suffered a headache and returned to SC a day early and did not see the customer. He never informed me of this and while I thought he was in Indiana.

In July 2007, prior to the end of his thirty-day deadline several more issues have arisen.

- Only July 3, 2007 he did not show up for work and left me a message that he would be at Hexion in Greenville all day. He did not get permission for this trip. Later I found out directly from the Hexion representative that he did not show up. Although he did see another supplier in Greenville briefly, he has no been able to adequately account to me his whereabouts for the entire day.
- Also on this day he instructed the Hexion representative to deliver sulfuric acid to him at the plant without an MSDS. This is in direct violation of company policy.

In the last three months he has also demonstrated other poor work habits that are affecting his work performance.

- Does not return calls or emails consistently. His co-workers consistently complain of this as it affects their ability to complete their tasks that are contingent on his work.
- Does not keep consistent work hours and often cannot be physically located at the facility. Gate entries indicate an erratic pattern of coming and going that is not approved in advance.

In light of the continued problems with Gary's work practices and performance I am recommending that we terminate his employment at Tietex. Gary has been counseled about these issues, but at this point I have lost confidence in his ability to perform his job in a satisfactory manner.

Attachment D
Affidavit of
Pamela Griffin

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

AFFIDAVIT OF PAMELA GRIFFIN

1. I, Pamela Griffin, am of majority age, competent to testify, and make this Affidavit based on personal knowledge of facts I know to be true and correct.

2. I have been employed with Tietex International, LTD, ("Tietex") since December 3, 1990. I currently hold the position of Human Resources Manager and have held that position since January 1, 2008. Prior to holding the position of Human Resources Manager, I held the position of Employee Relations/Benefits Manager.

3. Tietex has never had an employee handbook.

4. I have read the above statement and declare under penalty of perjury that the foregoing is true and correct.

Pamela Griffin

Sworn to and subscribed before me
This 30th day of April, 2013

Lynn N. Bishop
Notary Public for South Carolina
My Commission Expires: MY COMMISSION EXPIRES MARCH 19, 2020

Attachment E
Exhibit 1 to the Second Deposition of Wade Wallace

EXHIBIT 1

Deposition of Wade Wallace

Harris v. Tietex International Ltd.
In the Court of Common Pleas for Spartanburg County
C.A. No: 2011-CP-42-4538

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 7:08-cv-3020-HFF-WMC
	)	
Tietex International, LTD,	)	
	)	
Defendant.	)	

DECLARATION OF WADE WALLACE

1. I, Wade Wallace, am of majority age, competent to testify, and make this Declaration based on personal knowledge of facts I know to be true and correct.

2. I have been employed with Tietex International, LTD ("Tietex"), since April 2000. I currently hold the position of Vice President of Sales and Marketing and have held that position since June 2008.

3. From February 1, 2007, until his employment was terminated, Gary Harris was under my supervision. At that time, my position was Product Development and Improvement Manager. I reported to Mark Isbell, Vice President of Operations.

4. Immediately before reporting to me, Harris was supervised by Jake Butts, Quality Assurance/Lab/Environmental Manager.

5. David Wilson, Human Resources Manager, and Mark Isbell, Vice President of Operations, in January 2007, asked me if I would consider supervising Harris. Harris was going to be relocated to the plant and was going to be providing more assistance working on projects that would give return on investment and cost savings. Harris had requested the opportunity to use his skills to assist Tietex on more significant projects.

[redacted]

EX-1

6. Another reason for relocating Harris was to remove him from the lab area due to Harris' complaints about a negative impact on his health. Harris had complained about a mold smell that he attributed to Jake Butts' clothing and to the furniture which had been moved into Jake Butts' relocated office. Harris was removed from the supervision of Butts and placed under my supervision, partly as a result of these complaints.

7. Butts had had difficulty keeping up with Harris' whereabouts and work hours when he supervised him. Harris would often work after hours, on weekends, and at times when the plant was not operational, or when no one else was at the plant. Harris also came and went as he pleased and was hard to keep up with. For these reasons, Butts relocated his office to the laboratory area, where Harris' office was also located. Butts told me he would be able to supervise Harris more effectively from the new location.

8. I was aware of Butts' former difficulties with Harris when I began supervising him. Before beginning to supervise Harris, I talked with Jake Butts about Harris' work habits, his strengths, and any opportunities for improvement. Butts had concerns that Harris was difficult to manage. Harris was inconsistent about returning phone calls, attending meetings, and in his work hours. Harris was poor at delivering a project within the requested time frame.

9. When I began supervising Harris, I told him my expectations. I knew about his wife's medical problems during the last year and told Harris I was sensitive to these issues. I also told Harris I understood that he had some health problems from working in the lab. Harris related that he had felt underappreciated in the past at Tietex. I told Harris that I could not do anything about the past, but that he had a clean slate going forward, and he

[redacted] 2

was being given the opportunity to work on projects that would utilize his capabilities and give him an "opportunity to shine." (Appeal p. 62).

10. I personally told Gary Harris that, for safety reasons, he should not do any work, other than office work, when the plant was not operational. The reason for this was because it was a safety risk for anyone to be working alone while using chemicals and laboratory equipment.

11. I personally told Gary Harris that he was accountable to me for his whereabouts during the workday. I expected Harris to keep me informed when he was working at a location other than at Tietex. I expected Harris to be available by cell phone during work hours if he was not at the plant. If Harris told me of his plans, and those plans changed, I told Harris I expected him to keep me updated on any changes so he could be located, if needed. Harris was aware of these expectations.

12. Because of Harris' complaints about the mold smell, a hygienist was hired by Tietex to perform testing in the laboratory areas. Tests were conducted in all four areas of the laboratory building: the office area, wet lab, physical testing, and wet lab extension. The testing found no evidence of mold. The testing showed that the air in the lab was cleaner than the outside air. The laboratory building is located in a separate building from the plant.

13. Tietex wanted to protect Harris from any possible exposure to substances which were harmful to him and attempted to accommodate his need for lab access. Harris was offered the option of wearing a mask when working in the lab, but Harris ultimately concluded that would afford him adequate protection. Harris offered to sign a waiver,

[redacted]

but Tietex did not believe Harris should compromise his health if he believed exposure to the lab area adversely impacted his health.

14. Ultimately, Harris was told not to use the lab, due to his health, but was offered other accommodations. Harris and I went through the two secondary labs located in the plant: the dying and finishing lab and the coating lab. Harris confirmed that everything he needed, for the most part, was located within those two labs, and he would be able to perform his work in those two areas with a few supplies. I asked Harris for a list of supplies he would need, but Harris never provided a list. I followed up with Harris about a month later. Harris said he was still working on the list, and confirmed he was able to get the work done.

15. Harris asked for a vented hood and a pad coater. I told him to prepare a purchase order, which I would be glad to sign, and would get him those items. Harris never completed a purchase order. It was Harris' responsibility to choose and order the equipment he needed, but he never did. Tietex did purchase several thousand dollars worth of equipment for Harris, but did so without the purchase orders Harris was to prepare.

16. Harris was also given the option to coordinate with Robert Culbreath, a chemical tech, who could perform work for Harris in the main lab.

17. Tietex provided Harris with an alternative work area because Tietex wanted to protect Harris' health.

18. On February 7, 2007, Harris called me on the telephone in my office and told me that his personal and emotional problems had overwhelmed him and he was confused, disoriented, and could not function. Harris said he did not know what to do. I immediately went to Harris' office to discuss these issues with him in person. Harris

[redacted]

said his personal life over the past year had made him fragile emotionally, and he sometimes had episodes like the one he was experiencing. He specifically mentioned that his wife's illness and near death continued to affect him emotionally. As we talked, Harris said he felt better. I mentioned that the project work I assigned him could help keep his mind off these personal issues. I reminded Harris that he could seek help through the EAP, but he declined. I told Harris that he could come to me if a personal problem was interfering with his job, and we would work with Human Resources to find a solution. Harris assured me that he was okay and thanked me for my support and patience.

19. I was never verbally abusive to Harris, never berated him, and never confronted him in a hostile manner. Although I clearly articulated my expectations to Harris, I never did so in a manner that was unprofessional or derogatory.

20. On February 22, 2007, Harris left separate voice mail messages for Martin Wildeman and me at approximately 3:00 a.m., complaining about his inability to sleep because of "all that's been going on."

21. Harris would often leave me voice mail messages at times when he knew I would not be at work, or would not be available to answer the phone. I believe that Harris did so in order to avoid speaking with me directly.

22. Harris complained repeatedly about his environmental reporting duties. Harris had time to do the environmental reporting and was expected to complete these tasks on time.

23. I asked Wallace to come to me directly with any work-related issues before going to Martin Wildeman, the owner of Tietex.

[redacted]

24. Harris had complained repeatedly to me, Mark Isbell, and David Wilson, that the company was poorly managed, and the current leadership was crooked and would run the company out of business. These derogatory comments about management were inappropriate. Harris would make these sorts of vague derogatory statements with no factual basis or evidence to back them up.

25. I created the memorandum dated March 5, 2007, documenting issues with Harris' performance, which I discussed with him in a meeting on the same day. I sent a copy of this memorandum to Harris, at his request, and also to David Wilson and Mark Isbell. I did not distribute this document to anyone else, inside or outside of Tietex. The comments made in the memorandum were my honest, objective assessment of performance issues that had been identified with Harris. Harris did not protest any of the items in the memorandum as being false or inaccurate. A true and correct copy of the March 5, 2007, memorandum is attached as Exhibit A.

26. On June 18, 2007, I discussed Harris' poor performance with him. I documented the discussion in a memorandum to Harris, with a copy to David Wilson and Mark Isbell. I did not distribute this document to anyone else, inside or outside of Tietex. The comments made in the memorandum were my honest, objective assessment of performance issues that had been identified with Harris. A true and correct copy of the June 18, 2007, memorandum is attached as Exhibit B.

27. The C237 project was projected to save Tietex one and a half million dollars in costs, which was put into Tietex's financial projections. I told Harris that this was his primary project. The C237 compound proved much more complicated to produce commercially than Harris had initially promised. I began to work independently to produce an

[redacted]

alternative to Harris' project because it appeared Harris would be unable to achieve the cost savings for Tietex that he had predicted. I worked with the vendor that had been supplying the materials, because I was familiar with them and they were already producing a viable product. The vendor produced a viable product within thirty days, that not only met the projected savings, but exceeded it. The annualized savings were in excess of two million dollars.

28. Plant production trials are very expensive and are only conducted if laboratory production is successful.

29. The T602 project was estimated to save Tietex about $600,000 per year. Harris told me that the lab samples for the T602 project were promising and recommended a production trial. I relied on Harris' recommendation for a plant trial. Harris told me the results of the first plant trial warranted a second trial. I did not see the trial results myself at that time, but relied on Harris' representation. Based on Harris' representation, a second plant trial was conducted, but was unsuccessful, due to equipment failure. A third trial was conducted. Harris told me that the third trial was perfect from a production standpoint. Harris got the product tested, and, this time, I asked to see the laboratory test data. When, after repeated requests, Harris failed to provide the test data to me, I retrieved some of the material from both the first and third trials, had them tested, and found both materials failed the test. I would not have recommended the plant trials continue if I had seen the data or been given accurate information by Harris about the results of the first laboratory trial, which failed.

30. Although there were passing data on several individual samples on the first small scale up test, the criteria is 100% passage, so it was a failure. Mixed results are not sufficient to warrant further trials.

31. When asked for an explanation about why he said the earlier tests had passed, Harris simply said, "I thought they passed."

32. Due to the issues on the C237 and T602 projects, I told Harris, on June 18, 2007, that he needed to improve his performance within thirty days or face further discipline, up to termination from employment.

33. Harris continued to show poor judgment after his warning on June 18, 2007. Harris made no effort to complete the C237 project. Harris began taking multiple days of vacation immediately after being given the warning on June 18, 2007. Harris often took these vacation days on short notice. Sometimes, Harris did not notify me he was taking a vacation day until the day before he took it. This was contrary to policy and practice, which was to give sufficient notice before taking vacation days.

34. Harris left me a message on June 19, 2007, not asking for vacation, but telling me he was taking vacation on June 19 and June 20. Harris sent me an e-mail on June 23, 2007, stating he needed the entire week of June 25 off for vacation. On July 3, 2007, Harris left me a voice mail, stating he wanted to take the entire week of July 9 through July 13, off. I mistakenly made a reference to this date as June 9 through 13 in a hand-written note on the printed copy of an e-mail dated June 25, 2007.

35. Harris continued to work in the chemical lab areas at nights and on the weekends, even after being directed not to do so. Harris continued to work inconsistent and erratic hours. It continued to be difficult to locate Harris during regular work hours.

[redacted]

36. Harris' co-workers complained to me that he did not return calls or e-mails consistently, which disrupted their work.

37. Harris was scheduled to fly to Indiana on June 14, to visit a customer, and was to return on June 15. After flying to his destination, Harris returned home without seeing the customer. Harris never told me that he had not met with the customer in Indiana, as planned, or that he had returned from his trip without accomplishing any work.

38. On the morning of July 3, 2007, I arrived at work around 7:30 a.m., and had a voice mail from Gary Harris. Harris said he had an ant problem at his home and would not be at work.

39. At around 9:00 a.m., Harris left me another voice mail, saying he had resolved the ant problem and was going to go to Hexion to work on a project. This project had nothing to do with the C237 project, which Harris had been told was a priority. Harris was supposed to be working toward completing the C237 project after his June 18, warning.

40. I had told Harris in the past that if he needed to work with other vendors outside of Tietex, that was fine, but I needed a few days' notice of his plans for scheduling purposes. However, Harris was not diligent about giving me advance notice. Harris would often call the morning of his visit to a vendor and tell me he would be working outside of Tietex.

41. I assumed from Harris' voice mail that he would be working at Hexion for most of the day.

42. Sometime in the afternoon of July 3, 2007, a Hexion employee, George Henderson, brought sulfuric acid to Tietex for Harris. This was against Tietex policy. There was no MS/DS sheet on record, and Harris was aware that this was against policy. The

receptionist alerted me that Henderson had brought the sulfuric acid for delivery to Harris.

43. I spoke with Henderson and asked him if he had seen Gary Harris that day. Henderson said he had not seen Harris. I asked Henderson if he had spoken with Harris that day. Henderson said Harris left him a voice mail saying he needed some sulfuric acid urgently because he planned to do some work with it in the lab on July 4. This was troubling because Harris had been told not to do work in the lab when no one was present, and the plant was to be closed on July 4. Henderson said Harris asked him to bring the sulfuric acid to Tietex and leave it for him at the front desk. I asked Henderson if he knew where Harris was, but Henderson did not.

44. I was suspicious that Harris was not where he had told me he would be working that day. I attempted to reach Harris on his cell phone several times, without success. When I finally reached Harris on his cell phone in the late afternoon, I asked him where he had been that day. Harris told me he had been to Hexion. I told Harris that Henderson had been to Tietex and told me Harris was not at Hexion that day. Harris then revised his statement, saying he had gone to Hexion, but had been unable to get in or find anyone, so he left. I asked Harris again where he had been all day. Harris said he had gone to Spartan Chemical and was there for about an hour. I told Harris he had only accounted for a little over an hour of the whole day and asked him to explain where he had been the rest of the day, but Harris could not. Harris simply said, "I can't tell you."

45. I was scheduled to be off for vacation beginning the next day, so I told Harris he was suspended with pay until I returned from vacation. While I was telling Harris that he was suspended, the call was disconnected. I thought Harris had hung up on me. I tried

to call Harris back, but could not reach him. I spoke with David Wilson about all that transpired. Since we could not reach Harris by telephone, a voice mail message was left for him, reiterating that he was suspended with pay, and he was not to return to work until contacted by Tietex.

46. I called Dean Roberts to investigate Harris' claim that he had been to Spartan Chemical. Roberts confirmed that Harris had dropped by, unannounced, and spent about an hour there, talking with them about their capabilities as a supplier.

47. Harris could not account for his whereabouts for the remainder of July 3, other than the short time he spent at Hexion around 1:30 p.m., and the hour spent at Spartan Chemical. Since Harris left a voice mail at 9:00 a.m., saying he had resolved his ant problem, he failed to account for his whereabouts for most of the day. I could only confirm Harris' accounting for a little over an hour of his time between 9:00 a.m., when he left a voice mail for me that he would be at Hexion, and 4:00 p.m., when I was able to reach him on his cell phone.

48. After my investigation, I concluded that Harris was not working at Hexion, as he told me he would be, that Harris had not informed me that his plans had changed, and that Harris was evasive and refused to account for his whereabouts for most of the day of July 3. The events of July 3, as well as the events that occurred previously, made me lose confidence in Harris' abilities to perform his duties and be a reliable employee.

49. The decision to terminate Harris' employment was made on my recommendation, and was made by myself; David Wilson, Human Resources Director; Martin Wildeman, Owner; Reed Cunningham, President; and Mark Isbell, Vice President of Manufacturing.

50. Harris' employment was terminated based on multiple factors, outlined in the memoranda of March 5, June 18, and July 18, 2007, including the events of July 3.

51. I did not distribute the memorandum of July 18, 2007, to anyone inside or outside of Tietex, other than Mark Isbell and David Wilson. The comments made in the memorandum were my honest, objective assessment of performance issues that had been identified with Harris. A true and correct copy of the June 18, 2007, memorandum is attached as Exhibit C.

52. No one was hired to replace Gary Harris. Harris' position was eliminated and the duties assigned to various other positions. Patricia Guzman was hired to handle the Environmental and Lab duties that were previously a part of Harris' former supervisor, Jake Butts', duties. Guzman performed only a few of the general chemical duties that had previously been a portion of Harris' job. Guzman did not replace Harris.

53. Harris never complained to me about age discrimination. I never heard from anyone else at Tietex that Harris had mentioned age discrimination during his employment with Tietex.

54. I have read the above statement and declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of September, 2009.

Wade Wallace

Exhibit C Filed Under Seal Pages 14-15 Redacted

Attachment F

Lowe's Receipt

LOWE'S®

LOWE'S HOME CENTERS, INC.
170 RAINBOW LAKE ROAD
SPARTANBURG, SC 29316
(864)573-2771
-SALE-

SALES #: S1986HD1 4231 07-03-07

232219 3# OUTDOOR ANT KILLER GRA	13.94
2 @ 6.97	
250039 ORTHO MAX ANT & ROACH	3.94
2 @ 1.97	
94578 TERRO ANT KILLER 1 OZ.	2.47
SUBTOTAL:	20.35
TAX 38779 :	1.22
INVOICE 14386 TOTAL:	21.57
BALANCE DUE:	21.57
CASH :	22.00
CHANGE :	0.43

1986 TERMINAL: 14 07/03/07 07:36:30

OF ITEMS PURCHASED: 5
EXCLUDES FEES, SERVICES AND SPECIAL ORDER ITEMS

THANK YOU FOR SHOPPING LOWE'S
RECEIPT REQUIRED FOR CASH REFUND.
CHECK PURCHASE REFUNDS REQUIRE
15 DAY WAIT PERIOD FOR CASH BACK.
STORE MGR: EARL WIGFALL

HAVE A COMMENT OR FEEDBACK?
LET US KNOW AT
WWW.LOWES.COM/FEEDBACK

STORE CODE: 19860-70307-14386

Plaintiff **Exhibit # 1** - (2011-CP-42-5538)-01/15/2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL ENTRY UPON AND INSPECTION OF PREMISES

COMES NOW Defendant Tietex International, Ltd. ("Tietex"), and submits this Response in Opposition to Plaintiff Gary G. Harris's ("Harris") Motion to Compel Entry Upon and Inspection of Premises ("Motion to Compel"). Harris never made a formal request under Rule 34, SCRCP, for entry upon or inspection of Tietex's facilities. In the absence of a formal request under Rule 34, Harris's Motion to Compel is both premature and improper. Harris's Motion to Compel should be denied accordingly, with Tietex awarded the reasonable expenses (including attorneys' fees) it has incurred in opposing the Motion.

A. **Relevant Facts and Procedural History.**

The following timeline summarizes the entirety of the parties' communications regarding Harris's desire to enter upon and inspect Tietex's facilities, and clearly evidences the absence of a formal request under Rule 34:

1. On November 18, 2013, Harris's counsel sent Tietex's counsel a letter in which he stated, "I would like to conduct a site visit of the Tietex facility as soon as possible. Please let me know whether you will agree to this, or whether I need to file a Motion. Also, please let me

know with whom in your office we need to schedule this site visit. I would like access to the entire facility and grounds during this site visit." **(Exhibit 1.[1])** This letter does not contain any mention of or reference to Rule 34, SCRCP. Neither was this letter accompanied by a certificate of service or any other indication that Harris was making a request or that Tietex had a duty to respond under Rule 34.

2. Within 10 minutes of the e-mail from Harris's counsel, Tietex's counsel responded and inquired as to the purpose and scope of the desired visit: "For what purpose? Do you plan to have anyone accompany you?" **(Exhibit 2.)**

3. In response to the questions from Tietex's counsel, Harris's counsel sent 2 e-mails: (1) "Just Mr. Harris, Attorney Goforth, and I will attend. The purpose is to assist in my prosecution of Mr. Harris' claims." ***(id.)***; and (2) "Also, Id' like to take photos for use as trial exhibits." **(Exhibit 3.)** Again, Harris's counsel's e-mails made no mention of Rule 34.

4. Due to the vague nature of Harris's counsel's response regarding the purpose of the desired visit, Tietex's counsel asked for clarification: "Pls [sic] be more specific than 'to assist in my prosecution of Mr. Harris' claims.'" **(Exhibit 4.)**

5. In the final e-mail communication from November 18, Harris's counsel noted as follows: "Our claims involve several significant events that occurred in the plant and the separate lab area. I need to see Mr. Harris' old office, the lab, and his new office to better understand and prosecute our claims. I also want to see the grounds and the proximity to the highway. I don't know that I can be any more specific without revealing my mental impressions and my trial

[1] The substance of the documents Tietex attaches as Exhibits are generally identical to the exhibits Harris attached to his Motion to Compel. However, Tietex is attaching clean copies of these documents due to several of Harris's exhibits being difficult to follow and incomplete.

strategy. I also want to take photos as I mentioned, and I will agree that all photos will be treated as confidential." (*Id.*) Yet again, Harris's counsel did not reference Rule 34 in any way.

6. On November 20, 2013, Harris's counsel sent the following e-mail to Tietex's counsel: "Please advise whether Tietex will voluntarily agree to our site visit so we can work out any limitations in scope or time or otherwise address any concerns you may have. If your client is not inclined to agree I shall be forced to file an appropriate motion." **(Exhibit 5.)** Here, Harris's counsel makes clear that he has not yet made any formal request under Rule 34, as he asks whether Tietex will **voluntarily agree** to the desired site visit. There is nothing voluntary about the duty to respond to a formal request under Rule 34.

7. Approximately 30 minutes after receiving the November 20 e-mail from Harris's counsel, Tietex's counsel responded that he was "Waiting to hear" from Tietex as to whether it would voluntarily agree to allow the site visit based on Harris's informal request. (*Id.*)

8. On Thursday, December 12, 2013—three weeks after the last e-mail exchange—Harris's counsel sent Tietex's counsel a letter regarding the scheduling of two Tietex representatives' depositions. **(Exhibit 6.)** At the conclusion of this letter, Harris's counsel noted, "Please also let me hear back from you concerning my request to visit the Tietex facility." (*Id.*)

9. Tietex's counsel responded to Harris's counsel in less than 15 minutes using his mobile device: "Alan, I am out of the office for the remainder of this week. Next week I will attempt to confer with Tietex representatives then contact you." **(Exhibit 7.)**

10. Between December 12 and December 17, Tietex's counsel and Harris's counsel were able to reach agreement on the scheduling of the depositions at issue. Tietex's counsel sent Harris's counsel the following e-mail on December 17: "Depos [sic] are set. I am not authorized

to make an informal agreement for entry onto Tietex's property. You must make a formal Rule 34 request for the Company's consideration." (*Id.* **(emphasis added).**)

11. On December 23, Harris's counsel responded as follows to the December 17 e-mail from Tietex's counsel: "I served you with written correspondence on November 18, 2013, requesting a site visit. I believe this correspondence complies with Rule 34. We will file a motion to compel today, December 23 unless we hear back from you agreeing to a date and time for the site visit." (*Id.* **(emphasis added).)** This December 23 e-mail was the first time that Harris's counsel had **ever** mentioned Rule 34, and he only did so upon Tietex's counsel notifying him that Tietex would not **voluntarily agree** to the **informally requested** site visit and that he must make a formal request under Rule 34.

12. Tietex's counsel responded succinctly within 5 minutes: "I disagree that your informal request is proper under the Rules." (*Id.*)

13. On December 23, 2013, Harris filed his Motion to Compel without ever serving a formal request under Rule 34.

B. Legal Arguments and Authorities.

Rule 37(a)(2), SCRCP—the sole authority on which Harris can base his Motion to Compel—makes clear that a party can only seek relief thereunder in the following circumstance: "[I]f a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested." (Emphasis added). The plain language of this Rule makes clear that Harris's Motion to Compel is both premature and improper, as there has never been "a request for inspection submitted under Rule 34" in this case.

While no South Carolina appellate court appears to have addressed this issue, numerous federal courts have done so under the analogous Federal Rules 34 and 37. Federal courts throughout the country have repeatedly held that a party cannot invoke Rule 37 and seek an order compelling production or inspection under Rule 34 if there has never been a formal request under Rule 34. *See, e.g., Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1311 (3d Cir. 1995) ("[The plaintiff] never forwarded interrogatories, nor a request for production of documents, to [the defendant]. Thus, pursuant to Rule 37, the prerequisite for compelling discovery was never fulfilled."); *Texas Democratic Party v. Dallas County*, No. 3-08-cv-2117-p, 2010 WL 5141352, *1 (N.D. Tex. Dec. 9, 2010) ("It is axiomatic that a court may not compel the production of documents under Rule 37 unless the party seeking such an order has served a proper discovery request on the opposing party."); *Patterson v. Kim*, No. 1:08-cv-873, 2009 WL 1911819, *2 (W.D. Mich. July 1, 2009) ("While defendants' informal discovery request may be expeditious, and as such beneficial to all, federal courts have denied motions to compel the production of documents where the movant failed to make a formal discovery request for the documents."); *James v. Wash Depot Holdings, Inc.*, 240 F.R.D. 693, 695 (S.D. Fla. 2006) ("[C]ourts have denied motions to compel the production of documents where the movant failed to make a formal discovery request. . . . Rule 37 does not authorize a court to compel documents or a release to obtain them based on an informal discovery request."); *Sithon Maritime Co. v. Mansion*, No. Civ. A. 96-2262-EEO, 1998 WL 182785, *2 (D. Kan. Apr. 10, 1998) ("The Federal Rules of Civil Procedure provide necessary boundaries and requirements for formal discovery. Parties must comply with such requirements in order to resort to the provisions of [Rule 37], governing motions to compel. Informal requests for production lie outside the boundaries of the discovery rules."); *Ledbetter v. United States*, No. 3:96-cv-678x, 1996 WL

739036, *1 (N.D. Tex. Dec. 18, 1996) ("[I]t would be premature to grant the plaintiff's Motion to Compel in the absence of a formal discovery request served upon the proper parties. . . . [A] motion to compel pursuant to the enforcement provisions of Rule 37 clearly contemplates that the parties have relied on the formal discovery rules.").

Numerous federal courts have also made clear that letters are not formal requests under Rule 34 on which a motion to compel can be based. *See, e.g., Texas Democratic Party*, 2010 WL 5141352, at *1-2 (denying plaintiffs' motion to compel and holding that plaintiffs' letters to defendants requesting production of relevant billing records were nothing more than "informal discovery request[s]" to which defendants had no duty to respond or object); *Patterson*, 2009 WL 1911819, at *2 (denying motion to compel and noting as follows: "[T]here is no outstanding discovery directed to plaintiff. Defendants' . . . letter was an informal request to release medical records; it was not a request for production pursuant to [Rule 34]"); *James*, 240 F.R.D. at 694 ("Nothing in the record reflects that Defendant has sought Plaintiff's unemployment compensation records through a formal Request for Production pursuant to Rule 34 . . . . Rather, in a . . . letter to Plaintiff's counsel, Defendant's counsel merely informally requested that Plaintiff execute a release for such records."); *Suid v. Cigna Corp.*, 203 F.R.D. 227, 228 (D.V.I. 2001) (denying Plaintiff's motion to compel because the Plaintiff's counsel's letters to Defendant's counsel requesting various documents did not "create any basis for relief under Rule 37(a)"); *Sithon Maritime Co.*, 1998 WL 182785, at *2 ("The court will not consider the letter [requesting production of various documents] as a formal request for production of documents."). Accordingly, none of the communications between Harris's counsel and Tietex's counsel are a formal Rule 34 request on which Harris can base his Motion to Compel.

In *Sithon Maritime*, the United States District Court of Kansas clearly articulated the distinction between formal and informal discovery in holding that such an informal discovery request as Harris's is insufficient to support a motion to compel:

> The Federal Rules of Civil Procedure provide necessary boundaries and requirements for formal discovery. Parties must comply with such requirements in order to resort to the provisions of [Rule 37], governing motions to compel. Informal requests for production lie outside the boundaries of the discovery rules. Formal requests may be filed under some circumstances, not letter requests. Formal requests require certificates of conferring and service. Letters do not. Formal requests certify representations of counsel under [Rule 11]. Letters do not. Formal requests clearly implicate the duties of opposing parties to respond, pursuant to [Rule 34]. Letters do not. Formal requests may occasion sanctions. Letters usually do not. To treat correspondence between counsel as formal requests for production under Rule 34 would create confusion and chaos in discovery. [Rule 37] permits a party to move to compel production of documents "if a party, in response to a request for inspection submitted under Rule 34, fails to respond." An evasive or incomplete response is a failure to respond, within the meaning of Rule 37(a)(2)(B). Fed.R.Civ.P. 37(a)(3).
>
> [Rule 34(a)] establishes the permissible scope of production. [Rule 34(b)] establishes the procedure for submitting the request and for responding to it. The letter . . . does not meet the requirements of Rule 34. Plaintiff did not "serve" the letter upon [defendant] as contemplated by the Rule. *See* Fed.R.Civ.P. 34(a). The letter does not give [the defendant] thirty days in which to provide a written response. *See* Fed.R.Civ.P. 34(b). Plaintiff cannot properly move to compel production of documents sought in an informal letter requesting production. Although both informal investigation and formal discovery have their proper place in the litigation arena, the Federal Rules of Civil Procedure address only formal discovery.

Sithon Maritime, 1998 WL 182785, at *2 (emphasis added).

Like the plaintiff's letter in *Sithon Maritime* requesting production of documents, the letters and e-mails from Harris's counsel to Tietex's counsel: (1) contained no certificate of service; (2) contained no certification under Rule 11; (3) did not implicate Tietex's duty to respond or object; (4) were not "served" on Tietex as contemplated by Rules 26(g) and 34; and

(5) did not give Tietex 30 days in which to provide a written response as is clearly required by Rule 34(b). Additionally, none of Harris's letters or e-mails "specif[ied] a reasonable time, place, and manner of making the inspection and performing the related acts"—a black letter requirement of a Rule 34 request. Instead, Harris's counsel simply sent a letter requesting an informal and voluntary agreement and threatened a motion to compel if Tietex was not willing to agree. As the Court in *Sithon Maritime* aptly noted, "To treat [such] correspondence between counsel as formal requests for production under Rule 34 would create confusion and chaos in discovery." *Id.*

Because Harris has never submitted a request under Rule 34, his Motion to Compel is both premature and improper. Harris's Motion to Compel should be denied accordingly. Because there is no basis for Harris's Motion to Compel, Tietex is entitled under Rule 37(a)(4) to recover the reasonable attorneys' fees it has incurred in opposing Harris's Motion:

> If the motion [to compel] is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

Rule 37(a)(4), SCRCP (emphasis added). Harris cannot make any showing of substantial justification for making his Motion to Compel, as he jumped the gun and filed his Motion without even attempting to follow the Rules of Civil Procedure. While Harris accuses Tietex in his Motion as "perpetuat[ing] a pattern of delay in this case," Harris is the one who is unnecessarily wasting both the Court's and Tietex's time by filing this unjustified and baseless Motion.

C. **Conclusion.**

Harris's counsel could have easily avoided the filing of this Motion (and likely could have accomplished the site visit he desires) if he would have simply followed the suggestion of Tietex's counsel on December 17: "I am not authorized to make an informal agreement for entry onto Tietex's property. You must make a formal Rule 34 request for the Company's consideration." **(Exhibit 7 (emphasis added).)** Harris's counsel chose not to follow that suggestion and resorted to the present Motion to Compel, notwithstanding his inability to resort to Rule 37 in the absence of a formal Rule 34 request. Therefore, the Court should deny Harris's Motion to Compel as premature and improper and award Tietex the attorneys' fees it has incurred in opposing the Motion.

Dated this 7th day of January, 2014.

Respectfully submitted,

By: Fred W. Suggs, Jr.
Fred W. Suggs, Jr. (SC Bar # 5423)
Lucas J. Asper (SC Bar # 77902)

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Attorneys for Defendant Tietex International, Ltd.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
Gary G. Harris,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No.: 2011-CP-42-4538
	)	
Tietex International, Ltd.,	)	
	)	
Defendant.	)	
	)	

CERTIFICATE OF SERVICE

I certify that on the 7th day of January, 2014, a true and correct copy of the above **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL ENTRY UPON AND INSPECTION OF PREMISES** was served by Email to:

D. Alan Lazenby, Esq.
alan@lazenbylawfirm.com

and that on the 8th day of January, 2014, a true and correct copy of the above **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL ENTRY UPON AND INSPECTION OF PREMISES** will be served by hand delivering a copy to Plaintiff's counsel, D. Alan Lazenby, Esq.

By: Fred W. Suggs Jr
Fred W. Suggs, Jr.

16757806.1

Exhibit 1

Suggs, Fred

From:	Jessica Holmen <jessica@lazenbylawfirm.com>
Sent:	Monday, November 18, 2013 4:12 PM
To:	Suggs, Fred; Suggs, Fred
Cc:	Childress, Sheri M; Alan Lazenby; Gary Harris
Subject:	Harris v. Tietex - Site Visit
Attachments:	Suggs from DAL re site visit 11.18.13.pdf

Mr. Suggs,

Please see attached correspondence from Attorney Lazenby.

All the best,
--

Jessica Holmen
Paralegal
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LAZENBY LAW FIRM, LLC

ATTORNEYS AT LAW

D. ALAN LAZENBY
GINGER D. GOFORTH

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340 E. MAIN ST., SUITE 240
SPARTANBURG, SC 29302
PHONE: 864-804-5050
FAX: 864-804-5051

November 18, 2013

VIA EMAIL & US MAIL
Fred Suggs, Jr. Esq.
Ogletree Deakins Nash Smoak & Stewart, PC
PO Box 2757
Greenville, SC 29602

Re: ***Harris v. Tietex International Ltd.***
In the Court of Common Pleas for Spartanburg County
C.A. No: 2011-CP-42-4538

Dear Fred:

I would like to conduct a site visit of the Tietex facility as soon as possible. Please let me know whether you will agree to this, or whether I need to file a Motion. Also, please let me know with whom in your office we need to schedule this site visit. I would like access to the entire facility and grounds during this site visit.

Very truly yours,

D. Alan Lazenby
alan@lazenbylawfirm.com

DAL:jeh

Exhibit 2

Suggs, Fred

From: Alan Lazenby <alan@lazenbylawfirm.com>
Sent: Monday, November 18, 2013 4:24 PM
To: Suggs, Fred
Subject: Re: Harris v. Tietex - Site Visit

Just Mr. Harris, Attorney Goforth, and I will attend. The purpose is to assist in my prosecution of Mr. Harris' claims.

Alan

On Mon, Nov 18, 2013 at 4:22 PM, Suggs, Fred <Fred.Suggs@ogletreedeakins.com> wrote:

For what purpose? Do you plan to have anyone accompany you?

From: Jessica Holmen [mailto:jessica@lazenbylawfirm.com]
Sent: Monday, November 18, 2013 4:12 PM
To: Suggs, Fred; Suggs, Fred
Cc: Childress, Sheri M; Alan Lazenby; Gary Harris
Subject: Harris v. Tietex - Site Visit

Mr. Suggs,

Please see attached correspondence from Attorney Lazenby.

All the best,

--

Jessica Holmen
Paralegal
Lazenby Law Firm, LLC
P.O. Box 6099 (29304)
340 E Main St, Suite 240
Spartanburg, SC 29302
jessica@lazenbylawfirm.com
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--

D. Alan Lazenby
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Spartanburg, SC 29302
alan@lazenbylawfirm.com
Office: (864) 804-5050
Mobile: (864) 415-2753
Fax: (864) 804-5051

Exhibit 3

Suggs, Fred

From: Alan Lazenby <alan@lazenbylawfirm.com>
Sent: Monday, November 18, 2013 4:27 PM
To: Suggs, Fred
Subject: Re: Harris v. Tietex - Site Visit

Also, I'd like to take photos for use as trial exhibits.

Alan

On Mon, Nov 18, 2013 at 4:22 PM, Suggs, Fred <Fred.Suggs@ogletreedeakins.com> wrote:

For what purpose? Do you plan to have anyone accompany you?

From: Jessica Holmen [mailto:jessica@lazenbylawfirm.com]
Sent: Monday, November 18, 2013 4:12 PM
To: Suggs, Fred; Suggs, Fred
Cc: Childress, Sheri M; Alan Lazenby; Gary Harris
Subject: Harris v. Tietex - Site Visit

Mr. Suggs,

Please see attached correspondence from Attorney Lazenby.

All the best,

--

Jessica Holmen
Paralegal
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P.O. Box 6099 (29304)
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alan@lazenbylawfirm.com
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Fax: (864) 804-5051

Exhibit 4

Suggs, Fred

From: Alan Lazenby <alan@lazenbylawfirm.com>
Sent: Monday, November 18, 2013 4:36 PM
To: Suggs, Fred
Subject: Re: Harris v. Tietex - Site Visit

Our claims involve several significant events that occurred in the plant and the separate lab area. I need to see Mr. Harris' old office, the lab, and his new office to better understand and prosecute our claims. I also want to see the grounds and the proximity to the highway. I don't know that I can be any more specific without revealing my mental impressions and my trial strategy. I also want to take photos as I mentioned, and I will agree that all photos will be treated as confidential.

Alan

On Mon, Nov 18, 2013 at 4:28 PM, Suggs, Fred <Fred.Suggs@ogletreedeakins.com> wrote:

Pls be more specific than "to assist in my prosecution of Mr. Harris' claims."

From: Alan Lazenby [mailto:alan@lazenbylawfirm.com]
Sent: Monday, November 18, 2013 4:27 PM
To: Suggs, Fred
Subject: Re: Harris v. Tietex - Site Visit

Also, I'd like to take photos for use as trial exhibits.

Alan

On Mon, Nov 18, 2013 at 4:22 PM, Suggs, Fred <Fred.Suggs@ogletreedeakins.com> wrote:

For what purpose? Do you plan to have anyone accompany you?

From: Jessica Holmen [mailto:jessica@lazenbylawfirm.com]
Sent: Monday, November 18, 2013 4:12 PM
To: Suggs, Fred; Suggs, Fred
Cc: Childress, Sheri M; Alan Lazenby; Gary Harris
Subject: Harris v. Tietex - Site Visit

Mr. Suggs,

Please see attached correspondence from Attorney Lazenby.

All the best,

--

Jessica Holmen
Paralegal
Lazenby Law Firm, LLC
P.O. Box 6099 (29304)
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Exhibit 5

Suggs, Fred

From: Suggs, Fred
Sent: Wednesday, November 20, 2013 4:58 PM
To: 'Alan Lazenby'
Subject: RE: Harris v. Tietex - Site Visit

Waiting to hear

From: Alan Lazenby [mailto:alan@lazenbylawfirm.com]
Sent: Wednesday, November 20, 2013 4:23 PM
To: Jessica Holmen
Cc: Suggs, Fred; Suggs, Fred; Childress, Sheri M; Gary Harris
Subject: Re: Harris v. Tietex - Site Visit

Fred,

Please advise whether Tietex will voluntarily agree to our site visit so we can work out any limitations in scope or time or otherwise address any concerns you may have. If your client is not inclined to agree I shall be forced to file an appropriate motion.

Alan

On Mon, Nov 18, 2013 at 4:11 PM, Jessica Holmen <jessica@lazenbylawfirm.com> wrote:
Mr. Suggs,

Please see attached correspondence from Attorney Lazenby.

All the best,
--

Jessica Holmen
Paralegal
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P.O. Box 6099 (29304)
340 E. Main St, Suite 240
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--

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alan@lazenbylawfirm.com
Office: (864) 804-5050
Mobile: (864) 415-2753
Fax: (864) 804-5051

Exhibit 6

Suggs, Fred

From:	Jessica Holmen <jessica@lazenbylawfirm.com>
Sent:	Thursday, December 12, 2013 4:32 PM
To:	Suggs, Fred; Suggs, Fred
Cc:	Alan Lazenby; Childress, Sheri M; Gary Harris
Subject:	Harris v. Tietex
Attachments:	Suggs from DAL re depo dates and site visit 12.12.13.pdf

Mr. Suggs,

Please see attached correspondence from Attorney Lazenby.

All the best,
--

Jessica Holmen
Paralegal
Lazenby Law Firm, LLC
P.O. Box 6099 (29304)
340 E Main St, Suite 240
Spartanburg, SC 29302
jessica@lazenbylawfirm.com
Office: 864-804-5050
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LAZENBY LAW FIRM, LLC

ATTORNEYS AT LAW

D. ALAN LAZENBY
GINGER D. GOFORTH

POST OFFICE BOX 6099 (29304)
340 E. MAIN ST., SUITE 240
SPARTANBURG, SC 29302
PHONE: 864-804-5050
FAX: 864-804-5051

December 12, 2013

VIA EMAIL & US MAIL
Fred Suggs, Jr. Esq.
Ogletree Deakins Nash Smoak & Stewart, PC
PO Box 2757
Greenville, SC 29602

Re: ***Harris v. Tietex International Ltd.***
In the Court of Common Pleas for Spartanburg County
C.A. No: 2011-CP-42-4538

Dear Fred:

I would like to schedule the depositions of Martin Wildeman and Reed Cunningham. Please provide available dates for these witnesses sometime within the next four (4) weeks. We can have these depositions at my office in Spartanburg or at your office in Greenville. I would like to schedule these depositions on two consecutive days, if possible. I believe I will need no more than one day per witness.

Please also let me hear back from you concerning my request to visit the Tietex facility.

Very truly yours,

D. Alan Lazenby
alan@lazenbylawfirm.com

DAL:jeh
cc: Mr. Gary Harris (via email only)

Exhibit 7

Suggs, Fred

From: Suggs, Fred
Sent: Monday, December 23, 2013 11:37 AM
To: Alan Lazenby
Subject: RE: FW: Harris v. Tietex

I disagree that your informal request is proper under the Rules.

From: Alan Lazenby [mailto:alan@lazenbylawfirm.com]
Sent: Monday, December 23, 2013 11:32 AM
To: Suggs, Fred
Cc: Ginger Goforth
Subject: Re: FW: Harris v. Tietex

Fred,

I served you with written correspondence on November 18, 2013, requesting a site visit. I believe this correspondence complies with Rule 34. We will file a motion to compel today, December 23 unless we hear back from you agreeing to a date and time for the site visit.

Alan

On Tue, Dec 17, 2013 at 4:49 PM, Suggs, Fred <Fred.Suggs@ogletreedeakins.com> wrote:

Depos are set. I am not authorized to make an informal agreement for entry onto Tietex's property. You must make a formal Rule 34 request for the Company's consideration. Fred

From: Suggs, Fred
Sent: Thursday, December 12, 2013 4:46 PM
To: 'jessica@lazenbylawfirm.com'
Cc: 'alan@lazenbylawfirm.com'; Childress, Sherl M
Subject: Re: Harris v. Tietex

Alan, I am out of my office for the remainder of this week. Next week I will attempt to confer with Tietex representatives then contact you. Fred
Sent from my mobile device (please forgive any typos).

From: Jessica Holmen [mailto:jessica@lazenbylawfirm.com]
Sent: Thursday, December 12, 2013 04:32 PM
To: Suggs, Fred; Suggs, Fred
Cc: Alan Lazenby <alan@lazenbylawfirm.com>; Childress, Sherl M; Gary Harris <gglharris@windstream.net>
Subject: Harris v. Tietex

Mr. Suggs,

Please see attached correspondence from Attorney Lazenby.

All the best,
--

Jessica Holmen
Paralegal
Lazenby Law Firm, LLC
P.O. Box 6099 (29304)
340 E Main St, Suite 240
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STATE OF SOUTH CAROLINA)
) IN THE COMMON PLEAS COURT
COUNTY OF SPARTANBURG)

Gary G. Harris,)
) TRANSCRIPT OF RECORD
Plaintiff,) 2011-CP-42-4538
)
-vs-)
)
Tietex International, Ltd.,)
) February 6, 2014
Defendant.) Spartanburg, South Carolina

B E F O R E:

HONORABLE J. DERHAM COLE, JUDGE

A P P E A R A N C E S:

DUANE ALAN LAZENBY, ESQUIRE
Attorney for the Plaintiff

LUCAS J. ASPER, ESQUIRE
FRED W. SUGGS, JR., ESQUIRE
Attorneys for the Defendant

Linda D. Moffitt
Circuit Court Reporter

INDEX

Motions -- page 3.

No sworn testimony; no exhibits entered into evidence.

THE COURT: All right. Who wants to be heard?

MR. ASPER: Well, Your Honor, I believe the motion for a continuance and a motion for a pretrial hearing as long as we can essentially complete the pretrial hearing during the procedures today -- both of Mr. Lazenby's motions are moot with that understanding.

MR. LAZENBY: Yes, Your Honor. We discussed this prior.

My motion is based upon the -- for a continuance is based upon the inability to site visit and needing to have the motion for summary judgment heard.

We had the site visit on Monday. We're hearing the motion for summary judgment today. So the motion for a continuance is moot.

THE COURT: Okay.

MR. LAZENBY: I have a motion for a -- I want to have a preliminary hearing so we can address several issues before trial which is scheduled to begin next Tuesday. And as long as we can hear that I'm satisfied.

THE COURT: All right. So motion for summary judgment is going to be heard first?

MR. ASPER: Yes, sir, Your Honor. I believe so.

MR. LAZENBY: That suits me, Your Honor.

THE COURT: Okay.

MR. LAZENBY: And one matter before this motion is

heard.

In preparing for trial and doing all of the things that you do in preparing for trial I'm prepared to state on the record that the plaintiff is withdrawing all causes of action except for defamation.

So we're withdrawing the breach of contract and we're withdrawing outrage.

MR. SUGGS: Breach of contract, breach of contract accompanied by fraud, both of them.

MR. LAZENBY: Yes, sir.

MR. SUGGS: And intentional infliction of emotional distress.

MR. LAZENBY: Yes. The only thing that's remaining is defamation.

THE COURT: Does that help with the summary judgment motion?

MR. ASPER: That gets us 75 percent of the way there, Your Honor. We still have arguments related to that motion obviously.

THE COURT: All right. Well, it's not obvious.

MR. ASPER: I apologize.

I'll hand you up. We have a notebook prepared or a memo, and they're all exhibits. This is the same thing that was submitted to the Court in conjunction with our memo and our motion itself. Just that way you have it

handy and easier to flip through as we're going through this, Your Honor.

THE COURT: Okay.

MR. ASPER: Just because I know you've heard several motions in this case, but to give you a brief procedural history this case really originated all the way back in 2008.

Mr. Harris, the plaintiff in this case, filed a lawsuit in this court alleging four claims. This is just for your reference. I know visually sometimes it's easier.

In the first action we had an A.D.E.A. claim. It's an age discrimination claim, a claim for breach of contract, breach of contract accompanied by fraud and defamation.

That case was removed to federal court based on the A.D.E.A. claim. We went through discovery, through extensive discovery, multiple depositions taken essentially based on the exact same set of facts that we're dealing with in this case.

Ultimately, the federal court granted summary judgment on the age claim and chose not to exercise supplemental jurisdiction over the state claims.

That decision went up to the 4th Circuit. The 4th Circuit affirmed the decision.

So as far as the merits of that case it has clearly been actually litigated. And all of the underlying facts

are the same as what we're dealing with here.

The only difference in the complaint between what we saw in the original case and what we have now is the defamation claim has expanded. Our position is that individual allegations of defamation need to be treated really as individual claims because they are all so specific based on the defamatory statement or the alleged defamatory statement.

The first case involved four defamation claims. This case now involves seven defamation claims. The additional claim that's been added was outrage, but you've heard that now that claim has been dismissed. So I'll forgo my arguments related to that.

We filed a motion for summary judgment in this action here in state court, and Judge Addy was here on the circuit and heard that motion.

The primary focus of our motion when we made that was based on the doctrine of collateral estoppel. We essentially argued the federal court has made certain factual determinations and legal conclusions. Those are equally applicable to the claims that are before the Court now.

We still hold that to be true, and you'll hear more about that in just a minute.

We also argued based on the merits, but Judge Addy

didn't reach the merits when he issued his order. Judge Addy ultimately denied our motion and found that in his opinion collateral estoppel did not apply.

Our position is that's not the law of the case because we couldn't appeal that decision. We will continue arguing for the application of collateral estoppel throughout this case.

The other part of his decision was that essentially summary judgment was premature at that time. Mr. Lazenby's primary argument in opposition to the merits was that he had not yet had a full and fair opportunity to conduct discovery.

He was attempting to take approximately seven depositions. He had four or five depositions noticed prior to that hearing that he put on hold until our motion was heard. And then he had also noticed that he wanted to take two executives' depositions at Tietex.

After the summary judgment decision -- and Judge Addy granted him full ability to conduct further discovery -- Mr. Lazenby did notice two depositions of Morton Wildman who's the owner of Tietex and Reed Cunningham who is the president of Tietex. Those depositions were scheduled and noticed to take place on January 16th and 17th.

On January 14th Mr. Lazenby's paralegal called Mr. Suggs' paralegal and canceled those depositions only

with the explanation that they decided to go in a different direction.

Since Judge Addy issued that ruling in October we've had no discovery other than the site visit that just took place on Monday and some supplemental responses that were just served on us between last Wednesday and this Monday. Other than that there has literally been no discovery in this case.

And so our position is that the merits are what they are and it's time to look at those merits. And we believe there's only one conclusion based on the undisputed facts in the record, and that is that the defamation claims fail as a matter of law.

I'll go through each of those claims individually just to try to better explain what his claims are. Like I said, there are seven different claims here.

The crux of the first four that I'll address as far as our defense really is the doctrine or the qualified privilege that applies to these statements.

If you'll turn in tab B to the notebook and come to Exhibit No. 13 it has bates No. 331 on the bottom. Are you with me?

THE COURT: No. 331?

MR. ASPER: Yes, Your Honor. And I'll be happy to give you my copy and work with yours since I'm already

there, and it'll be easy to flip to the next ones from mine. You don't have to go digging.

THE COURT: Tab B, bates 331?

MR. ASPER: Yes, Your Honor. And it's Defendant's Exhibit No. 13 to Harris' deposition.

THE COURT: Okay.

MR. ASPER: This is the first allegation of defamation. Harris, Mr. Harris, the plaintiff in this case, alleges that this e-mail constituted a defamatory act.

What this e-mail is as is made clear in the actual sender line is it's from Wade Wallace. Wade Wallace was Mr. Harris' direct supervisor. The to-line, it's sent to David Wilson. It's the Tietex human resources manager at the time.

The copy on the e-mail, the carbon copy or courtesy copy, is marked Isbell who was Mr. Wallace's supervisor. These are all people very much on a need-to-know basis about Mr. Harris' performance, and therefore the qualified privilege absolutely applies to this e-mail.

Whether or not a situation gives rise to a qualified privilege is a matter of law for the Court to decide. Typically, the question of whether that privilege has been abused is a question for the jury. However, if there's only one reasonable conclusion as to whether or not the

privilege was abused, then that is also a question of law that the Court can make, that the privilege stands and that there is no defamation as a matter of law.

What this e-mail is to give you a little factual background, Mr. Harris had been having some personal issues. His wife was sick. He had had a problem sleeping. He admitted many times in his depositions and in transcripts before the employment security commission that he was distraught at this time, that he was having a lot of issues.

He went to Mr. Wallace and said he was having a hard time with some of his work because of those issues. This e-mail very simply is Mr. Wallace's notification or documentation to human resources and his own boss that these issues were going on with one of his employees. He's letting them know, hey, this is what's going on in my workplace.

There's nothing defamatory in here at all. And placing aside the absence of defamatory matter and the truth of these statements, there's no malice per Mr. Wallace.

The way that Mr. Harris has attempted to show malice is he has a big conspiracy theory that there was this intent to get rid of him based on his age. This all goes back to the age claims that the Court has already kicked on

summary judgment in the federal court. We can't relitigate those issues here today.

I have a copy of the complaint that may be helpful to the understanding of that issue. I'll hand that up to you just so you can have that handy. And if you'll turn to page three, paragraph 14, this is the first allegation in the complaint regarding the alleged conspiracy or this intent, malicious intent, to get rid of him. And what does it say? Defendant-employee Mark Isbell conspired to replace plaintiff with a much younger woman.

Well, the federal court specifically ruled in its order that Harris was not replaced with a younger employee. So that -- it's gone. That ship has sailed. And that is the crux of his argument in this case.

You go down to paragraph No. 15 and it talks about a campaign to set him up for failure based on this conspiratorial intent. Well, again it relates back to the age allegation.

MR. LAZENBY: I'm sorry. Which complaint is that?

MR. ASPER: This is the amended complaint. This is your complaint.

MR. LAZENBY: This is the operative complaint.

MR. ASPER: Yes.

MR. LAZENBY: Okay.

MR. ASPER: If you'll turn to paragraph 23 on the next

page, defendant employees conspired to put false and defamatory reasons for the termination of plaintiff to achieve ulterior objectives. These ulterior objectives again are to replace plaintiff with a younger employee, to get rid of him based on his age. That issue has been litigated.

No. 24, Defendant terminated him based upon the pretextual case crafted against him. This all relates back to the age claim.

And then finally paragraph 25, it absolutely seals the deal on what this is all about. Plaintiff was replaced by Patricia Guzman who is the younger employee.

Well, the Court's already said that he wasn't replaced by Guzman. We can't relitigate that here. That's the basis for Mr. Harris' argument that there is malice.

Well, the federal court's already told us that those things aren't true, so there can't be malice. If there's not malice, the privilege stands and his claim fails.

The next defamation claim if you'll flip to Exhibit No. -- I believe it's 16. Yes, 16 on tab B. It's three or four pages behind where we just were. It's an internal memorandum, bates No. 334.

This we have walked about a month down the road in the situation of Mr. Harris' separation. During the last 30 days we see in this because there's been a reassignment.

Mr. Harris previously worked for a supervisor named Jake Butts. He and Mr. Butts got along fairly well, and he didn't have a lot of performance issues while working for Mr. Butts. But then he was replaced to where Mr. Wallace was his supervisor. Their management styles were different, and Mr. Wallace had different expectations for him.

Well, since -- between the time that he was transitioned into this new supervisory role and the time of this memo on March 5th Mr. Wallace began noticing problems with Harris' performance.

What this memo is, it's a memo from Wade Wallace, Harris' supervisor, to David Wilson. Again, that's the H.R. manager copying only Mark Isbell who's Wallace's supervisor and Gary Harris, the plaintiff himself. That's the entirety of the publication here. And it documents issues that are going on with Harris' performance.

Qualified privilege applies again here. Absolutely no evidence of malice, because we've already litigated whether or not these things are true.

And the federal court basing its decision in finding summary judgment in Tietex's favor, they had to make two conclusions: No. 1, that Harris was not performing up to the reasonable legitimate expectations of Tietex. That's something that absolutely was necessary to their decision.

No. 2, that he was not replaced with a younger employee. Those two things have a lot of factual background that the federal court found in order to reach those conclusions.

Well, a lot of those things are that Mr. Harris did have issues with harboring grudges, that he did complain about his ownership and environmental reporting, these very bullet points, that he wasn't honoring the chain of command and that Wallace had problems with that.

Mr. Wallace documented these things, many of which Harris has admitted to as you'll see in our memorandum. But my whole point is there's no malice. It's true. The qualified privilege prevents the claim on this memo.

The next claim is the very next page in your notebook. It's Defendant's Exhibit No. 18, bates No. 336 and 337. We've moved forward in the timeline now to June 18th of 2007. Mr. Harris is continuing to have performance issues. This memo specifically addresses issues related to two projects. They're referred to as the C237 and T602 projects.

Well, stated simply, Harris had not done what Wallace wanted him to do on those projects, and Wallace was displeased with his efforts. Any supervisor has a right to be displeased with his employees' efforts on any given task. That's all that's documented here. The way that Wallace interpreted Harris' performance -- and you see in

the distribution that it was sent directly to the plaintiff. The only copies here, H.R. and Mr. Wallace's supervisor.

Very limited world of publication. And it's really not even publication because it's a corporation speaking to itself. It's not distributed even to other employees within the corporation, not spoken about to other employees within the corporation and certainly not published on a third-party basis.

The final actual statement on which these claims are based is the Exhibit No. 19. Just for reference if you'll flip a few pages there's two copies of this exhibit in your notebook, but bates Nos. 338 and 339 are the ones I'll reference just for clarity on the record for the bates numbers.

This is again one month forward after 30 days. And remember that in the June memo, the one we just looked at, Wallace had specifically said it is mandatory that Gary make significant progress toward resolving the problems and improving on his analytical practices within the next 30 days. Mr. Harris has testified he interpreted this memo as his final written warning.

So we get to July 18th. Thirty days have passed. There are other intervening events where Mr. Wallace can't track down Mr. Harris on a day when he's supposed to be

working, just poor performance issues. I won't get into the nitty-gritty of it because we're talking about the statement here. And the statement is what forms the basis for the defamation. All it does is summarize these performance issues again.

And this one is only sent to David Wilson in H.R. and copied to Mark Isbell. That's the supervisor of Mr. Wallace again.

It's recommending Harris' termination. It's summarizing performance issues and recommending termination. That's what this memo is about. So the qualified privilege applies. There's no malice here. There's no malicious intent or conspiracy as the federal court has already decided. And as a matter of law there can only be one conclusion, and that's that it's simply not defamatory statement.

The other three allegations of defamation are a little bit less clear. Mr. Harris alleged that there were, quote, unquote, rumors in the industry. To support this allegation he's never identified an actual statement, only that there are rumors in the industry about the reason for his termination.

The sole support he's given are his unsupported conclusory allegations. He's never identified even the person who told him of these alleged rumors, let alone that

it came from someone at Tietex.

They're based on -- this statement's based on multiple layers of hearsay inadmissible in evidence. And it just can't be the basis for a defamation claim.

The sixth defamation claim involves what Harris refers to as being suspended with pay from the plant. He calls it being banned from the facility.

Well, on July 18th or on July 3rd after there was the performance issue in which Mr. Wallace could not locate Mr. Harris, could not account for his whereabouts throughout the day, Mr. Wallace did, in fact, suspend him until he had a chance to investigate what all was going on. But he suspended him with pay.

The only communication was Mr. Wallace telling Mr. Harris you're suspended, don't come to work until I've had a chance to look through all of this.

Now, Mr. Harris also says in his deposition that Wallace supposedly told somebody else at a third-party vendor that Harris was suspended.

This is based on what he heard from a friend named George Henderson who heard it from somebody else. Multiple layers of hearsay. He's never produced a witness who said that this statement actually took place. Harris says it took place, and that's all.

But ignoring those facts, it's true. Harris clearly

acknowledges, yes, I was suspended. If the entirety of Mr. Wallace's statement, which is all Harris has identified, is Gary Harris is suspended from Tietex right now, that statement was 100 percent true, and truth is an absolute defense to defamation.

The final allegation of defamation goes back to February. The factual background for this is a little bit confusing. Whenever there was the changeover in supervisory authority the -- part of the reason for that was that the former supervisor Harris worked with named Jake Butts had moved with Harris into a working environment together.

Mr. Harris then began to complain about headaches and sinus issues. And he attributed it to mold in the workplace.

Well, it wasn't based on Tietex's actual building. It was based on things that Mr. Butts had brought into the workplace -- some old furniture from the house.

So what did Tietex naturally do? They said if you can't work in there, why won't we move you over here. Well, Harris said I need to be able to work in this area to do my job.

Wallace's first reaction was why don't we try to get you some of the equipment that you would need to do it outside, or as an alternative you can wear a mask.

Harris tried wearing the mask, said it's not doing good

enough job. Wallace ultimately said, look, if we can't resolve these health issues we can't have you working in an environment that's possibly detrimental to your health.

Harris refers to this as being banned from the laboratory. Again, it's based solely on Harris' own complaints about health issues from working in the lab. His complaint was I offered to sign a liability waiver.

Well, Tietex said that's not good enough because if you truly are having health issues based on this condition we -- a liability waiver is not good enough. You can't waive comp. You can't waive types of claims that Harris could later raise based on working in this environment and the environment hurting his health.

But placing aside the liability, Tietex was concerned about his health. There are e-mails in the record which are quoted and cited in the memorandum that we provided that summarize Tietex's position on that.

But stated simply, none of that's defamatory. There's no statement about Harris within there. It's you can't work in the lab, is the closest thing to a statement there. And a statement that you're unable to work in a certain part of the facility just isn't defamation.

Part of the -- one of the elements of defamation is it must be a statement about the plaintiff. Well, telling a plaintiff you can't work somewhere is not a statement about

the plaintiff. It's just controlling his working conditions. It has nothing to do with his person, with his reputation. It's just not defamation.

One of the key aspects of the qualified-privilege defense is this aspect of malice. In order to overcome or show malice, because in the situation like this where there is a qualified privilege the burden shifts to the plaintiff to show that malice is there.

Typically, there's a presumption of malice in private-party-defamation actions. Well, because of the privilege that burden shifts to Mr. Harris to prove the existence of malice. With that burden-shifting he has put nothing in the record to overcome Tietex's good faith. All it is is his big conspiracy theory about them wanting to get rid of him. And there's just no evidence of that in the record.

So because of all of that there's but one conclusion we can reach on the undisputed facts, and that's that the qualified privilege precludes all of the actual statements on which Harris is relying for his defamation claims.

I will -- I think that sufficiently addresses the defamation. So I'll wait and hear what Mr. Lazenby has to say, and then I'll respond.

THE COURT: All right. Mr. Lazenby.

MR. LAZENBY: Thank you, Your Honor.

I apologize. I did not bring another copy of the memorandum I submitted on August 29 in opposition to the previous motion.

Could I ask the Court to see if that's in the clerk's file?

(Pause.)

THE COURT: No.

MR. LAZENBY: Again, Your Honor, I apologize for that.

First of all, we disagree with the position taken by Tietex. We think there is an issue of material fact.

Initially, we would like to note that this motion is simply a rehash of a motion that's previously been heard by the Court.

Counsel stated that my primary argument at the original hearing on summary judgment was that we hadn't had a chance to conduct discovery. That's false. That's simply not true.

If you look at my memorandum and the attachments thereto the section on page 12, the last paragraph, where I cite to the three memoranda that form the basis of the defamation claim I cite to extensive testimony in the record which refutes Tietex's position with regards to those memos.

Tietex says, well, these are -- these were good-faith, fair memos, this is just documenting work performance, it's

completely normal.

Our contention is, is that they're lies. They're mistruths and that those -- and we've cited in the record numerous testimony that contradicts those statements in the memoranda.

So when Judge Addy ruled, he ruled and denied the motion for summary judgment. And I'd like to hand the Court the order that Judge Addy signed unless you have it handy.

THE COURT: Well, I don't know if I've got it handy or not. Not as handy as you have got it.

MR. LAZENBY: If I can preface this, Your Honor, by stating that I -- the way that I see this motion I break it down into two separate arguments, one, that collateral estoppel applies, and then, two, there's no evidence that creates a genuine issue of material fact as to malice.

First, if we can look at collateral estoppel, Judge Addy clearly ruled on that argument. Tietex came in here and made a presentation to you just like they did before in front of Judge Addy. And Judge Addy found that the doctrine of collateral estoppel did not apply to the plaintiff's claims and goes into the table outlining why those claims -- why collateral estoppel did not apply.

And the basic reasoning, Your Honor, is that collateral estoppel is a very difficult doctrine to prove

and to rely upon.

In order to prove collateral estoppel you have to -- you have to prove that the issues that you're trying to foreclose in the subsequent action, that those were necessarily decided in the previous case. Those were that they were the but-for cause of denying the motion.

And in this case we're dealing with an A.D.E.A. claim. And in an A.D.E.A. claim the plaintiff has a burden of establishing that there was -- has to establish that he met the expectations of his employer, that he met the subjective expectations of his employer.

The Court ruled -- and the order is attached to my memorandum; it is attached to the defendant's memorandum -- that the district judge found that Mr. Harris failed to carry the burden of proof. He failed to establish that he met the subjective standards of his employer. That's it. That is the only fact that was necessarily determined in that A.D.E.A. claim.

The Court goes on and discusses other issues that would be relevant to an A.D.E.A. claim had Mr. Harris met that initial burden. But, Your Honor, everything that the Court finds after that is not a finding that can be relied upon and used as a basis for collateral estoppel because those findings were not necessary. They weren't necessary to finding there was no A.D.E.A. claim.

It is true that our defamation claim is based on the fact that Mr. Wallace, Mr. Harris' immediate supervisor, generated memos, submitted those to management and used those to get Mr. Harris fired.

Now, if, as counsel claims, that those -- that the facts had been decided that that was all done in good faith and that those were true, if those had been decided the Court would have dismissed the defamation claim. But the Court didn't. The Court remanded the defamation claim down to state court.

And, Your Honor, Judge Addy's ruling goes into all of those reasons and makes a specific finding that because only the issue of meeting the employer's expectations -- because that's the only issue that is determinative in the case. That's the only thing that can work for collateral estoppel. So they're rehashing the same argument trying to get another judge to rule differently.

But I think if Your Honor digs into the law of age discrimination and the shifting burdens that apply there this is not a proper case for applying that, applying collateral estoppel to those supposed findings.

Now, as for the facts of the defamation claim, I believe I've already stated at page 12 and 13 of the memorandum I supported or I submitted August 29th before the first motion, I outlined several specific instances

where we can show those memoranda were false. They were simply false.

Now, I think it's somewhat of a new argument that was not raised initially, is this idea of malice. And I think it's significant to understand how malice is proved in a case such as this, which is a -- as counsel pointed out, this is a private -- private-party malice. We're not dealing with a public figure or anything like that.

There is in this case common-law presumed malice because these memos that we have referred to, that counsel has referred to, those memos go to the fitness of Mr. Harris to do this job.

They call him a bad employee, say that he doesn't read test results right. They say that he's not doing his job properly. That in and of itself creates a common-law presumption of malice.

Now, counsel is also right when he says that the burden then shifts to the defendant to prove that there was a conditional or a qualified privilege.

However, if that privilege is abused, then the privilege doesn't apply. And we can prove malice by showing that the -- that the privilege was abused.

In this case the privilege was abused because completely false items or completely false details were put in these memos, and these memos were used to get Mr. Harris

fired. So, and as counsel pointed out, typically it is a jury question to determine whether a privilege has been abused.

Your Honor, there's more than sufficient evidence in the record to show that these memos that Mr. Wallace wrote were lies. They're full of lies, and we're going to show that next week.

It's up to a jury to determine whether that conditional privilege has been abused. And if the conditional privilege has been abused, then common-law malice will apply. Thank you, Your Honor.

MR. ASPER: Just really quickly to address something that I think is critical here in Judge Addy's ruling.

I've stated before we respectfully disagree with Judge Addy's ruling that collateral estoppel does not apply. The entire purpose of collateral estoppel is to prevent the waste of time to relitigate issues that have already been litigated. It's a long-held doctrine, and there's no getting away from it.

While Judge Addy heard our argument, he ruled against us. As I said, we respectfully disagree with that. It's not the law of the case here.

Mr. Lazenby says we're rehashing that. We have a right to because it's not the law of the case. We didn't have a right to appeal that decision, and so we have a

right to continue raising that or else we wouldn't be doing our clients a proper service in this case.

THE COURT: Well, you have a right to raise it, but you don't have a right to just keep filing motions for summary judgment to have it reheard, do you?

MR. ASPER: Your Honor, I would agree with that. And the primary reason for renewing our motion as is made clear in the introduction is not based on collateral estoppel.

We focused on the undisputed facts in the record in this case. We didn't mention the federal court order one time in our memorandum.

We -- in the original motion for summary judgment we made many of these same arguments. But looking at Judge Addy's order, he rules that the motion is denied because the Court finds the doctrine of collateral estoppel does not apply. That's the entire discussion of whether or not --

THE COURT: I understand. But you're not raising the issues of collateral estoppel today.

MR. ASPER: Well, we would argue that collateral estoppel does apply. But that's not what we're relying on primarily for summary judgment here. We're relying on undisputed facts in the record which Judge Addy did not consider at all in his order.

THE COURT: All right.

MR. ASPER: And the reason we're convinced that he didn't go to the merits is because Mr. Lazenby made the argument that summary judgment was premature. And Judge Addy's order, the second paragraph, specifically granted -- or denied a motion we had filed for a protective order to prevent certain depositions and granted him the right to conduct those depositions.

Those depositions never took place, and so now we're back here. We didn't find out that those motions weren't going to take place until January 14th. We filed this motion approximately a week and a half after that.

We renewed it as soon as we possibly could upon learning that the discovery was done in this case. And the facts are what they are.

Mr. Lazenby focuses on several -- or in his memorandum that he's drawing your attention to, pages 12 and 13, the entirety of his opposition on the merits based on these defamatory statements consists of a sentence. It says Harris has explicitly testified concerning the lack of veracity of the contents of these memos. And then he gives you a screen cite of deposition cites.

Well, I'm not disputing that Harris disagreed with what was in those memos. But he's ignoring that Harris admitted the underlying facts contained in those memos many times in other places in his deposition.

The law is clear that a plaintiff cannot create an issue of fact by contradicting his own testimony, and that's what Harris did there. He disagreed with something in one place in his deposition and then he acknowledged it in another place. We are relying on the places in which he acknowledged those facts. And he can't create an issue of fact based on later denials of the same thing.

As far as the necessarily decided and what was decided by the federal court, as you brought up and as I acknowledge we're not relying primarily on collateral estoppel, but that is something that we believe needs to be addressed before we get things in front of the jury in this case, because we believe there are numerous findings of fact that the jury should not be able to hear contradicted based on the things the federal court has already found.

Specifically, the Court found based on the burden-shifting framework for an A.D.E.A. claim that Mr. Harris had not met even a prima facie case. That's taking all of the facts in the fav -- in a light most favorable to him. And they said you can't even meet that threshold burden to show you met your employer's legitimate expectations. They had to reach numerous factual conclusions in order to reach that ultimate conclusion.

There's no way to say that those facts weren't necessarily decided. If you'd prefer that we didn't focus

on collateral estoppel at this point I'll withdraw or I won't go any further on that because we'll raise it again in another -- in another forum.

I think it's important to point out something else about the malice. Even if Mr. Harris disputed whether or not these things were true, that's not the law.

The law is whether or not Mr. Wallace had a good faith belief that what he put in those memos was true. There's nothing in the record to show that Mr. Wallace had anything but good faith.

Mr. Harris disagrees with what's in the memo. And this gets us to really a policy-based argument.

If what Mr. Harris has alleged as defamation is an actionable defamation claim in this state, what does that really mean? That means that every time an employer writes a performance-based memo about one of its employees and somehow has problems with the employees's performance and puts it in writing it becomes a defamation claim that not only a plaintiff can assert and that we have to spend money litigating but that according to Mr. Harris can go all the way to allow a jury to decide.

Ninety-nine times out of a hundred an employee disagrees with their employer's analysis of their performance. And they don't like things that are said about them when they're disciplined. They don't agree with

those things. It's just human nature. But human nature to disagree with someone else's evaluation of your performance doesn't equal defamation.

If we allowed this type of defamation claim to go all the way to the jury, we will turn the qualified privilege, the claim of defamation and the civil court system in its entirety on its head because there will be defamation claims coming out of the woodworks all of the time. Every single performance evaluation would then become an actionable defamation claim. Thank you, Your Honor.

MR. LAZENBY: Just briefly, Your Honor.

I hate to knock his crate of horribles there, but what we're going to prove is that the performance evaluation was false and that Mr. Wallace knew it was false or should have known that it was false. That's a very specific finding that we're prepared to prove.

And one more issue if I may, Your Honor. These factual issues were argued ad nauseam. They were briefed and they were argued before Judge Addy. And Judge Addy did not reference any factual findings in his form 4 order.

But if I can hand to the Court a transcript of that hearing at page 22, line six, the judge references the -- what he calls the tyranny of the scintilla rule.

I'm sure circuit court judges are tired of hearing about the scintilla rule, because the Supreme Court has now

made it such that any disputed fact or any evidence at all that creates the mere scintilla -- a mere scintilla of evidence is not to deny summary judgment.

I think it's clear from what the judge said during the hearing that he was denying the motion based upon the scintilla rule.

THE COURT: All right. Anything else?

All right. I'll review the memorandums that have been submitted and decide the case hopefully by tomorrow.

MR. ASPER: Yes, Your Honor. Would you like for us -- we have several motions in limine that we've gone ahead and prepared.

We'll leave it up to the Court to decide would you like to hear those now, or would you prefer to wait until Tuesday morning assuming we get there?

THE COURT: Well, how long are they going to take?

MR. ASPER: Several will be extremely quick. We can -- we can withhold one until Tuesday. That's the more complex one.

THE COURT: All right. Are y'all ready to hear them?

MR. LAZENBY: Your Honor, I haven't seen these motions. I have no idea what they're going to talk about.

THE COURT: All right. We'll wait until Tuesday then.

MR. LAZENBY: Your Honor, I just have a couple of issues I wanted to raise. I was hoping the Court could --

could help streamline these issues and help us get ready for trial next week sort of like a pretrial conference.

THE COURT: Okay.

MR. LAZENBY: First of all, I would request that the Court require the parties to exchange witnesses that they intend to call at trial by tomorrow.

THE COURT: Well, that hasn't already been done?

MR. ASPER: Well, Your Honor, frankly, we provided copies of our witnesses that we subpoenaed, the actual subpoenas, in conjunction with when he served those subpoenas to Mr. Lazenby.

The only party who has not shared his witnesses with the other is Mr. Lazenby. We specifically requested copies of his subpoenas, and he said I don't believe I'm required to give those to you under the rules.

MR. LAZENBY: I just wanted to have a pretrial hearing where the Court could order that we exchanges witnesses. I don't know if that's all of their witnesses. I don't know if they intend to call Wade Wallace or David Wilson or --

THE COURT: All right. Y'all exchange witness lists.

What else?

MR. LAZENBY: Your Honor, I think it's also -- would be helpful to -- for us to meet on Monday and look over exhibits that each side intends to introduce so that we can determine whether there are any objections that we can try

to work out before the trial on Tuesday.

THE COURT: Well, y'all can do that before Monday. Y'all can do that tomorrow too.

MR. LAZENBY: Your Honor, I'm not sure I'm going to have all of the exhibits pulled together that I need by tomorrow.

THE COURT: Okay. Well, y'all do it on Monday.

MR. LAZENBY: Thank you, Your Honor.

MR. ASPER: And that's fine. We have no objection to that, Your Honor.

THE COURT: Good.

MR. LAZENBY: Next, Your Honor, we have a claim for punitive damages, and I just want to -- and I don't think there's going to be objection to this, but that any evidence that relates to punitive damages, the amount of punitive damages, should be bifurcated. And in the event the jury finds the necessary findings that we can present that evidence at a subsequent hearing.

I mean, otherwise I'm going to be asking their president about the net worth and all of these other issues going to punitive damages.

MR. ASPER: If those are the sole -- not knowing what all issues he's talking about as leading to punitive damages, that's hard to really respond to.

THE COURT: Usually -- usually the defense is the one

that wants to bifurcate it.

MR. ASPER: That's right, and that's where I --

THE COURT: Well, throw you off guard?

MR. ASPER: I'm a little confused as to where this is coming from, Your Honor.

THE COURT: Well, do you object to it?

MR. ASPER: We don't have any objections if that's --

THE COURT: Okay. That sounds good to me.

MR. ASPER: Just to be clear, will it be based on finding all of the liability clear and convincing evidence that punitives are proper before we have this separate hearing?

MR. LAZENBY: I'm saying that I'm not going to put up any evidence of --

THE COURT: It's exclusive to punitive damage.

MR. LAZENBY: It's exclusive to punitive damages.

MR. ASPER: Right. We'll only get to that point if --

THE COURT: In other words, like net worth of -- net worth of defendant is not appropriate to be inquired upon determining liability. But it is on punitive damages.

So any -- any evidence that relates exclusively to the appropriateness of an award of punitive damages will not be discussed during the liability portion of the trial.

MR. ASPER: Yes, Your Honor.

My only question was whether we will wait on a finding

from the jury that there is clear and convincing evidence to support a --

THE COURT: That would be true.

MR. ASPER: Okay. Yes, Your Honor.

THE COURT: In other words, the jury would have to make a finding that it's been proven by clear and convincing evidence.

MR. ASPER: Yes, Your Honor.

THE COURT: And so if so, then we'd have a separate hearing to present evidence as to punitive damages award.

MR. LAZENBY: Two more matters, Your Honor.

THE COURT: Is that what -- did I understand correctly?

MR. LAZENBY: Yes, Your Honor. I think it's all set forth in the statute, so.

THE COURT: Okay.

MR. LAZENBY: Thank you, Your Honor.

Next, I served subpoenas, trial subpoenas, on two officers of Tietex -- Wade Wallace and Martin Wildman. I served those last Wednesday.

Mr. Suggs indicated in an e-mail that he would object to those trial subpoenas. And I'm hoping we can work out any issues regarding that now.

MR. ASPER: Our objection, Your Honor, is that just as Mr. Lazenby said these were served on us last Wednesday.

We intended or planned to go to trial on Monday.

These are the owner and president of the company or former president of the company who have busy schedules, both of whom have conflicts for this week.

I'm not sure about conflicts beginning on Tuesday. We honestly don't know about their availability for next week. But we did intended to object to having them appear this week for trial based on their availability.

MR. LAZENBY: And, Your Honor, I'll be happy to work with them on their schedules and work their testimony in, but I do think there are some matters I need to present in my case in chief from those witnesses.

THE COURT: Have their depositions been taken?

MR. LAZENBY: They were -- the deposition of one has been taken -- Wade Wallace. But the deposition of Mr. Wildman has not been taken.

THE COURT: Is that the one that was scheduled for January?

MR. LAZENBY: Yes, sir.

THE COURT: Why wasn't it taken?

MR. LAZENBY: Your Honor, unlike Tietex, we do not have unlimed resources to take depositions. We looked at the facts, looked at the documents. We felt like we could present our testimony of Mr. Wildman without the aid of a deposition.

THE COURT: Did you serve him with a subpoena and the $25 witness fee and his mileage?

MR. LAZENBY: I did, Your Honor.

THE COURT: And y'all object to that?

MR. ASPER: We objected based on appearance this week. We'll need to check with him regarding availability.

THE COURT: Well, y'all check. Do y'all want it continued if he can't come?

MR. ASPER: We do not want a continuance. But if he's unable to appear we don't want that to be held against him individually.

MR. LAZENBY: Your Honor, we'd like to know as soon as possible. We spent a lot of time preparing for this trial and are participating going forward on Tuesday.

THE COURT: Well, I don't think I would have to mediate that. Y'all need to talk about that.

In other words, when y'all come to court you're not supposed to be asking me what I can get y'all to talk about and agree to. Y'all are supposed to talk about and agree or disagree before you come here.

MR. LAZENBY: And, Your Honor, they made it clear that they were objecting to these subpoenas, which is why I brought that to your attention.

THE COURT: Okay.

MR. ASPER: And our objection was based on this week,

Your Honor. I honestly am unaware of their schedules for next week.

THE COURT: All right. Well, we know we weren't going to try it this week by now. So y'all haven't talked to the witness?

MR. SUGGS: I have not.

THE COURT: All right. Well, I guess they'll need to be here then.

All right. What else?

MR. LAZENBY: Your Honor, the only other issue I had was that counsel had brought up the issue of mediation or possible settlement. And I didn't know if that's something the Court wanted to inquire into and see if a mediation would be beneficial. We've not --

THE COURT: I wouldn't have the slightest idea if it would be beneficial. It doesn't sound like it would be, but I don't have any idea.

MR. LAZENBY: That's --

THE COURT: That's up to y'all to make that determination. But mediation should have taken place a long time ago.

MR. LAZENBY: I agree, Your Honor. It's something that can be discussed in a pretrial conference, and that's the reason I brought it up.

THE COURT: All right. Well, y'all discuss it. If

y'all think it's beneficial, then we'll talk about it. But I don't care one way on another. Right now this case is supposed to be tried this week. It's been put off until week. So if y'all wanted to mediate it, y'all could have done that this week I guess while you were out there on that site visiting.

MR. LAZENBY: Your Honor, those are all the issues I have.

MR. ASPER: I don't have anything else at this time.

THE COURT: All right. Thank you.

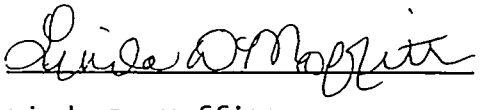
END OF REQUESTED TRANSCRIPT OF RECORD

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 6th day of February 2014.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

March 27, 2014



Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG 2011-CP-42-4538

Gary G. Harris,

Plaintiff,

-vs-

Tietex International, LTD,

Defendant.

COPY

TRANSCRIPT OF RECORD

August 30, 2013
Spartanburg, South Carolina

Ordered: November 20, 2013

Delivered: January 5, 2014

B E F O R E:

THE HONORABLE FRANK R. ADDY, JR., Presiding Judge.

A P P E A R A N C E S:

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Mr. Frederick Suggs, Esquire
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ARGUMENTS OF COUNSEL

Mr. Suggs..... 3

Mr. Lazenby..... 9

Mr. Suggs..... 17

Mr. Lazenby..... 19

Mr. Suggs..... 20

EXHIBITS

Plaintiff's Exhibits:	**Marked:**	**Received:**
(None)		

Defendants' Exhibits:	**Marked:**	**Received:**
(None)		

Reporter's Certification..... 25

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REPORTER'S NOTES: Some of the names in this transcript are spelled phonetically.

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August 30, 2013 9:32 A.M.

(Off-the-Record Comments)

THE COURT: All right. I think that the first case up is the *Harris vs. Tietex* case; is that correct?

MR. ASPER: Yes, Your Honor.

THE COURT: Very good. I've received the binder — we've received the binder and information from — on the Defense motion, concerning the Defendant's motion.

And I — I believe that the Plaintiff has filed something this morning, which — or at least we got it this morning. I've not had a really good chance to review it. I know it was emailed to me, but I — I've — I really not had a chance to look through this.

So we can go forward and see where we stand. But I'm going to obviously want a chance to look at this a little bit harder.

I think we have four motions this morning: Summary judgment, a motion to compel, a motion to stay discovery, and for a protective order. Let's take up summary judgment first may I suggest.

MR. SUGGS: Yes, Your Honor. And I think some of those other motions may fall by the wayside; for example, the motion to stay discovery.

THE COURT: Yes, sir.

MR. SUGGS: Mr. Lazenby and I have a deal that we won't proceed with discovery until this motion is decided.

THE COURT: That will work out fine for me.

MR. SUGGS: But we will need some guidance —

THE COURT: Sure.

MR. SUGGS: ---- on certain proposed depositions. So, if discovery cranks back up, we'll know where to go.

Your Honor, I'm Fred Suggs. And with me at counsel table is Lucas Asper. We represent Tietex. And I have given Mr. Lazenby 8.5" by 11" copies of these charts because his view is not direct.

What happened is Harris filed a lawsuit against Tietex in this court. And we removed it to the United States District Court. And Judge Michelle Childs had the case. And, in federal court, employment cases go first to the Magistrate.

And, in that first action, which was the — the action that was moved – removed to federal court, Mr. Harris claimed that he had been discharged because of his age. So he claimed a violation of the Age Discrimination and Employment Act.

He also claimed breach of contract, breach of contract accompanied by fraud, and defamation.

Now, the federal Court found for summary judgement in favor of Tietex on the age claim and declined to exercise supplemental jurisdiction over breach of contract, breach — breach of contract accompanied by fall — by fraud, and defamation.

Well, after summary judgment was granted, Mr. Harris filed a pro se complaint in this court. Later he hired Mr. Lazenby and a amended complaint was filed.

And it id not allege age discrimination, but it alleged the other same causes of action; breach of contract, breach of contract accompanied by fraud, defamation, and a new claim of intentional infliction of emotional

distress or outrage.

Now, all of these claims arise from the same set of facts. All of them evolved from Mr. Harris' employment and his separation from employment.

Now, the district Court's ultimate finding was that Harris was not performing up to Tietex's expectations; that Tietex had a legitimate reason to terminate Harris' employment. And that Harris did not prove that any of this was protectual (phonetic).

In this current lawsuit, Harris is claiming he was performing to Tietex's expectations; that Tietex told lies about him. And all the memoranda and warnings that he received were lies and protectual.

And our contention is that all of those claims are barred by the doctrine of collateral estoppel. And it's not just these three ultimate findings that we're talking about, but the Magistrate judge's first nine pages of his recommended order, which are in the binder that we've presented to the Court, and which was adopted by Judge Childs in toto, make very specific findings of fact on the very same kinds of allegations that Mr. Harris is making in this case.

Now, as to the defamation claims, there were claims in the prior action. And it appears that the Plaintiff has a good argument as to those claims that were previously litigated, although not decided, that the statute of limitations was tolled.

But, in this case, there are new defamation claims; claims that were made for the first time in the pro se complaint and an additional claim that did not arise until Mr. Harris was deposed in this second case.

Well, those defamation claims arose in February and July of 2007. The pro se complaint was filed in October, 2011. That's four plus years. And

we've got a two-year statute of limitations.

So those new claims are barred by the statute. The same with the new outrage claim.

The latest it could be was the date of this termination. The earliest an action was taken was October 21, when the pro se complaint was filed; again, four years with a three-year statute.

We would contend that the new defamation claims and the outrage claim are barred by the statute.

(Brief Pause)

MR. SUGGS: Also, those defamation claims, which were brought for the first time in this case, and the intentional infliction of emotional distress claim, could have been made in the first action but weren't. And because they could have been made and were not made, they're barred by the doctrine of res judicata.

So, Judge, we would contend that there isn't any discovery that the Plaintiff could undertake that would allow the Plaintiff to afford the application so the doctrines of collateral estoppel or issue preclusion and the claim of res judicata and the bar of the statute of limitations.

But, if the Court will permit me, I'll talk just a little bit about the facts. Breach of contract, Mr. Harris admitted in his deposition that he was employed at will; that he understood he was employed at will. That he didn't have any contract of employment.

He said that there was a handbook and that there was a progressive disciplinary policy in the handbook. He didn't have the policy and could not articulate what it said. But that was looking at the facts most favorable to him,

that was his allegation of what a contract is.

Well, the Court will find in the record an affidavit by Pam Griffin, who is the HR manager at Tietex, who says under oath that Tietex has never had a handbook.

And, if you look at what the district Court said in its findings of fact, even if there was a handbook, and even by some stretch it was a contract, there was no breach because the Court found that Tietex had good cause to terminate Harris' employment.

And, then, if the breach of contract claim falls, the breach of contract accompanied by fraud falls as well. And, then, we come to defamation.

Now we had a telephone hearing with Judge Couch. And, during that telephone hearing, Mr. Lazenby told Judge Couch that he wasn't talking about a slander; that he was talking about defamation based on written documents or libel.

And what Mr. Harris is claiming are defamatory are documents written by his supervisor, Wade Wallace, critical of his performance, which Harris says is untrue, but which the district Court relied on to find that his discharge was appropriate and non-discriminatory.

But those documents were transmitted by Mr. Wallace to Mr. Wallace's boss, Mark Isbel (phonetic), and to the HR person, who was named David Wilson (phonetic). And Mr. Harris confesses that he doesn't have any evidence that those documents were transmitted to anyone else.

So based on what the district Court found the documents were true, which eliminates the claim of defamation. They will also qualifiably(phonetic) privileged in that they were distributed only among management and, then,

just a limited number of managers, the HR manager and Wade Wallace's boss.

So there was no publication beyond the publication that was qualifiably privileged.

And, as to the outrage claim, if you just look at the facts, what Mr. Harris says is that, in talking with him about the timeliness of a project, Mr. Wallace raised his voice. And that certainly doesn't qualify as outrage under the law of our state.

I'll be happy to answer any questions the Court has.

THE COURT: Here's the — the central question I have: The federal Court, in deciding not to exercise jurisdiction over the state law claims, the breach of contact, et cetera, in their opinion I understand that they've made certain findings of fact with regard to the age discrimination complaint under the ADEA.

But those findings of fact are necessary to dispose of that federal claim. Why couldn't they be able to pursue their cause of action in state court for breach of contract when the feds didn't ultimately — or the federal courts didn't ultimately address those claims?

MR. SUGGS: Judge, I will confess it would have been a lot simpler had the federal Court addressed the claim. But that seems to be their policy over there; they just -- they'll decide the federal claim and won't decide the state law claim. But that doesn't really address the Court's question.

The issues that the district judge and the magistrate judge decided are the very issues that Mr. Harris is attempting to use to support his claims —

THE COURT: For breach of contract.

MR. SUGGS: — for breach of contract and defamation; the same set of facts, same issues.

And, when — when the Court says for example, "We are relying on these memoranda that Mr. Harris is claiming are — now claiming are defamatory," I don't know how he does that.

I mean, he claimed in — in the underlying federal court litigation, that those memoranda were untrue; that they were lies. That they were meant to frame him. And the federal Court didn't buy it. And he's making the same claim here.

(Brief Pause)

THE COURT: All right. Mr. Lazenby, let me hear from you, sir, please.

MR. LAZENBY: Thank you, Your Honor. And I think with regard to the — to the collateral estoppel issue, you — you raise a very good point.

If the district Court had, in fact, found all these things, had found them, there was no legitimate reason for — for Mr. Harris' complaints and that he did an awful job as a matter of law and all of that, then, the Court would have ruled on those matters because there's a policy in the — in the — in the court system not to — not to send cases back when you have all the information to adjudicate them right then and there.

It's significant, Your Honor, with collateral estoppel — we've — we've cited a couple of cases in our — in our brief about how collateral estoppel is — is to be applied; how it's to be applied judiciously. And how the — the key phrase there is that it has to be absolutely necessary to the determination of the underlying action.

It's very rare that you see collateral estoppel being used in — in separate causes of action with separate elements, especially in the area of law like this with the ADEA. And, although this not an ADEA case right now, we have to delve into that.

And — and it's — it's fairly simple. In order to prove an ADEA claim, you have to prove that your age was the but for cause of your termination. And we would agree that, that issue is collaterally estopped.

We cannot allege in this case that Mr. Harris was terminated because of his age. That is the only issue that is precluded from us in this case.

I go on to discuss in the — in our memo the additional — the additional requirements the -- the Court can — or an ADEA Plaintiff can prove age discrimination by direct evidence. His boss said, "I fired him because he was old."

Or you can do it by circumstantial evidence. And it gets into the — into the burden shifting analysis.

And, Your Honor, the — the Court applies -- the Court applies a — an analysis where it determines...

(Off-the-Record Discussion)

MR. LAZENBY: "...Using circumstantial evidence in a ADEA claim – and I'm reading from Page 5 of my memorandum — that — that the plaintiff can establish a — a prima facie case for age discrimination if you prove that he's a member of a protected class, that he suffered an adverse employment action.

Those first two are not contested. He was over the age of 40 and he was terminated.

The third one is that he was performing his job duties at a level that met his employer's legitimate expectations at the time. And, then, four, the position remained open or was filled by a similarly qualified applicant.

The only issue that we are concerned with here is — is Item 3, that he was performing his job duties at a level that met his employer's expectations. And what the Court found is that Mr. Harris did not prove that he was meeting the — his employer's legitimate expectations.

And the Court analyzed it based upon the standpoint of the Defendant. And it's — if you look at I think it's Exhibit A to the — to the Defendant's memorandum, Page 14.

This is the — the memorandum of the magistrate judge. The third full paragraph —

(Brief Pause)

THE COURT: I'm having trouble finding it. Go head and read it to me and I'll — I'll keep looking here. You say it's "A"?

MR. LAZENBY: It's — it's Exhibit A to the — to the — to the Defendant's binder. I think it would be "B" in our binder, Your Honor.

(Brief Pause)

THE COURT: Okay. There you go. All right. Go ahead.

MR. LAZENBY: Okay. Now the Court here is — is addressing whether the — the Plaintiff has made a prima facie case.

The third full paragraph begins, "First, the Defendant argues the Plaintiff was not performing the job at a level that met the Defendant's legitimate expectations. The Court agrees. As set forth above, the Defendant articulated the deficiencies in the Plaintiff's performance."

What's significant here, Your Honor, is that this determination is made based upon the subjective view of the Defendant employer.

The very sentence the Court says, "the Plaintiff attempts to contradict Defendant's dissatisfaction with his performance by his subjective assessment of himself as a valuable, outstanding, and exemplary performer.'

The Court there is acknowledging that there is contradictory evidence. The Defendant says he's not doing a good job; Plaintiff says that he is doing a good job.

But, for the purposes of an ADA — ADEA claim, in this context of proving a prima facie case, the Plaintiff has to — has to establish that he was meeting it even with the employer's own perception.

And I think the last sentence of that paragraph is — is important. It says "The perception of the employer is critical, not the self-assessment of the Plaintiff," citing the *Hawkins vs. Texaco* (phonetic) case.

So, right then and there, Your Honor, we — we say that the magistrate judge acknowledged that there was a contradiction of fact, but because of the way that the ADEA claim is analyzed, that the Plaintiff just didn't — just didn't prove it.

Well, that — you can't argue the converse; that the magistrate necessarily found that he did an awful job; that's — that's what the Defendant is trying to do in this case.

And — and this is exactly why collateral estoppel shouldn't apply when you have different burdens of proof, different standings, and different ways of proving causes of action.

(Brief Pause)

MR. LAZENBY: And also too, in an ADEA claim — or in this case, the Court specifically found that the Plaintiff did not make a prima facie showing. So that right then and there ends the Court's analysis.

That — that is all that is necessary for the magistrate judge and the district Court to find that there's no ADEA claim.

The Court does go on and — and discuss whether there is a — whether there's a — a legitimate reason for — for termination, but that's — that's dicta. That's not — that's not pertinent to the decision because the Court has already found that there's no prima facie case.

THE COURT: Okay. Let's move along a little bit. The defamation and outrage causes of action with a two-year statute of limitations. Outrage wasn't pled in the initial complaint.

MR. LAZENBY: Yes. First of all, Your Honor, this case was -- you know, Counsel — you know, words and how we use them is — is really important in — in politics as in law.

Counsel was very good at articulating, "This is a new case. "This is a second case." Well, this is the same case. We've gone to the state court. We — it was the Defendant —

THE COURT: Right.

MR. LAZENBY: --- that removed it.

THE COURT: Right.

MR. LAZENBY: So really it's — it's part and parcel one and the same case. And — and, as Your Honor knows, amendments to — to pleadings relate back to the same — well, let — let me just say this, my — my position on the statute of limitations is this: The — the statute of limitations,

any statute of limitations that existed with regard to defamation, breach of contract, breach of contract accompanied by fraudulent acts, and any claims that Plaintiff had that — that arose out of the same nexus, were tolled as of August 15, 2008.

So we're talking about a period of time I think the earliest that — that Plaintiff 's outrage claim arose was in February of 2007. So we talking about a year and a half right there.

28 USC 1367(d) (phonetic) states that, "When a — a Court dismisses dependent claims, that the — that the statute of limitations is tolled during the pendency of that suit, including 30 days thereafter."

And I printed this off just to show the Court the — the under ---

(Documents handed up.)

MR. LAZENBY: And what I'm handing the Court is the mandate from the Court of Appeals. Mr. Harris pro se appealed the summary judgment motion or the summary judgment ruling in the district court.

And so the — the – the order finally dismissing his ADEA claim was not decided and made final until August 3, 2011.

And, according to 28 USC 1367(d), the statute is tolled during that federal case. It was tolled from August 15, 2008, not only up until August 3, 2011, but, then, 30 days thereafter.

And that takes us to September 2, 2011. Mr. Harris re-filed the state court claims, that were dismissed by the federal court, on October 21, 2011.

Mr. Harris claimed that he did not get this mandate back from the Court. He did not — he was not on this --- this payster (phonetic) system, but he went on and just filed a new case out of an abundance of caution.

But the point is, Your Honor, we've got the statute running for 18 months before suit was filed in August of 2008. We've got the statute running again, for approximately seven weeks, between July — I'm sorry, between September 2 and October 21 of 2011. And the filing of that suit, again, stops the — the running; it tolls the running of the statute of limitations.

So, at the time that — that I asserted the outrage claim, only 18 months and seven weeks of the statute had run.

That's — that's our position, Your Honor.

THE COURT: All right.

MR. LAZENBY: Has to the defamation, we contend the -- the – the defamation is not a — it's not a new claim; it's just additional evidence. When -- when cases are developed, you develop the evidence.

I think it's significant that federal court is a notice pleading jurisdiction. You don't have to plea specific facts.

When I got involved in the case, and filed a — a complaint in state court, South Carolina, as you know, is a fact pleading state. And so I set forth the facts that support the cause of action.

Your Honor, this is not a new claim. The de — it's the same defamation claim as before. So we contend that there is no issue at all with regard to the — the statute of limitations as to the defamation.

THE COURT: All right. Fair enough. I agree.

MR. LAZENBY: Outrage, my — my argument is that the — that the statute for the outrage claim ran for 18 months.

THE COURT: I don't disagree.

MR. LAZENBY: Okay.

THE COURT: We're getting into the merits now. Is the only thing that you've got to prove outrage that he got yelled at?

MR. LAZENBY: Okay. As far as — as far as the — the merits of the case, Your Honor, I've taken one deposition in this case.

THE COURT: Okay.

MR. LAZENBY: I had to fight to get that. After I deposed the – the representative for six hours and we even continued till the next day, Defendant fought that; filed a motion to — to keep me from deposing him again. We finally got that done.

I, then, noticed around five depositions. And Defendant immediately filed a motion to stay discovery until this summary judgment could be heard.

It is clear that I have not had a full and fair opportunity to complete discovery. I would simply argue that just on that record, the — the fact that — the fact that — that we have not been able to complete discovery, should preclude summary judgment on — on any factual issue in this case.

What I did in my brief, Your Honor, is cite to the testimony of — of Mr. Harris. And it wasn't — it wasn't raising his voice which I think is what Counsel said it was. My client described it as berating and yelling and that my client was scared. And it was — it was bad conduct.

And — and so, substantively, we would disagree with that. But we would also say we — we need more time to — to develop this. It's premature to grant summary judgment on any factual basis.

THE COURT: All right. I understand your position.

MR. SUGGS: Judge, may I be heard?

THE COURT: Sure. Please.

MR. SUGGS: It's not quite true that there's only been one depo in this case. For example, Wade Wallace, who was deposed on two separate days, over our strenuous objection, was deposed in the first case.

Likewise, two of the depositions that Mr. Lazenby seeks to redo were taken in the first case. And, you know, these laymen are saying, you know, I've already been deposed.

So I — I think that's — and it's the same — Judge, we had a hearing before Judge Cole, when I was trying to stress the deposition — the second deposition, of what it was. And Judge Cole admonished Mr. Lazenby not to re-plow the same ground.

And it was re-plowed for a day and a half.

MR. LAZENBY: And I disagree with that contention, of course. We -- we both have our opinions on that.

THE COURT: All right.

MR. SUGGS: Judge ----

THE COURT: While we're on the subject of discovery, what kind of assistance or guidance do you feel like you all need assuming for the moment I were to deny the motion for summary judgment and this were to continue?

MR. SUGGS: Judge, what —what we have before the Court is our motion for a protective order; that the depositions of the owner, Mark Waldman (phonetic), and the president, Reid Cunningham (phonetic), not be taken.

We submitted affidavits from each of these gentlemen. The most involvement that they had was approving Wade Wallace's and David Wilson's

recommendation that Mr. Harris be terminated, which is, of course, with the standing of rules of the Plaintiff; that, you know, if anybody is going to be terminated, it's going to be reviewed at the highest level.

And they just took under advisement what Mr. Wallace and Mr. Wilson presented. They don't have any firsthand knowledge.

And it's — I know it's not lost on the Court that we're talking about stuff that happened six years ago, 2007. And it's completely unnecessary to take those depositions.

And I suspect that Mr. Lazenby is doing it to satisfy his client. But they're not necessary to the suit or the Plaintiff's case.

THE COURT: How big is this corporation?

MR. SUGGS: Sir?

THE COURT: How big is this company, Tie — Tietex?

MR. SUGGS: They have one plant here in Spartanburg. And I — I don't know how to describe their size in terms of sales. They've — they've got about 300 employees here. And — and they've also got a plant in Asia.

Basically they're a textile company. And they make non-wovens like fire retardant fabric for bedding. And ---

THE COURT: I ask — I simply ask the question because I would — and how many employees it has, how many folks, how many plants, how big the operations are, that will determine very often how hands-on management is, or at least the upper management. That's the reason I'm asking the question.

MR. SUGGS: Well, you know, the owner is not involved in the day-by-day management whatsoever.

THE COURT: All right.

MR. SUGGS: Now the president obviously is. But he — he was not involved in the events leading up to Mr. Harris's discharge.

THE COURT: A typical hierarchical corporate structure?

MR. SUGGS: Correct.

THE COURT: Okay.

MR. SUGGS: Yes, sir.

MR. LAZENBY: Can I briefly respond? First of all, as — as to the time, I — I sympathize; however a lot of this delay is because I've been fought at every step of the way.

To amend that complaint, I had to wait six months to get a hearing to amend the complaint. To depose a witness, I had to wait three months to get a hearing so I could depose a witness. The delay is not the fault of the Plaintiff.

What I think is particularly significant, Your Honor, is that in the federal court case the Defendant was required to — well, all parties are required to file interrogatory answers listing their witnesses.

THE COURT: Uh-huh (affirmative).

MR. LAZENBY: And, on Page 5, you will see — and — and keep in mind this is the case that — that Mr. Suggs says is the same case in the federal court as it is here. On Page 5, Reid Cunningham and Mark Waldman are both listed as witnesses.

And also Mister — as far as the apex document is concerned, Mr. Wallace testified that — that this decision to terminate Harris, which is the basis of the lawsuit, would have been run up to Cunningham and Waldman.

And I think even, in the affidavit that was submitted with this motion for a protective order, Cunningham and Waldman admitted that they were involved in terminating Mr. Harris.

I — I just don't understand this — this motion, Your Honor.

MR. SUGGS: Judge, with respect to the document that he's handed up, which is the Defendant's response to the 26.03 interrogatories, that was one of the first documents filed in the case. And, obviously, we disclosed what we knew at the time.

(Brief Pause)

THE COURT: I understand, but if — if the Defense lists them witnesses and states that Waldman and Cunningham, quote "Will know about Harris's employment performance, Tietex's policies and procedures, the facts and circumstances surrounding Harris's termination from employment ,and the distribution of duties performed by Harris after his termination," if these two witnesses know all of that, then, perhaps they need to be deposed.

MR. SUGGS: Judge, I think, with the passage of time, and from what I know now from listening to Mr. Wallace that their — that their firsthand knowledge is extremely limited.

If the Court is inclined to allow Mr. Wallace [sic] to depose them, then, we would ask that the Court impose a limit of no more than two hours.

THE COURT: All right. All right, it's hard for me to — to impose that kind of limitation when I really don't know the extent to what they're going to testify to or what they know at this point.

And I was with you until I was told that they were listed as witnesses by the Defense in the federal litigation. So we are where we are.

MR. SUGGS: We never — we never used them. We never submitted an aff — an affidavit from them. They were never deposed. We listed them and — and essentially forgot about them.

THE COURT: And I — I understand parties are bound by their pleadings, though, and this apparently was filed. It was Defendant's response to interrogatories. It was filed; they're fair game.

MR. SUGGS: All right. Judge, I'd like to make just a couple of other points.

THE COURT: Certainly. Yes, sir?

MR. SUGGS: On — on the scope of the tolling, that — we disagree with Mr. Lazenby's take on the defamation claim because we've cited in our memo the fact that the defamation claims have to be looked at separately. It's not just one claim; it's like seven separate claims.

But, even if you view them like Mr. Lazenby does, the Fourth Circuit mandate was filed August the 3rd. The judgment took effect on May the 31st.

Well, if you take the later date of file of August the 3rd, 2011, the pro se complaint was filed on October the 21st, more than thirty (30) days. So they don't get the statutory protection that Mr. Lazenby was arguing to the Court.

We would also point out that to — to say that it's the same case, for purposes of relation back, is a little bit disingenuous. I mean, we do have two different case numbers.

(Brief Pause)

MR. SUGGS: And I think that, when you set aside the argument based on collateral estoppel and res judicata and the statute of limitations, and you look at the underlying factors — I've had a brief opportunity to look at

Mr. Lazenby's paper and to listen to his argument.

And I just don't hear any genuine issue of material fact on any issue. I think those facts have been decided. And that they -- if the — if the judge — if you look at our memo, and you look at the fact section of our memo, nearly everything we cite to is from the federal Court's opinion.

THE COURT: And — and I — I do understand that. And I appreciate your position a hundred percent (100%). And, in South Carolina in state court, as you're well aware, we're dealing with the tyranny of the — the scintilla rule.

The feds aren't under the same sort of constraints with the federal rules as I feel like our courts have — have indicated to us.

And, in all candor, if there are causes of action that were removed -- state causes of action that were removed to federal court, those causes of action haven't been decided.

There has not been any specific — I understand that the federal Court had to make specific findings, with respect to the age discrimination complaint, but I don't see where the state causes of action for breach of contract, et cetera, were ever decided.

MR. SUGGS: Well, Judge, they weren't. And ---

THE COURT: And I feel they should have a bite of that apple.

MR. SUGGS: What the Court says is -- and it cites *United Mine Workers vs. Gibbs* (phonetic), which is a 1966 case, and parenthetically says, "Certainly, if the federal claims are dismissed before trial, even though not as substantial in the jurisdictional sense, the state claims should be dismissed as well. " And that's what the Court did.

Now, I must confess, when I got the Court's opinion, I was disappointed because I looked at the opinion and I said, you know, "A Court has made every factual finding it needs to — to decide these issues, but, then, didn't do it." And — and I think that's where we are.

All of the issues have been decided. And that's what the doctrine of collateral estoppel is for.

THE COURT: And — and I — I hear you a hundred percent. I read the order, but the order specifically — the order from Judge Childs specifically said, "We're not deciding the state law claims." And they could have.

MR. SUGGS: But I would say, Judge, it doesn't matter they weren't decided because the facts were decided that Mr. Harris tries to rely on to support his claims that are before this Court.

THE COURT: All right. I — I appreciate your position. And I do understand. Perhaps it would have been better to keep the whole thing in state court.

Let me look at the memorandum again and I'll get you all an order in the next day or so.

MR. SUGGS: Judge, Mr. Lazenby and I are both willing, if — with the Court's indulgence, to submit proposed orders.

THE COURT: That — that is fine. I feel like I have enough to at least issue a Form IV. And, then, I'll contact you all instead of having each of you spend your time working up an order.

I don't see any reason to do two orders when — when whoever wins can write the order, so...

I don't take a lot of things under advisement, gentlemen. I usually rule within a matter of days. I think I currently have two things under advisement and one is a PCR from April where the attorneys wanted to get the transcript on a homicide case; I gave them a chance to do that.

So I — I typically try to move pretty quick. You all are not going to be waiting long to hear from me. I promise you that much.

Gentlemen, thank you all very much.

MR. LAZENBY: Thank you, Your Honor.

MR. SUGGS: Thank you, Judge.

THE COURT: Good to see you.

(Whereupon the proceeding ended at 10:24 a.m.)

REPORTER'S CERTIFICATE

I, the undersigned **PAMELA FAUCETTE**, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 24, were transcribed by me and represent a true and accurate transcript of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

December 31, 2013

Pamela S. Faucette - 1/31/14
Pamela S. Faucette
Official Court Reporter
Seventh Judicial Circuit

Q: Correct?

A: Yes.

Q: And you interviewed, according to this letter, with Martin Wildeman and the HR Manager, Don Woodward, and the Printing and Finishing Manager, Dave Hughston, and then John somebody. Who's John?

A: John Broughton.

Q: Spell that, please.

A: B-r-o-u-g-h-t-o-n.

Q: Who actually hired you?

A: John Broughton along with Dave Hughston, but John was the key figure.

Q: And you see on this Exhibit 5, the fourth paragraph where you talk about Tietex having a very clean, modern facility. Do you see that?

A: Uh-huh (affirmative response).

Q: And would you agree that the facility stayed clean throughout your employment?

A: Yes.

(Defendant's Exhibit 6 & 7 were marked for identification).

Q: I'm going to give you two together. Exhibit 6 is an Offer of Employment to you and Exhibit 7 is looks like your New Hire sheet. According to these documents, you began working at Tietex on July 13, 1994. Any reason to dispute that?

A: No.

Q: And your salary at hiring was $55,000. Any reason to dispute that?

A: No.

Q: And you were hired as a Senior Research Chemist. Any reason to dispute that?

A: That was the job title, but it did not cover what I was hired for.

Q: All right. And that Senior Research Chemist position was in the Printing and Finishing Department of Tietex, correct?

A: As far as the pay for that position, yes.

Q: As far as the what?

A: The pay.

Q: Well, it says, looking at Exhibit 6, it says in that first paragraph, second line, I'm sorry, first line, "We are pleased to offer you the position of Senior Research Chemist in our Printing and Finishing Department." Do you see that?

A: Yes, sir. That's what it reports to, but it doesn't spell out the responsibilities were plant wide.

Q: Okay. So Exhibit 6 is not a job description, right, it just states the name of the job?

A: Yes.

Q: And you reported to Dave Hughston, the Plant

Manager of Printing and Finishing?

A: Yes.

Q: Now, if you will look, please, at Exhibit 6, the second page, which is Bates Numbered 229. Do you see the bold underlined language that's two paragraphs above Mr. Woodward's signature?

A: Yes.

MR. STEWART: Objection to form.

Q: It says, "This letter summarizes our offer. Nothing herein should be construed as a Contract of Employment or as a promise of any specific terms for any determined period of time. Did I read that correctly?

A: Yes.

Q: So under the terms of your offer, you were employed at will, correct?

MR. STEWART: Objection to form. You can answer, I'm objecting for the record.

Q: Remember what we said, that he might object but you go ahead and answer.

A: Okay. Yes.

Q: And your employment could be terminated any time for any reason, correct?

A: May I add to that?

Q: Sure. Well, give me a yes or no and then qualify it.

Q: Last name?

A: Panell, P-a-n-e-l-l.

Q: Is that a male or a female?

A: It's a man. And what's the girl that had so many difficulties that worked with Rhonda who is another technician? Kay Ward.

Q: So all of these employees that you just named reported to you at some time or another?

A: Yes.

Q: All right. How many usually reported to you at once?

A: I guess at a minimum over the time I was there until I started reporting to Wade Wallace, maybe at any given time a minimum of three or four.

Q: Three or four at a time?

A: Yeah.

Q: What were your normal hours of work?

A: Let me just say that during an approximate six, seven year span, I would say that I averaged a minimum of 70 hours on the job site.

Q: I think my question wasn't clear. On the normal day, what time would you go to work and what time would you leave? What was your expected time to be at work?

A: The expected time, I believe, was 8 o'clock, and I believe the expected time we could leave was 5 with an hour

for lunch. Most of the time, I'm talking about when I was actually involved and this other stuff hadn't started, I would be there 6, 6:30.

A: A.M.?

A: Uh-huh (affirmative response). And stay there for as long as I needed to to get as much done as possible. It wasn't unusual to stay there till 6, 6:30.

Q: Were there safety reasons for you to be at work during regular business hours?

A: Since I was the key person regarding safety, are you talking about chemicals and things I worked with?

Q: Yes.

A: I was the person, the person that made decisions as to what was safe, what was not, maintain the MSDS books for the most of the time I was there and oversaw a lot of that without title, I was the one that was relied upon for making those kind of decisions. And in the first, before I reported to Wade Wallace, there was never one instance where anyone came to me and said you shouldn't be in here on Saturday or Sunday.

Q: Were there reasons that you shouldn't be working alone with chemicals and lab equipment?

A: No.

Q: You claim it would have been safe for you to work alone with chemicals and lab equipment?

A: No. I'm a professional in that area and I know what precautions to take. It would have actually been, I mean, take a scenario where I'm there and the plant's running and I'm working with chemicals, which I didn't do a lot of that, I mean, talking about hazardous chemicals, if I'm working with hazardous chemicals which, again, did not occur but fairly infrequently, I don't want, I'm not going to allow anyone else to be around me because then they would be, if something happened, then they would be exposed to it. There's no one any safer with regard to those kind of things than I. And it gets into the same area I was talking about earlier about being concerned for employee health.

Q: All right. If you had one of these employees that you named working under your supervision, would you permit them to work in the lab not during business hours but work back there by themselves?

A: Well, they did.

Q: Okay. Did part of your duties include working with production personnel in the testing processes?

A: I'm sorry.

Q: When you were working on tests and trials and so forth, things like that, did you need to work with production personnel?

A: That's a pretty broad question. There were times when I did and there were times when I didn't need to.

There were other things more important that I needed to be doing that had to do with that trial.

Q: Were there times when you did not work from 8 to 5 or from 6 to 6 but worked irregular hours?

A: The only time I worked 8 to 5 was when I worked for Wade Wallace.

Q: And why was that?

A: Well, the main basic reason was I was not allowed to work after hours, weekends, or whatever.

Q: Wade Wallace was trying to keep track of you?

A: No, I would not classify it as that, no. There was no point in that.

Q: Did you ever report to work at 10 p.m. at night?

A: Now, when you say that, the first thing that comes to mind is one of the plant trials early on was going to have to be done on third shift which started, say, at 11 o'clock and I needed to go in at 10 in order to be there for the trial. Other than that, with me not being a night person, there's no reason I would go in to do work at 10 o'clock at night. Now, I may have been in there finishing up something at 8, 9, or 10, but there's no reason I'd show up at 10 other than for something like a plant trial.

Q: Did you ever work those hours like coming in on third shift before you reported to Wade Wallace?

A: Oh, I mean, the hours I had, again, I want to

Martin wasn't at work, Martin Wildeman wasn't at work at 2 or 3 in the morning. I left a message and told him I'd like to meet with him if I could.

Q: So you left a message for Mr. Wildeman in the middle of the night?

A: I don't know that it mattered when I left it, because I knew he wasn't at work.

Q: Would it have been like 3 o'clock in the morning?

A: It could have been. It could have been 4, it could have been 2. It was when I woke up and all was on my mind was getting terminated.

Q: So you admit you called Mr. Wildeman like 3 or 4 o'clock in the morning?

A: No. I did not call him, I left a message on his work phone knowing he was not there.

Q: This is Attachment 5 to your communications to the EEOC.

MR. STEWART: Fred, can I see these before you hand them over?

MR. SUGGS: Sure. Sure. Let me show you. Look at the C part which is the last paragraph.

Q: See C part it says, "Tietex stated that Gary Harris made phone calls and left messages in the middle of the night when he knew no one would be there to answer them. Of course, that's a malicious lie."

Q: Now, is this a document that you gave to the EEOC?
A: I would think so. It looks like it.
Q: And then if you look at Exhibit 11 and go down to paragraph C, that's the paragraph that says it's a malicious lie, right?
A: Yeah, that's correct. And may I add?
Q: Sure.
A: I had information already that in one of our former hearings that it was stated in a way that I routinely did that, and it included more than one person and it included Wade Wallace. That's the reason I call it a malicious lie because it's just not true and the person that said that wasn't true.
Q: And who said it, Wade Wallace?
A: In one of our ESC Hearings, maybe the last one, it was brought up. I don't know who to attribute it to.
Q: All right. Now, before Wade Wallace, you said Jake Butts was your immediate supervisor?
A: Yes, sir.
Q: And at some time did Butts move his office from the plant to the lab?
A: He did.
Q: Would that have been about June 2006?
A: Yes.
Q: Do you know why Butts moved his office from the

lab?

A: I can't say yes or no to that. I don't know.

Q: All right. Did you see him just about everyday?

A: I don't know.

Q: Did you see him more often than you had seen him before he moved to the lab?

A: I would have had to have.

Q: Okay. That's what I thought. Did you object to Jake Butts supervising you more closely after Butts moved to the lab?

A: He never supervised me more closely.

Q: Now, when Butts moved to the lab, was your office in the lab?

A: Oh, yeah. There's four sections to the technical building and I was considered to be the Technical Center Manager, an accredited lab area. One section was the office area, another section was the wet lab, another section physical testing, and another section was sort of an extension of the wet lab, but it was where a real chemist would work, and we had a burn room. So, yes. He, obviously, moved into the office area which was huge and the area I had encouraged him to move to.

Q: And at some point did you move your office out of the lab?

A: Yes.

Q: Where did you move it to?

A: Now, let me qualify that and say I didn't move it out of the lab, I just established another office, you might say, we'll call it an office, in the main plant.

Q: Do you know when that was?

A: It was --- I'm going to take a stab at this, maybe December, November, December of 2006.

Q: Did you continue working in the lab up until, say, February 2007?

A: Yes.

Q: When do you claim you began to smell mold?

A: The middle of June '06. Well, whenever the furniture was moved in and that would have been in June.

Q: And what impact do you claim that these mold smells had on you?

A: I'm going to just, I'm going back to an area that I haven't looked at in more than two years as far as anything in writing, but I do remember being stopped up and, occasionally, it would go on to the point if like a, sort of like flu symptoms almost. But stopping up is one of the big things and occasionally that might lead to like a sinus headache or something, but really getting stopped up and couldn't breathe very well.

Q: Did anyone else voice complaints about the mold besides you?

A: I can say this about that. The technicians that reported to me were very careful about anything they said. They were highly concerned for their job and had they had an opinion, in my mind, they would not have expressed it.

Q: Well, is the answer no?

A: I don't recall.

Q: You don't recall anybody else voicing a complaint to you about the mold?

A: I do not recall that, no.

Q: Did you complain about the mold smells and the stopping up and the flu like symptoms?

A: It took some time. It was not until I went to a second doctor and he was asking me a lot of questions and things and he's the one that led me to believe that it had to do with work.

Q: Who is this doctor?

A: Weir, Dr. Weir.

Q: Where is he?

A: In Spartanburg.

Q: Is that W-e-i-r?

A: I think it is, David Weir.

Q: What kind of doctor is he?

A: Ear, nose, and throat.

Q: ENT. Okay. Did you complain to anybody at Tietex?

A: After --- Oh, it became, I mean, things evolved to the point, which I can't remember all the details, but I'm sure that after I was convinced that that was what was going on, I don't recall saying anything to anyone, but it wouldn't have surprised me if hadn't have said something to like a nurse or somebody. I even brought it to Jake's attention, I know that.

Q: You did bring it to Jake's attention?

A: Absolutely.

Q: What did you say?

A: I don't recall what I said. I just recall that well into it and after, this is after I had put up, something triggered it that he said or whatever, but this was after I put up an office down in the plant and I believe it was after I went to an allergy specialist where they stick all these things in you and they determined I was allergic to mold.

Q: Did Tietex have a hygienist check the lab?

A: I was told that that occurred.

Q: Do you know what type of testing was performed?

A: I saw at some point, I forgot how, I managed to get a hold of an after the fact report and, I mean, I'm a strong technician and I know how to, I know how to do projects, I know how to get from point A to point B in the shortest time possible. Based on what I saw, it was a

pathetic evaluation. They spent very little time and they did not concentrate on the area where the complaint was, which was the office area, and they did a little bit of dabbling around in several different sections of the laboratory when they should have been spending their time, all of it, concentrated wise in the office area.

Q: Do you know who performed the testing?

A: I do not.

Q: Do you know whether mold testing was performed?

A: No.

Q: No, you don't know or, no, it wasn't?

A: Oh, did you say where it was performed?

Q: Mold testing.

A: And where?

Q: Well, I just asked you if you knew whether mold testing was performed?

A: If I remember correctly, I believe the report said something to the effect that there's nothing --- In order for it to have been tested for mold, it would have had to have stated what it did, which was, you know, it was very clear that kind of thing.

Q: So you believe mold testing was performed?

A: The paper showed it, but if I had to qualify it as being performed, I would say no, being a technician.

Q: Do you know whether mildew testing was performed?

A: I do not know.

Q: So you claim that the testing that was done was flawed, correct?

A: Yes.

Q: But you admit that the hygienist reported finding no evidence of mold contamination, correct?

A: Yes. Yes.

Q: Well, and you were shown a copy of the report?

A: I don't remember how --- I did see a copy, but I'm not sure if I had to go looking or what, but it was well after it was done that I was told it had been done and it may have been David Wilson. I'm not sure.

Q: And the hygienist said that the air in the lab was cleaner than the outside air, correct?

A: Yeah, that's the same thing these employees in the nickel bath were told, the situation I mentioned earlier.

Q: So you draw a parallel between the nickel bath situation at --- What company was that?

A: Cherokee Finishing.

Q: At Cherokee Finishing and the mold at Tietex?

A: With regard to that kind of a statement. I think that's really an irresponsible statement.

Q: But you don't have any firsthand knowledge about how the hygienist's tests were conducted, right?

A: I do not, but I do know, also another thing I'll

add to this, that all the furniture was sprayed, in the general area where it was was sprayed with Lysol periodically and it would have had to have been on weekends and after hours, so it would had to have been --- If they were tested early in the week, it's a good possibility it was right on top of Lysol treatment.

Q: And you weren't present during the test?

A: No, sir.

Q: What information do you have to support your contention that the test was somehow faulty or unreliable?

A: The magnitude or degree of attention paid to the area of complaint, which was the office area. They had so much time to do testing, they had so much equipment to do it with, and they, it looks like to me, from memory, it looks like to me they delegated equal time to each of the four sections of the laboratory rather than concentrated on that one key area.

Q: So do you have any other information to support your contention that the testing was faulty other than the fact that they did not concentrate on the office?

A: No.

Q: Did you continue to complain about the mold smell after the testing?

A: I don't recall.

Q: Do you claim that Jake Butts was the cause of the

smell?

A: Yes. I did have other employees concur with me there. I don't recall names or anything, but regarding what I envisioned, because I've seen this before and I certainly don't fault Jake, but a house that's, you know, real shaded or a older house, moisture problems, I've walked into houses like that like looking for a house, when you're looking at houses for sale, and you could smell that musty mildew. And if one hangs their clothes in there, you know, it's just going to, it's no way around the clothes smelling like that.

Q: So you claim that Jake Butts wore clothes that smelled like mildew?

A: Yes. Without question, yes. I'm not saying everything he wore everyday, but many times.

Q: Did anybody, did you ever discuss that with anybody at Tietex?

A: I'm sure I probably did, but not as a casual thing. It would have been with maybe the plant nurse or someone. And after Jake was aware of it, I wouldn't have, I don't think I would have handled it unprofessionally as far as going out and just, you know, making a joke of it or something. I don't recall any details.

Q: And you claim his office furniture smelled like mildew?

A: Yes.

(Defendant's Exhibit 12 was marked for identification).

Q: Exhibit 12 is a series of e-mails beginning at the bottom with an e-mail from Wade Wallace to you and then it goes on with a message from you to Wade and then from Wade to you all in early February, between the 2nd and the 5th. Would you take a moment to look over that, please.

A: Okay.

(Reviewing document).

A: Okay.

Q: All right. You ready?

A: Yes.

Q: And would you agree with me that Exhibit 12 shows that Tietex moved you from the lab to remove you from the source of mold that you were complaining about?

A: I would prefer using the term banned, because I was already situated in the plant and they just didn't want me going back up there to do work anywhere in the building.

Q: And that was because you had complained about the mold, right?

A: In my opinion, no.

Q: All right. What evidence do you have to support your opinion?

A: Now, I cannot, I cannot say what David Wilson

discussed. Obviously, David was only at Tietex for a few years. I think he came in 2005, so he was totally unaware of what occurred before then, only what he would be told. I don't know his relationship with Wade and how this, why this occurred. I don't know who was the stronger person. Was Wade purely doing what David Wilson required because of what he had experienced in his previous employment? That's possible. But it also fits very well with, you know, hindsight being 20/20 and my being able to get away from the situation and become more objective and not so subjective, it also fits in with a lot of other things that was a malicious thing. If Wade were in control of this actually happening just to get me away from being able to do the work because they knew that was my lifeline. They knew the laboratory building and everything in there was key for me to be able to do my job.

Q: All right. Looking at Exhibit 12 and the e-mail to you from Wade Wallace, it says, "I received your voice mail this morning. As we discussed yesterday, we will do whatever is necessary to shield you from any further exposure to an environment(s) that might negatively affect your health." Do you see that?

A: Yes.

Q: And then he goes on to say, "As David Wilson directed, please do not enter the lab or any other work

there."

A: Okay. So it was just a few days really, that was the 2nd of February and then the 5th.

Q: So you were told not to enter the lab because, (A) of the mildew smell which you associated with Jake Butts, his clothes and his furniture, and you didn't think that even a mask would be sufficient protection, correct?

A: There was no need for a mask. Let me just say this. If a mask would keep mold spores from getting into one's nose or sinuses or whatever, there was no need for a mask in the other three areas of the lab, only in the office area. That was a huge room with a door that closes and all the other rooms were separate with closing doors.

Q: All right. Is it fair to say that you began reporting to Wade Wallace around February 1, 2007?

A: I think, if I remember correctly, it was the 1st, because that's come up a lot and I think it was.

Q: And the reason Wade Wallace became your supervisor is because that you were complaining about Jake Butts and not wanted to have any interaction with him because of the smell you associated with him, right?

A: Probably not. I would say that it really stemmed from a conversation I had with the owner several years earlier when there was a lot of things that I was to be working on and a lot of trivial stuff coming my way that

to him, I said, this is basically what I said, I'm paraphrasing based on a very poor memory, but I said something to him to the effect, I said, "Look, Wade, I've got enough stress as it is and all that and all you're doing now is there's no point in you talking to me," things like that. You know, I don't remember the gist of it, but I do know that's what this is. Then he goes back at some point and creates this on the 9th, two days later, and sends it. I never know about it until we start having the ESC things.

Q: All right. Now, you see in the third line of that second paragraph where it says, "He explained that his personal life over the last year has made him so fragile emotionally, that sometimes he has episodes like the one he was experiencing." The last year in this context would have been 2006, right?

A: That's correct.

Q: Was it 2006 that your wife was ill?

A: That's correct.

Q: Did that take a toll on you nerve wise and make you kind of a wreck?

A: I got into a major sleeping problem caused mainly by stress and it did not happen until I went back to work and the way I was done after I got back to work.

Q: Would you say that your wife's condition

contributed to how you were feeling?

A: What she went through was horrific and anything she goes through negative, I suffer along with her big time because we're so close. But this here is not what happened that day. It did not happen.

Q: Let me just invite your attention to page 155 of the hearing before the Employment Security Commission on March 28. I've got it highlighted here. It says, "At this time I was kind of, you know, nerve wise kind of a wreck because of what my wife went through." Do you see that?

A: Uh-huh (affirmative response). That's still not what happened here. And, also, I will say this about that transcript, I put no credence, zero credence in that because of when I went back and reviewed it and I got a copy of it, they didn't send me a copy, what I was attributed to saying and what I really said, there were so many fallacies it was unbelievable.

Q: Tell me what was the matter with your wife in 2006.

A: She had a colonoscopy in late '05 and the doctor that did the colonoscopy did a pre-exam and said he picked up on a cyst on one of her ovaries. Anyway, he does the colonoscopy and I went home one day and she was frantically on the phone with the doctor. I got home about six. It could have been that I would have gotten there later and

these difficulties having to do with the colonoscopy and related surgery and so forth, did the physician give you medication to help you sleep and cope with her situation?

A: I actually, when I went back to work and realized what was going on and I started having this serious sleeping problem, I would literally stay up a night or two at a time. I went back to the doctor. I'm not sure what the time frame is relative to her being in the hospital, but I actually went back to him to get his help or whatever.

Q: Did you seek help from the EAP as Mr. Wallace suggested that you do in Exhibit 13?

A: No.

(Defendant's Exhibit 14 was marked for identification).

Q: All right. Have you had a chance to review Exhibit 14?

A: I've seen all I need to see.

Q: Okay. Well, in the first paragraph he just talks about that 3 a.m. call and how Martin Wildeman forwarded it to Wade Wallace, correct?

A: It also says that I left Wade Wallace a phone message and I doubt that seriously. I don't know why I would have and don't recall it.

Q: Did Mr. Wallace commit to you as this e-mail says, to get you a lab pad coater and vented hood?

A: Of course, I mean, Wade's aware of all this, so he

could have --- Oh, okay, so the second paragraph is not necessarily related to the phone call, is that correct?

Q: Correct.

A: It wasn't mentioned in the phone call in other words. I will say this about any and all equipment. There were several pieces of equipment that Wade Wallace agreed to purchase and, in fact, requisitions were done and they were actually purchased. There were several pieces of equipment in particular that I, one being a lab pad, tried my best to get installed for a period of weeks and I guess months. And this all started in probably maybe March. I'm not sure. But there was always something wrong with where it was going to go. Like the lab pad that was never installed. The burn equipment was never put together. Because always someone would find, no, we can't put it there, we can't put it there. And I just finally arrived at the point it's not going to be anywhere. But I stayed with it the entire time I was there trying to get stuff installed. Anything that was bought was never put in place. I'll just put it that way. It was a matter of and to make things look and certain way if I had to say now.

Q: But the equipment was purchased?

A: Some equipment was purchased, yes.

Q: And it was purchased to accommodate you because you couldn't go in the lab?

A: That would have been the reason.

Q: And the third paragraph, you said you had read enough, I wanted to make sure you read the third paragraph.

A: Yeah, but the thing there was not so much a being bothered or anything. It was more taking a stand that why am I, I'm down here, you've dumped all these key manufacturing projects on me, why am I going to stay involved with this environmental reporting which made no sense. So I was really, let's get it to the guy that's getting paid for it, even though I knew he couldn't do it. That's what I was I was really after there. Why am I going to have to do this, all these other major plant projects you've given me. It didn't make sense.

Q: But Wade Wallace thought you had time to do it?

A: He did, apparently.

(Defendant's Exhibit 15 was marked for identification).

Q: Take a look, please, at Exhibit 15. And Exhibit 15 is just an e-mail from Wade Wallace telling you he expected you to get the environmental report done on time, right?

A: Yes.

Q: Was that reasonable?

A: For him to expect that, yes.

Q: And whose responsibility did you think it ought to be?

A: The person in the job title of Environmental Manager.

Q: Do you know who that was?

A: Over the period of my being there, it could have been Jake Butts at that time, but Jake had it, John Knox had it. There was a guy that was hired back in the early 2000s that was hired specifically for that and he left the company, so at that time I'm not sure who it was.

Q: And didn't you voice mail to Mr. Wildeman protesting having to do the environmental report?

A: No. No. Are you talking about the one I left in the middle of the night?

Q: Yeah, Exhibit 14. It says, basically, Wallace says that Martin Wildeman forwarded your voice mail to him and two things were bothering you. One was lack of equipment and two was environmental reporting.

A: I wouldn't have --- I'm not seeing that. I'm just seeing, "He was distraught over all that's been going on."

Q: All right, look here. Exhibit 14, "Gary left voice mail messages for both me and Martin one morning this week ta 3 a.m. Martin forwarded me the one he received. Both messages consisted of him complaining about his inability to sleep due to being distraught over 'all that's been going on.'" The first thing, the equipment. The

second thing, environmental reporting.

A: I think those other paragraphs are taken out of context. Those were not left on any message to anyone. It was a general message that I left to Martin requesting a meeting with him and it wouldn't have got specific. It would have mentioned the problems I was having with sleep for sure.

Q: So you agree that it would not have been appropriate for you to leave Martin Wildeman a message about not wanting to do the environmental report?

A: I'll agree with that, yes. I mean, I don't see why that would even be necessary.

Q: Do you recall Mr. Wallace telling you to bring these issues to him before going to Mr. Wildeman?

A: First of all, the relationship I had with Martin, most of the time when we got together was a casual encounter and he would say, "Come on in here," and it would involve a project or something and he'd want to know how it was going. And that meeting, that spur of the moment extemporaneous meeting might evolve into our getting into other stuff, how is it going for you and all that, and then some stuff happening like that. But we've had a relationship that, I mean, it's just there. It's just the way Martin was. He never, you know, he never had a problem with it and he never said, you know, you need to bring this. Anything he

suggested I do, I did it though, if it meant bringing something up with whomever, I would always do that.

Q: Would you ever go around Wade Wallace to talk to Mr. Wildeman about work related issues?

A: No. No. I say that. I probably need to qualify that because if there were things happening that I saw were dishonest or that kind of thing, regardless of who it was, Wade or whomever it might be, I'm not going to go and, I mean, you do what you have to do. It's sort of like your house is on fire and you need to mow the grass, you're not going to cut the grass, you do what you've got to do. But, basically, generally I followed the chain of command. Within reason I followed it and it's just the way things were at Tietex with regard to what we had evolved to as far as my relationship with Martin.

Q: But you admit going directly to Mr. Wildeman?

A: I don't remember enough about any specific circumstances. I do know that I did that some, but I would say most of the time it had to do with like barrier fabric projects and things of that nature where he was wanting to know about it. It was nothing unusual for Martin to grab up somebody and start talking with them about something.

Q: When you began reporting to Wade Wallace, what did Mr. Wallace tell you about his expectations for your reporting to him?

A: I really don't recall to be honest.

Q: Did Mr. Wallace tell you he expected you to let him know your whereabouts?

A: I don't think that came up that way, because at the stage of the game, you might say, I mean, that was like an understood thing. It was not like kindergarten or something.

Q: So you understood you were supposed to let Wade Wallace know where you were?

A: Our agreement was if I were, as far as where I was, that to me would mean away from the plant, and our agreement was keep the cell phone on was our agreement.

Q: But you agree with me that it's reasonable for a supervisor to want to know the whereabouts of the employees under his supervision, right?

A: At all times.

(Defendant's Exhibit 16 was marked for identification).

Q: You have before you Exhibit 16, which is a memo from Wade Wallace to David Wilson.

(Reviewing document).

Q: You got that?

A: Yes, sir.

Q: Okay. Now, it's from Wallace to Wilson with a copy to you and Mark Isbell, right?

A: Yes.

Q: Do you have any evidence that this memorandum was seen by anyone other than you, David Wilson, Wade Wallace, and Mark Isbell?

A: I mean, right off the cuff, I don't know, I don't know that I have an answer for that.

Q: Do you have any evidence that the memo, which is Exhibit 16, was seen by anyone outside of Tietex or in the context of this lawsuit and your claims against Tietex?

A: I really don't, I don't know.

Q: Okay. If you examine the memo, it's dated March 5, 2007. Did Wade Wallace have a conversation with you on or about March 5 about the items listed in this memo?

A: Actually, I triggered this memo by requesting it. And the way that happened, Mr. Wallace called me to his ...

Q: Pardon me for interrupting and I'm going to let you say whatever you want to. But my question was simply did Wade Wallace have a conversation with you on March 5 about the items mentioned in the memo? And that's a yes or no answer.

A: Yes.

Q: Okay. Now, with respect to the items listed in the memo, tell me any parts of it that believe are not true?

A: All of it. We're talking in degrees when I say that, but my assessment to make a strong statement is either

one of those by itself is and I disagree with all of them.

Q: All right. Taking the first one that you become emotional and overly vocal about problems before researching the situation. What evidence do you have to support your contention that that statement is not true?

A: It's just not me. Never done it.

Q: All right. "Not honoring the chain of command." What evidence do you have to support your contention that that statement is not true?

A: I can't go back and recreate everything, but I'll say this, I think most of the time if there was a formal get together with Martin Wildeman and one where we didn't just run into each other, I would have run it by Wade.

Q: It says in the third bullet, "He harbors negativity over past grievances with management." Did you have some unresolved grievances with management at the time that Wade Wallace began supervising you?

A: I'm not sure what he's referencing there. The only thing I can say about this is this stems from some discussion I had with him, so with that said, I feel like for him to take and broadcast it this way was certainly way out of line.

Q: Okay. My question was, when Wallace started supervising you, did you have some unresolved issues with the company that existed prior to his undertaking the

supervision of you?

A: Oh, I had, I had a lot of concern about the things that had been going on since 2003.

Q: So you had those concerns when Wallace took over?

A: Well, this is all, anything he said here is because he and I talked about some things and not anything that he gathered otherwise. We would have had to have discussed it.

Q: What kind of things did you tell Mr. Wallace?

A: I don't remember. I do not remember.

Q: And then the last bullet is, "He complains about his ownership of environmental reporting." Now, that's true, isn't it?

A: You know, again, that falls in the category, here's a guy that I'm supposed to be reporting to and he's going, anything I say to him he broadcasts it. What kind of manager is that?

Q: When you say broadcast it, he sends it to David Wilson, Mark Isbell, and you?

A: Why would I ever say anything else to him again. Like I'm just having a discussion with him about something I'm concerned about and then the next thing you know, he's holding it against me and threatening me, basically.

Q: And he told you in this memo that you needed to make significant progress within 30 days, correct?

A: Yes.

Q: Did he tell you that when he sat down with you?

A: Without taking a lot of our time, this day was the anniversary of like my 30 days or so and he calls me and says, "Gary, we need to talk," to have a 30 day review. Go to his office and he said, "Let's go down to David Wilson so he can sit in on this." I had what seemed to be the flu coming on and I felt, I mean, really, really terrible that day. I do remember that. And he hits me with these things here and it's purely verbal. There's no written, anything written. And when I finished I said, "Wade, would you do me a favor? Would you send me an e-mail covering what we just talked about so I'll know what I need to improve on?" And that's the e-mail that came.

Q: All right. Did you ever fail to attend meetings, meaning that a meeting was scheduled that you were supposed to be present for and you just didn't show up?

A: Never.

Q: Did you ever fail to return voice mails?

A: I'm sure over the years that everyone does that, but it's not malicious or intentional. I never intentionally ignored voice mails.

Q: And would that be the same for e-mails?

A: And same for e-mails. I'll just add this. I don't spend a lot of time at the computer, didn't then.

(Defendant's Exhibit 17 was marked for identification).

Q: I'm going to give you Exhibit 17. Before we get to 17. You've told me that with respect to 16, at least the first three bullets were not true in your opinion. At the time that you talked to Wade Wallace, did you protest that these things were not true?

A: When we were talking in our meeting when David Wilson was present?

Q: Yes, sir.

A: I'm not sure what I said. I know I didn't feel like contesting anything that day, so I don't recall how I handled it.

Q: But those present in the meeting would have been you, David Wilson, Wade Wallace, and nobody else?

A: That's correct.

Q: All right. Let's take a look at Exhibit 17, which is April 4, 2007, e-mail from Wade Wallace to you and it's talking about working in the lab. Just let me know when you've read it.

(Reviewing document).

A: Yes, I've read it.

Q: Did you ask if you could work in the lab if you signed a waiver?

A: Yes.

Q: And you were told that Tietex thought that the

waiver might not be good.

A: Yes.

Q: Do you agree that Tietex was trying to protect you from a negative impact to your health and from itself being liable for negatively impacting your health?

MR. STEWART: Object to the form.

A: The second part I'd say yes.

Q: You don't agree that Tietex was trying to protect you from a negative impact to your health?

A: I don't feel that way, no.

Q: What evidence do you have that supports your belief that Tietex was not trying to protect your health?

A: We could talk a long time there on my thinking of that, so I'll just, if I may, leave it at that.

Q: All right. Did you ask if you could work in the plant on Saturday and Sunday?

A: Absolutely.

Q: And were you told that you could only work when the plant was operational?

A: There was one time I was told that and I don't remember which came first, but I was later told that I couldn't go in at all unless --- I'm sorry. Okay, I just confused something in my own mind. Yes, I was told if it were operational, then I could go in on like a weekend or whatever.

Q: And if the plant was down, you could go in but you could only do office work, not lab bench work, right?

A: That was what I was going to say. One would supersede the other. I was told at one time I couldn't go in at all, even with the plant, I mean, if the plant were not running, I couldn't go in at all.

Q: And that was changed to you could go in and do office work.

A: One way. I don't know which came first. I don't remember.

Q: But at one point you could go in and do office work?

A: That's correct.

Q: And that lasted until your last day of work?

A: I don't know. Again, I don't know which came first, that particular document or the other verbal. It could have been verbal, it could have been written where I couldn't go in at all unless the plant were running.

Q: But you understood that by Wade Wallace saying you could not operate lab equipment or production equipment or handling of dyes or chemicals when the plant was down and there weren't any other employees there was for safety reasons, right?

MR. STEWART: Object to the form.

A: Well, it could be done under that pretense but I

knew. I had done all those things without question and I was the key person as far as all the issues of doing those things and the safety issues related to them and I had done so for 12 1/2 years without ever being told I couldn't come in on weekends, I couldn't come in at night, I couldn't come in when people weren't there. That was never an issue until I started reporting to Wade Wallace.

Q: Do you dispute that it was for safety reasons?

A: For a yes or no, I'll say yes.

Q: All right. And what do you claim the real reason was?

A: To keep me from doing the projects I was assigned.

Q: And why would Wade Wallace want to do that?

A: Well, we've talked about all that before in other meetings and things, but it's involved.

Q: Tell me.

A: As I've said before, I mean, hindsight being 20/20 and I don't have a lot going for me except I do have an analytical mind and I can put pieces of puzzles together and it's clear to me that entire time I was working for him, it was an effort to create cause so I could be terminated.

Q: And what evidence do you have to support your belief?

A: All the things put together. To make me fail at projects. Keep projects that were assigned and be sure I

failed at them, couldn't do them, and so forth.

Q: Do you have any evidence that any other employees were allowed to work when the plant was not operational?

A: During my entire time at Tietex, and you could go back to the records kept by the gatekeepers that when they did have folks on the gates and kept records of those coming in, you will see that I was --- The only other person I ever saw in there, two people I ever saw in there when the plant wasn't running that I remember would be Robert Fontaine, a key grey mill guy, and Martin Wildeman, the owner. And I was there many weekends trying to do work and ...

Q: Do you claim you actually did lab work when the plant was down before Wade Wallace became your supervisor?

A: I did. Again, there was a couple of years leading up to that that were kind of dead years, but going back before, say, 2004 and back, I did most of my lab work when the plant, outside of the 8 to 5 hours, I'll put it that way. Because I was so involved with running my other jobs 8 to 5, that I had to do these other things outside hours.

Q: Was the plant operational?

A: Most of the time not. If it were weekends, not, not at all.

Q: But you were the only employee who did that?

A: For the most part. For the most part.

Q: Can you identify anybody else other than the two you just named, Martin Wildeman and the other guy?

A: I would periodically see someone from information services that worked in like the computers' area in to do something, but otherwise, no. I mean, the other manufacturing folks that were salaried and all and the department managers, no, they worked normal hours.

(Defendant's Exhibit 18 was marked for identification).

Q: Well, I guess there's something I don't understand and that is why couldn't you do the lab work during, say, 8 to 5 and if other work was to be done and needed to be done after 5 o'clock, make that your office work?

A: The other stuff had to do with managing people and running the laboratories and stuff like that, which had to be done when they were there. In other words, if I went off on, and we're talking about some high level projects in many cases that require a good ability to concentrate and so forth and might be interrupted, and any time I attempted to take on something like that, if I had time to do it, between regular hours ...

Q: Excuse me. You could have done your environmental reporting and prepared those documents as office work if the plant wasn't running, couldn't you?

MR. STEWART: Object to the form.

A: Most of the environmental stuff was done hours

wise, time wise, was done outside of the 8 to 5. Much of that was done at home. Things like that, there was no point, some of it was no point in going to work to do. I carried it home with me.

Q: Take a look at Exhibit 18, please. And that has to do with the C237 and T602 projects and it's dated June 18, 2007. See that?

A: Yes, sir.

Q: And that memo is addressed to you from Wade Wallace with a copy to David Wilson and Mark Isbell just like the other one, right?

A: Yes.

Q: Did you receive a copy of it about the time it was written?

A: Yes.

Q: Do you have any evidence that this memorandum was seen by anyone else other than the addressees?

A: Not offhand I don't.

Q: Do you have any evidence that this memorandum has been seen by anyone outside of Tietex or outside the scope of this lawsuit or the other claims that you have made?

A: I'm sure my wife has seen it.

Q: Because you showed it to her?

A: Yeah.

Q: Okay. Anybody else?

A: I don't know. I don't recall.

Q: You don't have any other evidence?

A: Not right now, no. Nothing comes to mind.

Q: All right. C237 was the development and qualification of a Tietex coating compound formula to replace the current coating formula, is that right?

A: It was a mattress fire barrier fabric, Tietex fabric coated with a chemical compound. At the time it was purchased outside and applied at Tietex and was sold to your mattress manufacturers as a barrier fabric.

Q: Okay. And T602 was a finish formula change. Is that right?

A: T602 was a product that I jointly came up with with a guy named Zhiping Ni. He came up with the fabric.

Q: With who?

A: Z-h-i-p-i-n-g and his last name is N-i, Chinese. He invented the fabric and I came up with a formula to put on the fabric and it evolved into a Tietex product called T602.

Q: Did Mr. Ni work for Tietex?

A: Yes.

Q: Okay.

A: And, anyway, the product was originally run on a pad finish, on one pad finish, and that particular finish was more suited for running window fabrics, finishing window

fabrics. And so we were doing this on that, a unit with the goal of taking it elsewhere. Wade came to me one day and wanted to know if I could create a foam finish so we could, instead of running it through just an old watery pad finishing and padding it on, could I create a foam finish because we had, I don't know, three other machines there that were equipped with foam finish units. He said, "If we can do that, then we can free up this number ten range we're needing for window fabrics." So ultimately, what that led to was that project where I was investigating doing a foam finish on T602 instead of a pad finish.

Q: So these two assignments were made to you?

A: Absolutely. These two projects no one else there could have taken them on. I was the only one that could have even come close to ...

Q: And they were priority projects?

A: Big time. Well, I would say that the C237 was definitely big time priority.

Q: Were you working on 237 before you started working with Wade Wallace?

A: I had done work on weekends and had come up with a formula that would come close to but not, I hadn't gone far enough with it, to replace the business that was currently coming from a company called Noveon.

Q: Was the answer yes?

A: Yes. Yes.

Q: At the time this memo was written, which is Exhibit 18, had you been working on the 237 project for about six months?

A: Yes.

Q: Had you made any progress?

A: Oh, yeah. Had actually on January 26 ran a trial that, effectively, gave us what we needed.

Q: And you say you initiated the project?

A: Not really. Martin Wildeman would be the one that prompted it and I was reporting to Jake Butts at the time. This would have been November, December '06 when Martin came to me and --- He accosted me. He came over to me in a meeting and he says, "Gary, we've got a major problem and need your help." Basically what he said was, "We've got this barrier business that's only going to grow. We've got good volume now, we're not making any money, because we can't be cost effective." And he said, "The biggest part of it is this compound we're buying from Noveon and I understand you've been doing some work and that you might can help us come up with a cheaper compound." So that started it.

Q: Did you tell the management of Tietex that developing the C237 coating would result in significant cost savings to the company?

A: Yes.

Q: And that was versus the compound that Tietex was using at the time, right?

A: Yes.

Q: Did Tietex project the savings that you predicted into the budget?

MR. STEWART: Object to the form.

A: No.

Q: Do you know?

A: At the time I started working on the project --- On January 26, real quickly, January 26, '07, we had the successful trial. I was not reporting to Wade Wallace. Six days later after having the successful trial, I was reporting to Wade Wallace. And the direction we were going with this and the way we were going to do it was totally changed.

Q: Now, you say you ran a successful trial before reporting to Wade Wallace?

A: Yes.

Q: Were you successful in developing a compound that could be produced commercially?

A: Yes.

Q: And who would be a witness to that?

A: Harry Sparrow.

Q: Say again.

relationship was continuing. When I started to reporting to Wade in February of '07, that relationship continued and since that ...

Q: Mr. Harris, I'm going to let you tell me whatever, but I don't understand how what you're telling me relates to the question about whether you know if Wade Wallace was successful in his endeavor to develop a project, a product like 237.

A: I thought I said no.

Q: Okay.

A: Then I was explaining why.

Q: All right. Well, do you want to give me some more explanation?

A: Only that there is, you know, there's this stuff that happened in February that shows he was, he and I both were working on C237 in tandem separately.

Q: So you agree he was working along a parallel course with you?

A: It was put down that way.

Q: But you claim he was not successful?

A: I'm claiming that he wasn't working on it. I'm claiming that all that ultimately would happen would be Noveon lowered their price and then it was passed off as an advanced product or something when all they did was lower their pricing.

Q: Okay. T602, did you tell Wade Wallace that the lab samples for this project were promising?

A: Oh, absolutely they were promising. They were well above my expectations.

Q: Did you recommend a production trial?

A: Yes.

Q: Who was present at that trial?

A: Ron Simms would have been the key figure. Ron Simms oversaw all plant trials. If there was going to be a plant trial in finishing, Ron would be the one to put it together.

Q: Ron Simms. Who else?

A: Grady Corbin would have been the department manager.

Q: All right. C-o-r-b-i-n?

A: Yes, sir.

Q: Who else?

A: That's all I can come up with right now.

Q: So it was you, Simms, and Corbin?

A: Yes.

Q: Wade Wallace was not present?

A: Wade was not --- Now, we had more than one trial.

Q: Well, let's talk about the production trial. Is that the first trial?

A: I'd have to go back and review it. Now, I've got

good notes on all this, but I'd have to go back. I'm sorry, I don't, I can't answer that, but I have good notes if I need to later.

Q: Do you recall Wade Wallace being present?

A: I recall Wade Wallace dropping in and then dropping out.

Q: So he wasn't present the whole time?

A: No.

Q: Did you tell Wade Wallace that the results of the trial were comparable to the current product?

A: Well, we actually reviewed the results. You know, there was no --- I did show him the lab results where they were tested and we had some samples that were not good where we put a certain amount of finish on and we had some samples that comparable where we put more finish on, which led us to believe, hey, we can vary the amount of finish and maybe we've got something. But I had no expectations going into this trial as far as it being something we'd be able to do.

Q: All right. I'm just reading it from the bottom of page 336 of Exhibit 18. "Although I was not presented the actual numerical results of the first production trial, Gary assured me that the results were comparable to the current product." And my question is did you give that assurance to Wade Wallace that the results were comparable to the current product?

A: No.

Q: What did you tell him?

A: I said based on the results, in effect now, this is in effect, based on the results, another plant trial was warranted.

Q: And did you do another trial?

A: Yes.

Q: Was it successful?

A: I think we tried two more trials and, again, I'd need to go back and really read to get all the details, but I believe it was the second trial when there was a bent bar that was an integral part of the machinery and this would have been Ron Simms' operator, something for them to pick up on. You'd have to have been there and seen what I had to do as my part of it to know that I couldn't have picked up on it. But they ran, we only had a small amount of yardage to run, and all the yardage was run with a bent bar. All the finish was on one side or the other and the middle of the fabric had no finish, so it was a mechanical malfunction that should have been caught.

Q: The second trial for various reasons was not successful?

A: That's correct.

Q: And how about the third trial, it wasn't successful either, was it?

A: The third trial was a failure because of Mark Isbell. We were prepared. We had the bar fixed and we were prepared to run the trial on the machine we had run the first two on. And the word comes to the management and department level, Mark Isbell says we need to run this over on number three instead of two, and two totally different machines. And anyone that, you know, to know what I know, I know, and Ron said right away, said, "You know, that's a mistake. We can't do this," because of the variables that are introduced. And there were several things that we were set up to do on two that we couldn't do on three. And we, essentially, had the same kind of fabric come off of that trial as we did on the second one, a very uneven finish. And I could go back in my notes and give you a good, clear explanation of that, but I don't recall otherwise.

Q: Did you do anything wrong or make any mistakes with regard to either the T602 or the C237 projects?

A: No. No. When I say that, I mean I did what I was supposed to do and would have done under any circumstances. And these kind of projects are highly involved and technical and it's where my expertise is and I was very aware of everything I needed to do and did my best to see that it was done.

Q: But Wade Wallace told you that he thought your performance on these two projects was unacceptable, correct?

A: One quick comment.

Q: Just tell me whether Wade Wallace said that or not, then you can explain.

A: Oh, yes. May I explain now?

Q: Yes.

A: On or about June 15, 14, 15, Mark Isbell, Wade's boss, went to Martin Wildeman. This is what he told him pretty much. And so I didn't know about that. And then on the 18th, three of four days later, I'm called to Wade's office and I see this.

Q: "This" meaning Exhibit 18?

A: Yes, sir. All right. Then, and this was at a time when, you know, I knew I was going to terminated. It was just a matter of when then. And, you know, it didn't matter about procedure or anything, but I went to see Martin and I showed him this and he said to me, he looks at it and he reads it. He said, "That's the same thing that Mark Isbell talked with me about back a week, a week and a half ago."

Q: Do you think that Mark Isbell prompted Wade Wallace to give you this warning to pave the way for you getting fired?

MR. STEWART: Objection to form.

A: I mean, I would classify it as, you know, could be a final written warning.

Q: But you knew that Isbell and Guzman were friends, right?

A: That's what I was told.

Q: And on June 18, Wallace told you you had 30 days to improve, correct?

A: Yes.

Q: Did you have any conversations with Mark Isbell about either C237 or T602?

A: Not the I recall.

(Defendant's Exhibit 19 was marked for identification).

Q: You have before you Exhibit 19. Have I given you plenty of time to read it?

A: I'm fine if you're going to just ask specific questions because it's quite voluminous.

Q: Well, are you familiar with it?

A: Yes.

Q: Now, this memo is addressed like the others to David Wilson from Wade Wallace to CC: Mark Isbell, so it's Wilson, Wallace, and Isbell, right?

A: Yes.

Q: Now, you weren't addressed on the memo, were you?

A: No.

Q: Did you get a copy of this document on or about the time that you were terminated?

A: I don't remember. I may have but I don't

remember.

Q: Okay. Do you have any evidence that this document was seen by anyone else other than perhaps you, David Wilson, Wade Wallace, and Mark Isbell?

A: No.

Q: Who informed you of the termination of your employment?

A: David Wilson.

Q: Were you told that you were being terminated for failing to improve on the issues that had been addressed to you in the two former meetings and memoranda?

A: Generally what I was told was it's not one specific thing, but just a whole lot of things that have added up.

Q: Well, Wade Wallace claims in the second paragraph that you still had the issues that he had pointed out back in March, right?

A: Yes, he does.

Q: With the exception of the environmental reporting. I mean, see that at the bottom of that paragraph? He says, "With the exception of the environmental reporting." So I take it what he means by that is environmental reporting was no longer an issue. Do you agree?

A: I take it that he says I wasn't complaining about it.

on a new pad, I mean, a used pad that was being installed. So that project was killed because of that decision. We're not going to foam finish anyway, no need to go forward with it.

Q: All right.

A: The C237, the Noveon folks had already reduced their price by about, I don't know, 20 or 25 cents a pound, and was further working on getting it on down. And the word was rather than go to and continue on with this and have to go to another vendor or whatever, let's just continue to deal with folks we're used to and they'll get our price in order. So that's ultimately what happened. They lowered the price on down into the seventies. So the direction I was going in both cases were brought to a halt.

Q: Let me ask you some questions about your vacation. You agree that you took multiple vacation days between Monday, June 18, and Wednesday, July 18, don't you?

A: I remember putting in for a week vacation in June. I don't remember anything else. And then asking to add two days to that.

Q: Okay. You don't dispute that you left a voice mail message on the morning of Tuesday, June 19, asking to be out that day, June 19, and the next day, June 20?

A: I don't recall that. I may have, but I don't recall it.

Q: All right. And on Saturday, June, 23, you requested a week of vacation beginning the next Monday, June 25, correct?

A: I did request a week of vacation and I followed that up with a phone call requesting that I add July 2 and 3 to that. I was going to have seven consecutive working days for vacation.

Q: So you left a voice mail message on the afternoon of July 3 indicating that you would be taking the entire week beginning Monday, July 9 through 13?

A: No.

Q: What evidence do you have to dispute that?

A: On the afternoon of July 3, I had received a phone call and been put on administrative suspension or whatever you call it.

Q: Before your suspension, you called in and said you wanted to be off July 9 through July 13.

A: I don't recall that, I don't at all.

Q: None of these vacation days were approved in advance were they?

MR. STEWART: Object to the form.

A: If advance is before the vacation, actually was what happened, yes.

Q: Well, the day of is not before, is it?

A: No. No, I'm talking about like the week,

requested a week and the two days that followed. No, those were all advanced then. Those weren't the day of.

Q: Well, when you call in on Saturday, which is not a traditional work day, and ask for vacation beginning the next Monday, that's not in advance, is it?

MR. STEWART: Object to the form.

A: And Saturday what date?

Q: The 23rd of June.

A: That was covered with an e-mail. That week of vacation was covered with an e-mail.

Q: You agree that you were required to request vacation days in advance don't you?

A: I think that's pretty normal and I think I was one of those that followed pretty close the way we did things there.

Q: Well, let me just be clear. You agree that you were supposed to request vacation in advance, don't you?

A: Certainly.

Q: And you say that this vacation didn't interfere with the projects because as far as you were concerned, those projects were over on June 8, is that correct?

MR. STEWART: Object to the form.

A: The projects were over, yes.

Q: And you took the vacation days immediately after being given a warning on June 18, which is Exhibit 19.

MR. STEWART: Object to the form.

A: That's correct.

Q: Now, during the period from June 18 to July 18, did you submit any data to Wallace about these two projects, C237 or T602?

A: Not that I remember.

Q: Now, you were scheduled to fly to Indiana on June 14 to visit a customer and return on the 15th, right?

A: If the dates are correct, yes.

Q: And you flew to Indiana?

A: I'm not sure where I flew to.

Q: You flew toward Indiana?

A: Somewhere, Detroit or somewhere. I'm trying to remember, but the next leg was to go into Indiana.

Q: So you turned around and came home?

A: Yes.

Q: And you did not visit with the customer?

A: No.

Q: You claimed you had got a headache on the plane?

A: In fact, this trip was arranged by Wade Wallace through the sales manager who wanted me to go and I was not to visit a customer.

Q: Was that Steve Acker?

A: Yes.

Q: The sales manager was?

A: Right.

Q: And you were to meet Acker and the customer in South Bend?

A: For lunch.

Q: I'm sorry?

A: He was having meetings in the morning and I was going to meet them for lunch.

Q: And you returned to the plant without having met with the customer.

A: That's correct.

Q: And you did not tell Wade Wallace that you had aborted the trip.

A: You know, that's an area that I can't say for sure anything on right now, but when I got back in, I'm confident that I would have called him. But Steve Acker, when I called him, I told him the situation I was having and he and I together decided it best that I wait, I waited as long as I could before the flight was to leave for South Bend, and nothing had let up and we decided it best that I either spend the night there or come on back.

Q: You don't have any evidence that you told Wade Wallace that you had aborted this trip, do you?

A: I mean, I have no records of any kind in writing or anything.

Q: And you don't recall doing it?

Q: All right, Roebuck. Did you leave a message for Wade Wallace telling him you would be at Hexion in Roebuck on July 3 and that you would be at Hexion all that day?

MR. STEWART: Object to the form.

A: No. No.

Q: Did you leave him a message at all?

A: Yes.

Q: What did the message say?

A: It said that --- Let me just real quickly say it had to do with a project that I was going to work on that I couldn't work on at the plant and could work on it at Hexion and other places. So the message was that there was a serious ant problem at my house that I encountered when I got home and my wife was literally berserk with ants in two or three different places coming into the house and she's highly allergic to them, fire ants. Now, I don't know at what point before that I had left Wade any message, but at that point I left Wade a message and said, "Wade, I've got a serious problem. First thing in the morning I'm going to do my best to get it taken care of and as soon as I finish, I'm going to go on over to Hexion and work on the project." And he knows the project that I was referencing.

Q: What time did you leave that message?

A: My guess, I think it was early, in early evening after I got home from work.

Q: On what date?
A: This would have been the 2nd.
Q: So you say you didn't leave him a message on the 3rd?
A: The 3rd is the day I was at Hexion.
Q: Did you ever get permission from Wade Wallace to go work at Hexion?
A: Oh, yes.
Q: When?
A: The same permission I had to go to Rohm and Haas or any ...
Q: Sort of standing permission in your mind?
A: And let him know I was going and when and cell phone on.
Q: Did you go to Hexion?
A: Yes.
Q: What time did you get there?
A: I'm going to use a little wider --- Well, it would have been around 12:30.
Q: But you didn't do any work at Hexion?
A: I couldn't get in.
MR. STEWART: Object to the form.
A: Couldn't get in.
Q: So the answer to my question is, no, you did not do any work?

A: That day, no. No.

Q: What time did you leave Hexion?

A: I would say and, again, I'm looking back and guesstimating, 1:15 to 2:00 or something like that.

(Defendant's Exhibit 20 was marked for identification).

Q: How about take a look at Exhibit 20.

(Reviewing document).

Q: Do you have any reason to dispute the entries on Exhibit 20?

A: The thing that's written here, I don't recall.

Q: Which thing?

A: Received voice mail on the 19th.

Q: "Left voice mail on morning of June 19"?

A: Yeah, to be out 19th and 20th. I don't remember that.

Q: Okay.

A: "left voice mail on afternoon of July 3 ... was suspended."

Q: "... before he was suspended."

A: And without question, that's not true. I mean, it makes no sense is the reason I say that. I can't imagine that.

Q: Well, you would agree with me that June 9 through 13 should have been July 9 through 13, right?

MR. STEWART: Object to the form.

A: I don't know.

(Defendant's Exhibit 21 was marked for identification).

Q: Let me show you what's been marked as Exhibit 21. Do you contend that this is the Hexion Visitors' Register?

A: Absolutely.

Q: How did you get it?

A: I got it from a girl named Pam Westmoreland. She copied this for me right out of the manual.

Q: Out of the what?

A: Out of the, whatever you call it, register. I call it a manual.

Q: What do you contend that this Visitors' Register proves?

A: Well, it shows that I signed it.

Q: It says, "7/3 Gary Harris, Tietex, 1:30."

A: 1:30.

Q: Is that 1:30 p.m.?

A: So I guess I got there at 1:30.

Q: Is that 1:30 p.m.?

A: Yes.

Q: And your work day doesn't typically begin at 1:30, does it?

A: My work day begins usually when I get up.

Q: So not 1:30 p.m.?

A: This was not a typical day. No.

Q: So your work day doesn't normally begin at 1:30 p.m., right?

A: When I was with Tietex, no.

Q: The most this document shows is that you stopped by Hexion and signed in, correct?

MR. STEWART: Object to the form.

A: I mean, if you take it for what's here, yes, that's true.

Q: And you had told Mr. Wallace that you would be at Hexion all day?

A: I didn't say that, no.

Q: What did you say?

A: What I said earlier, I had an ant problem that had to be fixed and as soon as I took care of it, I was going to Hexion.

Q: All right.

A: No time given.

Q: And there was nobody at Hexion to let you in so you left?

A: There were people at Hexion that I later would find out that they were having a meeting that included the technicians, the people I would normally call and spoken with and gotten to come to the door. It included key management and everything. They have several buildings and that particular building, they were having a meeting and I

made phone calls one after another to everyone I knew there over a period of time, waited and tried it again, waited and tried it again.

Q: You couldn't get in?

A: Couldn't get in.

Q: So you left?

A: Yes.

Q: And you didn't see a living sole at Hexion?

A: At that time I did not know of a procedure that they had ...

Q: Just please answer the question. Did you see a living sole at Hexion?

A: Yes.

Q: Who?

A: I don't know their names. I saw folks at Hexion. I mean, to answer your question, I saw, physically saw people there, here and there, but they weren't the people I was there to see. They weren't in that building.

Q: You didn't see anybody you knew the name of?

A: No.

Q: Or who knew you?

A: No.

Q: So this sign in sheet that's Exhibit 21 is the only proof that you have that you were at Hexion?

A: Probably some phone calls.

Q: I'm sorry?

A: I mean, we don't have it here, but I suspect some phone calls will validate I was there as well during some time.

Q: Oh, you mean phone calls that you claim you made from the lobby ...

A: Yeah.

Q: ... to the interior of the plant?

A: Yeah. And also some other records.

Q: What other records?

A: Phone calls.

Q: But there aren't any individuals who can substantiate your being there?

A: That's correct. Not that they saw me or anything like that, that's correct.

Q: And you admit that you were at Hexion at most for about 30 minutes?

A: No. I mean, earlier when you asked me and, again, I haven't looked at this since, what's it been, a year and a half or so, but just trying to recall a time, I said 12:30, getting there at 12:30 and leaving, what 1:15 to 2:00 or something to that effect. Well, now that I see that I was actually there at 1:30 because I forgot, probably would have left more like 2:15 to 3:00 o'clock.

Q: All right. Let me invite your attention to the

ESC transcript March 28, 2008, page 171. "Question. And you stayed there for about 30 minutes." "Claimant." That's you. "My guess is 30 minutes." "Question. Pardon me?" "My guess is 30 minutes." "Question. Thirty?" "Claimant. An estimate, from memory, an estimate."

A: Okay.

Q: Do you agree with 30 minutes?

A: About 30 minutes because I don't know, I didn't keep a record of it. I would say, probably now I would change that to at least 30 minutes because of what I did. Because I was fairly, it was a time when I was concerned about getting in and finishing the project. I'll put it that way.

Q: And you agree with me that Wade Wallace, based on your phone call, expected you to be at Hexion?

MR. STEWART: Object to the form.

A: Yes.

Q: What did you do when you left Hexion?

A: What I did after Hexion was probably, in my mind anyway, it was like I was at a loss. I had tried to get this project done. And let me say this, I've never mentioned this before, but in the back of my mind, I knew that there were places other than Hexion and I chose Hexion because they were close. I could have just as easily gone to Rohm and Haas or somewhere else or to one of these new

places I hadn't been before. With that said, I called this guy that I knew that he had told me of two different places that he could get me a place to work, to do lab work, because he was aware of my situation as far as needing a place to work and so forth. And he wasn't a friend, he was an acquaintance from chemical sales. He and I met, I don't ...

Q: Can you just tell me where you went?

A: All I know is he and I met somewhere, I don't remember. I cannot call where we met but it was for him for the purpose, he couldn't go with me to tell me how to get to Chemurgy and all that. And we met for a period of time, I don't know how long, and when I left him I went looking for Chemurgy and to see if the folks were there and all this and I was going to go ahead and introduce myself and see if what their schedule was the balance of the week and I was going to go ahead and just break that ice and get in with those guys.

Q: So you went to Chemurgy about 4:30 p.m.?

A: No, it would have been before then. Maybe. I probably was leaving there about that time. I don't remember. Because it probably took me, I don't know, 30 or 45 minutes of driving.

Q: You didn't see anybody at Chemurgy, did you?

A: No.

Q: And the guy you met, was it Dean Roberts?

A: Dean Roberts.

Q: So on July the 3rd you went to Hexion for about 30 minutes and you went to Chemurgy but didn't speak to anybody.

A: That's correct.

Q: And how long do you claim you were at Chemurgy?

A: I'm going to guess and say it probably took, for me to find the place, between 30 minutes to an hour maybe.

Q: How long did you actually stay on the premises there?

A: There was no sign of anybody there.

Q: Did you telephone Wade Wallace and tell him you couldn't get into Hexion and you were going to go somewhere else?

A: No, I did not.

Q: Did you instruct a Hexion employee to bring sulfuric acid to you at the Tietex plant?

A: No, I did not.

Q: Did a Hexion employee bring you sulfuric acid at the Tietex plant?

A: I was told he did.

Q: And that was George Henderson?

A: Yes.

Q: And did you, in fact, want sulfuric acid, you have

A: No.

Q: And didn't Wade Wallace finally reach you on your cell phone about 3 in the afternoon?

A: No.

Q: When did he reach you?

A: First of all, I would object to the finally because I'm confident I had my cell phone on the whole time, and I received a phone call from him between 4:30 and 5 o'clock. He wanted to know where I was.

Q: Did you tell him that you had been at Hexion?

A: I told him exactly what had happened, which is what we've already talked about.

Q: Did you tell Wade Wallace that you had been to Hexion?

A: Yes.

Q: Did Wade Wallace tell you he knew you hadn't been at Hexion?

A: I don't --- No, he didn't say that to me when we were talking on the phone.

Q: Did Mr. Wallace tell you he knew you hadn't been at Hexion because George Henderson, the lab manager from Hexion, had brought sulfuric acid to the Tietex plant looking for you?

A: I don't know that we discussed that or not. I don't recall discussing that in our phone call. May I ---

the end of the day when he was on his way home from work. And all he announced was Gary Harris had come by and needed acid, left a message, left a message he needed acid.

Q: Well, didn't you say that the call to you was between 4:30 and 5:30?

A: Yes.

Q: Well, that would have been consistent with the time that you say Henderson went by there, right, at the end of the day?

A: Yeah, but inconsistent with when Wade said he came by. Wade said he came by like 1:30.

Q: But Henderson asked the people at Tietex where you were, and they said, well, he's supposed to be at Hexion.

A: I don't believe he, I don't believe he asked that question.

Q: You don't believe who asked what question?

A: I don't think George Henderson asked where I was. All he was doing, he knew that I was going to come back at some point and pick up acid, and he decides --- that's the way George is --- as a courtesy he decided, well, on my way home I'll just drop this acid off to Gary and he won't have to pick it up. And he didn't call me or anything and say he was going to do that.

Q: Well, for all Wade Wallace knew you could have been fishing or cutting the grass or anything else other

than working, right?

A: That's true.

Q: And wouldn't it have been reasonable for Wallace to expect you to call him and say, look, my plans have changed. I can't go in to Hexion. I'm going to make other arrangements?

MR. STEWART: Object to the form.

A: I think that's one of those marginal questions that could go either way. I mean, I'll agree but then again I think I could give a reason that it's okay.

Q: During this conversation did Wade Wallace ever say, well, tell me where you've been all day?

A: Well, when he called me he wanted to know where I was, and I explained to him about what had transpired and, I mean, just right on top of that --- we probably talked no more than, I want to say three minutes. He said, "Well, I'm going to put you on administrative leave or suspension," whatever it's called, "and I don't want you back in here." Now, the other part that I had a problem with there, why did he not want me to come on back in right then and talk with him. Why did he ban me then? I mean, that still bothers me and I don't understand that.

Q: Did you hang up on Wade Wallace?

A: No.

Q: Did the telephone get disconnected?

A: No, we were talking and it was after he had told me all that and everything, and I don't know if it's where I was driving or what, but we got cut off.

Q: Do you know what Wade Wallace did to investigate?

A: No, I don't.

Q: Do you know who he talked to?

A: Oh, I do. I think he called both those fellows, George Henderson and Dean Roberts. Word was he called them.

Q: Do you know if he talked to anyone else?

A: Not to my knowledge.

Q: Do you know the content of Wallace's conversation with Henderson?

A: No, but I will say this, that it was pretty strong according to what George said. George said he felt it to be highly unprofessional, the way it was handled because it made me look kind of, maybe something I didn't need to be made to look like.

Q: Well, what do you claim that Wade Wallace said to George Henderson that you object to?

A: I can't recall that, I'm sorry.

Q: So you don't have any evidence that Wade Wallace said anything to George Henderson that would have been defamatory towards you. It was just unprofessional, is that what you're saying?

A: Probably more so unprofessional, yeah, if I had to

say one or the other.

Q: And what you know about that conversation you learned from who, Wade Wallace or George Henderson?

A: From George. George actually called me about it.

Q: And does Dean Roberts work for Spartan Chemical?

A: He works for --- he did, I'm not sure. I haven't talked with him in a long time, but he was with Spartan Chemical at the time.

Q: And you said that you have some information that Wallace called Roberts.

A: Right, yeah, Dean and Wade Wallace were reasonably close and they had a, I mean, I don't know if it was a friendship relationship but they were pretty close.

Q: Do you know what Wade Wallace said in that conversation?

A: I don't.

Q: So you don't have any claims that Wade Wallace made any remarks about you to Dean Roberts that were defamatory.

MR. STEWART: Object to the form.

A: I don't know. I don't know of any right now, no.

Q: Now, your employment was terminated on July 19, 2007, for unsatisfactory performance, correct?

A: Yes.

Q: Do you know who made the decision to terminate

the sign-in sheet shows you were there, right?

A: Absolutely.

Q: Any other reasons that you claim that the points that Tietex makes for your termination were phoney?

MR. STEWART: Object to the form.

A: Just real quickly, looking back, hindsight 20/20, I'm convinced that the day I went to work for Wade Wallace there's no question my days, in my mind the days were numbered. The one hurdle they had to overcome because Martin Wildeman knew that I could potentially do some things for the company that were important. And even though over the years he hadn't been in on a lot of stuff I had done, because I had a supervisor always between me and Martin for the most part, but in the final analysis, it was a big hurdle for those guys to convince Martin that I should be terminated.

Q: Why do you claim Wade Wallace wanted to get rid of you?

A: I don't think Wade did, necessarily.

Q: Well, who do you claim did?

A: I would have to say Mark Isbell.

Q: But you didn't work for Mark.

A: Indirectly I did.

Q: Who did Wade report to?

A: Mark Isbell. And the day I went to work for Wade

this before, I think, in the hearing --- but I have a document that shows where I purchased chemicals on the morning of July 3 from Lowe's. It spells out chemicals, it spells out the time that I checked out and all that. Is that the kind of thing we're talking about?

Q: Yeah.

A: Okay.

Q: Absolutely.

A: Anything I got like that I'll give to my attorney. I've got, I mean, I'd love to share it.

MR. STEWART: I'll look over it and try to get it to you in an expedited fashion.

A: One quick question, if I have, like, for example, going back to February of '07 following a visit to my office by Mr. Wallace, and I made a series of notes and comments and dated it, and that kind of thing, would that be considered a document that you would want?

Q: Uh-huh (affirmative response), absolutely. Look at these. This is Tietex 266 to 272, and show them to your lawyer so he can see them, too. And 274, 275, and 277, 278.

A: Yes, sir.

Q: Now, do those documents have anything to do with your lawsuit?

A: I suspect what this has to do with is simply demonstrating that, in fact, I did have something to do with

Q: Let me ask you this. Last time you heard or you knew, how much were they getting the product from Noveon for?

MR. SUGGS: Object to the form, requires speculation and an answer based totally on hearsay.

Q: You can answer.

A: I remember something to the tune of the mid seventies based on a friend of mine who he and I had a conversation and he was, and we'd spent some time together, and he was still working at Tietex at the time.

Q: What was the name of the ...

MR. SUGGS: Whoa, whoa, whoa. Move to strike. Speculation, hearsay.

Q: What was the name of the salesperson from Noveon that Wade Wallace dealt with?

A: Lisa Bowes.

Q: If you will, tell me how many inaccuracies you see in this memo, Defendant's Exhibit Number 18, as it relates to the T602 formula.

A: The second trial as well as the third trial is a correct statement. They were unsuccessful. But, okay, they were unsuccessful. The test results that he, of course, he generalizes a lot and he doesn't, he basically is highly misleading as to what really happened. He doesn't spell out that the second trial was a failure because of a significant

Tietex who has stepped in and fulfilled the responsibilities you had before you got terminated?

MR. SUGGS: Object to the form, leading.

A: Probably some of the things were split off because, I mean, like some of the things I was doing and the volume of the things I was doing, in particular before Wade Wallace, there's no way that a person unless they were highly dedicated and working 80 hours a week could do them. I suspect she's got part of them, a key part of them, and other folks --- and I suspect a lot of them have been let go, like the key things of maintaining formulas and all. It's sort of like you've got a car and if you don't maintain it, you can still drive it.

Q: Let me ask you this.

MR. SUGGS: Whoa, whoa, whoa, whoa. Move to strike, speculation, lack of foundation.

Q: Do you know if Ms. Guzman is allowed to use the primary laboratory?

A: I would suspect so, but I cannot say anything about Tietex in that area because I haven't been there and I don't know.

Q: You testified yesterday that you don't know if Wade Wallace wanted to get rid of you or not. Is that correct? Do you remember that?

A: That would be, as I said, I think I would have

felt it would be more Mark Isbell working through Wade Wallace. But I certainly am not going to in any way, shape or form condone anything that Wade Wallace did that I feel was wrong and highly negative. It's the last thing I want to do.

Q: That's fine. That's beyond my question.

A: Okay.

Q: You don't know what Wade Wallace was thinking or trying to do, is that fair?

A: Fair.

Q: Do you believe you were treated fairly by Mr. Wallace?

A: Absolutely not.

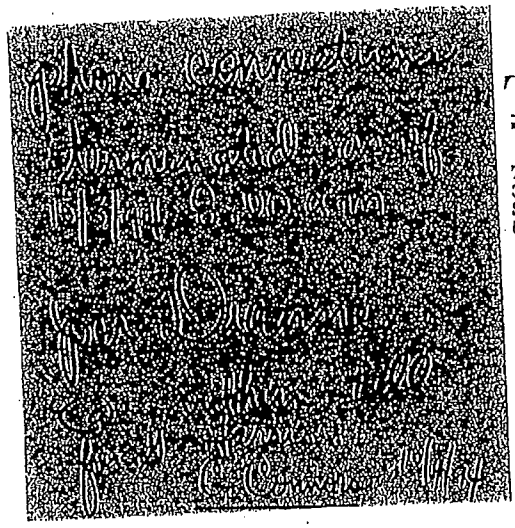
Q: Was he the person responsible for the written report, which I believe is labeled as Defendant's Exhibit Number 18, which talks about your last key projects and called them failures?

A: That was prompted by Mark Isbell and he simply put it together.

MR. SUGGS: Object to the form, speculation, lack of foundation, move to strike.

Q: Let's take a look at it, Defendant's Exhibit Number 18. That's the report I'm referring to. Who's it by?

A: Wade Wallace.



TIETEX

TIETEX CORPORATION
3010 North Blackstock Road, P.O. Box 6218
Spartanburg, SC 29304
803 574-0600 FAX 803 574-9440

CONFIDENTIAL

June 14, 1994

DEFENDANT'S EXHIBIT 6

Mr. Gary Harris
309 Fox Run Drive
Galax, Virginia 24333

Dear Gary:

We are pleased to offer you the position of Senior Research Chemist in our Printing and Finishing Department. This position reports to Dave Hughston, Plant Manager, Printing and Finishing.

The purpose of this letter is to provide you with a summary of the offer, as follows:

1. Your base salary will be $55,000 per year. As an exempt employee, you will be paid monthly, and paychecks are issued on the 25th of each month. For information, we provide direct payroll deposit. To begin the direct deposit process, you will need to provide us with a deposit slip for your banking account.

2. We have provided you with handouts which outline our fringe benefits package. Each of these will be explained in greater detail to you on your first day of employment. In the meantime, however, if you have any questions, please let me know.

3. We will provide you with certain relocation-related benefits. These include:

   a) We will pay all costs associated with the move of your household goods, clothing, furniture, etc. from Galax, Virginia to Spartanburg, South Carolina.

   b) We will provide reasonable temporary housing for you for a period of up to sixty days. This will consist of a furnished apartment plus utilities.

   c) We will pay you the equivalent of one month's salary ($4,583.33 gross amount) for incidental relocation-related expenses. Payment

DRH 9/9/94 extend 30 additional days at Tietex expense to (Oct. 15, 1994)

11 14*

Advised Gary of conversation w/ Amber @ Timberlane. To extend lease 1 more month @ Tietex expense. He's trying to move Amber out

will be made on your request following the closing of the purchase of your Spartanburg residence or the lease of an apartment by you as your permanent address.

d) We will pay up to $5,000 toward closing costs associated with the purchase of your Spartanburg residence. (This does not apply to rental of property.) This benefit will be available to you for a period of up to twelve months following the date of your employment.

e) Any other requests for assistance during the pre-relocation period must be reviewed and approved in advance.

f) All items listed above which relate to relocation shall be handled in accordance with all applicable state and federal tax laws. You are encouraged to consult with your tax advisor to make the necessary plans.

We remind you that on the first day you report to work you will need to bring with you certain documents which will be used for form I-9 purposes. Suggested documents are a valid driver's license and a birth certificate or social security card.

This letter summarizes our offer. Nothing herein should be construed as a contract of employment or as a promise of any specific terms for any determined period of time.

We have enjoyed meeting with you and hope that you will accept our offer to join Tietex. We will be available to help you get settled in Spartanburg and to help you in any way as you begin your career with us.

Sincerely,

TIETEX CORPORATION

Donald P. Woodward
Human Resources Manager

TIETEX
000229

DATE: 7-13-94

TIETEX CORPORATION

Salaried X
Non-Exempt
Hourly

NAME Gary G. Harris (First Middle Last)
DEPT. 08 EMP. NUMBER 3335
ADDRESS Timberlane Apts. # 316
106 Kensington Drive
Spartanburg SC 29301 (City State Zip)
HIRE DATE 7-13-94
SOC. SEC. NO.
SEX M MARITAL STATUS M
PHONE 587-8959
DATE OF BIRTH
JOB TITLE Senior Research Chemist
JOB CODE —
JOB SERV. DATE 7-13-94

SALARY

ANNUAL RATE $55,000.00
WEEKLY RATE
HOURLY RATE SHIFT 1

TAX DATA

FEDERAL TAX -2-
STATE TAX -2-
ADD'L. TAX 0

*DIRECT DEPOSIT
(*attach authorization agreement)

DEDUCTIONS

	AMOUNT		AMOUNT
GROUP INSURANCE	Eligible 60 days from H.D.	MISC.	
LIFE INSURANCE	" " " " "		
401(K)	After 3 months of service		
UNITED WAY	0		
SAVINGS	0		

DEFENDANT'S EXHIBIT A HARRIS

EMPLOYEE SIGNATURE Gary G. Harris DATE July 13, 1994
PERSONNEL Cornelia H. Connors
COPY TO PAYROLL 7/18/94
DPW 7/18/94

TIETEX
000215

Wallace, Wade

F: Wallace, Wade
Se... Monday, February 05, 2007 1:42 PM
To: Harris, Gary
Cc: Wilson, David; Isbell, Mark
Subject: RE: Acceptable work areas

Thanks. I got your voice mail this morning where you mentioned that your original thoughts on wearing a mask may have been wrong and that it may still not be enough protection. I spoke with David Wilson and we do not want to take any chances with your health. Please do not enter the lab under any circumstances, even if you are wearing a mask. Give me a the list of items you need and I will have them relocated without any need for you to go up there.

-----Original Message-----
From: Harris, Gary
Sent: Monday, February 05, 2007 10:18 AM
To: Wallace, Wade
Cc: Wilson, David; Isbell, Mark
Subject: RE: Acceptable work areas

Wade:

As I stated in a phone message earlier today, I am working on a list of needed equipment, etc. for the new work area. This is a very important undertaking and I want to be sure that it is handled correctly and thoroughly in the beginning on my part.
I hope to have this completed by the end of the week.

Gary 2/5/07

-----Original Message-----
From: Wallace, Wade
Sent: Friday, February 02, 2007 11:53 AM
To: Harris, Gary
Cc: Wilson, David; Isbell, Mark
Subject: Acceptable work areas

Gary,

I received your voicemail this morning. As we discussed yesterday we will do whatever is necessary to shield you from any further exposure to an environment(s) that might negatively affect your health. As David Wilson directed please do not enter the lab or any other work areas that Jake occupies unless it is an approved exception (see next paragraph). In addition, we will protect your new work areas from any potential exposure by directing Jake not to enter those areas. You have set up a temporary work place in the office/lab in the compounding area so this area will be protected. Also, you are free to utilize or permanently relocate your work area to the color shop area and this area will be protected as well. Both of these locations have ample countertop and sink space for laboratory bench work. If there are any tools, supplies, or equipment in the lab that you need for your work, please make a list and I will have them moved to your new work area.

As we discussed by phone today there may be exceptions to entering the lab in order to perform your job duties. One specific example is that your project work will require you to witness testing on the bench burn apparatus. It is neither practical or economical to relocate the bench burn testing outside of the lab due to the smoke venting and ambient room conditioning needed. Therefore you will need to enter the lab to do so. In these situations always wear proper respiratory protection in the form of a mask with sufficient coverage and filtration to keep out any potential irritants. You have indicated that you have tried this approach and feel it will work fine for periods of limited exposure. If you encounter any more job functions where it is not practical or economical to move the equipment, please let me know and we will consider the same procedure for these situations.

Thanks for you cooperation,

Wallace, Wade

From: Wallace, Wade
Sent: Friday, February 09, 2007 8:58 AM
To: Wilson, David
Cc: Isbell, Mark
Subject: Gary Harris

Per our conversation, I'd like to document the discussion I had with Gary Harris on Wed 2/7/07.

Gary called me mid afternoon on Wed and stated that at that moment his personal and emotional problems had overwhelmed him and he was confused, disoriented, and could not function. He did not know what to do. I immediately went out to his office to discuss his problem in person. He explained that his personal life over the last year has made him so fragile emotionally that sometimes he has episodes like the one he was experiencing. As we talked he felt better and mentioned that the project work I had assigned him would be help keep his mind off his personal problems.

I took that opportunity to remind Gary that Tletex is committed to our employees well being and that at any time we would support him if he felt he needed to utilize EAP. He said that that was not necessary and that he could work through it. I also asked him to be open with me if in any case this personal problem interfered with his ability to perform his job as we would need to sit down with HR to find a resolution.

When I left him he assured me that he was OK and thanked me for my support and patience.

ATTACHMENT D

Wallace, Wade

From: Wallace, Wade
Sent: Thursday, February 22, 2007 4:16 PM
To: Wilson, David; Isbell, Mark
Subject: Voicemails from Gary this week

Gary left voicemail messages for both me and Martin one morning this week at 3am. Martin forwarded me the one he received. Both messages consisted of him complaining about his inability to sleep due to being distraught over "all that's been going on."

The first thing that was bothering him this week have been that his work area has been moved from the lab and he is still not set up to easily do his bench work. I have covered this with him several times and he has asked for a lab pad coater and a vented hood. I have committed to both but he must understand it will take some time to locate, acquire, and install the equipment. In the meantime he is to make do with the pad in the beam dye area and/or seek chemical tech resource time from Robert Culbreth in the lab (coordinating with Jake). Robert is qualified and trained to do this and can help if Gary needs something done on the pad in the lab since he cannot go up there.

The second thing bothering him is his responsibilities regarding environmental reporting. He has a report due March 1 and is concerned about having to do it due to his project work. I have reviewed his project work and it does not consume all of his time. Unless he convinces me otherwise, I see no reason that his projects would interfere with his ability to get this report done on time. I made this clear to him. Although his environmental reporting duties have not changed, he does not think this should continue to be his responsibility. Regardless I have made it clear to him that it still is his responsibility and must be done.

I will update Martin as he was confused by Gary's email. I will also encourage Gary to bring his problems to me first since I am his immediate manager.

TIETEX
000332

ATTACHMENT E

Wallace, Wade

From: Wallace, Wade
Sent: Thursday, February 22, 2007 4:04 PM
To: Harris, Gary
Subject: Environmental reporting

Gary,

You left me a voicemail this week expressing concerns over the upcoming environmental report(s) due March 1st. As we discussed when you transitioned into the Development/Improvement department, your environmental reporting duties have remained unchanged. There is a possibility that we could transition these duties to the engineering department at a later date. However, this may take some time and you will need to continue with it until it happens.

You expressed concern about getting it done. Please be sure to complete this on time. If you have difficulty managing this task and your project work, please see me tomorrow when I am back in the office so that I may understand the situation better.

Thanks,

To: David Wilson

From: Wade Wallace

CC: Mark Isbell, Gary Harris

Date: March 5, 2007

Subject: Gary Harris' Transition

During the last thirty days as Gary Harris has transitioned into his new role, several issues relating to his work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

As we discussed these issues are not sustainable and it is mandatory that Gary make significant progress towards resolving these issues within the next 30 days.

ATTACHMENT F

Wallace, Wade

From: Wallace, Wade
Sent: Wednesday, April 04, 2007 1:58 PM
To: Harris, Gary
Subject: Followup from yesterday

Gary,

In reference to the two questions you had yesterday I have discussed them with David and have the following answers.

1. Can you begin using the lab again if you agree to sign a waiver of liability. No. This is still unacceptable from an HR/company liability perspective since we would be allowing you to come in contact with an environment that might negatively affect your health. As previously mentioned, you may continue with acquiring and setting up equipment in the plant that you need to do your work.

2. Can you work on Saturdays and Sundays? Yes and No. You may work in the plant anytime the plant is operational. You may come into the facility to do office work when the plant is down. However, you may not operate any lab equipment, production equipment, or handle any dyes or chemicals even in a lab setting when the plant is down and there are no other employees present. The reason for this is because of safety. If you must do lab work after the regular business hours I recommend you do this on weekday evenings while the second shift is operating.

Thanks

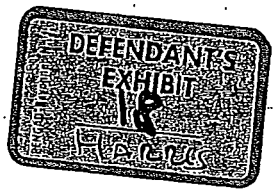
To: Gary Harris

From: Wade Wallace

CC: David Wilson, Mark Isbell

Date: June 18, 2007

Subject: Gary Harris Work Perfomance

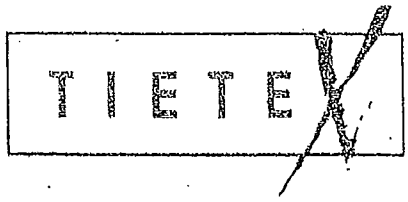


During the last ninety days some issues relating to Gary Harris' project work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

Of Gary's multiple duties two projects were identified ninety days ago as priorities and he was instructed to give them his most thorough and diligent focus. The first project was the development and qualification of a Tietex coating compound formula as a replacement for the current coating used on C237. Gary actually began work on this project prior to his reporting to me. His lab coating work began in December 2006 so the project has been ongoing for over six months. The second project was to develop a finish formula change and process to enable T602 to be finished with the parabolic applicator instead of a pad application. The project was assigned and work began ninety days ago.

Although the first project has been on going for six months no significant progress has been made toward completion. This project was initiated solely by Gary and he convinced senior management that it was completely feasible in order to gain support. He committed to developing a compound that would cost between $0.60 and $0.62 per pound verses the current product which cost $0.885 per pound. Despite months of lab work in house and at four different chemical supplier locations and numerous production trials he has been unsuccessful in creating a viable product. The formulation which Gary developed has proven to be much more complicated to reproduce commercially than initially promised. Gary exercised poor judgement by making claims and commitments that he could not deliver. This project was included in corporate financial improvement goals. Due to the failure of this project I have personally had to begin parallel project work with other suppliers to develop a suitable replacement to achieve the financial commitment of the project.

The scope of the second project to develop a finish formula and process for parabolic application of T602 was a technical challenge. However, Gary informed me that lab samples were promising and recommended a production trial. Although I was not presented the actual numerical results of the first production trial Gary assured me that the results were comparable to



the current product. From this I approved a scale up run for statistical qualification. The second trial, as well as a third were unsuccessful. These subsequent failures concerned me and I personally recalled samples from the first trial that Gary assured me was a success. I witnessed them being tested and found that the product from that initial trial did not perform comparable. By this I can conclude that Gary did not conduct adequate scientific and numerical analysis of the first trial. This negligence was costly in that two subsequent production trials could have avoided. In addition, this negligence in applying the proper scientific analysis is unacceptable in the work of a Sr. Research Chemist.

Obviously the two issues regarding the C237 project failure and poor analytical practices demonstrated in the T602 project are not sustainable. It is mandatory that Gary make significant progress towards resolving the problems with the C237 project and improving on his analytical practices within the next 30 days.

TIETEX

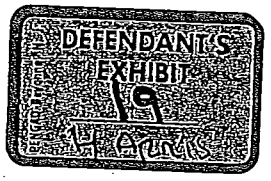
To: David Wilson

From: Wade Wallace

CC: Mark Isbell

Date: July 18, 2007

Subject: Gary Harris Work Performance



Despite efforts to counsel Gary Harris we continue to have issues with his work practices and performance. These issues are listed in the following paragraphs. On this basis I am recommending that we terminate his employment immediately.

In February 2007 he was reprimanded for the following issues:

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

With the exception or the environmental reporting he continues to have these issues.

In April 2007 he was instructed not to come in and work in the chemical lab areas at nights or on weekends for safety reasons. Gate records and management observation indicate that he has continued to do this.

In June 2007 he was reprimanded for the two following issues and given a thirty-day deadline for resolution. It was made completely clear that failure to complete this task and resolve this issue would jeopardize his employment.

- Failure to complete the project to replace the current C237 coating compound with formula of his design.
- Not conducting and reporting adequate scientific and numerical analysis to substantiate lab and plant trials.

He has not demonstrated any effort to complete the C237 project. Despite the deadline to complete the project within four weeks he took two vacation days the first week, five the second week, and was planning to take five days the fourth week. This would have accounted for more than 50% absenteeism during this time and no effort to complete the project as instructed. None of these days were approved in advance. He left messages the day of the vacation without any

advance notice despite my request that he have them pre-approved. In addition he has not submitted to me any scientific data on any of his other projects.

I recently found out that also in June that Gary missed an important trip to visit a custome did not inform me. He was scheduled to fly to Indiana on June 14 to visit with United Sh return on June 15. On the way there he suffered a headache and returned to SC a day earl did not see the customer. He never informed me of this and while I thought he was in In

In July 2007, prior to the end of his thirty-day deadline several more issues have arisen.

- Only July 3, 2007 he did not show up for work and left me a message that he wo Hexion in Greenville all day. He did not get permission for this trip. Later I fou directly from the Hexion representative that he did not show up. Although he di another supplier in Greenville briefly, he has no been able to adequately account his whereabouts for the entire day.
- Also on this day he instructed the Hexion representative to deliver sulfuric acid the plant without an MSDS. This is in direct violation of company policy.

In the last three months he has also demonstrated other poor work habits that are affect work performance.

- Does not return calls or emails consistently. His co-workers consistently comp as it affects their ability to complete their tasks that are contingent on his work.
- Does not keep consistent work hours and often cannot be physically located at facility. Gate entries indicate an erratic pattern of coming and going that is no in advance.

In light of the continued problems with Gary's work practices and performance I am recommending that we terminate his employment at Tietex. Gary has been counselec these issues, but at this point I have lost confidence in his ability to perform his job ir satisfactory manner.

Wallace, Wade

F: Wallace, Wade
Sent: Monday, June 25, 2007 8:03 AM
To: Harris, Gary
Subject: RE: Vacation

Gary,
I do not have a problem with you taking vacation this week. However, in the future please try to communicate this kind of time off further in advance.

-----Original Message-----
From: Harris, Gary
Sent: Saturday, June 23, 2007 9:47 AM
To: Wallace, Wade
Subject: Vacation

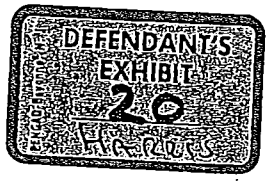
Wade:

As a result of an important situation, I need week of June 25 for vacation. There are several key work related issues that need attention which I will arrange to cover.

Thanks,
Gary

Left Voice mail on morning of June 19 to be out June 19 + 20.

Left Voice mail on afternoon of July 3 before he was suspended indicating he would take vacation entire week of June 9 – 13.



TIETEX
000340

ATTACHMENT J

VISITORS REGISTER

ADDRESS	TIME	REMARKS
Woodruff Comm Center		
UNLV		
United Way		
Children's Advocacy		
Henderson		
Hexico Hospital NL		
Colonese		
Spa [illegible]		
Regency	9:00	
	10:05	
Typical		
I [illegible]	[illegible]	
	2:35	
	6/14	
Rebels	6/14	
TROY		
K [illegible]	[illegible]	
omegachemicals	[illegible]	

DEFENDANT'S EXHIBIT 21 [illegible]

2007

VISITORS REGISTER

DATE	VISITOR'S NAME	ADDRESS	TIME	REMARKS
6/20	Gary Harris	Treetop	5:40	
6/25	[illegible]	Treetop	3:10	
[illegible]	[illegible]	Treetop	1:30	
[illegible]	[illegible]	Aviation	10:00	
[illegible]	[illegible]			
8/28	[illegible]	Chateau	10:00	
8/28	[illegible]			
9/4	Gary Harris	Lakeside	7:15	
[illegible]	[illegible]	[illegible]	[illegible]	
9-18	James Winston	Trump	[illegible]	
9/19	[illegible]	Spa	8:45	
9/20	GARY HARRIS	SPARTAN	8:50	
11/1	D. Mally	L.C.	11:30	
11/1	C. Al Sharp	Sportsmen	2:50	
			3:00	
11/8	S. Fujisawa	Central Glass Intl Inc.	10:00	
			10:50	

ROA 000690
APP 000693

ATTACHMENT K

TIETEX
000342

TIETEX INTERNATIONAL, LTD.
3010 North Blackstock Road, P.O. Box 6218
Spartanburg, SC 29304
(864) 574-0500 FAX (864) 574-9440

* Paid → 7/31/07
Do Not owe 1.32 Hr. Vacation
✓ RJ Holley

EMPLOYEE TERMINATION

Effective Date 7-19-07 | Employee No. _____ | Employee Name GARY FIANNIS
W/E Date _____ | Hire Date 7-13-94 | Social Security No. _____
Termination Date 7-19-07 | Dept. No. 55 Shift D | Department PRODUCT DEV & PROCESS IMP.
Rehire: Yes ____ No ✓ | Termination Type (V/I/L/M) I (V = VOLUNTARY, I = INVOLUNTARY, L = LAYOFF, M = MEDICAL (LTD))
Comments GARY IS NOT CONSIDERED TO BE A GOOD MATCH FOR TIETEX'S NEEDS. | Supervisor N/A Date _____
Dept. Mgr. Approval _____ Date _____
Plant Mgr. Approval _____ Date _____
HR Approval David A. Wh Date 7-19-07

CHECKLIST

A. ID Card	✓	F. Payroll Deductions			L. Vacation Years Service	13	
B. Uniforms	N/A	1. _____	N/A		1. Hours Taken	88	
C. Keys/Tools/Equipment	✓ (3)	2. _____	N/A		2. Hours Accrued	89.32	
D. Manuals/Guides		G. Garnishments	N/A		3. Hours Vacation Due	* 0 (1.32)	
1. Policy Manual	N/A	H. Computer Access	✓	(5G)	M. 401K		
_____	N/A	I. Voice Mail	✓		N. Pension		
E. Credit Cards		J. Tuition, Classes, etc.	N/A		O. Insurance/COBRA	✓	
1. _____	N/A	K. Miscellaneous	N/A		P. Co. Agreement	✓	

Reason for Leaving AFTER EVALUATING COUNSELING & GARY CONCERNING HIS UNSATISFACTORY WORK PERFORMANCE, THE COMPANY HAS LOST CONFIDENCE IN GARY'S ABILITY
Comments _____ Exit Interview By David A. Wh Date 7-19-07
HUMAN RESOURCE DEPT.

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
631 Hampton Street
Post Office Box 995
Columbia, South Carolina 29202

Date: March 28, 2008

NOTICE OF HEARING BEFORE THE COMMISSION

APPEAL NO 13018

CLAIMANT: HARRIS GARY G
473 CRESTHAVEN DRIVE
BOILING SPRINGS SC 29316

CLAIMANT'S SSN:

LIABLE EMPLOYER: APPEAL NO 13018
TIETEX INTERNATIONAL LTD
P O BOX 6218
SPARTANBURG SC 29304

SEPARATING EMPLOYER:

A hearing has been scheduled in this matter for Thursday, April 10, 2008 at 10:20 a.m. All hearings are held at the offices of the Commission.

SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION
C. LEM HARPER, SR., CENTRAL OFFICE ANNEX BUILDING
631 HAMPTON STREET, ROOM 350, COLUMBIA, SC

The Commission acts as a Board of Review, and hearings are heard solely on the record, no further evidence is admissible. Parties may appear in person or be represented by counsel. Parties may also submit written argument that deals with the record. Failure to appear may result in your interests considered abandoned.

Commission Appeals Unit
Legal Department
(803) 737-2668
(803) 737-0124 FAX

cc: Claimant
Claimant Attorney – Richard Stewart, Esquire
Liable Employer
Separating Employer
Employer Attorney – Fred Suggs, Esquire
Local Office – Spartanburg
File

A: Okay.

Q: That's it, the one that bears the signature, the next page down.

A: Oh, okay.

Q: Do you recognize your signature and the date, 20th of January 2012?

A: Yes.

Q: Now, take a look at Exhibit 4.

A: Okay.

Q: Now, in your pro se Complaint, which is Exhibit 4, you allege that certain communications were defamatory. And one of those was the February 9, 2007, e-mail from Wade Wallace to David Wilson. And that's in your Complaint at paragraphs 19 and 38.

A: Okay.

Q: In this lawsuit, do you claim that e-mail was defamatory?

A: I definitely think it was. For a third party reading that and believing it, would have to be. It showed a definite, to me, it's my thinking on that, it showed a definite disregard for a person's stability mentally and that kind of thing. I mean, the memo was so farce and whatever.

Q: Is your answer yes?

A: Ask me again, please.

Q: In this lawsuit, do you claim that the February 9, 2007, e-mail from Wade Wallace to David Wilson was defamatory?

A: Yes.

Q: Now, let's do it that way. I'm not going to cut you off, but if you'll give me a yes and if you want to continue and explain, I'm not going to cut you off. Okay.

A: Okay.

Q: But it's going to be clearer. Now, the March 5, 2007, memo from Wade Wallace to David Wilson with a carbon copy to Mark Isbell and you is referenced in your Complaint, Exhibit 4, at paragraph 20 and at paragraph 39.

A: I remember that. Okay.

Q: Do you claim in this lawsuit that the March 5, 2007, memo from Wallace to Wilson was defamatory?

A: Yes.

Q: The June 18, 2007, memo from Wallace to you with a cc: to David Wilson and Mark Isbell is mentioned in your Complaint, Exhibit 4, at paragraphs 26, 27, 28, and 40. Do you claim in this lawsuit that the June 18, 2007, memo was defamatory?

A: Yes.

Q: All right. July 18, 2007, memo from Wade Wallace to David Wilson with a carbon copy to Mark Isbell is mentioned in your pro se Complaint, Exhibit 4, at paragraph

41. Do you claim the July 18, 2007, memo from Wallace to Wilson was defamatory?

A: Yes.

Q: In your Complaint at paragraph 36, you refer to "rumors in the industry" that you were terminated from Tietex for falsifying a test report. Do you claim that those rumors in the industry were defamatory?

A: Yes.

Q: All right. That's a claim in this lawsuit?

A: Yes.

Q: In your Complaint, Exhibit 4, paragraphs 35 and 42, you refer to your ban from the premises on July 3, 2007, by Wade Wallace. Do you claim in this lawsuit that ban from the premises was defamatory?

A: Yes.

Q: All right. These are the only written or verbal statements or actions that you are claiming are defamatory?

MR. LAZENBY: Object to the form of the question.

A: That includes whatever may be, but without, obviously, not having the time to expand on that here --- There's another issue that was just right on the tip of my tongue that you didn't mention. There was the issue of being banned on July 3, which I say was defamatory. Also, and I don't recall exactly what you said there, the detailed wording, but the fact that I was banned from going to the

laboratory building in itself, I'm considering that defamatory, very much so. When I was banned from going to the lab building on February 1, 2007, when I was assigned to report to Wade Wallace.

Q: Okay. In addition to the list of items that we went through and you said were issues in this lawsuit, you would add to that your banning from the laboratory during the time that you worked for Tietex?

A: That's correct.

Q: Is there anything else that you claim was defamatory that's an issue in this lawsuit?

A: As far as what's in that what you've got there?

Q: No, what we're going to litigate in this case. I'm asking you what your claims are. That's what we're here for.

A: I don't think there's something off the cuff I want to start speculating on that may be out there that I've overlooked.

MR. SUGGS: All right, counselor. You want to get your witness to answer the question.

MR. LAZENBY: I think he's answered the question.

MR. SUGGS: I don't think he's answered it at all.

Q: Mr. Harris, I'm asking you right now, do you have any other claims of defamation other than what we've gone through? If you do, I want to know what they are.

Q: Now, you're not making that claim in this lawsuit are you?

A: No.

Q: Now, in your earlier United States District Court lawsuit, you didn't claim that the February 9, 2007, e-mail was defamatory, correct?

A: I don't recall doing that, no.

Q: So the claim about the February 9, 2007, e-mail being defamatory is a new claim made for the first time in this lawsuit, correct?

A: Yes, and if I may add to that. That's not that it should have not been part of the first one.

Q: Okay.

A: It was an oversight or a mistake or whatever on the part of my representation.

Q: Okay. And in your earlier lawsuit in Federal Court, you didn't claim that the July 18, 2007, memo from Wallace to Wilson was defamatory, did you?

A: For the same reason that I just said to the previous question. The same reasons, no, I did not.

Q: So that your claim that the July 18, 2007, memo was defamatory is a claim being made for the first time in this lawsuit?

A: That's correct.

Q: And in your earlier Federal lawsuit, you didn't

claim that your ban from the premises on July 3, 2007, was defamatory, did you?

A: No, not that I recall. I don't think so.

Q: So being banned from the premises is a new claim being made for the first time in this lawsuit?

A: As far as I know, yes.

Q: And you didn't claim in your earlier lawsuit that being banned from the laboratory was defamatory, did you?

A: As far as I know, that's correct.

Q: And that's being made for the first time in this lawsuit.

A: As far as I know, yes.

(Defendant's Exhibit 13 was marked for identification).

Q: Mr. Harris, you have before you Exhibit 13?

A: Yes.

Q: And that's the February 9, 2007, e-mail from Wade Wallace to David Wilson?

A: Yes.

Q: And in your prior deposition, you talked about stress and emotional issues around the time this memorandum dated February 9, 2007, was written, didn't you?

A: There were questions asked of me, in your records in our under oath deposition and previous testimony, there were questions that were asked regarding that. And if you can go back and look at my deposition, you'll see that at

this point in time here that referenced emotional stress and all had actually occurred mostly six months to a year earlier that was referenced. It was done in a way to make it appear, I don't know if it was made to appear that way, but it did appear in the testimony that it was going on at this time and, actually, the biggest issues I had with stress had to do with work related and my wife's hospitalization related issues that all occurred back in the spring of 2006 primarily. And then as time wore on, that gradually, you know, improved or whatever, went away.

Q: Well, in your conversation with Mr. Wallace that led to Wade Wallace preparing this memorandum dated February 9, 2007, you said to Mr. Wallace, "Look, Wade, I've got enough stress as it is," correct?

A: That was probably something to the effect of testimony. But I think, also, if you look, you will see that --- And he references February 7, he references my calling him to come down, that I was having troubles. When, in fact, the real story was he came to my office that morning and asked me, the leading question was, "Have you done these two assignments that I requested you get done?" I hadn't even had time to do them. And I said, "Well, no, Wade, I haven't had time. I've been working on ...." And that led to an explosion. And so this memo, I don't know when this memo was done. According to this, it was done two

days later and I never saw it until we started having our, after I was terminated later is when this shows up and I never was copied on it. So all this showed up, and I'm starting to ramble a little bit, but in the conversation I had with Mr. Wallace, in essence, it was after he was really verbally abusing me and "We can find another chemist," and all that kind of talk. Which is the way he typically operated if nobody was around to hear it. And it was, "Look, Wade, you don't have to talk to me like that." You know, I'd never been talked about, no one in my life had ever had reason to even talk like that to me. And it was incredible. It was amazing. And I think I might have said this before, but if there were any doubt about my going to be terminated, it was removed that day. And I'd only been reporting to him for, well, in essence, less than a week.

Q: In the course of this conversation that you were having with Mr. Wallace that led to the February 9, 2007, memo, you admit that you said, "Look, Wade, I've got enough stress as it is."

A: I think I said that, yes.

Q: And you admitted that in 2006, which was the year prior to this e-mail, your wife was ill and you had stress and sleep issues arising from her illness, correct?

A: The sleep issues, actually, arose directly from

work stress, the way I was done after I went back to Tietex from her situation. I was, obviously, as anyone would be, very concerned about my wife and what she went through. That's pretty normal stuff that we can deal with. But when you throw in work stress, a place you're giving 60 and 70 hours a week into it, it becomes a different ball game.

Q: All right. I'm going to read from your deposition, page 106, line 18.

MR. LAZENBY: Hold on. Let me get there so he can read along.

Q: Ready?

MR. LAZENBY: He's there, yes.

Q: Okay. All right. Line 18, you with me?

A: Yes.

Q: "Question: Was it 2006 that your wife was ill?"

"Answer "That's correct."

A: Yes.

Q: Question, "Did that take a toll on you nerve wise and make you kind of a wreck?"

Answer "I got into a major sleeping problem caused mainly by stress and it did not happen until I went back to work and the way I was done after I got back to work."

That was your prior testimony, right?

A: Yes.

Q: And you told the South Carolina Employment Security Commission that you were a nervous wreck, correct, because of what your wife went through.

MR. LAZENBY: Object to the form.

A: I think it's very broad and general. It could be for a lot of reasons, that happened to be part of it. I don't recall what I told them. But I would say that, I mean, someone could make a statement like that. That could be a very opinionated statement.

Q: All right. This is the Employment Security Commission transcript, February 5, 2008, see that?

A: Uh-huh (affirmative response).

Q: This is your testimony on page 55, that runs over from prior pages starting on 152. Just read what's highlighted there, please, sir.

A: You want me to read it?

Q: Yes.

(Reviewing document).

A: "Answer: And at this time I was kind of, you know, nerve wise, kind of a wreck because of what my wife went through."

Q: That's what you told the Employment Security Commission under oath, right?

A: Yeah. Taking that out of context, out of that total picture there, that was said.

Q: Now, do you claim that Mr. Wallace fabricated the emotional issues that he references in his February 9, 2007, e-mail based on information that was in your personnel file about issues that you had concerning returning from a trip to Thailand in 1997?

A: You know, on my part, I'm looking for why, why did this memo come out? Because I knew it was, well, the memo itself I knew was not truthful. That did not happen. So I'm looking for an explanation what's going on here. And the best I could come up with, well, you know, I had some issues back in 1997 and surely there's stuff on file that would have to do with being sent to a psychiatrist by Tietex and stuff like this. And it's like for some reason. So I'm purely speculating, but I agree, to answer your question, yes, I agree that I would have done that, that I would have related it and that's the best I could come up with. I would have related it to the things that happened following my visit to Thailand.

Q: Do you claim now that Mr. Wallace fabricated the emotional issues that are listed in Exhibit 13 based on information in your personnel file concerning your 1997 return from a trip to Thailand?

A: If I had to say yes or no, it would be yes. But the part that you mentioned, several parts of that, I definitely say yes to fabrication. As to why, I'm

speculating when I say it had to do with Thailand. You know, had to do with what happened.

Q: I'm sorry. I hate to ask you to repeat, but I just didn't understand you. You say you're speculating about what?

A: To say why he did what he did. I'm saying, yes, he fabricated it. He fabricated that report. That did not happen. What he says there did not happen. And I'm saying that the reason for it, obviously, I cannot know. But my guess is it had to do with --- My answer yes or no, if I had to give yes or no, is yes, it had to do with what was on file regarding what happened in 1997 relative to my visit to Thailand and the months that followed coming back.

(Defendant's Exhibit 11 was marked for identification).

Q: Mr. Lazenby is going to help you to get those straight. Take a look at Exhibit 11. Do you recognize Exhibit 11 as your medical records from Dr. Terry Johnson?

A: Yes.

Q: And if you'll look with me at page 179, you're complaining about stress and anxiety, right?

A: 179?

Q: Yes.

A: Yes.

Q: 2/10/06, correct?

A: Yes.

A: I mean, he came to my office. It wasn't prompted by a phone call and it had to do with to inquire were these two requests that he had made done.

Q: You disagree with how Mr. Wallace said the conversation arose, correct?

MR. LAZENBY: Object to the form.

A: I don't disagree with anything except his saying that I called him, which is not truthful, and his saying that he came to my office and this is what we discussed, that I was having serious problems. That wasn't, is not truthful. The events of what happened are just not truthful in this memo. That's what I'm saying. I cannot, you know, you cannot deal with that. You cannot contest it.

Q: I just want to make sure I understand. You disagree with who called whom, right?

A: No one called anyone. He came to my office. He just walked in the door.

Q: Okay. So you disagree with what he says in this memo where it says, "Gary called me mid-afternoon on Wednesday," and you say that's not correct?

A: That's incorrect.

Q: He just walked in your door?

A: He walked in the door and, in fact, it was probably --- You know, I can't remember this, but I don't know when it would have been. But if I were just asked to

guess when did he show up at your office, I think it was probably early in the morning. Because if he came to see me, typically, it was early in the morning just to come around and see what was going on. And he would come in and just say hey or that kind of thing. And so I would have had to have said that what really happened happened early in the morning. So you disagree on who initiated the conversation and the time of day, right?

A: I disagree not so much with the time of day as who initiated the conversation and what was said, what really took place in that conversation.

Q: And you say during the conversation that his primary focus was these projects that hadn't been completed?

A: They weren't --- Let me just say this. They were more, I would put them --- I see a project as something kind of big. It was more of an assignment.

Q: These assignments that hadn't been completed.

A: Okay.

Q: All right. is there anything else about the memo, which is Exhibit 13, that you claim is incorrect?

A: I mean, I think I've pretty well covered it by just saying generally, this doesn't represent what happened that morning or that afternoon or whenever. It is not representative of what took place.

Q: Well, did you tell Mr. Wallace that the

assignments hadn't been completed in part because of your personal and emotional issues?

A: No.

Q: During the course of the conversation, did Mr. Wallace suggest that you go to Tietex's EAP?

A: No.

Q: Is there any part of this memo, which is Exhibit 13, that you agree was said?

MR. LAZENBY: You can take your time and look at the entire document.

A: Okay.

(Reviewing document).

A: I can't recall specifically everything, but my answer is, no, I don't agree with any of that. What I'm basing it on is, like I said, I cannot recall February 7, 2007, but I can look at those things that are said there and know whether or not I would have said them. I mean, whether they fit or not. And my answer is no. I think all of it is totally representative of what took place, totally non-representative of what took place.

Q: So your opinion is that what Mr. Wallace wrote in Exhibit 13 is not representative of what was said?

MR. LAZENBY: Object to the form.

A: That's correct.

Q: You don't have any evidence or other information

to show that this e-mail, which is marked Exhibit 13, was ever seen by anyone other than Wade Wallace and David Wilson except for this litigation, do you?

A: No, I don't.

Q: And that February 9, 2007, e-mail that's dated Exhibit 13, was an internal Tietex communication between two Tietex managerial employees, right?

A: Yes.

Q: One of them was Wade Wallace, who was your supervisor, correct?

A: That's correct.

Q: And the other one was David Wilson who was the Human Resource Manager?

A: Yes.

Q: So both Wallace and Wilson had legitimate business need to know about and discuss personal and emotional problems that you might have been facing that would have impacted your job performance or suggested that it would be prudent to refer you to EAP, correct?

MR. LAZENBY: Object to the form.

A: In the big picture, yes, that certainly should have been proper or would have been.

Q: Well, if you were under stress in performing your job duties, that would be a legitimate issue for your supervisor and HR to discuss, wouldn't it?

A: Normally, yes.

Q: And your struggles with anxiety, depression, insomnia, and stress had previously resulted in you missing work time, right?

MR. LAZENBY: Object to the form.

A: I had no depression. I've never had any depression.

Q: Well, these mental and emotional issues resulted in you taking a two week medical leave, right?

MR. LAZENBY: Object to the form.

A: I was approved for that, and I only took a few days.

Q: You didn't take two weeks?

A: No.

Q: Were you approved for two weeks?

A: Yes. Well, I believe it was two weeks based on memory. But I only took a few days and realized that I think I was kind of addicted to work.

Q: Look back at Exhibit 11, page 185.

A: Okay.

Q: Entry for 4/7/2006, second to the last sentence in that block, "After discussion, will give two weeks medical leave of absence from work to taper off his Klonopin gradually over a two week period." See that?

A: Yes.

A: It appears. I don't know his signature, but that does say David something, W.

Q: Do you remember discussing this memorandum which is marked Exhibit 16 with Mr. Wilson?

A: I do not.

Q: But you don't deny that he discussed it with you?

A: I recall discussing something with him regarding some issues and, in essence, his telling me, if you want to keep your job, I would recommend you just go do it and keep your mouth shut. And that may have been after this if, in fact, and apparently I did discuss it with him. But since the --- Now, what I'm taking this to mean, Mr. Suggs, is that he and Wade Wallace discussed it with me and then it was on 3/5 that we discussed it. And then I requested that Wade Wallace send me an e-mail to document all these things so I would know what I needed to improve on. So I think I'm responsible for the e-mail having been sent.

Q: Well, now, when you say e-mail, you mean Exhibit 16, right?

A: That is correct.

Q: So you admit that Exhibit 16 was prepared at your request to document the meeting regarding Tietex's 30-day review of your progress after you were transferred to Wade Wallace's supervision?

A: Yes.

Q: And you don't know if this, you don't have any evidence or information to establish that Exhibit 16 was seen by anyone other than you, Wilson, Wallace, and Isbell, do you?

A: Not that I recall.

Q: And you admit that you had some unresolved issues with Tietex?

MR. LAZENBY: Object to the form.

A: I don't understand that question.

Q: Line 23, 119.

A: Okay.

Q: "Question: Okay. My question was, when Wallace started supervising you, did you have some unresolved issues with the company that existed prior to his undertaking the supervision of you? Answer: Oh, I had, I had a lot of concern about the things that had been going on since 2003." Did I read that correctly?

A: You did, yes sir.

Q: So at the time Exhibit 16 was prepared, you had some unresolved issues with the Company, right?

A: I was very concerned about the way older employees had been done for a number of years. This is the place I had planned and hoped to retire one day.

Q: All right. Do you claim that any part of Exhibit

16 is incorrect?

A: You mean as far as the statements made?

Q: Yeah.

A: All of them. I mean, I disagree with all those. They're just not correct.

Q: Well, you admitted in your earlier deposition that you had objected to your environmental reporting duties and admitted that environmental reporting was an issue you were concerned about, correct?

A: If I may --- That is correct, but if I may just say a couple of things. Mr. Wallace called me what was supposed to be a, in my thinking, a review of my 30 days. I went to his office in a good mood, reasonably good mood, expecting a nice meeting. And 30 minutes later we were in David Wilson's office and, again, I was being, at the end of all this told, "If you want to keep your job, you need to shape up. You've got 30 days to do so." So it went from here I am thinking something good's going to happen and end up in a very negative situation. Regarding the environmental, I realized that I, I'm very slow in a lot of areas that maybe five months later I realize I should have done something else four months earlier, but the environmental issue at Tietex was something that I had to do because I was the chemist. That's just the way it is. You don't go to a non-doctor for brain surgery or whatever.

Q: And let's go to the second full paragraph that starts on March 5, 2007. I'm sorry, page 5.

MR. LAZENBY: Page 5, Exhibit 2?

Q: Right. Now, it says, "On March 5, 2007 ..." That's the same date as Exhibit 16, isn't it?

A: That's correct.

Q: And the Magistrate wrote, "On March 5, 2007, Mr. Wallace discussed several issues with the plaintiff regarding his performance and documented the discussions at the Plaintiff's request in a memorandum to David Wilson, with a copy to Mark Isbell and the Plaintiff." See that?

A: Yes.

Q: Then he goes on to say, "Mr. Wallace noted the Plaintiff made emotional and overly vocal accusations and statements without supporting research or data, was not honoring the chain of command, harbored grudges over past grievances and toward the management in general, and complained about ownership of environmental reporting duties. The memorandum concluded with the statement 'As we discussed, these issues are not sustainable and it is mandatory that Gary make significant progress towards resolving these issues within the next 30 days.'" Did I read that correctly?

A: Yes, you did.

Q: So where Wade Wallace said that you became

emotional and overly vocal, that was his opinion, correct?

A: No. In my opinion of that, no, I don't think that was his opinion. There's no one --- If you took someone that as he described here and you take the extreme, I would have been more on the other end. As an employee, I was probably less apt to raise my voice, raise cane, make an issue than the average. That totally is not true.

Q: Well, who wrote Exhibit 16?

A: Who wrote it? Wade Wallace.

Q: All right. Now, you say that what Mr. Wallace wrote is incorrect. Is that right?

A: I mean, just to be frank, I think he's making it up.

Q: All right.

A: I mean, for reasons that I'm not going to go into, I think this is, this is all made up. It didn't happen.

Q: Do you agree with me that it was Wade Wallace's opinion that you became overly emotional and overly vocal?

A: I think, no. I do not, I never gave Wade Wallace a reason to think that of me.

Q: Okay.

A: So I don't think that was his opinion.

Q: Well, it's your opinion that it's incorrect, right?

A: It's not true, yes.

supervisor had a right to be concerned about these two assignments of C237 and T602?

A: Certainly as my supervisor he did.

Q: All right. And don't you agree that Mark Isbell as Wade Wallace's boss had a legitimate reason to discuss the status of these projects which the Company was counting on for cost savings with Wade Wallace and David Wilson?

A: For the same reasons, going back to the March 5, memo, for the same reasons, I think he should have handled it directly with me and in private and had me sign something. And if he was genuinely concerned about this, then that's the way it should have been handled. In other words, I think that anyone at Tietex should have been concerned about my performance as an employee there and we can take it to anyone in the plant who had a job there. They certainly should be concerned that I was going my job. I do not agree that David Wilson and Mark Isbell necessarily needed to know about this.

Q: All right. It would have been okay with you if Exhibit 18 had been just written from Wade Wallace to you?

A: I would have preferred that. And, you know, we could have handled the situation. You know, if that was the intent of making things better, we could have worked it out.

Q: But if you weren't performing on a project to the

satisfaction of your supervisor, and a project that you said earlier the failure to finish on time might put your job in jeopardy, wouldn't it have been appropriate for Wade Wallace to involve Human Resources?

A: For the exact same reasons of what we discussed in the March 5, this again is untruthful. I mean, I just have to say it. This is a pretext memo and everything in here is not for the right reasons. So with that said, I can't, you know, to answer your question, it's got to be based on what this is really all about. And, I mean, I agree with you that Wade Wallace should have been concerned about my lack of performance, absolutely, but it wasn't there. He had no reason and was never given a reason.

Q: Okay. So you disagree with the content of the memo?

A: Again, exactly like March 5, absolutely.

Q: All right.

A: A hundred percent.

Q: And in your opinion, the content of Exhibit 18 is incorrect?

A: Yes.

Q: And in Wallace's opinion, since he wrote it, would you agree that Wallace's opinion was your progress on C237 and T602 had not been satisfactory?

A: I don't think that was his opinion. I think he

Q: ... July 3, 2007. Correct, Mr. Harris?
A: That's correct.
Q: So you admit you didn't do any work at Hexion on July 3, 2007?
A: That's correct.
Q: And you admit you told Mr. Wallace you were going to Hexion as soon as you took care of an ant problem at your home?
A: Out of pure courtesy, yes.
Q: And you admit that when you couldn't get in Hexion, you left?
A: After some time of trying to get in, I left a message for one of the technicians and then I left.
Q: And you admit there was no one who saw you at Hexion who could substantiate you being there?
A: As far as I know.
Q: And you admit you were only at Hexion for about 30 minutes?
A: Thirty or 45, I don't remember exactly. I'd say 30 to 45.
Q: Look at your deposition at page 158.
A: Okay.
Q: All right. This actually starts at 157, last line.
A: Uh-huh (affirmative response).

Q: 157, the last line. You there?

A: Yes.

Q: Okay.

"Question: All right. Let me invite your attention to the ESC transcript March 28, 2008, page 171. 'Question. And you stayed there for about 30 minutes.' 'Claimant.' That's you. 'My guess is 30 minutes.' 'Question. Pardon me?' 'My guess is 30 minutes.' 'Question. Thirty?' 'Claimant. An estimate, from memory, an estimate.'

Answer: Okay.

Question: Do you agree with 30 minutes?

Answer: About 30 minutes because I don't know, I didn't keep a record of it. I would say, probably now I would change that to at least 30 minutes because of what I did."

A: Okay. That's consistent.

Q: And you admit that Mr. Wallace expected you to be at Hexion?

A: No. Wait a minute. Let me just say that he was aware that at some point I was going to be going to Hexion. I was on vacation. I had no intention, I had no intention of going to Hexion, finishing a project, and going back to Tietex.

A: Yes.

Q: Wade Wallace who was your supervisor and David Wilson who was the Human Resource Manager?

A: Yes.

Q: And a copy to Mark Isbell who was Wade Wallace's supervisor and in your chain of command?

A: Yes.

Q: And this was a recommendation for termination, right?

A: Yes.

Q: Exhibit 19 recommended that your employment be ended, right?

A: That's correct, yes.

Q: So Mr. Wilson in Human Resources would have had a need to know that, right?

A: Yes.

Q: And Mark Isbell, who was Wade Wallace's boss would have had a need to know that Wade Wallace was recommending that one of his employee's employment be ended, right?

A: In a normal situation, yes.

MR. SUGGS: This is probably a good time to take a break if you're ready.

MR. LAZENBY: Sure, that's fine.

(Off the Record)

Examination Resumed by Mr. Suggs:

Q: And let's go to Exhibit 3 and go to the bottom of page 3.

A: Okay.

Q: And look at page 3 through page 5.

(Reviewing document).

A: Okay.

Q: And the District Court in reviewing the evidence and the Magistrate's Report found as fact that the performance deficiencies cited by Tietex, which are listed in the memoranda in Exhibits 16, 18, and 19 were true, right?

A: Yeah, they concurred with the Magistrate Judge, yes.

Q: Right. Okay. Now, let me invite your attention to your claim about rumors in the industry.

A: Okay.

Q: Are you with me? And you claim it was reported to you that a former Tietex employee who had previously worked in sales for Tietex told you there were rumors about you in the market, right?

A: Yes.

Q: And you don't recall the name of this former Tietex sales employee?

A: Yes.

Q: Yes, you don't?

A: I do.

Q: You do. Who is that?

A: Ann Weaver.

Q: Who?

A: Ann Weaver.

Q: Who is she?

A: All I know her as is Ron Weaver's wife and both of them worked at Tietex and they eventually got married. She was Ann someone else.

Q: Does she still work at Tietex?

A: No.

Q: Where does she work now?

A: I don't know.

Q: Do you have any contact information on her?

A: No.

Q: Tell me what you claim Ann Weaver said.

A: She told me that there were things being said and she thought I ought to know about them. And I didn't really pursue it that much. She said, "I'm just going to tell you that. There's been some things spread out there about you. You need to know about them." And I said, "Do you think the Tietex folks ..." She wasn't at Tietex then. I said, "Do you think any of the sales folks at Tietex would know?" She said, "It might be that. It might be that they would, they should. They're apparently involved in it."

Q: Okay. Did Ann Weaver tell you what was being said?

A: No.

Q: She just said generally there were rumors?

A: She said some bad --- I don't remember exactly. But it was obviously negative what she implied to me, or actually said was that it was negative stuff, general stuff. And I'm not the kind of person to start digging for details and I didn't really pursue it with her. I didn't ask her for much.

Q: When did you have this conversation with Ann Weaver?

A: I don't remember. It would have been, obviously, after I was terminated. And it could have been, I mean, maybe somewhere there's some where I was asked this same kind of a question, there may be some record when it was. But my thinking right now just based purely on memory is that it was probably in the fall of 2007. It could have been 2008 sometime, but it wasn't that long, not that far out from my termination.

Q: Where did the conversation with Ann Weaver take place?

A: It would have been probably by telephone.

Q: Who called whom?

A: I do not recall the reason why I was talking with

her. There was several times we talked with each other, by the way, because at that time I was trying to restart a career and I knew Ann fairly closely.

Q: At the time of the conversation with you, who did Ann Weaver work for?

A: I don't know. I don't remember. Oh, at the time. Oh, you were saying now while ago. At the time, I believe it's something like Clama, Lava, Clama. I know there's a Lava and there's a Clama, but it was either Lava or Clama.

Q: If I set out to find Ann Weaver, where would I start looking?

A: Probably go to Pam. I mean, if I were you, Pam, I'm sure, she knows a lot of people who's worked at Tietex and the sales folks. She could trace it down for you. I mean, I'm being serious.

Q: When's the last time you talked to Ann Weaver?

A: Probably three years. Let me see. At least three years ago.

Q: When did it occur to you that Ann Weaver was the person who reported these rumors in the industry?

A: That she reported them?

Q: Yes.

A: In other words, saying when did we first talk?

Q: No, no. When I took your deposition in the Federal case, I asked you who it was that told you about

these rumors and you said you didn't know.

A: Well, maybe I didn't at the time. I was still in a lot of --- If I told you that, I meant it.

Q: And I'm asking you now when did it occur to you that it was Ann Weaver?

A: Well, I know it was Ann Weaver. I mean, it didn't occur to me. I know it and it's just a matter of when did it happen. Did it happen before July of 2009 or after? But at the time, if I in fact said what you said I said there, I meant it. If I'd have known it was Ann Weaver when you asked me the question, you would have gotten her name. There's no reason not to give it to you.

Q: Look at page 217 of your deposition.

A: Okay.

Q: All right. We'll just start at the top. This is part of your answer.

"--- and I'm not 100 percent sure about the person that told me, but they did work at Tietex and they're out in the sales force, and they said they had heard a rumor about me out in the market. Question: You don't know the name of this person? Answer: The one that alerted me first, I don't recall."

A: Well, I'll just tell you right now, there's absolutely no reason had I known it was Ann Weaver at that

time, I would not have told you. There's absolutely no reason why I wouldn't have mentioned that. So, you know, I'd need to go do some digging now to figure out when I first learned it was Ann Weaver.

Q: At the time you had the conversation ...

A: But I ... I'm sorry.

Q: At the time you had the conversation with Ann Weaver, what was she doing? What was her job?

A: She was in sales, mattress fabric sales.

Q: But you're not sure of the name of her employer?

A: Not right now, no, absolutely not. That's been, like I said, three plus years since I talked with her.

Q: Okay. As a result of Ann Weaver telling you about rumors in the market, you telephoned Tietex employee Jimmy Fleming who worked in Tietex's color shop?

A: No. At that time Jimmy Fleming was in sales when I made the phone call.

Q: Look at page 216 of your deposition, line 13.

A: Okay.

Q: "Question: Tell me who Jimmy Fleming is.
Answer: He's a young fellow that was working in the color shop, just various jobs in the color shop ..."

Is that ...

A: Yes. Please, can I ask you to read the rest of it

and you'll see what I'm talking about.

Q: "... right before I left there he ended up getting some sort of a degree from, I don't know if it was a community college or what but once he got that he was given a job in ticking sales, working in the sales marketing area for ticking fabrics. Fairly young fellow."

A: Yes.

Q: So where did he work?

A: He was in sales at the point in time I was terminated and he was going into sales pretty much right about that time. So by the time I was calling him on the phone whenever it was later, he was actually out there in the sales force. And I knew Jimmy. He and I had a fairly close relationship.

Q: Okay. As a result of your conversation with Ann Weaver, you called Jimmy Fleming?

A: I called him because I had his cell phone number and I knew him and I knew he would tell me the truth.

Q: Is it true that you called him as a result of your conversation with Ann Weaver?

A: Yes.

Q: And Jimmy Fleming told you that a ticking manufacturer's representative in Texas asked him if it were true your employment had been terminated for preparing a

false testing report.

A: Yes.

Q: And you don't know the name of the person who allegedly asked Fleming if your employment had been terminated at Tietex for falsifying test results, do you?

A: I do not and did not pursue getting it. I intentionally did not pursue getting that information.

Q: And you don't know for what company that person worked?

A: I do not. I can't sit here and say I know exactly where the person works. But it was like a knowing without knowing. I just didn't bother pursuing it. I didn't, for a lot of reasons, I didn't want to start opening a can of worms and digging in and scaring people off and all that. I had all I needed and wanted.

Q: You've never spoken to this unknown person?

A: Not at this time, no.

Q: Do you know what Jimmy Fleming told this unknown person about whether Tietex had terminated your employment for falsifying test results?

A: I cannot sit here and say that we brought that up. The only thing I can remember about ...

Q: Is the answer yes or no? Do you know what Jimmy Fleming told him in answer to his questions?

A: No.

Q: Now go ahead.

A: He did, I don't know if I asked him this, I probably did. Was there anyone else there that heard that from Tietex? And he said Kenny Parrish knew about it. So both he and Kenny Parrish knew about it.

Q: Did he say definitely that Kenny Parrish was present?

A: Yes. They were together. In fact --- Well, let me just say, I gathered from what we discussed in that phone conversation that Kenny Parrish was with him that particular moment when that occurred.

Q: All right. Turn with me to page 217 of your deposition.

A: Okay.

Q: Line 22.

"Question: And you don't know the name of this person that was talking to Fleming?

Answer: No, I do not. He would if he remembers. And anyway it was, and anyway once I was told what I was told, and I asked him if anybody else was there and I think he mentioned that Kenny Parrish, who worked at Tietex at the time was also present there on that particular assignment."

A: I mean, I agree that you've read what I'm reading, yeah.

Q: All right. Well, back when you gave your deposition in the Federal case, you said that you thought that Fleming said Kenny Parrish was present.

A: And I think it today. You know, I mean, just simply saying ...

Q: What evidence do you have that Parrish was there?

A: Based on what Jimmy Fleming told me.

Q: Did you ever talk to Kenny Parrish?

A: Not specifically about that.

Q: Now, when do you claim this conversation occurred?

A: I can't, because I'm not sure. I'm just simply saying, obviously, it had to have been after I was terminated. And if were putting out a guess, it would have ranged some time between the fall of 2007 on up into possibly some time in 2008.

Q: Could it have been summer of 2007?

A: No, it had to have been after I was terminated to have made sense that I would have been told all this in a phone call and then that Ann Weaver would have called me or I called her, whatever, that we talked. Because at the time we talked, I was actually trying to restart a career.

Q: So just so we're clear, I'm talking about when Jimmy Fleming's conversation with the ticking manufacturer's representative occurred. Do you know when that was?

A: No.

Q: And you don't have any evidence that any representative of Tietex made any statements to this unknown named ticking manufacturer representative about you, do you?

A: Not at this time, no.

Q: Do you have any evidence that any representative of Tietex made any statement to anyone in the industry about the reasons for your termination?

A: Only that I have evidence, not evidence but --- Well, I guess you could call it evidence that may have occurred, but to say that I have evidence that absolutely that occurred, I don't.

Q: Now, when you refer to your ban from the premises on July 3, 2007, you're talking about Wade Wallace suspending you until he returned from vacation, correct?

A: Yes.

Q: And I think you said earlier you were suspended with pay.

A: That's what happened.

Q: And that was on the day, that suspension was on the day that you had told Mr. Wallace you were going to be working at Hexion, correct?

A: That was the day that I was going to be doing work at Hexion, July 3.

Q: And Wade Wallace telephoned you on July 3 to learn where you had been because he had information that you were

not at Hexion, right?

MR. LAZENBY: Object to the form.

A: I will say yes, but I'd like to add something to that. In real life when this happened, and this is my speaking today when I know a lot more than I knew in 2009. I've forgotten information, obviously, with the passage of time, but I've also been able to become less subjective to the matter. And it's pretty clear to me today that what happened on July 3 was that Wade Wallace expected, based on our miscommunication, my thinking that he was going on vacation on, leaving the last day being the 6th, and his knowing that it was the 3rd and assuming I knew that, he expected me back in there with information from Hexion toward the end of the day on the 3rd. And I have no problem with understanding that he wanted me back in there so he could terminate me before he went on vacation. And so what happened, everything is calm. None of this other stuff that's in these reports about July 3 that he said happened. Later after the fact, he's trying to make it look like I disappeared for the whole day. But, actually, he did not get alarmed at all about anything on July 3 until George Henderson showed up between 4 and 4:30 with sulfuric acid. And then, and I can just imagine that Mr. Wallace is thinking, he'll be back in here by 5 o'clock and we'll take care of things. And all at once he gets notice that someway

somehow George Henderson has come by with something for me and then, of course, that's when everything starts, after 4 o'clock. Up until then, he had no reason to be not calm and ready to do whatever he was going to do. So that really got him highly concerned that, man, he's not going to be around here for me today. So he starts doing all this stuff. He calls me like 4 whatever, 4:40 or whatever, and gets me on the phone. My cell phone has been on all afternoon. He calls me and he says, "Gary, will you come to my office?" And I said, "Wade, I'm not there." I said, "I'm on my way to Hexion to pick up some acid." Then he flew off the handle like he can do and started, "What do you mean you're not here," and all this. And he said, "I tell you what, I'm putting you on suspension and I don't want you back in here until I'm back from vacation." And there may have been a few more little comments in there thrown in. He asked me to explain something but he flew off the handle. And then we were on the phone and I was driving going out kind of, I guess, where you could get cut off. And then the next thing you know, we don't have a connection. But, anyway, that was the phone call. That was the essence of the phone call that was made to me.

Q: In this telephone call that you described between you and Wade Wallace on July 3 where Wallace telephone you to find out where you had been, no one was on the phone

other than you and Wallace, right?

A: On our phone call?

Q: Yeah.

A: That's correct.

Q: And it was during that call that Wallace told you you were suspended, correct?

A: That's correct.

Q: Do you know if Wade Wallace told anyone at Tietex that you were suspended?

A: I don't know that for a fact, but based on what happened later, at some point he told some other people I would learn later.

Q: Do you know if Wade Wallace told anyone outside of Tietex that you were suspended?

A: I later learned from the Textile Rubber plant manager that he had passed that information along.

Q: Textile Rubber plant manager. Who is that?

A: In Charlotte. I can't recall his name right now, but he's the guy that headed it up at the time.

Q: And he's in Charlotte?

A: Yes. And it was reported to me that Wade Wallace had told him. I was actually still involved with Textile Rubber and he called and told them I was suspended.

Q: Who reported that to you?

A: I'd have to look. I think it may have --- I

don't know. It may have been George Henderson. Because George had a very close relationship with them and George was working with me. I was directed to go to Textile Rubber by Wade Wallace and, ultimately, George Henderson got involved with me because he sold some of the key products to Textile Rubber that I needed to change over to for my successful formula. In going to Textile Rubber, another story, I had to totally try to reformulate because they only had certain ingredients they would use. And I believe it was George Henderson that ultimately let me know of that phone call. I'm trying to think of the guy's name as we speak. But he was telling me that this guy told, had been called by Wade Wallace and told this information.

Q: What information do you have to establish that Wade Wallace told this unknown named person from Textile Rubber that you had been suspended?

A: Well, I would have, somewhere I would have knowledge or access to the actual person. I'm just saying today, I believe it was George Henderson. It's logical based on the connections I had with Textile Rubber and who all was involved.

Q: You believe that George Henderson told you that this unknown named Textile Rubber person told Henderson that Wade Wallace had told the person from Textile Rubber that you had been suspended?

A: Yes. I've got the name now if you want it. Les Davis. Is that okay? Les Davis, Textile Rubber.

Q: It was true that you had been suspended.

A: That's true.

Q: Do you have any information that Wade Wallace told Les Davis at Textile Rubber anything other than the bare fact that you had been suspended?

A: The only information I have is like second hand what George Henderson told me. And as far as giving you any details on what George told me, I don't know exactly. I'm just saying the essence of it was that Wade Wallace told Les Davis that you had been suspended or something to that effect. That's based on memory. And I cannot sit here and give you details on that.

Q: That's what you remember?

A: That's what I remember, yes.

Q: Do you have any evidence or information that anyone outside or Tietex other than Les Davis and George Henderson knew you had been suspended?

A: Well, all of my connections knew I had been suspended.

Q: I'm sorry?

A: The people that I knew that I spoke with frequently or dealt with, they knew I had been suspended.

Q: Is that because you told them?

A: Partly and who knows. I think there's probably situations, I'd have to go back and dig, but situations where people were aware, even more so than the suspension, was being banned from the lab as far as that kind of thing being a negative matter for me. Once I was banned from the lab, and that was something that was learned, and all the people that I dealt with out in the industry started shying away from me and didn't want to have anything to do with me, in essence, because ultimately they were looking out after themselves and their business and they felt like I was a negative.

Q: Okay. Is it fair to say that you disagree with the statements that Wade Wallace made in the memoranda that we've been examining about your performance?

A: Totally. I totally disagree with what he said about my performance.

Q: And your disagreement is based on your own subjective view of how you performed, correct?

A: No. No. It's based on my view, my objective view as a manager and my understanding of Wade Wallace as a non-technical person and not having a clue about how someone technical is supposed to do things.

Q: All right. Since you gave your deposition in your Federal lawsuit, have you any additional information supporting your view that your performance was adequate?

(Defendant's Exhibit 7 was marked for identification).

Q: And do you recognize Exhibit 7 as an Intake Form for when you first started to work at Tietex that's dated July 13, 1994?

A: Yes.

Q: And it says your service date is July 13, 1994, right?

A: Yes.

Q: Take your deposition, please, and turn to page 60.

A: Okay.

Q: Line 3.

A: Okay.

Q: "Now, if you will look, please, at Exhibit 6, the second page, which is Bates Numbered 229 ..."

A: Okay.

Q: So that's the same document you have before you now, which is Bates Numbered 229.

"Do you see the bold underlined language ..."

A: Yes.

Q: "... that's two paragraphs above Mr. Woodward's signature?"

A: Yes.

Q: "Answer: Yes."

A: Yes.

Q: "It says, This letter summarizes our offer.

now. I'll say I'm not sure right now."
Did I read that correctly?
A: Yes.
MR. LAZENBY: I just want to object to the form, that there were several objections in within there that you skipped over.
Q: That's fine. I skipped over them. I confess.
MR. LAZENBY: Well, it is what it is.
Q: The document speaks for itself.
MR. LAZENBY: Right.
Q: Would your answers to those questions that I just read to you be any different today than they were in 2009 when you gave those answers?
MR. LAZENBY: Object to the form.
A: In essence, in other words, the actual being what I would say would probably be essentially the same.
Q: You were never bullied when you worked for Tietex, were you?
MR. LAZENBY: Object to the form.
A: Well, you've got to get into the definition. But the closest thing I would ever, I mean, obviously --- well, not obviously, but the way I was treated by everyone else at Tietex in that area was pretty what you would expect. But I would certainly look at what Wade Wallace did to me and the way he did it. In the position that he was in because he

had control over me, was bullying me around, you know, because he could or whatever.

Q: You claim you were bullied when you worked at Tietex by Wade Wallace?

A: If you want to call it that. I think we've got to get into what that means. But I'm not going to expand on what we first said and then convert it into, yes, I was bullied. Because without knowing what we are talking about in terms of definition. I was pushed around and shown high disrespect. Treated like an animal. If had to put it in terms, I was treated like an animal.

Q: Mr. Harris, how about turn to Exhibit 5, page 8.

A: Okay.

Q: Paragraph 44. This is your claim. "Defendant employee agents, with full knowledge and forethought, using their position of power and authority over Plaintiff, sought to bully Plaintiff to achieve their own ends, knowing the emotional damage they would and did inflect upon Plaintiff." So that's your claim.

A: Now, are you reading 45?

Q: 44.

A: I'm sorry. I mean, I think it's well written.

Q: You claim you were bullied by Wade Wallace?

A: If we're not going to do a definition, yes. In other words, I'm leaving to my interpretation of being

bullied, I will definitely say yes without question.

Q: All right. How do you claim you were bullied?

A: Anytime, like on February 7, when he had the opportunity with nobody else around, he was two different people in private with me versus out in the middle. Mr. nice guy out in the public and all this. Behind closed doors, different ball game. The threats and the threatening tone of voice. You know, I cannot recall all the language and the way it was said and the tone of voice. It was just incredibly abusive. And then in the final analysis, you know, the end of it would always be get your act in order or we'll find another chemist to hire. In essence, that would be the kind of, those kind of encounters would end up with that kind of a comment.

Q: So these were threats that you were going to get fired if you didn't do your job?

MR. LAZENBY: Object to the form.

A: I mean, as to the reason for them, that was the way they came off to me. As to the reason behind them, I can't sit here and say what his motives were.

Q: All right. Were all the threats threats about what was going to happen to you if you didn't do your job?

A: Yes or no, no.

Q: No?

A: My answer to that question the way you asked it is

A: I'm sorry?

Q: You have to answer verbally so she can take it down.

A: Oh, okay. Yes. I'm sorry.

Q: Tell me why you claim that the conversation that you had with Wade Wallace on March 5, 2009, was bullying of you by Mr. Wallace?

A: First I would say that it was probably more intimidation than bullying. I consider bullying as much stronger and harsh and unnecessary. And I think it was toned down because of the presence of David Wilson. There was certainly not this arrogant, high level arrogant threatening like tone of voice and all that. The things that were said there was I'm sitting in there. Mr. Wilson was sitting away and I was sitting across from Wade, and Mr. Wilson was off to the side. And he starts in with all these things in a very boastful manner and arrogant, really arrogant tone of voice about all these things that I've not done. And I'm sitting there and I can't believe it. First of all, as I said earlier, I was half sick with the flu or something. And I'm sitting there and just, you know, I mean, what's going on here? And I actually looked over for Mr. Wilson as if I wanted, you know, are you kidding me? Can I have some help? And I think, I don't remember any comments, but I think I made some comments to Mr. Wilson

about this. In the final analysis, after all of that, my comment was, "Wade, would you do me a favor? You're telling me this is stuff I've done and I need to shape up on. Would you please send me an e-mail so I can be sure to know what I need to do to correct it." He said, "Be glad to." But before I said that to him, he had already said, "You've got 30 days to shape up or we're going to be looking for another chemist." And it was done in a tone of voice that was pretty hateful.

Q: The entire conversation on March 5, 2009, occurred in the presence of David Wilson and it was all work related, correct?

A: It was, what he told me I had to do was work related.

Q: Correct.

A: Well, it had to do with my job. It had to do with what he, not my job directly, but my character, conducting myself properly and all that. It had to do with my job in general, if that's what you mean.

Q: Are there any other incidents of bullying other than the incident that you related that you claim happened on February 7 and the incident on March 5, 2009?

A: The whole spring, once all that happened and a long the way the entire spring, I mean, you can look back at everything you've got and you'll see that there's a lot that

didn't happen. For some reason, there's nothing, not a whole lot showing up in April and May. But I do remember, and I cannot here today sit here and tell you dates or anything, but I do remember there was a time or two after all that and before June 18 that there was an encounter or two but I cannot sit here today and give you dates or information on it.

Q: So the only two events that you can tell me about today that were incidents of bullying occurred on February 7, 2009, and March 5, 2009. Is that correct?

MR. LAZENBY: Object to the form.

A: Maybe we can throw in July 3.

MR. LAZENBY: I think you said 2009. Did you mean 2007?

Q: I said 2007?

MR. LAZENBY: You said 2009.

Q: I meant 2007. Thank you. I wrote 2009. So the only two events I asked you about were February 7, 2007, and March 5, 2007, and your response was, "Well, we can throw in July 3."

A: Yeah, I would consider what he did when he called on the phone totally unnecessary and uncalled for. And he really got carried away when he found out I was not there in the plant.

Q: Tell me what Mr. Wallace said to you on July 3

that's recorded in Exhibit 19 that you claim is bullying.

A: Again, it was more his tone of voice and yelling type tone of voice. And, you know, "I'm banning you from, I'm banning you from Tietex property until I get back from my vacation." And, you know, that is one thing to say, but to scream it and just really in the questions he's asking, asking them in a hateful manner. Just very disrespectful.

Q: And all of this conversation on July 3 that you claim was evidence of bullying arose from his inquiries about where you had been that day, correct?

A: No. I'll say no to that and say it really arose from the fact I was not in the plant.

Q: That's what really ticked him off. And he thought, he said, "Gary, you come to my office." And then, "What do you mean you're not here?" And then na, na, na. I said, "Well, wait a minute. Wait a minute." And I started trying to tell him what's happened. I'd been to Hexion and this happened. I'm trying to get the project done that he wanted done so I can get the information to him Thursday, on and on and on. And it's somewhere along the way I'm the one that throws in all this quick talk and everything and explanation trying to explain, that I throw in where I've been. So it's after I've said all that that he, you know, says I'm banning you from Tietex. In a hateful, very hateful way, "I'm banning you from Tietex property. I do

not want you back on the property until I'm back from my vacation." Something to that effect.

Q: You've given me three incidents of bullying. The incident that you claim occurred on February 7, which is recorded in Exhibit 13; the incident that occurred on March 5, 2007, which is also recorded in one of the exhibits; and the incident on July 3, 2009, which is recorded in Exhibit 19. Any other incidences that you claim were bullying?

A: Not at this moment I don't have any to offer.

Q: And the March 5 was Exhibit 16. Now, with respect to February 7, 2007, where did this alleged bullying occur?

A: In a small little, I always describe it as a little dungeon like office in the very back of the Tietex main plant facility, just right off of the Compounding Department.

Q: And the only folks present were you and Mr. Wallace?

A: In that room.

Q: Was somebody nearby?

A: Ricky Miller would have been outside the door there somewhere working.

Q: Any information that Miller heard the exchange between you and Wallace?

A: Not to my knowledge.

Q: After your meeting with Mr. Wallace in February of

DATE: 7-13-94

TIETEX CORPORATION

Salaried X
Non-Exempt
Hourly

NAME Gary G. Harris
First Middle Last

08 DEPT. 3335 EMP. NUMBER

ADDRESS Timberlane Apts. # 316
106 Kensington Drive
Spartanburg SC 29301
city state zip

HIRE DATE 7-13-94

SOC. SEC. NO

SEX M MARITAL STATUS M

PHONE 587-8959

DATE OF BIRTH

JOB TITLE Senior Research Chemist

JOB CODE — JOB SERV. DATE 7-13-94

SALARY

ANNUAL RATE $55,000.00

WEEKLY RATE

HOURLY RATE SHIFT 1

TAX DATA

FEDERAL TAX -2-

STATE TAX -2-

ADD'L. TAX Ø

*DIRECT DEPOSIT
(*attach authorization agreement)

DEDUCTIONS

	AMOUNT		AMOUNT
GROUP INSURANCE	Eligible 60 days from H.D.	MISC.	
LIFE INSURANCE	" " " " "		
401(K)	After 3 months of service		
UNITED WAY	Ø		
SAVINGS	Ø		

DEFENDANT'S EXHIBIT 7 HARRIS

DEFENDANT'S EXHIBIT AD HARRIS

EMPLOYEE SIGNATURE Gary G. Harris DATE July 13, 1994

PERSONNEL Cornelia H. Connors

COPY TO PAYROLL 7/18/94

TIETEX
000215

DPW 7/18/94

Wallace, Wade

From: Wallace, Wade
Sent: Friday, February 09, 2007 8:58 AM
To: Wilson, David
Cc: Isbell, Mark
Subject: Gary Harris

Per our conversation, I'd like to document the discussion I had with Gary Harris on Wed 2/7/07.

Gary called me mid afternoon on Wed and stated that at that moment his personal and emotional problems had overwhelmed him and he was confused, disoriented, and could not function. He did not know what to do. I immediately went out to his office to discuss his problem in person. He explained that his personal life over the last year has made him so fragile emotionally that sometimes he has episodes like the one he was experiencing. As we talked he felt better and mentioned that the project work I had assigned him would be help keep his mind off his personal problems.

I took that opportunity to remind Gary that Tietex is committed to our employees well being and that at any time we would support him if he felt he needed to utilize EAP. He said that that was not necessary and that he could work through it. I also asked him to be open with me if in any case this personal problem interfered with his ability to perform his job as we would need to sit down with HR to find a resolution.

When I left him he assured me that he was OK and thanked me for my support and patience.

TIETEX - SC
000012

ATTACHMENT D

TIETEX

To: David Wilson

From: Wade Wallace

CC: Mark Isbell, Gary Harris

Date: March 5, 2007

Subject: Gary Harris' Transition

During the last thirty days as Gary Harris has transitioned into his new role, several issues relating to his work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

As we discussed these issues are not sustainable and it is mandatory that Gary make significant progress towards resolving these issues within the next 30 days.

ATTACHMENT F

TIETEX

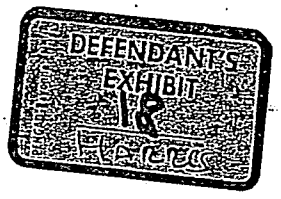
To: Gary Harris

From: Wade Wallace

CC: David Wilson, Mark Isbell

Date: June 18, 2007

Subject: Gary Harris Work Perfomance

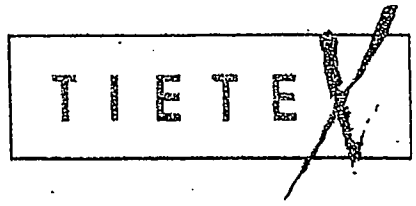


During the last ninety days some issues relating to Gary Harris' project work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

Of Gary's multiple duties two projects were identified ninety days ago as priorities and he was instructed to give them his most thorough and diligent focus. The first project was the development and qualification of a Tietex coating compound formula as a replacement for the current coating used on C237. Gary actually began work on this project prior to his reporting to me. His lab coating work began in December 2006 so the project has been ongoing for over six months. The second project was to develop a finish formula change and process to enable T602 to be finished with the parabolic applicator instead of a pad application. The project was assigned and work began ninety days ago.

Although the first project has been on going for six months no significant progress has been made toward completion. This project was initiated solely by Gary and he convinced senior management that it was completely feasible in order to gain support. He committed to developing a compound that would cost between $0.60 and $0.62 per pound verses the current product which cost $0.885 per pound. Despite months of lab work in house and at four different chemical supplier locations and numerous production trials he has been unsuccessful in creating a viable product. The formulation which Gary developed has proven to be much more complicated to reproduce commercially than initially promised. Gary exercised poor judgement by making claims and commitments that he could not deliver. This project was included in corporate financial improvement goals. Due to the failure of this project I have personally had to begin parallel project work with other suppliers to develop a suitable replacement to achieve the financial commitment of the project.

The scope of the second project to develop a finish formula and process for parabolic application of T602 was a technical challenge. However, Gary informed me that lab samples were promising and recommended a production trial. Although I was not presented the actual numerical results of the first production trial Gary assured me that the results were comparable to



the current product. From this I approved a scale up run for statistical qualification. The second trial, as well as a third were unsuccessful. These subsequent failures concerned me and I personally recalled samples from the first trial that Gary assured me was a success. I witnessed them being tested and found that the product from that initial trial did not perform comparable. By this I can conclude that Gary did not conduct adequate scientific and numerical analysis of the first trial. This negligence was costly in that two subsequent production trials could have avoided. In addition, this negligence in applying the proper scientific analysis is unacceptable in the work of a Sr. Research Chemist.

Obviously the two issues regarding the C237 project failure and poor analytical practices demonstrated in the T602 project are not sustainable. It is mandatory that Gary make significant progress towards resolving the problems with the C237 project and improving on his analytical practices within the next 30 days.

To: David Wilson

From: Wade Wallace

CC: Mark Isbell

Date: July 18, 2007

Subject: Gary Harris Work Performance

Despite efforts to counsel Gary Harris we continue to have issues with his work practices and performance. These issues are listed in the following paragraphs. On this basis I am recommending that we terminate his employment immediately.

In February 2007 he was reprimanded for the following issues:

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

With the exception or the environmental reporting he continues to have these issues.

In April 2007 he was instructed not to come in and work in the chemical lab areas at nights or on weekends for safety reasons. Gate records and management observation indicate that he has continued to do this.

In June 2007 he was reprimanded for the two following issues and given a thirty-day deadline for resolution. It was made completely clear that failure to complete this task and resolve this issue would jeopardize his employment.

- Failure to complete the project to replace the current C237 coating compound with formula of his design.
- Not conducting and reporting adequate scientific and numerical analysis to substantiate lab and plant trials.

He has not demonstrated any effort to complete the C237 project. Despite the deadline to complete the project within four weeks he took two vacation days the first week, five the second week, and was planning to take five days the fourth week. This would have accounted for more than 50% absenteeism during this time and no effort to complete the project as instructed. None of these days were approved in advance. He left messages the day of the vacation without any

DEFENDANT'S EXHIBIT

advance notice despite my request that he have them pre-approved. In addition he has not submitted to me any scientific data on any of his other projects.

I recently found out that also in June that Gary missed an important trip to visit a customer and did not inform me. He was scheduled to fly to Indiana on June 14 to visit with United Shade and return on June 15. On the way there he suffered a headache and returned to SC a day early and did not see the customer. He never informed me of this and while I thought he was in Indiana.

In July 2007, prior to the end of his thirty-day deadline several more issues have arisen.

- Only July 3, 2007 he did not show up for work and left me a message that he would be at Hexion in Greenville all day. He did not get permission for this trip. Later I found out directly from the Hexion representative that he did not show up. Although he did see another supplier in Greenville briefly, he has no been able to adequately account to me his whereabouts for the entire day.
- Also on this day he instructed the Hexion representative to deliver sulfuric acid to him at the plant without an MSDS. This is in direct violation of company policy.

In the last three months he has also demonstrated other poor work habits that are affecting his work performance.

- Does not return calls or emails consistently. His co-workers consistently complain of this as it affects their ability to complete their tasks that are contingent on his work.
- Does not keep consistent work hours and often cannot be physically located at the facility. Gate entries indicate an erratic pattern of coming and going that is not approved in advance.

In light of the continued problems with Gary's work practices and performance I am recommending that we terminate his employment at Tietex. Gary has been counseled about these issues, but at this point I have lost confidence in his ability to perform his job in a satisfactory manner.

TIETEX

To: David Wilson

From: Wade Wallace

CC: Mark Isbell, Gary Harris

Date: March 5, 2007

Subject: Gary Harris' Transition

During the last thirty days as Gary Harris has transitioned into his new role, several issues relating to his work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

As we discussed these issues are not sustainable and it is mandatory that Gary make significant progress towards resolving these issues within the next 30 days.

ATTACHMENT F

TIETEX

To: Gary Harris

From: Wade Wallace

CC: David Wilson, Mark Isbell

Date: June 18, 2007

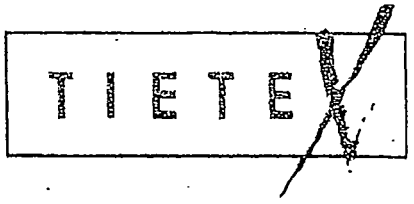
Subject: Gary Harris Work Perfomance

During the last ninety days some issues relating to Gary Harris' project work have been identified. In the best interest of Tietex and Gary, these issues were discussed with him today so that he can improve upon them. Here are the points we discussed.

Of Gary's multiple duties two projects were identified ninety days ago as priorities and he was instructed to give them his most thorough and diligent focus. The first project was the development and qualification of a Tietex coating compound formula as a replacement for the current coating used on C237. Gary actually began work on this project prior to his reporting to me. His lab coating work began in December 2006 so the project has been ongoing for over six months. The second project was to develop a finish formula change and process to enable T602 to be finished with the parabolic applicator instead of a pad application. The project was assigned and work began ninety days ago.

Although the first project has been on going for six months no significant progress has been made toward completion. This project was initiated solely by Gary and he convinced senior management that it was completely feasible in order to gain support. He committed to developing a compound that would cost between $0.60 and $0.62 per pound verses the current product which cost $0.885 per pound. Despite months of lab work in house and at four different chemical supplier locations and numerous production trials he has been unsuccessful in creating a viable product. The formulation which Gary developed has proven to be much more complicated to reproduce commercially than initially promised. Gary exercised poor judgement by making claims and commitments that he could not deliver. This project was included in corporate financial improvement goals. Due to the failure of this project I have personally had to begin parallel project work with other suppliers to develop a suitable replacement to achieve the financial commitment of the project.

The scope of the second project to develop a finish formula and process for parabolic application of T602 was a technical challenge. However, Gary informed me that lab samples were promising and recommended a production trial. Although I was not presented the actual numerical results of the first production trial Gary assured me that the results were comparable to



the current product. From this I approved a scale up run for statistical qualification. The second trial, as well as a third were unsuccessful. These subsequent failures concerned me and I personally recalled samples from the first trial that Gary assured me was a success. I witnessed them being tested and found that the product from that initial trial did not perform comparable. By this I can conclude that Gary did not conduct adequate scientific and numerical analysis of the first trial. This negligence was costly in that two subsequent production trials could have avoided. In addition, this negligence in applying the proper scientific analysis is unacceptable in the work of a Sr. Research Chemist.

Obviously the two issues regarding the C237 project failure and poor analytical practices demonstrated in the T602 project are not sustainable. It is mandatory that Gary make significant progress towards resolving the problems with the C237 project and improving on his analytical practices within the next 30 days.

TIETEX

To: David Wilson

From: Wade Wallace

CC: Mark Isbell

Date: July 18, 2007

Subject: Gary Harris Work Performance

Despite efforts to counsel Gary Harris we continue to have issues with his work practices and performance. These issues are listed in the following paragraphs. On this basis I am recommending that we terminate his employment immediately.

In February 2007 he was reprimanded for the following issues:

- He becomes emotional and overly vocal over a problem before researching the situation and makes statements and accusations without research or data.
- He is not honoring the chain of command by informing senior management with complaints and problems before covering them with his immediate manager.
- He harbors negativity over past grievances with management and continues to be negative towards the current management culture.
- He complains about his ownership of environmental reporting.

With the exception or the environmental reporting he continues to have these issues.

In April 2007 he was instructed not to come in and work in the chemical lab areas at nights or on weekends for safety reasons. Gate records and management observation indicate that he has continued to do this.

In June 2007 he was reprimanded for the two following issues and given a thirty-day deadline for resolution. It was made completely clear that failure to complete this task and resolve this issue would jeopardize his employment.

- Failure to complete the project to replace the current C237 coating compound with formula of his design.
- Not conducting and reporting adequate scientific and numerical analysis to substantiate lab and plant trials.

He has not demonstrated any effort to complete the C237 project. Despite the deadline to complete the project within four weeks he took two vacation days the first week, five the second week, and was planning to take five days the fourth week. This would have accounted for more than 50% absenteeism during this time and no effort to complete the project as instructed. None of these days were approved in advance. He left messages the day of the vacation without any

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advance notice despite my request that he have them pre-approved. In addition he has not submitted to me any scientific data on any of his other projects.

I recently found out that also in June that Gary missed an important trip to visit a customer and did not inform me. He was scheduled to fly to Indiana on June 14 to visit with United Shade and return on June 15. On the way there he suffered a headache and returned to SC a day early and did not see the customer. He never informed me of this and while I thought he was in Indiana.

In July 2007, prior to the end of his thirty-day deadline several more issues have arisen.

- Only July 3, 2007 he did not show up for work and left me a message that he would be at Hexion in Greenville all day. He did not get permission for this trip. Later I found out directly from the Hexion representative that he did not show up. Although he did see another supplier in Greenville briefly, he has no been able to adequately account to me his whereabouts for the entire day.
- Also on this day he instructed the Hexion representative to deliver sulfuric acid to him at the plant without an MSDS. This is in direct violation of company policy.

In the last three months he has also demonstrated other poor work habits that are affecting his work performance.

- Does not return calls or emails consistently. His co-workers consistently complain of this as it affects their ability to complete their tasks that are contingent on his work.
- Does not keep consistent work hours and often cannot be physically located at the facility. Gate entries indicate an erratic pattern of coming and going that is not approved in advance.

In light of the continued problems with Gary's work practices and performance I am recommending that we terminate his employment at Tietex. Gary has been counseled about these issues, but at this point I have lost confidence in his ability to perform his job in a satisfactory manner.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

Case No. 2011-CP-42-4538
Appellate Case No. 2014-000902

Tietex International Ltd, ... Respondent,

v.

Gary G. Harris,..... Appellant,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties.

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THE STATE OF SOUTH CAROLINA
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Gary G. Harris,..... Appellant,

PROOF OF SERVICE

I, the undersigned, hereby certify the Record on Appeal in the above referenced matter was mailed, postage prepaid, to Respondent's Attorney, Fred Suggs, by sending to Ogletree Deakins Nash Smoak & Stewart PC, PO Box 2757, Greenville, SC 29602, on November 26, 2014.

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Attorneys for Appellant

November 26, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

Case No. 2011-CP-42-4538
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Tietex International Ltd, ... Respondent,

v.

Gary G. Harris,..... Appellant,

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S DEFAMATION CAUSE OF ACTION BASED ON THE DOCTRINE OF COLLATERAL ESTOPPEL.

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S DEFAMATION CAUSE OF ACTION BASED ON THE STATUTE OF LIMITATIONS AND RES JUDICATA.

III. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S DEFAMATION CAUSE OF ACTION BECAUSE APPELLANT ESTABLISHED GENUINE ISSUES OF MATERIAL FACT FOR TRIAL.

STATEMENT OF THE CASE

On October 21, 2011, Gary G. Harris ("Harris or "Appellant") filed the pro se Complaint in this action, alleging various claims arising from the termination of his employment with Tietex International, Ltd. ("Tietex" or "Respondent"). (R. p. 70). Attorney D. Alan Lazenby filed a Notice of Appearance on behalf of Harris on March 8, 2012. (R. p. 79). On April 6, 2012, Harris moved to amend his complaint. (R. p. 81). Tietex opposed this motion. This motion was granted, and Harris filed his Amended Complaint on September 5, 2012, raising claims for breach of contract, breach of contract accompanied by a fraudulent act, defamation, and intentional infliction of emotional distress. (R. p. 83). Tietex timely answered.

On or about May 1, 2013, Tietex moved for Summary Judgment. (R. p. 107). Tietex based this motion in large part on the Report and Recommendation of the United States Magistrate and the Opinion and Order of the United States District Court in C.A. No. 7:08-CV-03020-JMC, a prior federal case brought by Harris, pro se, alleging violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621. et seq. (R. pp. 37-38). Tietex moved on the following grounds: (1) collateral estoppel, (2)

res judicata, (3) statute of limitations, and (4) generally, that no genuine issue of material fact existed as to any of Harris's claims.

The Honorable Frank Addy, Circuit Court Judge, heard arguments on this motion on August 30, 2013. (R. p. 574). On September 23, 2013, Judge Addy issued his Order Denying Defendant's Motion for Summary Judgment. This Order was filed on October 17, 2013. (R. p. 33). Judge Addy denied the Motion for Summary Judgment based on the ground that none of Harris's claims were barred by the doctrine of collateral estoppel. Judge Addy determined that all of Harris's claims should go forward to trial.

On January 27, 2014, Tietex filed a Renewed Motion for Summary Judgment. (R. p. 349). Tietex acknowledged that its first motion was based on collateral estoppels. This time, Tietex moved on the following grounds: (1) statute of limitations, (2) res judicata, and (3) generally, that no genuine issue of material fact existed as to any of Harris's claims. This motion was argued before the Honorable J. Derham Cole on February 6, 2014. (R. p. 533). At the hearing, Harris withdrew all claims but his cause of action for defamation. On February 18, 2014, Attorneys Alan Lazenby and Ginger Goforth were relieved as counsel, and Judge Cole granted Tietex's Renewed Motion for Summary Judgment. (R. pp. 1, 26).

Harris timely filed this Notice of Appeal on April 15, 2014.

FACTS/PROCEDURAL HISTORY

This action has a convoluted history, compounded in no small part by Tietex's constant efforts to delay and obstruct Harris's prosecution of his claims. The details provide necessary and important background for the Court.

Harris initially brought an action in the Court of Common Pleas for Spartanburg County on August 15, 2008, C.A. No.: 2008-CP-42-4316, alleging claims against Tietex

for violation of the ADEA, as well as state law claims for breach of contract, breach of contract accompanied by a fraudulent act, and defamation. (R. p. 61). Tietex removed the case to the United States District Court for the District of South Carolina, Spartanburg Division, on the basis of federal question jurisdiction over the ADEA claim. The District Court granted summary judgment as to Harris's ADEA claim, declined to exercise supplemental jurisdiction over the pendent state law claims, and dismissed them without prejudice. Harris's state law claims were protected by the tolling provision of 28 U.S.C. § 1367(d).

Harris timely filed the present action, pro se, in state court, asserting his state law claims over which the District Court had declined jurisdiction. He thereafter retained counsel, who moved on April 6, 2012 to amend the complaint. Tietex objected to the amendment. The motion was ultimately granted. Harris filed an amended complaint on September 5, 2012. Harris has since that time fought an uphill battle to conduct discovery in order to pursue his claims.[1]

In December of 2012, Harris sought to depose Tietex witness and employee Wade Wallace ("Wallace"). Harris had successfully worked for Tietex for 13 years, and by 2007 was a Senior Chemist and Technical Manager. Wallace became Harris's immediate supervisor for the six month period prior to his termination. Wallace was a crucial witness, and Harris's claims were directly related to his conduct. Nonetheless,

[1] By April of 2009, Harris's attorney original attorney, Richard Stewart, had conducted no discovery. Stewart shortly thereafter informed Harris that he was going into another area of law practice, and notified Harris that he was turning his case over to his partner, Jason Kellett. Kellett was disbarred two months later. Harris proceeded pro se until he retained new counsel, Candy Kern-Fuller, who was required file a motion in order to be allowed the right to depose witnesses. Harris was limited to three depositions. (R. p. 58).

on January 11, 2013, Tietex filed a motion for a protective order to prevent the examination of Wallace. (R. p. 93). In the interim, Tietex filed its first Motion for Summary Judgment, before Harris had even been able to take the first deposition in this case.

The Motion for Protective Order was later denied, and Wade Wallace was finally deposed on June 12, 2013.[2] Wallace had given prior sworn testimony in a number of forums, and more than one day was required for his deposition to fully explore the numerous inconsistencies in his testimony. Tietex refused to make Wallace available for a second day, and on June 17, 2013, filed a Motion for Protective Order Prohibiting or Limiting any Further Deposition of Wallace. Harris ultimately successfully obtained additional time by court order to complete the deposition. (R. pp. 35, 286).

On June 28, 2013, Harris noticed the depositions of Tietex witnesses George Henderson, Patricia Guzman, and Timothy Isbell. On July 2, 2013, in direct response to these subpoenas, Tietex filed a Motion to Stay Pending Ruling on Tietex's Motion for Summary Judgment, effectively cutting off any further discovery for Harris. (R. p. 294). On July 25, 2013, Tietex filed an additional Motion for Protective Order to block the proposed depositions of Tietex's Owner, Martin Wildeman and President, Reed Cunningham. (R. p. 311).

At this point in the litigation, Harris, despite his best efforts, had been allowed to depose a single witness. The Motion for Summary Judgment was heard on August 20, 2013. Contrary to Tietex's assertions, the Motion for Summary Judgment was denied on the grounds that collateral estoppel did not establish certain facts for the record. It was

[2] Wallace was deposed on the record for 6.3 hours on June 12, 2013.

not denied on the basis that discovery was not complete. Still, Tietex had made – and continued to make - every effort to block Harris's access to evidence.

For example, Harris requested a site visit to photograph the conditions of his working environment at Tietex on November 18, 2013, months before trial. Tietex refused the request, and, again, Harris was required to file a formal motion to obtain access to evidence to which he was absolutely entitled. (R. p. 329). Tietex vigorously resisted this motion, which the trial court ultimately granted on January 10, 2014. (R. p. 28).

Tietex makes much of the two witness depositions that Harris cancelled prior to trial. However, at that point, and after years of incessant and unnecessary wrangling with Tietex over basic discovery issues, Harris had to make difficult decisions concerning his case in order to continue to fund the litigation. Nonetheless, Harris has raised genuine issues of material fact, as noted below, that preclude summary judgment in this action.

ARGUMENTS

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S DEFAMATION CAUSE OF ACTION BASED ON THE DOCTRINE OF COLLATERAL ESTOPPEL.

Collateral estoppel does not bar Harris's pursuit of his state law claims in state court. Collateral estoppel, or issue preclusion, is an equitable doctrine that generally bars the relitigation of issues actually and necessarily determined in an earlier proceeding by a valid and final judgment, and then, only if the determination was essential to the judgment. The party asserting collateral estoppel bears the burden of proving that (1) the issue was actually litigated in the prior action, (2) the issue was directly determined in the prior action, and (3) the issue was necessary to support the

prior judgment. Carolina Renewal, Inc. v. South Carolina Dep't of Transp., 385 S.C. 550, 684 S.E.2d 779, 782 (Ct. App. 2009).

The Court of Appeals has warned that collateral estoppel should not be rigidly applied. Even if all of the elements are met, courts may refuse to apply it when "unfairness or injustice results or public policy requires it." Carolina Renewal, 684 S.E.2d at 782. Among these exceptions is the situation where the burden of proof on the cause of action litigated in the first suit differs significantly from the burden in the second suit. RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982).

The Supreme Court has further emphasized that all of the facts necessary to prove the material elements of the second suit must have been the same ones decided in the first suit for collateral estoppel to bar a second suit based upon different causes of action. Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770, 774 (1997), citing Dunlap v. Travelers Ins. Co., 223 S.C. 150, 74 S.E.2d 828 (1953). The inquiry must focus on the points actually litigated and determined in the prior action, not what might have been litigated and determined. Id. at 831. The Court has cautioned that collateral estoppel does not apply to speculative comparisons of factual issues not directly determined in a final decision. Jones, 483 S.E.2d at 774, Dunlap 74 S.E.2d at 828.

The only issue decided by the District Court was that Harris failed to prove age-based discrimination under the ADEA. The District Court, adopting the Magistrate's Report and Recommendation stated: "The Magistrate Judge determined that Defendant articulated deficiencies in Plaintiff's performance in memoranda dated March 5, June 18, and July 17, 2007, and found that Plaintiff did not establish a prima facie case of age discrimination under the ADEA because he failed to provide evidence

that established that he was meeting his employer's legitimate expectations at the time of the adverse action." (R. p. 37).

The trial court made the untenable and unsupported finding that the District Court made the following findings of "fact": (1) that Harris's job performance did not meet Tietex's expectations; (2) that Tietex had a legitimate reason to discharge Harris; and (3) that Harris cannot establish that the reason given was pretext.

None of the three purported "fact findings" was actually determined by the District Court under the same standard of proof in play on Harris's state law claims. Further, these "facts" were neither necessary to support the District Court's judgment, nor essential to the resolution of the ADEA claim.

To prove an ADEA claim, Harris was required to show that, but for his age, his employment would not have been terminated. Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009). The United States Supreme Court has placed the burden of persuasion squarely on an ADEA plaintiff. As such, Harris was required to prove by a preponderance of evidence that age, and age alone, was the reason he was terminated. 29 U.S.C. § 623(a). To allege a *prima facie* case under the ADEA, a plaintiff must show that (1) he is a member of a protected class, (2) he suffered an adverse employment action, (3) he was performing his job duties at a level that met his employer's legitimate expectations at the time of the adverse employment action, and (4) the position remained open or was filled by similarly qualified applicant outside the protected class. Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 277, 285 (4th Cir. 2004). One this is done – the Fourth Circuit, at least – the burden shifts to the employer to proffer a nondiscriminatory reason for the adverse action.

The District Court found that Harris did not prove that he was performing his job duties at a level that met Tietex's stated expectations. The perception of the employer is critical in deciding issues under the ADEA, and the District Court clearly evaluated the evidence from Tietex's subjective point of view. Hawkins v. PepsiCo, 203 F.3d 274 (4th Cir. 2000). This is not equivalent to a finding that Tietex's proffered reasons for firing Harris were true and taken as fact.

Absent direct evidence of intentional discrimination, the Fourth Circuit Court of Appeals analyzes ADEA claims under the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Warch v. Ohio Casualty Ins. Co., 435 F.3d 510 (4th Cir. 2006). The burden shifting analysis should only be undertaken where the plaintiff meets the prima facie case.[3] The District Court, despite finding that Harris did not meet his prima facie case, applied this analysis anyway. Accordingly, any "facts" alleged by Tietex and accepted by the trial court to be determined in the burden shifting analysis were therefore unnecessary to the District Court judgment, and not binding on him in this action.

The relative burdens of production and persuasion involved in the McDonnell Douglas analysis have been recently clarified. In Robinson v. Fred Store, Inc., 2013 WL 4505406 (August 22, 2013), the Court held that where a plaintiff established a prima

[3] The Supreme Court has held that the ADEA does not authorize "mixed-motive" discrimination claims. If a plaintiff cannot establish "but for" causation, the burden does not shift to the employer to show that it would have taken action regardless of age, even when the plaintiff may have adduced some evidence that age was a contributing factor in his termination. Gross, 557 U.S. at 175-180. However, there is some question whether the Fourth Circuit has adopted this approach. See Miller v. HSBC Fin. Corp., No. 08-1942, 2009 WL 3233490 (D.S.C. 2009)(finding that in the absence of further direction from the Supreme Court, the district court judge would follow Fourth Circuit precedent, which applies the McDonnell Douglas framework to ADEA claims). Therefore, Harris addresses the District Court's application of the framework.

facie case of discrimination, the burden shifts to the employer to proffer a legitimate, nondiscriminatory reason for the dismissal. The burden then shifts back to the employee to prove that the reason is pretextual. Significantly, the employer does not have to **prove** a nondiscriminatory reason; it simply needs to offer one into evidence.[4] It is a burden of production, not persuasion. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993). The Court also recognized that "it is not necessary for a court to 'decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the [the defendant's decision].'" Robinson, 2013 WL 4505406 at *6, citing Hawkins v. PepsiCo, 203 F.3d 274, 279 (4th Cir. 2000).

In other words, Tietex did not have to prove a legitimate, nondiscriminatory reason to prevail on the ADEA claim. It only needed to satisfy the burden of production by proffering one. The burden, this time of proof, then shifted to Harris to prove the articulated reason was false. Therefore, even if the District Court "found" that Tietex had a legitimate, nondiscriminatory reason for discharging Harris, that finding was not essential to Harris's claim

The District Court found that Harris did not meet the burden of proving that, but for his age, he would not have been terminated. That is the only factual inquiry necessary with respect to the ADEA claim, and the only finding of fact binding on Harris in the present action. Therefore, he could assert age as the factual basis of any of his claims in this action, and he did not do so.

[4] "Proffer" means to offer or tender, as, the production of a document and offer of the same in evidence. "Proof", on the other hand, is defined as the effect of evidence; the establishment of a fact by evidence. To "prove" is to establish or make certain. Black's Law Dictionary (6th Ed. 1990).

Even assuming the "facts" asserted by Tietex and adopted by the trial court were binding on this litigation, they do not bar Harris's state law defamation claim. Tietex could still be liable for defamation, even if it had a legitimate reason to fire Harris.

Finally, that Tietex asked the Court to decide the case by way of summary judgment militates in favor of declining to apply collateral estoppel. Summary judgment should be cautiously invoked so that it will not improperly deprive a party of a trial of disputed issues. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 543 (1991). Tietex had the burden of proving all of the elements of collateral estoppels, and the trial court erred in finding that it had done so. The "facts" Tietex raised and the trial court adopted were not essential to proving Harris's claim; rather, they were simply proffers of evidence that Harris did not **disprove** under the burden shifting framework applicable to his ADEA claim. In resisting Tietex's summary judgment motion on the issue of collateral estoppel, Harris only needed to submit a scintilla of evidence. See Hancock v. Mid-South Management Co., 381 S.C. 326, 673 S.E.2d 801, 803 (2009). He more than satisfied that burden.

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S DEFAMATION CAUSE OF ACTION BASED ON THE STATUTE OF LIMITATIONS AND RES JUDICATA.

Harris stated a cause of action for defamation. Tietex twisted Harris's deposition testimony to create "additional" defamation claims that it asserted were not "raised" in the federal action. Specifically, it points to his deposition testimony concerning three instances of defamatory conduct on the part of Tietex that all occurred in 2007, within the six months prior to his discharge. Tietex posits that because these specific evidentiary facts supporting the properly pleaded defamation claim were not set forth in

the original complaint, then Harris is time barred from relying on those facts to support his defamation claim.

This position, adopted by the trial court, has no merit.

Harris properly stated a cause of action for defamation in his original action. (R. p. 61, ¶¶ 39-46). South Carolina requires notice pleading. The purpose of a pleading is to provide "fair notice to the opponent and the court." Watts v. Metro Security Agency, 346 S.C. 235, 550 S.E.2d 869, 871 (Ct. App. 2001). Under Rule 8, SCRCP, a pleading must contain "ultimate facts" rather than "evidentiary facts" in order to state a cause of action. Such facts fall "somewhere between the verbosity of evidentiary facts and the sparsity of legal conclusions." Id. (citations omitted). Harris's cause of action for defamation, filed on August 15, 2008, met this standard by alleging that Tietex issued false statements about him containing a defamatory meaning, that these statements concerned his competence and acumen in his profession, that the statements were published to third parties with actual malice and/or reckless disregard of the truth, and that he suffered specific legal and special damages. Rule 8 requires no more. Harris was not obliged - as the trial court apparently found - to specify in his complaint each piece of evidence supporting his defamation claim. Harris's original pleading was more than sufficient to put Tietex on notice of his defamation claim.

Tietex removed the original state court action on August 29, 2008 based on the federal question jurisdiction conferred by Harris's ADEA claim. The District Court had supplemental jurisdiction over the state law claims, pursuant to 28 U.S.C. § 1367(a), if it chose to exercise that jurisdiction. Upon granting summary judgment on the ADEA claim, it decided not to exercise that jurisdiction, and dismissed the state law claims without prejudice.

The statute of limitations for these pendent state law claims was tolled while the federal case was pending, and for an 30 additional days after dismissal. 28 U.S.C. § 1367(d). Harris's federal case was finally disposed of no earlier than July 26, 2011, when the Fourth Circuit Court of Appeals denied his Motion for Rehearing. The mandate was returned on August 3, 2011. On October 21, 2011, Harris filed his pro se complaint in state court, timely raising the state law claims preserved under the tolling provision. Harris's court-permitted amendment to his complaint, filed on September 5, 2012, did nothing to affect the validity or timeliness of his state law claims. Further, amendment of a complaint after the statute of limitations has run is allowable where new or additional allegations do not change the nature of the cause of action, but amplify and make more definite and certain the original general allegations. Scott v. McCain, 272 S.C. 198, 250 S.E.2d 118 (1978).

In like manner, res judicata does not operate to bar Harris's cause of action for defamation. To invoke res judicata, a defendant must prove (1) identity of the parties, (2) identity of the subject matter, and (3) adjudication of the issue in the former suit. Plum Creek Development Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). Harris properly raised his defamation claim, and the District Court declined to exercise supplemental jurisdiction over it. There was no adjudication of any of the state law claims. The trial court therefore erred in finding that Harris's defamation claim was barred by res judicata.

III. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S DEFAMATION CAUSE OF ACTION BECAUSE APPELLANT ESTABLISHED GENUINE ISSUES OF MATERIAL FACT FOR TRIAL.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences that can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). Summary judgment should not be granted, even when there is no dispute as to evidentiary facts, if there is disagreement concerning the conclusions to be drawn from those facts. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001).

Summary judgment should have been denied based solely on Tietex's concerted and deliberate efforts to thwart discovery.[5] Nonetheless, viewing the record in the light most favorable to Harris, he established at least some evidence to create a genuine issue

[5] Tietex intentionally parried every effort by Harris to conduct meaningful discovery in this case. It repeatedly refused to voluntarily produce witnesses for depositions, requiring motions and arguments at every turn. Tietex objected to the bulk of Harris's discovery requests, claiming in its responses that it should not have to answer because (in its estimation) the claims were foreclosed by collateral estoppel. Harris was required to obtain court order after court order to require appearances and obtain discovery. These purposeful actions by a well-funded corporate defendant ate away at Harris's resources, which effectively deprived him of a fair opportunity to conduct discovery on the state law claims left untouched by the District Court.

of fact as to his defamation claim. See Hancock v. Mid-South Management Co., 381 S.C. 326, 673 S.E.2d 801 (2009) (holding that in cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment).

Harris's defamation claim is supported by evidence of record. The tort of defamation allows a plaintiff to recover for injury to his reputation as a result of the defendant's communication to others of a false message about him. The elements include (1) a false and defamatory statement concerning another, (2) an unprivileged communication to a third party, (3) fault on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Holtzscheiter v. Thompson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998). The defamatory material relied upon by Harris was actionable per se because (1) it was written and (2) it charged Harris with unfitness in his profession. Therefore, he was not required to plead or prove special damages to recover. Id. at 502. The court has held that "a communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Fleming v. Rose, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000).

In Murray v. Holnam, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001), the court held that an employer could be liable to a former employee for an allegedly defamatory statement made by the employee's supervisor (in this instance, that the employee had misappropriated company property). This is so even if the employer did not direct the supervisor to make the statement. The court further held that defamation need not be

direct; a mere insinuation is actionable as a positive assertion if it is false and malicious, and its meaning is plain.

Communications between officers and employees can be qualifiedly privileged if made in good faith and in the usual course of business. However, it is the jury's province to decide if the publication at issue went beyond what the occasion required and was unnecessarily defamatory. Murray, 542 S.E.2d at 749.

The record contains at least three memoranda constituting malicious personal attacks outside any privilege and impugning Harris's professional standards and abilities. (R. p. 753; R. p. 754; and R. p. 756). Further, Harris has explicitly testified concerning the lack of veracity in the contents of these memos. He gave unequivocal testimony that Wallace fabricated reports about him, lied about conversations that he purportedly had with him. (R. pp. 693-696, 697,701-702, 705-707, 709, 711-712, 713-714, 715-716, 736). Harris has also testified to the abusive, bullying behavior that he endured from Wallace. (R. pp. 738-740, 741-745). Harris's testimony creates fact issues, and certainly provides the required scintilla, to preclude summary judgment. To find otherwise was error on the part of the trial court in making what should be a jury determination.

The trial court appears to have relied heavily on what Tietex urged to be "conclusively determined facts" from the District Court order. These "facts" cited by Tietex – as argued more fully above - are **not** conclusive, were **not** necessary to the District Court's ADEA ruling, and **cannot** be bootstrapped to form the basis of a finding against Harris on the merits of his defamation claim.

The trial court erred in ignoring the genuine issues of material fact plainly present in the extensive record in this case. That the trial court's order contains

upwards of ten pages of "facts," carefully chosen and construed against Harris, should alone require reversal of the summary judgment order in this action.

CONCLUSION

For the reasons set forth herein, Harris submits that the trial court erred in granting summary judgment in favor of Tietex, and that he is entitled to a trial on his state law defamation claim.

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December 16, 2014

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

Case No. 2011-CP-42-2538
Appellate Case No. 2014-000902

Gary G. Harris, ... Appellant,

v.

Tietex International, Ltd., ... Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL PROPERLY GRANTED SUMMARY JUDGMENT BASED ON THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT REGARDING THE SUBSTANTIAL TRUTH AND PRIVILEGED NATURE OF ALL ALLEGEDLY DEFAMATORY STATEMENTS AND THE ABSENCE OF ANY ACTUAL MALICE?

2. WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL BASED ON THE FINAL, BINDING, AND CONCLUSIVE FINDINGS IN A PRIOR LAWSUIT BETWEEN THE SAME PARTIES INVOLVING THE SAME FACTUAL ALLEGATIONS?

3. WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT UNDER THE DOCTRINE OF *RES JUDICATA* AND THE STATUTE OF LIMITATIONS WITH RESPECT TO THE DEFAMATION CLAIMS HARRIS COULD HAVE RAISED BUT DID NOT RAISE IN HIS PRIOR LAWSUIT AGAINST TIETEX?

STATEMENT OF THE CASE

A. Harris Files Initial Lawsuit against Tietex in 2008.

Appellant Gary G. Harris ("Harris"), a former employee of Appellee Tietex International, Ltd. ("Tietex"), originally filed a lawsuit against Tietex in the Spartanburg County Court of Common Pleas on August 15, 2008—C.A. No. 2008-CP-42-4316 ("First Action"). Harris' First Action included a claim for violation of the Age Discrimination in Employment Act ("ADEA"), and various state law claims.[1] All of Harris's claims in the First Action arose from allegations regarding his employment with Tietex and his separation therefrom.

[1] Harris' state law claims in the First Action included (1) breach of contract, (2) breach of contract accompanied by a fraudulent act, and (3) defamation (consisting of four separate allegations of defamation).

B. Federal Court Grants Summary Judgment to Tietex in First Action.

Tietex removed the First Action to the United States District Court for the District of South Carolina ("Federal Court") based on Harris's ADEA claim. After engaging in discovery in the First Action, Tietex moved for summary judgment on all of Harris' claims. On October 28, 2010, the Federal Court granted Tietex's motion on Harris' ADEA claims but chose not to address Harris' remaining state law claims, dismissing them without prejudice. The Fourth Circuit Court of Appeals affirmed the Federal Court's decision, and later denied Harris' petition for rehearing.

C. Harris Files Present Action against Tietex in 2011.

Harris filed a *pro se* Complaint in the action now on appeal ("Second Action") on October 21, 2011. Harris' *pro se* Complaint asserted claims against Tietex for defamation and unspecified discrimination, relying on the same general facts alleged in the First Action.

On March 8, 2012, Harris' newly-employed counsel entered his appearance. On August 10, 2012, the Court granted Harris' motion to amend his Complaint. On September 5, 2012, Harris filed his Amended Complaint in the Second Action alleging identical claims to those alleged in the First Action (except his ADEA claim) and adding a new claim for intentional infliction of emotional distress ("outrage") based on the same facts.[2] As in the First Action, all of Harris' claims in the Second Action arose from allegations regarding his employment with Tietex and his separation therefrom.

[2] Harris' *pro se* Complaint also added two new defamation claims that were not included in the First Action, and Harris identified a third new defamation claim during his deposition in the Second Action.

On May 3, 2013, Tietex moved for summary judgment in the Second Action on the grounds that (1) Tietex was entitled to summary judgment on the merits because Harris failed to identify a genuine dispute of material fact as to any of his claims; (2) Harris' claims were barred as a matter of law based on the conclusive findings by the Federal Court in the First Action; and (3) Harris' outrage and three new defamation claims were barred by the statutes of limitation and the doctrine of *res judicata*. Harris opposed Tietex's motion, arguing in his brief and during the hearing that summary judgment was premature based on his inability to fully conduct discovery at that time.

On September 23, 2013, the lower court denied Tietex's motion for summary judgment. The September 2013 Order focused on Tietex's collateral estoppel argument but did not rule on the merits or address Tietex's arguments that Harris' outrage and new defamation claims were barred by the statute of limitations and *res judicata*. The September 2013 Order also permitted Harris to engage in additional discovery, specifically including the depositions of two Tietex executives.

Presumably, the lower court believed any ruling on the merits would be premature given the decision to allow Harris to engage in additional discovery—specifically including the depositions of Tietex executives Martin Wildeman and Reed Cunningham—which Harris' attorney insisted was necessary.[3] Notwithstanding Harris' reliance on his alleged need for additional discovery in arguing that summary judgment was premature, Harris failed to engage in <u>any</u> discovery after the September 2013 Order

[3] Harris' counsel argued during the hearing on Tietex's first motion for summary judgment: "It is clear that I have not had a full and fair opportunity to complete discovery. I would simply argue that just on that record, the – the fact that – the fact that – that we have not been able to complete discovery, should preclude summary judgment on – any factual issue in this case." (R. p. 589.)

other than a site visit to Tietex's facility, which he was extremely dilatory in conducting. While Harris noticed the depositions of Wildeman and Cunningham to take place on January 16-17, 2014, he suddenly and voluntarily cancelled those depositions on January 14, explaining only that he was "going in a different direction."[4]

D. Like the Federal Court, the South Carolina Circuit Court Grants Summary Judgment to Tietex.

Harris' total lack of discovery after the September 2013 Order made clear that there were no additional facts on which Harris intended to rely in support of his claims. Accordingly, Tietex filed its Renewed Motion for Summary Judgment and supporting memorandum on January 27, 2014. On February 6, 2014, the lower court heard Tietex's Renewed Motion for Summary Judgment. On the record during the February 6, 2014 hearing, Harris voluntarily withdrew his claims for (1) breach of contract, (2) breach of contract accompanied by fraudulent act, and (3) outrage, leaving only his defamation claims before the lower court.

After considering the record, argument of counsel, memoranda, and submissions made, the lower court issued a Form 4 Order on February 18, 2014, granting Tietex's Renewed Motion for Summary Judgment and instructing Tietex's counsel to prepare a formal order for the lower court's consideration. The lower court entered its formal Order granting summary judgment on March 20, 2014.

[4] Rather than reciting the entire timeline demonstrating Harris' lack of diligence in conducting discovery, Tietex invites the Court's attention to Tietex's Memorandum Opposing Plaintiff's Second Motion for Continuance. While much of Harris' brief focuses on the alleged "roadblocks" Tietex created in Harris' efforts to conduct discovery, he conveniently ignores his own dilatory actions in obtaining and participating in discovery. Additionally, given that summary judgment was granted during pre-trial hearings in the lower court on the literal eve of trial, a remand of this action would not result in Harris having the opportunity to conduct any additional discovery—it would result in the case being placed at the top of the trial roster and the parties proceeding to trial.

In its March 20 Order, the lower court indicated that it was granting summary judgment based on all of the following: (1) the allegedly defamatory written statements on which Harris relied—the only statements he was able to identify with any degree of particularity—were substantially true based on Harris' admissions and the Federal Court's conclusive findings; (2) the allegedly defamatory written statements were all subject to a qualified privilege as a matter of law, and Harris failed to present any evidence that would permit a jury to conclude that Tietex had abused that privilege; (3) the doctrine of collateral estoppel precluded Harris' claims in their entirety; and (4) the statute of limitations and the doctrine of *res judicata* precluded Harris' three defamation claims that he first asserted in the Second Action.

E. Harris' Appeal to this Court.

On April 15, 2014, Harris filed his Notice of Appeal. On May 9, 2014, Harris received the transcript from the February 6 hearing, creating a June 9, 2014 deadline to file and serve his initial brief and designation of matter to be included in the record on appeal under Rules 208 and 209, SCACR. Instead of complying with this deadline, Harris filed a motion to extend time on June 13, 2014—four days after his deadline had already passed. On June 20, 2014, Tietex filed and served its Motion to Dismiss Harris' appeal based on his failure to comply with the Appellate Court Rules. On August 6, 2014, the Court denied Tietex's Motion to Dismiss and ordered that briefing proceed.

FACTS

A. All Relevant Facts were Fully and Finally Litigated in the First Action, and the Federal Court's Findings of Fact are Entitled to Preclusive and Binding Effect.

The below statement of facts is essentially identical to (1) the Federal Court's findings of fact in the First Action, which the Federal Court based almost exclusively on

Harris' own testimony and described in the manner most favorable to Harris given all evidence in the record (these findings are entitled to preclusive and binding effect under the doctrine of collateral estoppel, as described below in Section II of the Argument); and (2) the lower court's findings of undisputed fact in the Second Action now on appeal, which, like the Federal Court's factual findings, relied almost exclusively on Harris' own testimony.

B. Harris' Work Hours were Erratic and His Work Practices Unsafe.

Harris began working at Tietex on July 13, 1994, as a Senior Research Chemist. (R. pp. 162, 599-601, 676-78, 737, 746.[5]) Harris' normal working hours were 8:00 a.m. to 5:00 p.m., but he claims he was often at work by 6:00 or 6:30 a.m. and stayed later than 5:00 p.m. (R. pp. 163, 602-03.) On occasion, Harris stayed until 8:00, 9:00, or 10:00 at night. (R. pp. 163, 605.)

Harris admits that he was told by his supervisor, Wade Wallace, not to work in the plant for safety reasons when it was not operating. (R. pp. 164-65, 187, 634.) Wallace told Harris he could work in the plant anytime the plant was operational, and he could come into the facility to do office work when the plant was down. (R. pp. 164, 633-34.) Wallace told Harris not to operate any lab equipment in a lab setting when the plant was down and no other employees were present. (R. pp. 164-65.) Wallace told

[5] The Order and Report of Magistrate Judge Kevin F. McDonald ("Magistrate Order") and the Opinion and Order of District Judge J. Michelle Childs ("District Judge Order") in the First Action are included in the Record on Appeal for ease of reference. In the District Judge Order, Judge Childs expressly adopted the Magistrate Order, in its entirety. (R. p. 183.) Tietex provides parallel cites throughout this statement of facts to the relevant pages of the Federal Court Orders to demonstrate that all of these facts were actually litigated and conclusively determined in the First Action. Under the doctrine of collateral estoppel, these facts are entitled to preclusive and binding effect. *See Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997).

Harris that if he had to do lab work after regular business hours he should do it on weekday evenings when the second shift was operating. (R. p. 165.) Harris admitted he ignored these directives because his own opinion was it was safe for him to work with chemicals when the plant was not operating. (R. pp. 187, 603-04, 634.) While Harris' erratic hours had been acceptable to his previous supervisor, they were not acceptable to Wallace. (R. pp. 187, 635.) Harris admits this was a new directive under Wallace's supervision. (*Id.*) Harris admits he was the only employee who did lab work after hours. (R. pp. 163, 636-37.)

There are four sections in the technical building at Tietex: an office area; wet lab; physical testing; and an extension of the wet lab for chemists' work, with a burn room. (R. p. 608.) Harris' former supervisor, Jake Butts, had difficulty keeping track of Harris due to Harris' erratic work hours, so Butts relocated his office from the plant to the office areas of the technical building (the lab—where Harris' office was situated) in order to more closely supervise Harris. (R. pp. 163, 607-08.)

Soon after Butts relocated his office, Harris claimed he noticed a mold smell and had symptoms of congestion, sinus headache, and flu. (R. pp. 163, 609.) Harris does not recall anyone else complaining about the alleged smell. (R. p. 610.) Harris claimed that the smell originated from Butts' clothing and the furniture Butts moved into his relocated office. (R. pp. 163, 615-16.) After some time and several visits to doctors, Harris contended that the smell was the source of his illness due to a mold allergy. (R. pp. 163, 610-11.) Harris reported his belief to Butts. (*Id.*)

C. Tietex Accommodated Harris' Unsubstantiated Complaint about Mold.

Based on Harris' allegation that mold in the lab was making him ill, Tietex hired a hygienist to perform testing. (R. pp. 163, 611.) The hygienist reported there was no mold contamination in the lab and the air in the lab was cleaner than the outside air. (R. pp. 163, 613.) Although Harris claims the testing was flawed, he admits he has no evidence of that. (R. pp. 163, 611-14.) Harris does not know who performed the testing or what kind of testing was performed. (*Id.*) Harris admits he has no first-hand knowledge of how the testing was conducted. (R. pp. 612-13.) Harris' only specific complaint about the testing was that it tested all four sections of the lab rather than focusing solely on the office area. (R. pp. 163, 614.)

At some time in late 2006, Harris established a second office in the main plant. (R. pp. 163, 609-10.) Harris continued to do work in the lab until February 2007. (R. pp. 163, 609.) Effective February 1, 2007, Harris was removed from Butts' supervision and placed under the supervision of Wallace. (R. p. 164.) Tietex made this transition in part due to Harris' continued complaints about the odor associated with Butts. (R. pp. 164, 618.)

Between February 2 and 5, Harris and Wallace discussed by e-mail whether Harris would be able to continue working in the lab because of Harris' continued complaints about the mold smell. (R. pp. 164, 616, 679.) Wallace agreed that Tietex would do whatever was necessary to shield Harris from any further exposure to an environment that might negatively impact his health. (R. pp. 164, 617, 679.) Wallace instructed Harris to wear a mask when he worked in the lab. (R. pp. 164, 679.) However, Harris decided the mask would not give him enough protection. (*Id.*) Wallace

then told Harris not to enter the lab under any circumstances. (R. pp. 164, 618, 679.) Thereafter, Harris asked if he could work in the lab if he signed a waiver. (R. pp. 164, 632-33, 684.) Tietex rejected the waiver stating that a waiver was "unacceptable from an HR/liability perspective since [Tietex] would be allowing [Harris] to come in contact with an environment that might negatively affect [his] health." (*Id.*) Wallace's e-mail communications with Harris made clear that Tietex was more concerned about Harris' health than its own liability. (R. p. 679.)

Tietex purchased equipment to accommodate Harris' needs outside of the lab. (R. pp. 164, 622-23, 681.) Tietex provided Harris with an alternative work area because Tietex wanted to protect Harris' health. (R. p. 679.) Harris has no contradictory evidence. (R. p. 633.)

D. Tietex Documented Harris' Work-Related Issues.

1. Tietex Attempted to Accommodate Harris' Complaints of being Overwhelmed.

On February 7, 2007, Harris told Wallace he was overwhelmed by personal and emotional problems that had occurred in his personal life over the past year, and he was having difficulty functioning. (R. pp. 165, 680.) Harris admits (1) his wife was ill during this time period, (R. pp. 165, 619); (2) dealing with his wife's illness left him stressed with major sleep disturbances, (R. pp. 165, 619-21, 681, 692); and (3) he was a "wreck" because of his wife's illness (R. pp. 165, 620, 692). Wallace told Harris that Tietex "would support him if he felt he needed to utilize EAP," but Harris stated that was not necessary. (R. pp. 165, 621, 680.)

2. Tietex Allowed Harris to do His Work Outside the Lab.

On February 22, 2007, Harris left voice mail messages for Wallace and Tietex's Owner, Martin Wildeman, at 3:00 a.m. complaining about his inability to sleep and about unspecified work-related issues. (R. pp. 165, 606, 681.) Harris expressed concern about being moved from the lab and that he was "still not set up to easily do his bench work." (R. pp. 165, 681.) Harris asked for a lab pad coater and a vented hood. (*Id.*) Wallace reiterated his commitment to obtaining the necessary equipment for Harris, which would take time. (R. pp. 621-23, 681.) Wallace stated that it would take time to locate, acquire, and install the equipment; however, Harris could use the equipment in the beam/dye area, and/or coordinate to use Robert Culbreth—a chemical technician—to perform work for him in the lab in the meantime. (R. pp. 165, 621-23, 681.) Harris believes Tietex was motivated to keep him out of the laboratory to avoid liability for any health problems he might experience rather than out of a real concern for his health. (R. pp. 166, 633.) Harris never asserted Tietex was motivated to keep him out of the lab because of any unlawful reason. (*Id.*)

3. Harris Complained about His Environmental Reporting Duties.

Harris admits he complained about being required to stay involved with environmental reporting and stated he was concerned about completing an environmental report that was due on March 1, given his other projects. (R. pp. 166, 623, 682.) Wallace saw no reason that Harris' projects would interfere with his ability to get the environmental report done on time and made this clear to Harris. (*Id.*) Harris admits it was reasonable for Wallace to expect him to complete the environmental report on time. (*Id.*)

4. Harris Disregarded the Chain of Command.

Wallace also asked Harris to come to him directly with issues before going to Wildeman. (R. pp. 166, 681.) Harris admits that, at times, he went directly to Wildeman rather than using the chain of command. (R. p. 626.) Harris admits it was inappropriate for him to complain to Wildeman about having to do the environmental reporting. (R. p. 625.)

5. Wallace's March 5, 2007 Memorandum Accurately Recorded Harris' Performance-Related Deficiencies.

On March 5, 2007, Wallace discussed several issues with Harris regarding his performance and documented the discussion at Harris' request in a memorandum to Human Resources Director David Wilson, with a copy to Vice President of Manufacturing Mark Isbell and Harris. (R. pp. 166, 627-28, 683.) Wallace noted that Harris made emotional and overly vocal accusations and statements without supporting research or data, was not honoring the chain of command, harbored grudges over past grievances toward management in general, and complained about ownership of environmental reporting duties. (*Id.*) The memorandum concluded with the statement, "As we discussed these issues are not sustainable and it is mandatory that Harris make significant progress towards resolving these issues within the next 30 days." (R. pp. 166, 630-31, 683.)

At the time, Harris did not protest any of the points in the March 5, 2007, memorandum or claim that Wallace's observations were not true. (R. p. 632.) Harris admits he was experiencing emotional stress (R. pp. 619-21, 681, 692), circumvented Wallace by going directly to Wildeman (R. p. 626), and complained about environmental reporting tasks (R. p. 623). Harris does not deny he harbored grudges, and admits he had

unresolved issues that existed before he began reporting to Wallace and had discussed those issues with Wallace. (R. pp. 629-30.)

6. Wallace's June 18, 2007 Memorandum Accurately Recorded Harris' Project Failures.

On June 18, 2007, Wallace had another discussion with Harris regarding his subpar performance. (R. p. 166.) Wallace documented the discussion in a memorandum to Harris, with a copy to Wilson and Isbell. (R. pp. 166-67, 638, 685-86.) The discussion focused on two projects for which Harris was responsible. (R. pp. 167, 640, 685-86.) The first was the development and qualification of a Tietex coating compound ("C237 Project"). (R. pp. 167, 639, 685-86.) The second was the development of a finish formula and process ("T602 Project"). (R. pp. 167, 639-40.)

a. Harris' Poor Performance on the C237 Project.

Harris had been working on the C237 Project for about six months. (R. pp. 167, 186, 641-42, 685-86.) Harris had predicted the C237 Project would result in significant cost savings for Tietex. (*Id.*) Harris claimed he had a successful trial before he began reporting to Wallace. (*Id.*) Despite Harris' characterization of the compound he created as a success, it was unacceptable to Tietex because it was much more complicated to produce commercially than Harris had initially promised. (R. pp. 167, 186, 683.) In February, Wallace began working separately on a parallel C237 Project because it appeared Harris would fail to achieve the cost savings he had predicted. (R. pp. 167, 643, 683, 685-86.)

b. Harris' Poor Performance on the T602 Project.

Because of the expense, a plant production trial is only done if laboratory production is successful. (R. p. 167.) Harris told Wallace the lab samples for the T602

project were promising, and Harris recommended a production trial. (R. pp. 167, 644.) According to Harris, the first plant production trial showed mixed results with some samples that were "not good," but others that were "comparable," depending on the amount of finish. (R. pp. 167, 645.) However, Harris told Wallace that, based on the results, another plant production trial was warranted. (R. pp. 167, 646, 685-86.) On Harris' recommendation, a second plant production trial was performed, which was unsuccessful. (R. pp. 167, 646, 673, 685-86.) A third trial was similarly unsuccessful. (R. pp. 167, 646-47, 673, 685-86.) When the second and third trials failed, Wallace reviewed the results of the first plant production trial himself. (R. pp. 167, 685-86.) Wallace saw "that the results of the first trial had not been as [Harris] portrayed them, so the second and third trials were unwarranted based on the results of the first." (R. pp. 167-68, 685-86.)

Wallace's June 18, 2007 memorandum cited Harris for his poor analytical practices and instructed him to improve his performance within 30 days. (R. pp. 168, 649, 685-86.) Harris considered this his final written warning. (R. pp. 168, 648, 685-86.)

7. Harris' Performance Deteriorated and He Used Poor Judgment, Ultimately Leading to the Termination of His Employment.

a. Harris Continued to Work Erratically and Ignore Wallace's Directives.

Despite being told and understanding that his job was in jeopardy if his performance failed to improve, Harris made insufficient effort to complete the C237 project. (R. pp. 168, 687-88.) Instead, Harris began taking multiple days of vacation immediately after being given the warning on June 18. (R. pp. 168, 651-54.) These vacation days were frequently taken on short notice. (R. pp. 168, 651-52, 689.) Sometimes, Harris waited until the day before to notify Wallace. (*Id.*) Other than the

environmental reporting, Wallace did not see that Harris improved on any of the issues cited in the March 5, 2007 memorandum. (R. pp. 168, 687-88.) Gate records and management observation showed that Harris continued to ignore the directive not to work in the chemical lab areas at nights or on the weekends. (*Id.*) The same records showed inconsistent work hours and erratic patterns of entry and exit to and from the facility. (*Id.*) Harris' co-workers complained that he did not return calls or e-mails consistently, disrupting their work patterns. (*Id.*)

b. Harris Concealed His Failure to Meet with a Customer.

Harris was scheduled to fly to Indiana on June 14 to visit a customer and return on June 15. (R. pp. 168, 654-55, 687-88.) After flying the first leg of his trip, Harris turned around and came home because he had a headache. (*Id.*) Harris never told Wallace he had not met with the customer in Indiana. (R. pp. 168, 687-88.)

c. Harris Lied about his Whereabouts.

On the evening of Monday, July 2, after work, Harris left a voicemail message for Wallace telling him he had an ant infestation at his house. (R. pp. 168, 656-57.) Harris said he would take care of the ants first thing the following morning and then go to Hexion, a chemical facility, to work on a project. (*Id.*) Since Harris left this message after work hours, Wallace did not hear the message until the morning of Tuesday, July 3, 2007. (R. pp. 168-69, 656-57, 687-88.)

Harris purchased pesticide chemicals at Lowe's on the morning of July 3, at approximately 7:30 a.m. (R. p. 672.) Harris called Wallace and left a voicemail message around 9:00 a.m., saying he had resolved the ant problem and was going to work at Hexion. (R. p. 169.) Harris did not arrive at Hexion until 1:30 p.m. (R. pp. 169, 659,

690.) Harris could not enter Hexion because he could not contact anyone he knew there to gain entry. (R. pp. 169, 657-58, 660-61.) Harris left without performing any work. (R. pp. 660-61.) There are no witnesses to establish how long Harris was allegedly at Hexion. (R. p. 662.) Harris is vague about how long he was at Hexion trying to get in. Harris estimates he was there between thirty and ninety minutes.[6] (R. pp. 169, 662-63.)

Harris claims that after leaving Hexion, he drove around for 30 to 45 minutes looking for Chemurgy, another chemical facility. (R. pp. 169, 664-65.) When Harris located Chemurgy, no one was there, so he did not stay. (*Id.*)

Harris left a message for Hexion employee Pam Westmoreland, telling her that he could not get into the laboratory. (R. p. 169.) Harris stated in his message that he needed a small sample of sulfuric acid, and he would return and pick it up. (*Id.*) Hexion employee George Henderson told Westmoreland that he would take the sample to [Harris] at Tietex on his way home. (*Id.*) Harris contends he told a Hexion employee to get the acid together so Harris could pick it up "at the guard house or something." (R. p. 665.) Harris never accomplished this task. (*Id.*)

Harris did not call Wallace to tell him about being unable to get in at Hexion or about his intent to go to Chemurgy. (*Id.*) Harris admits it would have been reasonable for him to call Wallace to tell him his plans had changed. (R. pp. 169, 668.) Harris understood he needed to let Wallace know his whereabouts, to let him know when he was away from the plant, and to keep his cell phone on so he could be reached. (R. p. 627.) Harris acknowledges it was reasonable for his supervisor to expect to be informed of his whereabouts "at all times." (*Id.*)

[6] Harris previously testified to the South Carolina Employment Security Commission that he was at Hexion around thirty minutes. (R. pp. 717-18.)

During the afternoon of July 3, Henderson brought the sulfuric acid Harris needed to Tietex. (R. pp. 169, 665.) Wallace was confused, as Harris was supposed to be at Hexion. Wallace called Henderson and asked if he had seen Harris that day. (R. p. 169.) Henderson had not. (*Id.*) Henderson said he had a voicemail from Harris saying he needed some sulfuric acid urgently because he was planning to do some work on July 4. (*Id.*) Wallace was troubled because Harris was not where he said he would be and it appeared Harris planned to work with chemicals in the lab on a day the plant was to be closed. (*Id.*)

Harris admits Wallace had no idea what Harris was doing on July 3, or even if Harris was working. (R. pp. 667-68.) Harris claims Wallace called him on his cell phone between 4:30 p.m. and 5:00 p.m. and asked where he had been. (R. pp. 170, 666.) Harris told Wallace he had been at Hexion. (*Id.*) Wallace told Harris that Henderson had been to Tietex and said that Harris had not been at Hexion that day. (R. p. 170.) Harris then admitted he had gone to Hexion, but had been unable to get in or find anyone, so he left. (*Id.*) Harris could not give Wallace an adequate explanation of his whereabouts for the day. (R. pp. 170, 663-64, 687-88.)

Wallace told Harris he was suspended until Wallace returned from vacation. (R. pp. 170, 668.) During the phone call, Harris and Wallace were disconnected, and Wallace could not reach Harris again by telephone. (R. pp. 170, 668-69.) Wallace talked to Wilson about what transpired and left a voicemail message for Harris reiterating that he was suspended with pay and should not return to work until contacted by Tietex. (R. p. 170.)

d. Tietex Terminated Harris' Employment for Unsatisfactory Performance.

Wallace conducted an investigation of the events of July 3 when he returned from vacation. (*Id.*) Wallace could not verify Harris' whereabouts for most of the hours between 9:00 a.m. and 4:00 p.m. on July 3. (R. pp. 687-88.) Wallace recommended the termination of Harris' employment. (R. p. 170.) The decision to terminate Harris' employment was made by Wallace, Wilson, Wildeman, Cunningham, and Isbell. (*Id.*) Harris was told he was not being terminated for one specific deficiency, but for many shortcomings that "added up," including the issues Wallace had addressed with him in the March 5, 2007 memorandum. (R. pp. 170, 650, 683.) These issues were also documented in a memorandum dated July 18, 2007. (R. pp. 170, 687-88.) Harris' employment was terminated on July 19, 2007. (R. pp. 170, 670, 691.) Harris admits his employment was terminated for unsatisfactory performance. (R. pp. 670, 691.)

ARGUMENTS

I. STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 541, 730 S.E.2d 340, 347 (Ct. App. 2012) (citations omitted), *aff'd as modified and vacated in part on other grounds*, Op. No. 27450 (S.C. Sup. Ct. filed Oct. 1, 2014) (Shearouse Adv. Sh. No. 39 at 25). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. An issue of fact is "genuine" when the evidence is such that a reasonable jury could

return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." *D.R. Horton*, 398 S.C. at 541, 730 S.E.2d at 347. "Appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP when reviewing a grant of summary judgment." *Id.* (citing *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011)).

The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). The moving party may discharge this responsibility "by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim." *D.R. Horton*, 398 S.C. at 542, 730 S.E.2d at 347. "Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings." *Id.* (citing *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545; Rule 56(e), SCRCP). "[T]he nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.'" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (quoting *Baughman*, 306 S.C. at 107, 410 S.E.2d at 545).

"Where a verdict is not '*reasonably possible* under the facts presented, summary judgment is proper.'" *Id.* (quoting *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000)) (emphasis in original). While a party opposing summary judgment "'is only

required to submit a mere scintilla of evidence'" to withstand the motion, *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 250, 734 S.E.2d 161, 163 (2012) (quoting *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)), Harris failed to present any evidence demonstrating the presence of a genuine issue for trial. Accordingly, "[t]his case illustrates well the utility of summary judgment in disposing of a meritless claim." *Cox & Floyd Grading, Inc. v. Kajima ConsDep. Svcs., Inc.*, 356 S.C. 512, 517, 589 S.E.2d 789, 792 (Ct. App. 2003).

II. SUMMARY JUDGMENT WAS PROPER BASED ON THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT REGARDING THE SUBSTANTIAL TRUTH AND PRIVILEGED NATURE OF ALL ALLEGEDLY DEFAMATORY STATEMENTS AND THE ABSENCE OF ANY ACTUAL MALICE.

Harris was required to "prove the following four elements to state a claim for defamation: '(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.'" *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012) (quoting *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006)).

The truth of an alleged defamatory statement "is a complete defense to an action based on defamation and evidence establishing a statement is substantially true is a sufficient defense." *Haulbrooks v. Overton*, 295 S.C. 380, 383, 368 S.E.2d 676, 679 (Ct. App. 1988) (citing *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 221 S.E.2d 770 (1976)). "It is not necessary to establish the literal truth of the precise statement made." Restatement (Second) of Torts § 581A (1977).

"One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (citing *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999)). "'The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.'" *Id.* (quoting *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 32, 315 (Ct. App. 1987)). "There is a basis for applying a qualified privilege to situations in which an employee's job performance is properly evaluated." *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989); *see also Bell v. Bank of Abbeville*, 211 S.C. 167, 44 S.E.2d 328 (1947) (attaching a qualified privilege to communications between an employer and employee during the employer's inquiry into the employee's alleged misconduct).

"Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." *Swinton Creek Nursery*, 334 S.C. at 484-85, 514 S.E.2d at 134. To prove actual malice, Harris must show that Tietex was activated by ill will, intending to causelessly and wantonly injure Harris, or that the statements were published with such recklessness as to show a conscious disregard for Harris' rights. *Id.* at 485, 514 S.E.2d at 134.

Whether an occasion gives rise to a qualified privilege is a question of law for the court. *Id.* "'While abuse of privilege is ordinarily an issue for the jury, . . . **in the**

absence of a controversy as to the facts . . . it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.'" *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (quoting *Woodward v. S.C. Farm Bureau Ins. Co.*, 297 S.C. 29, 32-33, 292 S.E.2d 599, 601 (1981)) (emphasis in original); *see also* Restatement (Second) of Torts § 619, cmt. b (noting that the court should decide if the privilege has been abused where only one conclusion can reasonably be drawn).

While Harris' Amended Complaint included only one cause of action for defamation, he identified seven separate allegedly defamatory statements or incidents on which he was attempting to rely.[7] (R. pp. 693-96.) Separate allegations of defamation are analyzed as independent claims. *See, e.g.*, *George v. Fabri*, 345 S.C. 440, 456-61, 548 S.E.2d 868, 876-79 (2001) (analyzing defamation allegations separately in affirming grant of summary judgment); *McBride v. School Dist. of Greenville County*, 389 S.C. 546, 559-63, 698 S.E.2d 845, 851-54 (Ct. App. 2010) (analyzing alleged defamatory statements individually).

The first four of Harris' claims are internal Tietex e-mails and memoranda discussing Harris' work performance. Interpreting the facts in the light most favorable to Harris, the lower court correctly concluded that each of these communications was substantially true. (R. pp. 15-19.) This is an absolute defense to defamation, and summary judgment was proper on these claims. *Haulbrooks*, 295 S.C. at 383, 368 S.E.2d at 679 (citing *Ross*, 266 S.C. 75, 221 S.E.2d 770).

[7] Given that the only allegedly defamatory statements identified in Harris' initial brief are the three internal memoranda Wallace prepared in March, June, and July 2007 (Initial Brief of Appellant at 15), Harris has apparently abandoned his defamation claims related to the other four allegedly defamatory statements. However, out of an abundance of caution, Tietex will address each of Harris' seven defamation claims.

As internal, performance-related communications, the lower court rightly found as a matter of law that these four communications gave rise to a qualified privilege. (R. pp. 15-19); *see Wright*, 298 S.C. at 474, 381 S.E.2d at 506; *Bell*, 211 S.C. 167, 44 S.E.2d 328. Harris did not produce any evidence to support a finding of actual malice or other abuse of the qualified privilege. Accordingly, the trial court properly ruled that the qualified privilege stood as a matter of law and that Tietex was entitled to summary judgment for this reason as well. (R. pp. 15-19); *see Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (citing *Woodward*, 297 S.C. at 32-33, 292 S.E.2d at 601).

The statements on which Harris relied in support of his fifth, sixth, and seventh defamation claims are less clear. Given the ill-defined nature of the alleged defamatory statements and the lack of evidence to support these claims, the lower court concluded correctly that Harris failed to create a triable issue of fact.

Harris failed to produce evidence sufficient to overcome Tietex's motion for summary judgment on any of his seven defamation claims. Summary judgment was thus proper, and the decision of the lower court should be affirmed.

A. Each of the Allegedly Defamatory Written Communications was Substantially True and Gave Rise to a Qualified Privilege, and Harris Presented No Credible Evidence to Overcome the Privilege.

1. February 9, 2007 E-Mail from Wallace to Wilson.

Harris' first defamation claim was based on a February 9, 2007 e-mail that his supervisor, Wallace, sent to Tietex's Human Resources Director, Wilson, with a copy to Wallace's supervisor, Isbell.[8] (R. pp. 693-94, 747.) In this internal e-mail between managerial employees at Tietex, Wallace summarized a discussion he had with Harris

[8] This is one of the defamation claims that Harris has apparently abandoned, as he does not in any way mention it in his Initial Brief.

two days earlier regarding personal and emotional problems Harris was experiencing that were impacting his performance. (R. p. 747.) Harris claims this e-mail was defamatory because he alleges that it was false and that it "showed a definite disregard for [his] stability mentally and that kind of thing." (R. p. 693.)

The trial court properly found this defamation claim insufficient because the content of the February 9 e-mail was substantially true. (R. pp. 16-17.) Harris admitted as much on more than one occasion: during his unemployment hearing (R. p. 702), and during his deposition in the First Action (R. pp. 698-701). (*See also* Facts Section D.1. *supra*.)

The lower court was also correct in concluding that the February 9 e-mail gave rise to a qualified privilege and that Harris failed to present any evidence showing that Wallace acted with actual malice. (R. pp. 16-17.) In fact, Harris admitted he has no evidence of malice on Wallace's part, stating he did not think Wallace was trying to "get rid of him" and had no idea about Wallace's motivation. (R. pp. 671, 674-75.)

Harris' sole allegations of "malice" in the Amended Complaint surround a contention that Tietex engaged in a conspiratorial campaign to "put forward false and defamatory reasons for the termination of [Harris] to achieve ulterior objectives." (R. pp. 86-87 at ¶¶ 14-15, 23-25.) Namely, the alleged objective "to replace [Harris] with a much younger woman with whom Mr. Isbell [allegedly] had an ongoing personal relationship." (*Id.*) This is merely an attempt to re-litigate the issues underlying his age discrimination claim in the First Action. Among other findings in its Orders in the First Action, the Federal Court specifically concluded (1) Tietex did not discriminate against Harris based on his age (R. pp. 175-78, 185-88), (2) Harris was not meeting Tietex's

legitimate expectations at the time of his termination (R. pp. 175, 185-87), and (3) Tietex did not replace Harris with a younger employee (R. pp. 175-76, 187-88). As such, all allegations in the Amended Complaint that could support a finding of malice are precluded under the doctrine of collateral estoppel.

The undisputed facts also demonstrate Wallace did not exceed the scope of the privilege. Wallace's e-mail recounted his conversation with Harris to Wallace's own supervisor and Tietex's Human Resources Manager, both of whom Harris admits "had legitimate business need to know about and discuss" the issues in the e-mail. (R. pp. 708-09.)

Even assuming the content of the February 9 e-mail was false and not protected by the qualified privilege, though the record establishes otherwise, the e-mail was not defamatory and did not cause Harris any damages. The e-mail evidences that Wallace (and Tietex) cared about Harris' well-being and offered to support him if he needed to utilize the employee assistance program (EAP). (R. p. 680.) Harris admits that he rejected the offer to utilize the EAP. (R. p. 621.) This is far from defamatory.

2. March 5, 2007 Memorandum from Wallace to Wilson.

Harris' second defamation claim focuses on the March 5, 2007 memorandum Wallace sent to Wilson with copies to Isbell and Harris. (R. pp. 694, 748.) Like the February 9 e-mail, this memorandum simply documented a performance-related discussion Wallace had with Harris. (R. p. 748.) Harris admits that Wallace generated the March 5 memorandum only because Harris requested that he do so. (R. p. 710.)

As determined by the lower court, this memorandum is not actionable as defamation because Harris has admitted that each of the points Wallace made in the memorandum was substantially true. (R. pp. 17-18 (citing R. pp. 619-21, 623, 626, 629-

30); *see also* Facts Sections D.1. – D.5. *supra.*) As with the February 9 e-mail, the trial court ruled that this memorandum is entitled to a qualified privilege as a matter of law. Harris failed to overcome that privilege because he did not produce any evidence from which a jury could conclude that Wallace acted with actual malice in drafting the memorandum (particularly since Harris himself specifically requested that Wallace prepare it) or that Wallace exceeded the scope of the privilege.

3. June 18, 2007 Memorandum from Wallace to Harris.

Harris' third defamation claim related to the June 18, 2007 memorandum Wallace provided to Harris, with copies to Wilson and Isbell, which Harris has described as his "final written warning." (R. pp. 694, 749-50.) The June 18 memorandum focuses exclusively on Harris' poor performance on the C237 and T602 projects. (*Id.*)

Harris' own testimony precluded a finding that the June 18 memorandum was false and defamatory, as he admits the statements in the memorandum are substantially true.[9] Harris admitted he had been working on the C237 project for six month and projected significant savings for Tietex. (R. pp. 641-42, 685-86.) Although Harris claimed he had a successful trial before reporting to Wallace, he admitted the direction of the project shifted. (R. p. 642.) Tietex was convinced Harris' compound was too complicated to produce commercially, and, therefore, unacceptable. (R. pp. 685-86.)

Harris admitted that Wallace began working separately on a parallel C237 project in February. (R. pp. 643, 685-86.) Harris admitted his compound was never used by

[9] In the First Action, the Federal Court concluded that Harris failed to meet Tietex's legitimate expectations on the C237 and T602 projects for the very reasons summarized in Wallace's June 18 memorandum. (R. pp. 166-68, 175, 185-87.) Thus, beyond the undisputed facts showing the substantial truth of the June 18 memorandum, the doctrine of collateral estoppel prevents Harris from asserting in this action that he performed up to Tietex's legitimate expectations on the C237 and T602 projects.

Tietex. (R. p. 643.) Harris admitted the first trial of the T602 project was not completely successful, with mixed results, but he recommended a production trial anyway. (R. pp. 644-46, 685-86.) Harris admitted the two subsequent trials, run on his recommendation, were unsuccessful. (R. pp. 646-47, 685-86.) The June 18 memorandum is thus substantially true, according to Harris' own testimony.

As an internal memorandum addressing employee performance, the June 18 memorandum was subject to a qualified privilege. Harris produced no evidence of actual malice or other abuse of the privilege, as Wallace prepared and distributed the June 18 memorandum to a small group of Tietex managers who needed to be aware of the issues discussed therein.

4. July 18, 2007 Memorandum from Wallace to Harris.

The final specific statement on which Harris relied in making his defamation claims is the July 18, 2007 memorandum from Wallace to Wilson (with a copy to Isbell) in which Wallace summarized Harris' performance issues and recommended the termination of Harris' employment. (R. pp. 694-95, 756-57.) The trial court correctly found this claim deficient for reasons similar to Harris' first three defamation claims. (R. p. 19.)

The summary of Harris' performance deficiencies in the July 18 memorandum is substantially true based on Harris' own testimony. (R. pp. 619-21, 623, 626-27, 629-30, 641-47, 651-65, 668; *see also* Facts *supra*.) An internal memorandum from an employee's supervisor to Human Resources recommending the employee's termination based on poor performance and poor judgment is entitled to a qualified privilege. There is no evidence in the record to support a finding that Wallace acted with actual malice in publishing this memorandum, as with the other internal, performance-related

communications on which Harris relied. Harris acknowledged that Wallace did not exceed the scope of the privilege or act unreasonably in providing the memorandum to Wilson and Isbell, as he admits that both Wilson and Isbell "would have had a need to know" about the subject matter of the memorandum. (R. p. 719.)

B. Public Policy Mandates the Affirmation of Summary Judgment in Favor of Tietex on Each of the Four Internal, Performance-Related Communications that Harris Alleges to be Defamatory.

A consideration of the implications of permitting Harris' defamation claims based on Tietex's internal, performance-related communications to survive summary judgment demonstrates that public policy mandates affirmation of the lower court's decision. Referencing the March, June, and July 2007 memoranda, Harris contends in his brief that "[t]he record contains at least three memoranda [allegedly] constituting malicious personal attacks outside any privilege and impugning Harris's professional standards and abilities." (Appellant's Initial Brief at 15.) However, Harris failed to identify any evidence in the record from which a jury could reasonably conclude that (1) these memoranda are not substantially true, or (2) Wallace acted with actual malice or otherwise exceeded the scope of the qualified privilege in preparing these memoranda.

Instead, Harris relies on vague, blanket assertions that he "testified concerning the lack of veracity in the content of these memos," and "gave unequivocal testimony that Wallace fabricated reports about him, lied about conversations that he purportedly had with him." (*Id.*) Examining the deposition pages to which Harris cites in support of these conclusory statements, all of which come from his own deposition, reveals there are simply no "specific facts showing that there is a genuine issue for trial." *Baughman*, 306 S.C. at 107, 410 S.E.2d at 545. Rather, these deposition excerpts contain nothing more than Harris' own subjective assessment of why the memoranda did not accurately

describe his performance. That's all. Harris does not point to a single document, the testimony of any witness, or any other type of evidence to support his personal and subjective disagreements. This is far from sufficient.[10]

Harris' defamation claims based on these performance-related memoranda can be summarized as follows:

- Employer believes employee's performance to be deficient;
- Employer documents employee's performance deficiencies and keeps the documentation confidential by informing only those management personnel who employee admits would have a need to know about the subject matter;
- Employee disagrees with employer's assessment of his performance, but bases his disagreement solely on his own subjective evaluation; and
- Employee files defamation claims based on the documentation of his performance deficiencies.

To permit such an employee's defamation claims to survive summary judgment would open the floodgates to litigation by every employee who is displeased with his employer's confidential performance-related critiques. This is a prime example of precisely what the qualified privilege is intended to protect against.

[10] Harris' reliance on his own subjective opinion regarding the quality of his performance was one of the key deficiencies the Federal Court identified in the First Action: "The plaintiff attempts to contradict the defendant's dissatisfaction with his performance by his subjective assessment of himself as a valuable, outstanding, and exemplary performer. However, the plaintiff's subjective view of his performance does not establish a *prima facie* case." (R. p. 175.) As the Federal Court aptly recognized, "The perception of the employer is critical, "'not the self-assessment of the plaintiff.'" (*Id.* (quoting *Hawkins v. PepsiCo*, 203 F.3d 274, 280 (4th Cir. 2000)).)

Significantly, the only case on which Harris relies in support of his assertion that "an employer could be liable to a former employee for an allegedly defamatory statement made by the employee's supervisor" (Appellant's Initial Brief at 15) is easily distinguishable from Harris' situation. *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001), involved (1) allegations of clearly defamatory statements that the plaintiff had committed a crime that went well beyond performance evaluations and critiques, (2) far more egregious allegations that the qualified privilege had been abused, and (3) actual evidence beyond the plaintiff's subjective assessments and conclusions.

In *Murray*, the plaintiff/former employee was accused by a co-worker, whom the plaintiff had recently confronted regarding an unexplained absence, of stealing company property including fuel, oil, and antifreeze. *Id.* at 134-36, 542 S.E.2d at 745-46. The accusing co-worker falsely reported that a second co-worker had also witnessed the theft and assisted in compiling evidence of the theft. *Id.* at 134, 542 S.E.2d at 745. At his deposition, the second co-worker denied observing the plaintiff steal anything and acknowledged that he did not assist in compiling evidence of the theft. *Id.*, 542 S.E.2d at 746. The employer investigated but did not discipline the plaintiff based on the inability to substantiate the co-worker's allegations. *Id.* at 135, 542 S.E.2d at 746.

After his first attempt failed at getting the plaintiff in trouble for the alleged theft, the co-worker in *Murray* again accused the plaintiff of theft one year later based on the same alleged incident together with four additional incidents. *Id.* This time, the employer informed the plaintiff "he was suspended for stealing company property." *Id.* In response to the renewed allegations, the plaintiff "produced receipts for the fuel he purchased," documentary evidence that contradicted the allegation of theft, in addition to

his denial of the theft. *Id.* at 136, 542 S.E.2d at 746. The employer ultimately terminated the employee. *Id.* The accusing co-worker and the second co-worker "testified [that their supervisor] held a meeting of his employees, including at least six workers, and told them [the plaintiff] was fired for misappropriating or misusing company property." *Id.* The plaintiff's entire "appeal center[ed] on the statement made by [the supervisor] to the employees in the meeting." *Id.*

While Harris is correct in asserting that the Court of Appeals in *Murray* "held that an employer could be liable to a former employee for an allegedly defamatory statement made by the employee's supervisor," there is no comparison between the facts of *Murray* and Harris' situation: (1) while the allegedly defamatory memoranda on which Harris relies contained evaluations and critiques of his performance, the defamatory statement in *Murray* involved a blatant allegation that the plaintiff had been fired for theft; (2) while Harris openly admits that the allegedly defamatory memoranda regarding his performance were only circulated to management employees on a "need-to-know" basis, the supervisor in *Murray* informed all of his employees, at least six of the plaintiff's peers, that the plaintiff had been fired for theft; and (3) while Harris attempts to contradict the content of the allegedly defamatory memoranda regarding his performance by pointing to his own subjective disagreements in his own deposition testimony, the plaintiff in *Murray* presented both documentary evidence and third-party witness testimony contradicting the allegations of theft.

That there was a question of fact for the jury to determine in *Murray* regarding whether the supervisor abused the qualified privilege is obvious based on the clear factual

disputes the plaintiff identified based on actual evidence.[11] Conversely, Harris relies on nothing more than his own subjective assessment regarding the veracity of the performance-related memoranda. This is not evidence from which a jury could reasonably conclude that Tietex abused the qualified privilege that inherently applies to these memoranda as a matter of law. Given Harris' failure to identify a legitimate question of fact, "'it is for the court to say . . . whether or not the privilege has been abused or exceeded.'" *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310 (quoting *Woodward*, 297 S.C. at 32-33, 292 S.E.2d at 601); *see also* Restatement (Second) of Torts § 619, cmt. b (noting that the court should decide if the privilege has been abused where only one conclusion can reasonably be drawn).

C. Harris Failed to Present Any Credible Evidence to Support his Three Unclear and Ill-Defined Allegations of Non-Written Defamation.

As with Harris' defamation claim regarding the February 2007 e-mail discussed above, Harris appears to have abandoned each of his three remaining defamation claims, all of which were unclear and ill-defined to begin with. However, Tietex will briefly analyze each of these three claims below to ensure clarity regarding the meritless nature of the claims.

[11] Significantly, the *Murray* Court concluded that "the trial judge did not err in initially concluding [the supervisor] was protected by a qualified privilege" in making the statement to the plaintiff's co-workers regarding the plaintiff being fired for theft. *Id.* at 141; 542 S.E.2d at 749. The Court simply held that there existed a jury question regarding whether the supervisor had abused that privilege based on the clear factual dispute—supported by documentary evidence and third-party testimony—regarding whether the supervisor made the statement in good faith. *Id.* Here, the qualified privilege applies as a matter of law to all of the internal, performance-related memoranda, and Harris presented no evidence that the privilege was abused.

1. "Rumors in the Industry."

Harris' fifth defamation claim arose from his contention that there were "rumors in the industry that [he] w[as] terminated from Tietex for falsifying a test report." (R. p. 695.) Harris never identified an actual statement that Tietex made with respect to these "rumors." Rather, Harris simply contended that he spoke to two former Tietex employees who allegedly informed him that they had heard about rumors being spread about him. (R. pp. 720-30.) Harris never alleged that Tietex was the actual source of these alleged rumors, and he never produced a witness to testify about what Tietex supposedly said.

In the absence of any such allegations or testimony, the trial court properly ruled that this defamation claim could not overcome Tietex's motion for summary judgment. Rule 56(e), SCRCP, requires a party desiring to oppose summary judgment with testimony to "set forth such facts as would be admissible in evidence." Harris' claim regarding "rumors in the industry" is based on inadmissible hearsay. Accordingly, Harris failed to establish there was a statement or that Tietex published the statement, let alone prove the remaining elements of this claim.

2. Harris' July 2007 Suspension with Full Pay.

Harris' sixth defamation claim alleged that Tietex defamed him by suspending his employment, with full pay and benefits, in July 2007. (R. p. 695.) The only statements Harris identified for this claim were (1) Wallace's telephone call to Harris in which he informed Harris of the suspension, and (2) Wallace allegedly informing an individual at another company, Textile Rubber, that Harris was suspended. (R. pp. 730-36.)

With respect to the telephone call between Wallace and Harris, there was no publication to a third party, as Harris admits that they were the only parties on the call.

(R. pp. 732-33.) Regarding Wallace's alleged statement to the Textile Rubber employee, Harris relies on inadmissible hearsay. Beyond being unable to specify any details about the alleged statement, Harris admits that "[t]he only information [he] h[as] is like second hand what George Henderson told [him]." (R. p. 735.) Thus, Harris cannot establish that any statement was published for the purposes of this motion. Even assuming Wallace had informed this individual Harris was suspended, that statement is wholly true and cannot be defamatory as a matter of law.

3. Harris' February 2007 Ban from the Laboratory.

Finally, Harris contended that being "banned from going to the laboratory building" in February 2007 was somehow defamatory. (R. pp. 695-96.) The only "statement" Tietex or the lower court have ever been able to infer from this allegation is when Wallace told Harris "not to enter the lab under any circumstances." (R. pp. 618-679.) While Wallace did make that statement, Harris has never even attempted to explain how the statement could be defamatory to Harris.

First, the statement was not about Harris, it was a work directive. Second, Wallace made that statement, and Tietex prohibited Harris form entering the lab, after Harris complained that the work conditions in the lab were detrimentally impacting his health. (R. pp. 609-16, 679.) Tietex and Harris jointly attempted to find a solution that would have allowed Harris to continue working in the lab without harming his health, but they were unable to do so. (*Id.*) After "banning" Harris from the lab, Harris admits Tietex made special purchases of equipment to allow him to set up a work area in a different location that would be better for his health. (R. pp. 621-23, 681.) These circumstances do not support any allegation of defamation.

III. SUMMARY JUDGMENT WAS PROPER UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL BASED ON THE FINAL, BINDING, AND CONCLUSIVE FINDINGS IN A PRIOR LAWSUIT BETWEEN THE SAME PARTIES INVOLVING THE SAME FACTUAL ALLEGATIONS.

Placing aside the absence of any genuine dispute as to the material facts in this matter, the lower court properly determined that the doctrine of collateral estoppel is fatal to Harris' claims. (R. pp. 21-23.) "Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits were the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (citing *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009)).

"The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* (citing *Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189-90 n.1 (Ct. App. 1984)). Tietex met its burden to establish the presence of these elements.

Harris' claims in the First Action and his claims in this matter all rely on the same factual allegations, his contentions (a) that he was performing his job at Tietex at a level that met Tietex's legitimate expectations; (b) that the internal memoranda describing his performance deficiencies were false and defamatory; (c) that Tietex did not have a legitimate reason for terminating his employment; and (d) that Tietex's stated reason for terminating his employment was pretextual. However, the Federal Court considered all of these factual allegations in the First Action and made factual findings and conclusions that directly contradict Harris' version of the facts. (R. pp. 162-70, 175-78. 185-88, 190.)

The Federal Court's findings and conclusions were necessary and relevant for its determination of Harris' ADEA claims, and the same findings and conclusions are equally applicable to the following issues at the forefront of Harris' state law claims in the Second Action, among others: (a) whether Tietex was justified in terminating Harris' employment; (b) whether Tietex's internal memoranda regarding Harris' performance, on which Harris relies heavily to support his defamation claims, were substantially true; (c) whether Tietex exhibited any actual malice or otherwise exceeded the scope of the qualified privilege with respect to the internal memoranda regarding Harris' performance; (d) whether Tietex conspired to replace him with a younger employee, as alleged in the Amended Complaint; (e) whether Tietex engaged in a campaign to set up Harris for failure, as alleged in the Amended Complaint; (f) whether Tietex intentionally made it impossible for Harris to perform his job duties, as alleged in the Amended Complaint; (g) whether Tietex put forward false and defamatory reasons for the termination of Harris' employment, as alleged in the Amended Complaint; and (h) whether Tietex terminated Harris' employment based on pretextual reasons, as alleged in the Amended Complaint.

Harris "actually litigated" all of these issues in the First Action, in which he (a) submitted a brief in opposition to Tietex's motion for summary judgment; (b) submitted written objections to the Magistrate Order; (c) appealed to the Fourth Circuit Court of Appeals, which affirmed the Federal Court's decision; (d) filed a petition for re-hearing with the Fourth Circuit, which was denied; and (e) submitted a letter to the Federal District Court requesting further review after exhausting all avenues with the Fourth Circuit, which was rejected.

All of these issues were "directly determined" and were "necessary to support the prior judgment" in the First Action, as the Federal Court expressly relied on its findings and conclusions in granting Tietex's motion for summary judgment. Harris attempts to narrow the preclusive effect of the Federal Court's Orders by contending that (1) "[t]he only issue decided by the District Court was that Harris failed to prove age-based discrimination under the ADEA," and (2) none of the other facts summarized by the Federal Court and relied upon by the lower court here were "actually determined." (Appellant's Initial Brief at 7.) These misplaced contentions evidence (1) an improperly narrow application of the doctrine of collateral estoppel, and (2) a misunderstanding of employment discrimination law.

With respect to Harris' first contention, it is simply inaccurate to allege that the only issue the Federal Court decided "was that Harris failed to prove age-based discrimination under the ADEA." This improperly narrow application of collateral estoppel ignores the clear case law holding that "collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." *Pye*, 325 S.C. at 436, 480 S.E.2d at 460 (emphasis added) (citing *Liberty Mut. Ins. Co. v. Employers Ins. of Wausau*, 284 S.C. 234, 325 S.E.2d 566 (Ct. App. 1985)). Harris is essentially attempting to conflate the doctrines of collateral estoppel (issue preclusion) and *res judicata* (claim preclusion), as the "issue" he identifies is actually a "claim" the Federal Court decided. *See id.* ("*Res judicata* bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding.").

A proper application of the doctrine of collateral estoppel demonstrates that all facts and issues the Federal Court necessarily determined in the First Action are entitled to preclusive and binding effect, which includes the facts set forth above that are fatal to Harris' defamation claims. Harris simply cannot overcome the fact that the statement of relevant facts set forth above is essentially a verbatim recitation of the Federal Court's findings of fact. (*Compare* Facts *supra*, *with* R. pp. 162-70 (Magistrate's findings of fact), *and* R. p. 190 (adopting and incorporating entire Magistrate Order).)

Harris' second inaccurate contention, that the facts summarized by the Federal Court and relied upon by the lower court here were not "actually determined" in the First Action, disregards what the Federal Court was obligated to determine to grant summary judgment on Harris' ADEA claim. The Federal Court expressly held that Harris "was not performing his job at a level that met [Tietex's] legitimate expectations."[12] (R. pp. 175, 185-87.)

In order the reach this conclusion, the Federal Court had to make numerous findings of fact—based on evidence viewed in a light most favorable to Harris—regarding the facts and circumstances leading up to the termination of Harris'

[12] The lower court recognized this holding in its September 23, 2013 Form 4 Order denying Tietex's initial Motion for Summary Judgment. (R. p. 33 ("Specifically, the District Court found that the plaintiff was not performing his job duties at a level that met his employer's legitimate expectations at the time of the adverse employment action.").) However, the lower court then erroneously applied the collateral estoppel doctrine too narrowly, concluding that the Federal Court's findings "were applicable solely to the ADEA claim." (*Id.*) While the Federal Court did reach this conclusion—based on numerous findings of fact—in granting summary judgment on Harris' ADEA claim, that conclusion and the underlying findings of fact are binding against Harris with respect to any claim between these parties. *Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782 ("Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits were the same." (emphasis added) (citing *Judy*, 383 S.C. at 7, 677 S.E.2d at 217)).

employment. The Federal Court did just that, summarizing its findings of relevant and necessary facts in the Orders. (R. pp. 162-70 (Magistrate's findings of fact), 190 (adopting and incorporating entire Magistrate Order).) It is those findings of fact on which Tietex relies, and those alone, all of which are entitled to preclusive and binding effect.

In light of the Federal Court's Orders, the lower court understandably concluded that it was "unable to imagine any set of credible facts Harris could present at trial that would support his claims without contradicting the findings and conclusions of the Federal Court. There is no evidence in the record that would accomplish this result, rendering summary judgment proper based on the doctrine of collateral estoppel." (R. p. 23.) The trial court was wholly correct in this conclusion, and summary judgment should be affirmed for this reason also.

IV. SUMMARY JUDGMENT WAS PROPER UNDER THE DOCTRINE OF *RES JUDICATA* AND THE STATUTE OF LIMITATIONS WITH RESPECT TO THE DEFAMATION CLAIMS HARRIS COULD HAVE RAISED BUT DID NOT RAISE IN HIS PRIOR LAWSUIT AGAINST TIETEX.

Harris admits that his First Action did not allege the following defamation claims: (1) his claim based on the February 9, 2007 e-mail from Wallace to Wilson (R. p. 697); (2) his claim based on Tietex suspending his employment in July 2007 (R. pp. 697-98); or (3) his claim based on Tietex "bann[ing] him from the laboratory" (R. p. 698). Rather, he first asserted the first two of these claims in his *pro se* Complaint in the Second Action, and he only identified his claim based on being banned from the lab in his deposition in the Second Action. Using the October 12, 2011, filing of his *pro se* Complaint as the date on which Harris asserted these claims (assuming the third of these claims relates back to that date), they are barred by the statute of limitations. Due to

Harris' failure to plead these claims in the First Action, they are also barred by the doctrine of *res judicata*.

The statute of limitations applicable to Harris' defamation claims is two years. S.C. Code Ann. § 15-3-550. The two-year statute of limitations runs from the date on which the allegedly defamatory statement was published, not from the time the statement was allegedly discovered. *Jones v. City of Folly Beach*, 326 S.C. 360, 369, 483 S.E.2d 770, 775 (Ct. App. 1997) ("[S]ummary judgment [should be granted] because South Carolina has not adopted the discovery rule in libel and slander cases."). Harris' defamation claims based on (1) the February 9, 2007 e-mail from Wallace, (2) Tietex suspending his employment in July 2007, and (3) Tietex banning him from the lab in February 2007, are all based on "statements" that Tietex allegedly made in February and July 2007. Harris first alleged these claims in the Second Action, which he did not file until October 12, 2011. (R. pp. 697-98.) Thus, the trial court properly concluded that the two-year statute of limitations barred these claims.

While Harris has asserted that the statute of limitations for these claims should have been tolled under 28 U.S.C. § 1367(d) while his First Action was pending, he misreads that statute. Section 1367(d) is limited on its face to "any claim asserted under [a federal court's supplemental jurisdiction], and . . . any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under [a federal court's supplemental jurisdiction]." Harris did not plead these defamation claims in the First Action, and they were not dismissed from the First Action. Thus, they are excluded from the tolling provision of section 1367(d).

The complete absence of these three defamation claims in the First Action also implicates the doctrine of *res judicata*. "The doctrine of *res judicata* bars a litigant from raising any issues which were adjudicated in the former suit [between the parties] and any issues which might have been raised in the former suit." *Pye*, 325 S.C. at 432, 480 S.E.2d at 458 (citing *Hilton Head Ctr. v. Public Serv. Comm'n*, 294 S.C. 9, 362 S.E.2d 176 (1987)); *see also id.* ("'*Res judicata* also bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.'" (quoting *Riedman Corp. v. Greenville Steel Structures, Inc.* 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992))).

These three defamation claims arose out of the same transaction or occurrence that was the subject of the First Action—his employment with Tietex and separation therefrom. Harris could have raised these claims in the First Action, but he chose not to do so. Based on Harris' failure to assert these claims in the First Action, the lower court properly ruled that the doctrine of *res judicata* precluded Harris from asserting the claims in the Second Action.

CONCLUSION

Harris' claims in this lawsuit were an impermissible attempt to gain a second bite at the apple in the same dispute in which he has been engaged with Tietex for seven years. Fortunately, the lower court recognized the insufficiency of Harris' claims on the eve of trial and granted Tietex summary judgment. That decision should now be affirmed for each of the reasons set forth by the lower court: (1) Harris has failed to identify a genuine dispute of material fact on any of his defamation claims, which primarily rely on internal, performance-related memoranda that are substantially true and subject to a

qualified privilege that Harris cannot overcome; (2) the doctrine of collateral estoppel precludes Harris' defamation claims as a matter of law, as those claims rely on factual allegations that attempt to contradict the Federal Court's binding and conclusive findings in the First Action; and (3) the statute of limitations and the doctrine of *res judicata* preclude Harris' three defamation claims that he could have raised but did not raise in the First Action. Accordingly, Tietex requests that the Court affirm the decision of the lower court.

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December 12, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

Case No. 2011-CP-42-2538
Appellate Case No. 2014-000902

Gary G. Harris, ... Appellant,

v.

Tietex International, Ltd., ... Respondent.

CERTIFICATE OF COUNSEL REGARDING COMPLIANCE WITH RULE 211(B), SCACR

I certify that the Final Brief of Respondent complies with Rule 211(b), SCACR.

December 12, 2014

Lucas J. Asper

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PROOF OF SERVICE

I certify that I have served Respondent's Final Brief on Appellant Gary G. Harris by sending to his attorneys of record a copy of the same via first class mail, properly addressed, postage prepaid at the following addresses: D. Alan Lazenby, Ginger D. Goforth, Lazenby Law Firm, Post Office Box 6099, Spartanburg, South Carolina 29304.

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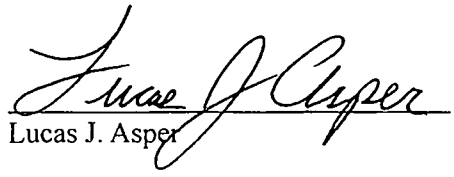

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PROOF OF SERVICE

I, the undersigned, hereby certify the Initial Reply Brief of Appellant in the above referenced matter was mailed, postage prepaid, to Respondent's Attorney, Fred Suggs, by sending to Ogletree Deakins Nash Smoak & Stewart PC, PO Box 2757, Greenville, SC 29602, on October 27, 2014.

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REPLY ARGUMENTS

I. COLLATERAL ESTOPPEL DOES NOT BAR APPELLANT'S DEFAMATION CLAIM.

The most important question in this appeal is whether Harris's defamation claim is barred by the doctrine of collateral estoppel. Judge Addy evaluated the record and found as a matter of law that it did not. Judge Cole revisited this issue, and erred in applying the collateral estoppel standard.

Tietex bears the burden of proving that (1) the state law issues surrounding Harris's defamation claim were actually litigated in the federal action, (2) the facts underlying the state law defamation claim were directly determined in the federal action, and (3) a determination of facts underlying the state law defamation claim was necessary to support the judgment in the federal action. See, e.g., Carolina Renewal, Inc. v. South Carolina Dep't of Transp., 385 S.C. 550, 684 S.E.2d 779, 782 (Ct. App. 2009).

None of this happened.

Tietex mischaracterizes Harris's collateral estoppel argument as "improperly narrow." Tietex should be well aware that, as a matter of public policy and judicial restraint, collateral estoppel should **never** be strictly applied. In fact, even if a party meets each element of a collateral estoppel defense, the court should reject its application when, in its estimation, the results are unfair, unjust, or go against public policy. Id. at 782. When seeking to bar a different cause of action than the one(s) litigated in the prior suit, the party seeking to use collateral estoppel must show that the facts necessary to prove that cause of action were decided and determined in the prior

suit. Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770, 774 (1997), citing Dunlap v. Travelers Ins. Co., 223 S.C. 150, 74 S.E.2d 828 (1953).

Despite Tietex's dogged insistence otherwise, the facts underlying Harris's defamation claim were not determined in the federal action.

The District Court decided a single issue: that Harris failed to prove age-based discrimination under the ADEA. More specifically, the District Court found that Harris did not establish a prima facie case of age discrimination "because he failed to provide evidence that established that he was meeting his employer's legitimate expectations at the time of the adverse action." (District Court Order, October 28, 2010, p. 3).

From this finding, the trial court extrapolated that the District Court found: (1) that Harris's job performance did not meet Tietex's expectations; (2) that Tietex had a legitimate reason to discharge Harris; and (3) that Harris cannot establish that the reason given was pretext. The District Court made no such findings, and they were not necessary to the District Court judgment.

Harris bore the burden of persuasion in the District Court. He was required to prove by a preponderance of the evidence that, **but for his age**, his employment would not have been terminated. This was the only issue before the District Court: Did Harris establish age as the "but for" reason for his termination? The District Court found that he did not meet this burden. This is not, however, a finding that Tietex's proffered reasons for firing Harris were found to be true or established as "facts."

The Fourth Circuit Court of Appeals analyzes ADEA claims under the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Warch v. Ohio Casualty Ins. Co., 435 F.3d 510 (4th Cir. 2006). This analysis only comes into operation if the plaintiff meets the prima facie case. The District Court, upon finding

that Harris had not met his prima facie case, had made all of the findings necessary to dismiss his ADEA claim. No further discussion by the District Court of any part of the record was necessary to this determination. Only facts necessary to determination of the action (i.e., the disposition of the ADEA claim) are subject to collateral estoppel. Therefore, no other "facts" discussed in the District Court's narrative were necessary to the ADEA decision, nor binding in this action alleging a state law defamation claim.

Tietex was not required to – and did not - prove a legitimate, nondiscriminatory reason for firing Harris in order to prevail on the ADEA claim. It only needed to satisfy its burden of production by proffering one. Once it did so, Harris had to prove that the articulated reason was false. Thus, no alleged "finding" that Tietex had a legitimate, nondiscriminatory reason for discharging Harris was essential to Harris's claim

The District Court found that Harris did not meet the burden of proving that, but for his age, he would not have been terminated. That is the only factual inquiry necessary with respect to the ADEA claim, and the only finding of fact binding on Harris in the present action. He cannot assert age as the factual basis of any of his claims in this action, and he has not.

Further, the record is clear, and Tietex does not presume to argue, that the District Court made any finding whatsoever with respect to the state law defamation claim. There is nothing in the District Court's opinion to suggest that any finding with regard to the ADEA claim had any bearing on the defamation claim. Tietex could absolutely defame Harris, even if it did not discriminate against him.

II. APPELLANT'S DEFAMATION CLAIM IS NOT BARRED BY THE STATUTE OF LIMITATIONS OR RES JUDICATA.

Harris properly stated a cause of action for defamation. (August 15, 2008 Complaint, ¶¶ 39-46). The purpose of a pleading is to provide "fair notice to the opponent and the court." Watts v. Metro Security Agency, 346 S.C. 235, 550 S.E.2d 869, 871 (Ct. App. 2001). Under Rule 8, SCRCP, a pleading must contain "ultimate facts" rather than "evidentiary facts" in order to state a cause of action. Harris's initial defamation pleading alleged that Tietex issued false statements about him containing a defamatory meaning, that these statements concerned his competence and acumen in his profession, that the statements were published to third parties with actual malice and/or reckless disregard of the truth, and that he suffered specific legal and special damages. Harris satisfied the requirements of Rule 8. He was not required to describe each alleged occurrence if defamation in detail, or point to each piece of supporting evidence. Tietex was on notice of Harris's defamation claim as of August 15, 2008.

When Tietex removed the original state court action on August 29, 2008, the statute of limitations for the pendent state law claims, including the defamation claim, was tolled during the pendency of the federal action, and for an 30 additional days after its dismissal. 28 U.S.C. § 1367(d). The earliest date that could qualify as "dismissal" from federal court is July 26, 2011. Therefore, the statute of limitations did not begin to run again until, at the earliest, August 25, 2011. Harris filed his pro se complaint in state court on October 11, 2011, timely raising the state law claim – including the defamation claim - preserved under the tolling provision.

Assuming out of an abundance of caution that Harris's defamation claim arose as early as January 2007, the statute of limitations had run for no more than 20 months

when it was tolled by removal. Harris brought the state court action barely six weeks after the statute of limitations resumed its operation. His pleadings, and the defamation claim he raised, were not time-barred. Later amendments to the complaint, permitted by the trial court upon Harris's timely motions, did not change the nature of the defamation claim in any way. See,e.g., Scott v. McCain, 272 S.C. 198, 250 S.E.2d 118 (1978).

Likewise, Harris's cause of action for defamation is not barred by res judicata because the issue was not adjudicated by the District Court. Plum Creek Development Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). The District Court expressly declined to exercise supplemental jurisdiction over any state law claims.

III. APPELLANT MADE A CLEAR RECORD OF GENUINE ISSUES OF MATERIAL FACT FOR TRIAL, WHICH PRECLUDES SUMMARY JUDGMENT ON HIS DEFAMATION CLAIM.

It is surprising, and quite telling, that Tietex spends nearly fourteen pages of its brief setting forth its detailed exposition of the "facts," while arguing that there is no issue of material fact in this case.

When all reasonable inferences and conclusions are drawn from facts of this case in favor of Harris, as they must be, summary judgment is patently not appropriate. See, e.g., McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998).

Harris has established at least, and arguably more than, the mere scintilla of evidence supporting his claim that is required to defeat summary judgment. See Hancock v. Mid-South Management Co., 381 S.C. 326, 673 S.E.2d 801 (2009) (holding that in cases applying the preponderance of the evidence burden of proof, the

nonmoving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment).

Harris was required to present evidence on each of the following elements: (1) a false and defamatory statement concerning another, (2) an unprivileged communication to a third party, (3) fault on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Holtzscheiter v. Thompson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998). The defamatory material relied upon by Harris was actionable per se because it was written, it charged Harris with unfitness in his profession. Therefore, he was not required to plead or prove special damages to recover. Id. at 502; Fleming v. Rose, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000).

An employer can be liable to a former employee for defamation by a supervisor, even if the employer did not direct the supervisor to make the statement or condone the statement. Murray v. Holnam, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001). Communications between officers and employees can be qualifiedly privileged if made in good faith and in the usual course of business. However, whether the publication went beyond what the occasion required and/or was unnecessarily defamatory is a question for the jury to decide. Id. at 749.

Tietex supervisor Wade Wallace issued at least three memoranda that attacked the character and professional fitness and ability of Gary Harris. (Wallace Memoranda dated March 5, 2007; June 18, 2007; and July 18, 2007). There is at least a scintilla of evidence in the record that the information contained in these memos is false, and was based on ulterior motives. (Deposition of Gary Harris, March 14, 2013, pp. 27-30, 32, 41-42, 52-54, 56, 61-62, 71-72, 86-87, 130, 145-147, 152-156).

To the extent that the trial court granted summary judgment to Tietex based on the District Court order, this is plain error. The District Court ruled on Harris's ADEA claim and expressly declined to rule on any state law claim. To use the District Court order to determine the state law claims anyway deprives Harris of his day in court.

Tietex makes much of the length of the proceedings in this case. However, it is Tietex that caused the vast majority of delays by removing the case to federal court and tolling the state law claims, resisting discovery efforts at every turn, and otherwise engaging in obstructive and abusive litigation tactics.

CONCLUSION

Gary Harris is not looking for a "second bite" at the apple. He only wants the first bite; the opportunity to try his defamation claim against Tietex before a jury of his peers. This is a right to which he is entitled. Because the trial court order improperly deprived Harris of this right, Harris respectfully requests that the Court of Appeals reverse this ruling and permit him to proceed to trial on his state law defamation claim.

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October 27, 2014

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gary G. Harris, Appellant,

v.

Tietex International Ltd., Respondent.

Appellate Case No. 2014-000902

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5418
Submitted May 2, 2016 – Filed June 29, 2016

AFFIRMED

Duane Alan Lazenby and Ginger D. Goforth, both of Lazenby Law Firm, LLC, of Spartanburg, for Appellant.

Fred W. Suggs, Jr. and Lucas James Asper, of Ogletree Deakins Nash Smoak & Stewart, PC, of Greenville, for Respondent.

SHORT, J.: In this defamation case, Gary Harris appeals the trial court's grant of summary judgment in favor of Tietex International, Ltd. (Tietex), arguing the trial court erred in finding summary judgment was appropriate based on (1) a lack of genuine issue of material fact, (2) the statute of limitations, (3) res judicata, and (4) collateral estoppel. We affirm.

FACTS

In 1994, Tietex hired Harris as a senior research chemist. In 2006, Harris began to complain of having difficulty breathing and experiencing flu-like symptoms and headaches. Harris believed his health problems were being caused by mold present near his work area in Tietex's laboratory. Tietex had the laboratory tested; however, no mold was detected. A series of emails between Harris and his supervisor, Wade Wallace, indicate they discussed relocating Harris from the lab and allowing Harris to work in another area to protect him from the environment. Wallace explained to Harris that Tietex did not want to take any chances with his health and instructed Harris not to enter the lab under any circumstances.

On February 9, 2007, Wallace sent an email to his supervisor, Mark Isbell, and Human Resources Manager David Wilson, summarizing a conversation he allegedly had with Harris two days earlier. In the email, Wallace explained that Harris had expressed he was overwhelmed with personal problems and was "confused, disoriented, and could not function." However, according to Wallace, Harris eventually stated he could work through his problems and thanked Wallace for his support and patience.

On March 5, 2007, Wallace met with Harris to discuss several issues Harris needed to correct regarding his work performance. Following their meeting, Wallace sent a memo to Wilson, Isbell, and Harris, outlining the issues he and Harris discussed. On June 18, 2007, Wallace sent another memo to Wilson, Harris, and Isbell regarding Harris's work on two projects. Wallace explained Harris initiated the first project by convincing management he could develop a chemical compound that would result in cost savings for Tietex. However, according to Wallace, Harris had made no significant progress after working on the project for six months. Wallace claimed Harris "exercised poor judgement by making claims and commitments that he could not deliver." Wallace also criticized Harris's work on the second project, claiming Harris failed to conduct adequate scientific analysis. Wallace stated Harris's "negligence" was unacceptable for a senior research chemist.

On July 3, 2007, Wallace placed Harris on administrative suspension. On July 18, 2007, Wallace sent a final memo to Wilson and Isbell regarding Harris. Wallace claimed Harris had failed to correct all but one of the issues oulined in the March 5, 2007 memo and described several other problems he had had with Harris's work performance. Wallace explained he had lost confidence in Harris's ability to perform his job and recommended Tietex terminate Harris's employment. On July 19, 2007, Tietex terminated Harris's employment.

In August 2008, Harris filed a complaint in circuit court asserting causes of action against Tietex for retaliation and discrimination under the Age Discrimination in Employment Act[1] (ADEA), breach of contract, breach of contract accompanied by a fraudulent act, and defamation. Tietex removed the case to United States District Court.

At a deposition, Harris initially claimed the issues Wallace described in the March 5, 2007 memo regarding Harris were false; however, when questioned about each issue individually, Harris did not completely dispute each point. Harris also disputed some of the information contained in the June 18, 2007 memo and July 18, 2007 memo. Additionally, Harris characterized the portion of the June memo that described his work on the second project as "highly misleading as to what really happened." Harris admitted he had no evidence that Tietex shared these memos with anyone other than the individuals to whom they were addressed.

On October 28, 2010, the district court granted summary judgment to Tietex on Harris's ADEA claims and dismissed Harris's state law claims, declining to exercise supplemental jurisdiction. The Fourth Circuit Court of Appeals affirmed the district court's judgment on May 31, 2011.

On October 21, 2011, Harris filed his complaint against Tietex in the instant case. Harris later filed an amended complaint, which included a cause of action for defamation. Harris's amended complaint did not identify the specific statements on which his defamation claim was based. At a deposition, Harris identified seven items related to his lawsuit that he believed were defamatory: (1) the February 9, 2007 email from Wallace to Wilson; (2) the March 5, 2007 memo; (3) the June 18, 2007 memo; (4) the July 18, 2007 memo; (5) "rumors in the industry" that he had been terminated for falsifying a test report; (6) Tietex suspending Harris; and (7) Tietex "banning" Harris from the laboratory. Harris admitted his defamation claim in the first action was not based on the February 9, 2007 email, the July 18, 2007 memo, Tietex banning him from the laboratory, or Tietex suspending him on July 3, 2007.

Tietex subsequently moved for summary judgment. On March 20, 2014, the trial court granted the motion. In its order, the trial court addressed Harris's defamation cause of action as seven separate claims based on the items Harris identified as

[1] 29 U.S.C. §§ 621–634 (2012 & Supp. II 2014).

defamatory at his deposition.[2] The trial court found Tietex was entitled to summary judgment as to Harris's defamation claims relating to the February 9, 2007 email and the three internal memos because these communications were substantially true. Furthermore, the trial court found the email and memos were subject to a qualified privilege because they were internal, performance-related communications.

The trial court also granted summary judgment as to Harris's defamation claims relating to (1) "rumors in the industry" regarding Harris's termination, (2) Tietex suspending Harris's employment, and (3) Tietex "banning" Harris from the laboratory. The trial court explained, "Given the ill-defined nature of the alleged defamatory statements and the lack of evidence to support these claims, Harris has failed to create a triable issue of fact."

Additionally, the trial court granted summary judgment to Tietex as to the following claims based on the claims being barred by the statute of limitations: (1) the February 9, 2007 email; (2) Tietex "banning" Harris from the laboratory; and (3) Tietex suspending Harris's employment. The trial court explained Harris did not assert these claims in his first action, and therefore, the limitations period was not tolled under 28 U.S.C. § 1367(d). The trial court also found Harris was precluded from asserting these claims under the doctrine of res judicata because they arose out of the same transaction or occurrence as Harris's claims in the first action. Finally, the trial court found Tietex was entitled to summary judgment on all of Harris's claims because he was precluded from arguing facts necessary to support his defamation claims under the doctrine of collateral estoppel based on the federal court's findings in the first action. This appeal followed.

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

[2] At a hearing on the motion, Tietex addressed Harris's defamation cause of action as seven separate claims. Harris, however, stated his defamation cause of action was based on the three internal memos. In his brief to this court, Harris claims Tietex "twisted [his] deposition testimony to create 'additional' defamation claims."

judgment as a matter of law." Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860.

I. GENUINE ISSUES OF MATERIAL FACT

Harris argues the trial court erred in granting summary judgment because genuine issues of material fact existed. Harris contends his testimony regarding the lack of veracity of the memos created a genuine issue of material fact and argues that even if a qualified privilege applies to the communications, a jury must determine if the privilege was abused. We disagree.

A party asserting a claim of defamation must prove the following elements: "(1) a false and defamatory statement was made; (2) the unprivileged publication of the statement to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm." *Williams v. Lancaster Cty. Sch. Dist.*, 369 S.C. 293, 302-03, 631 S.E.2d 286, 292 (Ct. App. 2006). "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Fleming*, 350 S.C. at 494, 567 S.E.2d at 860.

A defendant in a defamation action may assert the affirmative defense of conditional or qualified privilege. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999). "Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Id.* The party asserting a qualified privilege must prove the following elements: (1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only. *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987). Whether an occasion gives rise to a qualified or conditional privilege is generally a question of law for the court. *Murray v. Holnam, Inc.*, 344 S.C. 129, 140, 542 S.E.2d 743, 749 (Ct. App. 2001). This court has previously found the qualified privilege applies "to situations in which an employee's job performance is properly evaluated." *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989).

"Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 134. "To prove actual malice, the plaintiff must show that the defendant was activated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff, or that the statements were published with such recklessness as to show a conscious disregard for [the] plaintiff[']s rights." *Id.* at 485, 514 S.E.2d at 134. Although abuse of the conditional privilege is generally an issue for the jury to decide, in the absence of a controversy as to the facts, it is for the court to determine. *Woodward v. S.C. Farm Bureau Ins. Co.*, 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981). Similarly, if the plaintiff fails to present evidence of a genuine issue of fact as to actual malice and the qualified privilege is otherwise applicable, summary judgment may be granted. *See Wright*, 298 S.C. at 474, 381 S.E.2d at 507 (affirming the trial court's grant of summary judgment based on the qualified privilege applying to the alleged defamatory statements and the plaintiff failing to establish a genuine issue of material fact as to actual malice).

Initially, we note Harris has not identified the specific defamatory statements on which he bases his defamation claim or claims. In his brief, Harris simply asserts the three internal memos contained "malicious personal attacks outside any privilege impugning Harris's professional standards and abilities." The memos contain numerous statements regarding Harris and his work performance. Without Harris identifying the specific statement or statements on which he bases his claim, we cannot evaluate whether there existed a genuine issue of material fact as to the truth or defamatory nature of the statements. *See McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 562, 698 S.E.2d 845, 853 (Ct. App. 2010) (finding the plaintiff's description of alleged defamatory statements was too vague to be evaluated).

Furthermore, we affirm the trial court's decision granting summary judgment on the basis of a qualified privilege applying to any statements made in the three internal memos.[3] These communications concerned the evaluation of an employee's job performance; therefore, the qualified privilege applies in the absence of evidence of actual malice or abuse of privilege. Harris fails to set forth an argument explaining what evidence he presented of actual malice or abuse of the qualified privilege in relation to these communications. Accordingly, we

[3] The trial court also found the qualified privilege applied to the February 9, 2007 email. Harris does not challenge this finding on appeal.

affirm the trial court's grant of summary judgment on the basis of the qualified privilege.

II. STATUTE OF LIMITATIONS

Harris also argues the trial court erred in finding his defamation cause of action was barred by the statute of limitations because the limitations period was tolled while the first action was pending in federal court. We disagree.

In South Carolina, defamation claims are subject to a two-year statute of limitation. S.C. Code Ann. § 15-3-550 (2005). The limitations period begins when the alleged defamatory statement is made, not when the plaintiff learns of the statement. *See Jones v. City of Folly Beach*, 326 S.C. 360, 369, 483 S.E.2d 770, 775 (Ct. App. 1997) (affirming the trial court's grant of summary judgment as to the plaintiff's defamation claim because South Carolina has not adopted the discovery rule in libel or slander cases). The limitations period for any claim asserted under a federal court's supplemental jurisdiction is "tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d) (2012).

The trial court found Harris's defamation claims relating to (1) the February 9, 2007 email, (2) Tietex suspending Harris's employment, and (3) Tietex "banning" Harris from the laboratory were barred by the statute of limitations because Harris admitted his defamation claim in the first action was not based on these "statements."[4] Accordingly, the trial court found the limitations period for these claims was not tolled by the first action. We agree with the trial court's analysis. Furthermore, we note that although Harris's complaint in the first action did not identify the specific statements on which his defamation claim was based, Harris

[4] The trial court correctly noted in its order that Tietex instructing Harris not to enter the laboratory was not a statement about Harris but merely a work directive; therefore, it could not form the basis of a defamation claim. The trial court also correctly noted the only statements related to Harris's suspension were (1) Wallace's statement to Harris informing him of his suspension, which could not support a defamation claim because there was no publication to a third party, and (2) an allegation Wallace informed an individual at another company of Harris's suspension, which Harris had only provided inadmissible hearsay evidence of, and, even if Wallace made the statement, it could not form the basis of a defamation claim because the statement was true.

did allege the defamatory statements had been made "*since his termination.*" The three defamation claims the trial court found to be barred by the statute of limitations were based on statements or acts that occurred prior to Harris's termination. Accordingly, Harris's defamation claim in the first action was obviously not based on these "statements," and the limitations period for a claim based on these "statements" was not tolled by the first action.

Additionally, although not ruled upon by the trial court, a review of the record shows that any claim based on statements contained in the memos is also barred by the statute of limitations for this same reason. Harris filed his original complaint in the current action on October 21, 2011, a date later than two years after the three internal memos were written and sent. Because Harris's defamation claims based on the memos were not tolled by the first action, those claims are barred by the statute of limitations. *See* § 15-3-550 (providing that the statute of limitations for actions for libel and slander is two years).

III. REMAINING ISSUES

In light of our finding that the trial court properly granted summary judgment based on the qualified privilege and the statute of limitations, we decline to address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address other issues raised by the appellant because resolution of a prior issue was dispositive of the appeal).

CONCLUSION

For the foregoing reasons, the trial court's grant of summary judgment is

AFFIRMED.

THOMAS, J., and CURETON, A.J., concur.

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JUL 29 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

Case No. 2011-CP-42-4538
Appellate Case No. 2014-000902

Tietex International Ltd, ... Respondent,

v.

Gary G. Harris,..... Appellant,

PETITION FOR REHEARING

The Court of Appeals filed its opinion in this matter on June 29, 2016. By Order dated July 22, 2016, the Court of Appeals extended the deadline to file a Petition for Rehearing until July 29, 2016. Appellant now petitions the Court pursuant to Rule 221, SCACR, for rehearing on the grounds that the Court overlooked or misapprehended the following points:

(1) The Court did not properly rely on McBride v. Sch. Dist. Of Greenville Cty., 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010) for the proposition that the description of the defamatory statements was too vague to be evaluated. The statements at issue in McBride

were described as 1) public comments made by the District superintendent and 2) public comments attributed to unnamed teachers at the school. Id. at 559, 698 S.E.2d at 851. The evidence for this was "vague references to the local newscast concerning McBride's arrest...." Id. at 562, 698 S.E.2d at 853. In McBride there was not a sufficient description of the alleged slander for the Court to analyze. In contrast, Appellant has identified specific written documents (R. 680, R. 683, R. 685, and R. 687) which contain the actual written statements which appellant claims are defamatory. These claims are not too vague to be evaluated;

(2) The Court overlooked evidence that Appellant specifically identified defamatory writings;

(a) February 9, 2007, email (R. 680). This writing claims that appellant advised his supervisor, Wade Wallace, that "he was confused, disoriented, and could not function." Appellant testified that this email was defamatory and that email was a "farce." (R. 693 ll. 10-23). Appellant maintained that this statement was false and that Mr. Wallace had fabricated the claim that Appellant was emotionally unstable. (R. 703 ll. 19-23). Appellant also testified that this email "is not representative of what took place." (R. 706 ll. 19-24);

(b) March 5, 2007, memo (R. 683). This writing accused Appellant of becoming "emotional and overly vocal," "not honoring the chain of command," and harboring "negativity

over past grievances with management...." Appellant clearly testified that the statements were defamatory. (R. 694 ll. 9-16). Appellant was asked whether any of the statements were false and he testified that all of them were. (R. 711 l. 25 – R. 712 l. 5). Again, Appellant was clear that he believed Mr. Wallace was fabricating the statements in this memo – "I mean, just to be frank, I think he's making it up." (R. 714 ll. 8-13);

(c) June 18, 2007, memo (R. 685). This writing accused Appellant of being in confidence in his job performance: "Gary exercised poor judgment by making claims and commitments that he could not deliver," (R. 685) and "I can conclude that Gary did not conduct adequate scientific and numerical analysis of the first trial ... [and] this negligence and applying the proper scientific analysis is unacceptable in the work of a Sr. Research Chemist." (R. 686). Again, Appellant clearly testified that this memo was defamatory. (R. 694 ll. 17-22). He specifically testified that the content of this memo was "incorrect" and it was a "pretext memo" to justify terminating him. (R. 716 ll. 5-21); and

(d) July 18, 2007, memo (R. 687). This memo restates the defamatory allegations raised in the February email and the June memo. It also accuses him of various "poor work habits." Again, Appellant clearly testified that this memo was

defamatory (R. 695 ll. 1-3) and that Appellant "disagree[d] with what [Wallace] said about my performance." (R. 736 ll. 12-16);

(3) The Court misapprehended Appellant's position – Appellant did not waive challenging the court's findings with regard to the February 9, 2007 email. Appellant's Final Brief at page 15 specifically identifies "**at least** three memoranda constituting malicious personal attacks outside any privilege and impugning [Appellant's] professional standards and abilities. (emphasis added). Appellant continues in the Final Brief and references specific deposition pages which referred to the February 9, 2007, email. (R. 693, R. 703, and R. 706);

(4) In finding that qualified privilege applied, the Court overlooked Appllant's testimony cited above that the statements in the memoranda were fabricated or made up;

(5) The Court did not consider the fact that since the statement was libelous, common law presumption of malice applies;

(6) The Court misapprehended the law regarding the qualified privilege. According to McBride, the Defendant has the burden of proving the statement was made in good faith in order to claim the qualified privilege. Id. at 562, 698 S.E. 2d at 853;

(7) The Court overlooked evidence that original complaint (R. 61) included pre-termination defamatory statements and should have

been liberally construed this pleading to do "substantial justice" under Rule 8(f), SCRCP. The defamation cause of action specifically incorporates all previous allegations of the Complaint. (R. 68). Paragraph 25 of the Complaint specifically references pretextual reasons given to terminate Appellant. This language was incorporated into the defamation cause of action. Furthermore, the specific statements identified above allege Appellant's lack of confidence in his trade or profession. Paragraph 42 of the Complaint should be read to include all of the defamatory statements cited above;

(8) The Court overlooked fact that the trial court ruled on statute of limitations issue at the August 30, 2013 hearing before Judge Frank Addy. Although Judge Addy's written opinion did not address the statute of limitations issue, Judge Addy orally ruled from the bench that the statute of limitations did not apply. Judge Addy expressly agreed with Appellant's argument that the defamation in this case was not a new claim, but simply additional evidence supporting the original defamation claim. (R. 588 ll. 10-21);

(9) The Court misapprehended Appellant's testimony regarding whether will that the original defamation complaint included the memos. It is clear in reading Appellant's testimony that he is testifying the February 9 email and the subsequent memoranda were not specifically referenced in the original Complaint. (R. 697-698). Furthermore, Appellant testified that the intent was to

include those memoranda, and if they were not included then it was because of an oversight on the part of his counsel. (R. 697 ll. 11-15).

For the reasons set forth above the Court misapplied the tolling provisions of § 1367(d); the result of which is to time bar Appellant's claims.

Respectfully submitted,

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July 29, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

Case No. 2011-CP-42-4538
Appellate Case No. 2014-000902

Tietex International Ltd, ... Respondent,

v.

Gary G. Harris,..... Appellant,

PROOF OF SERVICE

I, the undersigned, hereby certify the Appellant's Petition for Rehearing in the above referenced matter was mailed, postage prepaid, to Respondent's Attorney, Fred Suggs, by sending to Ogletree Deakins Nash Smoak & Stewart PC, PO Box 2757, Greenville, SC 29602, on July 29, 2016.

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July 29, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge

Case No. 2011-CP-42-2538
Appellate Case No. 2014-000902

Gary G. Harris, ... Appellant,

v.

Tietex International, Ltd., ... Respondent.

RESPONDENT'S RETURN IN OPPOSITION TO APPELLANT'S PETITION FOR REHEARING

Respondent Tietex International, Ltd. ("Tietex") submits its Opposition to Appellant Gary G. Harris' ("Harris") Petition for Rehearing. Nothing in Harris's Petition demonstrates how the Court "overlooked or misapprehended" any dispositive issues underlying the Court's decision to affirm summary judgment for Tietex on Harris's claims. Harris focuses on (1) irrelevant excerpts from the Court's Opinion that did not impact the holding, (2) a misstatement and misapplication of the burden of proof for the qualified privilege that attached to the allegedly defamatory statements, (3) his own unsupported and conclusory deposition testimony as the only "evidence" asserted to show actual malice, and (4) a regurgitation of the same arguments on the statute of limitations the Court properly rejected. Harris's Petition must be denied accordingly,

hopefully providing finality to the baseless claims Harris has forced Tietex to defend for the past eight years.

A. Harris's Petition Focuses on Dicta from the Court's Opinion that had no Bearing on the Court's Holding.

Harris spends the majority of his Petition (pages 1-4) attempting to identify allegedly defamatory statements within four documents in an effort to contradict the Court's comment regarding the vague and nonspecific nature of his allegations (*see* Slip Op. at 6 ("Initially we note Harris has not identified the specific defamatory statements on which he bases his defamation claim or claims. In his brief, Harris simply asserts the three internal memos contained 'malicious personal attacks outside any privilege impugning Harris's professional standards and abilities.'")). While the Court was correct in pointing this out—Harris's Petition is the first time he has isolated specific statements within the documents that are allegedly defamatory—Harris's attack on this comment in his Petition is irrelevant, as the Court's observation was merely dicta.

The Court made clear in Section III of the Opinion that the only issues it reached were the qualified privilege and the statute of limitations: "In light of our finding that the trial court properly granted summary judgment based on the qualified privilege and the statute of limitations, we decline to address the remaining issues on appeal." (Slip Op. at 8 (emphasis added)). Because the comment Harris attacks was dicta that had no bearing on the Court's holding, Harris's attempt to contradict the Court's statement is immaterial and provides no basis for a rehearing. Harris's Petition must be denied accordingly.

B. The Court Properly Applied the Law on Qualified Privilege, and Harris Has Offered Nothing to Impugn the Court's Holding.

As the Court recognized, "[t]his court has previously found the qualified privilege applies 'to situations in which an employee's job performance is properly evaluated.'"

(Slip Op. at 5 (quoting *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989))). Harris cannot dispute that the documents he cites as allegedly defamatory are all written communications about his job performance. Therefore, the qualified privilege applies, and the Court properly shifted the burden to Harris "'to show actual malice or that the scope of the privilege has been exceeded.'" (Slip Op. at 6 (quoting *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999))). Harris failed to meet this burden at every stage of the litigation, as demonstrated by his Petition.

In his Petition, Harris relies exclusively on his own unsupported and conclusory deposition testimony as somehow creating a triable issue of fact on whether there was actual malice to overcome the qualified privilege. In Harris's own words, the only "evidence" he claims shows actual malice is his own "testimony . . . that the statements in the memoranda were fabricated or made up." (Petition at 4.) Harris's personal and subjective disagreement with the veracity of the purportedly defamatory statements is far from sufficient. If this were not the case, there could never be summary judgment on this issue. As the Court recognized, "if the plaintiff fails to present evidence of a genuine issue of fact as to actual malice and the qualified privilege is otherwise applicable, summary judgment may be granted." (Slip Op. at 6.)

Harris did not point to anything beyond his own unsupported and conclusory statements that would even potentially show (1) that the allegedly defamatory statements were even false, (2) that Wade Wallace—his supervisor who made the statements—had any reason to believe the statements were false, or (3) that Wallace had any motivation to make false statements about him. Since Harris did not identify any documents,

witnesses, or other evidence to create a genuine issue of fact regarding actual malice, the Court properly concluded the summary judgment was appropriate on this issue. Thus, Harris's Petition should be denied.

C. The Court Properly Considered Each Allegedly Defamatory Statement as an Independent Claim and Found them All to be Barred by the Statute of Limitations.

Harris's argument in opposition to the statute of limitations is simple—he contends that any defamation claims he made against Tietex in his second action should not be barred by the statute of limitations because his filing of a different defamation claim in the first action should have tolled the limitations period.

The flaw in Harris's argument is similarly straightforward—he fails to recognize that claims based on different allegedly defamatory statements are different claims entirely. *See, e.g.*, *George v. Fabri*, 345 S.C. 440, 456-61, 548 S.E.2d 868, 876-79 (2001) (analyzing defamation allegations separately in affirming grant of summary judgment); *McBride v. School Dist. of Greenville County*, 389 S.C. 546, 559-63, 698 S.E.2d 845, 851-54 (Ct. App. 2010) (analyzing alleged defamatory statements individually). This is particularly clear in light of the statute of limitations for defamation claims, which is based on "when the alleged defamatory statement is made." (Slip Op. at 7.)

Harris's reference to Judge Addy's statements during the August 30, 2013 hearing is irrelevant. The Judge who subsequently issued the Order granting summary judgment on the statute of limitations issue was not Judge Addy, but Judge Cole. "An interlocutory denial of summary judgment is not a final order and is subject to change by the trial court." *Baber v. Greenville County*, 327 S.C. 31, 40, 488 S.E.2d 314, 319 (1997). Judge Cole had discretion to consider and rule upon the motion before him. Judge Cole was not bound by Judge Addy's prior comments.

Harris has failed to demonstrate how the Court in any way "overlooked or misapprehended" the facts or law related to the statute of limitations holding, rendering improper any rehearing under Rule 221, SCACR. Harris's Petition should be denied accordingly.

D. The Additional Bases for Affirming the Lower Court's Decision Further Support the Denial of Harris's Petition.

The Court of Appeals did not reach a number of issues on which the lower court based its summary judgment decision—(1) the allegedly defamatory statements were substantially true (R. pp. 15-19); (2) Harris's claims were barred by the doctrine of collateral estoppel (R. pp. 21-23); or (3) Harris's claims were at least partially barred by the doctrine of *res judicata* (R. p. 25). Even if the Court did reconsider this matter based on Harris's Petition—though it should not, for the reasons set forth above—these additional issues would further warrant the affirmation of the lower court's decision. The granting of Harris's Petition is not supported by the notions of judicial economy, as the reconsideration of the existing decision would simply lead to the same result. Harris's Petition should be denied for this reason as well.

E. Conclusion.

Like his claims in the underlying lawsuit, Harris's Petition is nothing more than an attempt to gain a second bite at the apple. Harris has not pointed to anything that could even potentially justify rehearing of this matter. His Petition must be denied.

********** SIGNATURE ON FOLLOWING PAGE**********

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

August 4, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
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J. Derham Cole, Jr., Circuit Court Judge

Case No. 2011-CP-42-2538
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v.

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PROOF OF SERVICE

I certify that I have served Respondent's Return in Opposition to Appellant's Petition for Rehearing on Appellant Gary G. Harris by sending to his attorneys of record a copy of the same via first class mail, properly addressed, postage prepaid at the following addresses: D. Alan Lazenby, Ginger D. Goforth, Lazenby Law Firm, Post Office Box 6099, Spartanburg, South Carolina 29304, and via electronic mail.

August 4, 2016

Lucas J. Asper

The South Carolina Court of Appeals

Gary G. Harris, Appellant,

v.

Tietex International Ltd., Respondent.

Appellate Case No. 2014-000902

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

J.

Columbia, South Carolina

FILED

September 23, 2016

cc:
Fred W. Suggs, Jr., Esquire
Lucas James Asper, Esquire
Ginger D. Goforth, Esquire
Duane Alan Lazenby, Esquire