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**Background:** Plaintiff propounded discovery on a non-party  
**Problem:** Defendant moved to quash the entire discovery request  
**Request:** This Court permits discovery on the non-party

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**Rule 26(b) (1) | Fed. R. Civ. P. | Discovery Scope and Limits**

*"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case"*

**Rule 45(d) (3) | Fed. R. Civ. P. | Subpoena Enforcement**

*(B) When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash..."*

Precedence

- 2:18-cv-00826-JLB-NPM - USFLMD (8/17/20)  
USFLMD recently denied a motion to quash

Abbreviations

[C###] - Paragraph ### from The Complaint<sup>2/</sup>  
[M###] - Page ### from That Motion<sup>3/</sup>  
[S###] - Page ### from The Subpoena<sup>4/</sup>  
[X@##] - Page ## from Exhibit @ in The Notice<sup>5/</sup>  
MDD at # - Middle District Discovery at [Page #] (2015)  
USFLMD - US District Court, Florida, Middle District

**RESPONSE**

**I. Substantive Facts**

1. Plaintiff sued Defendant for employment discrimination on several bases (under 42 USC §1981, and §760 FS). The most prominent of which were race, sex, and retaliation.
2. The allegations in his complaint which were most pertinent to this discovery dispute involve:
  - (i) Discriminatory terminations ([C037], [C051]);
  - (ii) Discriminatory terms & conditions ([C038]);
  - (iii) Pay Disparity ([C051b.i.]); and
  - (iv) Denied/Disparate privileges ([C051b.iii.])
3. In short, Defendant subjected Plaintiff to treatment/conditions that it never subjected its other employees to.
4. One such employee - as further detailed herein (see **Affidavit**) - was Janice Bradley (hereinafter "Their Employee").

**II. Procedural Facts**

5. On November 18, 2020, Plaintiff notified Defendant of his prospective non-party subpoena on Their Employee ([S001]). The Subpoena had 13 Requests for Production ("RFP").
6. Over the next few weeks, Plaintiff made seven discovery concessions ([XE34]-[XE37]). He rescinded one RFP (J997) because of a factual stipulation. And suspended six others due to his desire to streamline this proceeding (pursuant to Rule 1 Fed. R. Civ. P.).

7. The Subpoena's current status can be summarized in this table:

<u>#</u>	<u>ID</u>	<u>Title</u>	<u>Status</u>
1	J103	Communications (Allstate)	suspended
2	J104	Communications (SOA)	suspended
<b>3</b>	<b><u>J113</u></b>	<b>Pay Disparity (IRS Form W-2)</b>	<b>disputed</b>
<b>4</b>	<b><u>J114</u></b>	<b>Pay Disparity (IRS Tax Form 1099)</b>	<b>disputed</b>
<b>5</b>	<b><u>J115</u></b>	<b>Pay Disparity (IRS Tax Transcripts)</b>	<b>disputed</b>
6	J225	Littler Emails	suspended
7	J226	Legal Representation	suspended
<b>8</b>	<b><u>J308</u></b>	<b>SOA Transcript</b>	<b>disputed</b>
<b>9</b>	<b><u>J309</u></b>	<b>SOA Certificates</b>	<b>disputed</b>
10	J310	Myrick	suspended
11	J311	Higgins	suspended
<b>12</b>	<b><u>J313</u></b>	<b>Work-From-Home Privilege</b>	<b>disputed</b>
13	J997	Demographics Identification	rescinded

8. Thus, only six RFPs remain (J113, J114, J115, J308, J309, and J313). All of which pertain to the core allegations in Plaintiff's lawsuit (see ¶2, *supra*).

9. Nevertheless, despite Plaintiff's good faith efforts to resolve discovery issues, Defendant refused to make more preclusive factual stipulations.

10. As such, Plaintiff hereby asserts his need for the six remaining RFPs, as follows.

### III. Direct Rebuttal

11. Defendant's argument for an order to quash fails for two major reasons: lack of standing and lack of merit.

#### RFP J113 | Pay Disparity (IRS Form W-2)

12. That Motion claimed that Their Employee's financial information was confidential (emphasis added) **[M006]**:

*"This Court Should Preclude Discovery of Irrelevant and Confidential Information from a Non-Party... a lawsuit does not entitle Plaintiff to unfettered access to any and all information or documentation, including personal, financial, commercial, professional or confidential information of third parties."*

13. Defendant continued by claiming that such financial information would violate Their Employee's privacy **[M008]**:

*"...the disclosure of these documents would violate Ms. Bradley's constitutional, statutory, or common law entitlement to privacy, which is not outweighed by Plaintiff's purported need for the information."*

14. This argument fails.

15. It is well settled that a defendant lacks standing to assert a privilege for a non-party (see Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc., 231 F.R.D. 426, 429-30 (M.D. Fla. 2005)). This is especially true when the defendant - itself - has not "alleged any personal right or privilege with respect to the materials subpoenaed" (see Brown v. Braddick, 595 F.2d 961, 967 (5th Cir. 1979)).

16. In the instant case, Defendant has neither articulated a right to Their Employee's financial information nor produced any facts in support.

17. Moreover, Their Employee's earnings information is pertinent to this case (see ¶2, *supra*; see **Affidavit**); and will yield admissible evidence.
18. For one, earnings information provides statistical evidence in civil rights litigation. In Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974), the appellate court established that a "*prima facie case of discrimination may be established by statistical evidence, and statistical evidence alone*". This element of proof has been reinforced thousands of times over (see Buckley v Hospital Corp. of America, Inc., 758 F.2d 1525 (11<sup>th</sup> Cir. 1985)).
19. Secondly - and as Plaintiff foretold in his *Initial Disclosures* - Defendant's "reckless indifference" to an entire demographic group is grounds for punitive damages (accord 42 USC §1981a(b)).
20. Thus, Defendant's argument for quashing RFP J113 lacks both standing and merit.

**RFP J114 | Pay Disparity (IRS Tax Form 1099)**

21. Plaintiff hereby incorporates Paragraphs 12 through 19.

**RFP J115 | Pay Disparity (IRS Tax Transcript)**

22. Likewise, Plaintiff hereby restates each and every assertion from Paragraphs 12 through 19.
23. He will only add that Their Employee can retrieve her IRS Tax Transcript with ease - and at no cost.<sup>6/</sup> Thereby nullifying Defendant's boilerplate objection of "unduly burdensome" **[M002] [M005]**.

**RFP J308 | SOA Transcript**

24. Similarly, Defendant claimed that Their Employee's actuarial information was confidential (emphasis added) **[M008]**:

*"...the disclosure of [Ms. Bradley's SOA Transcripts/Certificates] would violate Ms. Bradley's constitutional, statutory, or common law entitlement to privacy, which is not outweighed by Plaintiff's purported need for the information."*

25. As explained in ¶14-16, Defendant lacks standing to assert a non-party's privilege (also see Trahan v. Sandoz Inc., 2014 WL 12628614, at \*3 (M.D. Fla. July 23, 2014)).

26. Notwithstanding, Defendant's argument is also self-defeating. It argued that it applied different terms & conditions to Their Employee's employment than it did to Plaintiff's (emphasis added) **[M007]**:

*"Plaintiff cannot establish Ms. Bradley as a proper comparator who is similarly situated to him in all material respects. Indeed, Ms. Bradley reported to a different manager, had a different job title and job duties, and was never enrolled in Allstate's Actuarial Career Program."*

27.42 USC §1981(a)-(b) prohibits discriminatory terms & conditions of employment (emphasis added):

*"All persons within the jurisdiction of the United States shall have the same... enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship"*

28. §760.10(1) FS has a nearly identical clause (emphasis added):

*"(1) It is an unlawful employment practice for an employer: (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment"*

29. Defendant - via That Motion - has effectively confirmed that it subjected Plaintiff to different terms & conditions of employment than it did to Their Employee (violating 42 USC §1981 and §760 FS). A point exacerbated by the fact that upon firing Plaintiff, Defendant:

(i) replaced him with two employees with far less qualifications (see **[C039]**); and

(ii) retained Their Employee - who also had far less qualifications.

30. In Kelliher v Veneman, 313 F. 3d 1270 (11<sup>th</sup> Cir. 2002), the appellate court affirmed that a prima facie case of employment discrimination gets established when the employer replaces the employee with equal-to-or-less qualified individuals of a different demographic.

31. The same can be said about keeping an equal-to-or-less qualified employee (see Morris v Emory Clinic, 402 F. 3d 1076 (11<sup>th</sup> Cir. 2005)); as it infers disparate treatment.

32. This disparity in treatment can be shown by contrasting Plaintiff's SOA Transcript with Their Employee's SOA Transcript (or lack thereof).

33. Thus, Defendant's self-defeating argument falls short, lacks merit, lacks standing and must be denied.

### **RFP J309 | SOA Certificates**

34. Plaintiff hereby incorporates Paragraphs 24 through 33 in support of his "J309" RFP. Plaintiff will merely add that anyone can retrieve his/her SOA Certificate/Transcript with ease.<sup>7/</sup>

**RFP J313 | Work-From-Home Privilege**

35. Lastly, Defendant argued that Their Employee should not have to produce documents related to Defendant's work-from-home privilege **[M009]**:

*"While Plaintiff generally alleged he requested to work from home, and that other non-Black employees were allowed to do so while he was not, Plaintiff does not allege Ms. Bradley was allowed to do so. Regardless, Ms. Bradley is Black. As a result, any information for documentation regarding Ms. Bradley's work locale is irrelevant"*

36. Defendant's argument has three crucial shortcomings.

37. The first is that it suggests that Plaintiff's Complaint had to log the names of every employee who Defendant gave favorable treatment to. This is neither practical nor required. In Evans v McClain, 131 F. 3d 957 (11<sup>th</sup> Cir. 1997), the 11<sup>th</sup> Circuit held that:

*"a complaint need not specify in detail the precise theory giving rise to recovery. All that is required is that the defendant be on notice as to the claim being asserted against him and the grounds on which it rests"*

38. The second is that it omitted Their Employee's gender. A distinction that is crucial to this lawsuit. As detailed further in the attached affidavit, Defendant discriminated against employees of the same-race-yet-different-genders.

39. Third, disparate treatment of employees from the same race in-and-of-itself does not preclude racial discrimination (see Billingsley v Jefferson County, 953 F. 2d 1351 (11<sup>th</sup> Cir. 1992)). Such a proposition breeds tokenism and demographic quotas. Unbecoming, illegitimate, and "incredible" - as the 11<sup>th</sup> Circuit puts it (Billingsley at 1352). Especially in light of Plaintiff's color discrimination basis **[C001]**.

40. As such, Defendant's argument against RFP J313 comes up short, and should be put down.

#### IV. Relevant Evidence

41. Instead, this Honorable Court should permit the disputed discovery (ie, RFPs J113/J114/J114/J308/J309/J313) because it will yield relevant evidence. Rule 401 Fed. R. Evid. states that evidence is relevant if "*it has a tendency to make a fact more or less probable... and the fact is of consequence*". Moreover, Rule 26(b)(1) Fed. R. Civ. P. permits Plaintiff's discovery because he seeks non-privileged matters proportional to the needs of his case.

42. Plaintiff contends that his six RFPs will help a jury determine the facts laid out in his Complaint (and amplified by his affidavit).

#### CONCLUSION

WHEREFORE, Plaintiff respectfully asks this Court to deny Defendant's motion to quash Plaintiff's subpoena (directed to non-party Janice Bradley). Plaintiff also asks this Honorable Court to await his upcoming response to Defendant's Motion for Protective Order of Non-Party Janice Bradley (arriving on-or-around 12/31/2020).

Dated this 31st day of December 2020.

Respectfully submitted,

/s/ Elias Makere

**ELIAS MAKERE, FSA, MAAA**, Plaintiff

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**CERTIFICATE OF COMPLIANCE**

I certify that the size and style of type used in this document is Times New Roman 14-point Font (caption) and Courier New 12-point Font (contents); thus complying with the font requirements of Local Rule 1.05(a).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 4th day of January 2021, I electronically filed the foregoing with the Clerk of Courts by using its online filing page. I also emailed it to the attached service list.

**/s/ Elias Makere**

**Endnotes:**

<sup>1/</sup> Please see "*Plaintiff's Response in Opposition to Defendant's Motion for Protective Order...*" (filed on-or-around December 31, 2020). <sup>6/</sup> via [www.IRS.gov](http://www.IRS.gov). (7 years of tax transcripts are available for all filers; no cost; within minutes).

<sup>2/</sup> The Complaint = "*Complaint Against Allstate Insurance Company with Jury Demand*" (Dkt No. 1; 8/12/20). <sup>7/</sup> via [www.SOA.org](http://www.SOA.org). (no cost; within minutes).

<sup>3/</sup> That Motion = "*Motion... to Quash... Janice Bradley...*" (Dkt No. 27; 12/18/20).

<sup>4/</sup> The Subpoena = '*Subpoena Duces Tecum Without Deposition*' (Dkt No. 29; Exhibit; 12/18/20).

<sup>5/</sup> The Notice = '*Notice to the Courts to Take Judicial Notice*' (Dkt No. 31; Exhibits; 12/21/20).

**SERVICE LIST**

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# PLAINTIFF'S AFFIDAVIT

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION

ELIAS MAKERE, FSA, MAAA	)	Case No (LT)
Petitioner	)	<b>3:20-cv-00905-MMH-JRK</b>
	)	
v.	)	
	)	
ALLSTATE INSURANCE COMPANY,	)	
Respondent	)	

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**PLAINTIFF'S AFFIDAVIT IN SUPPORT OF  
PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO QUASH  
SUBPOENA DIRECTED TO NON-PARTY JANICE BRADLEY**

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The affiant, Elias Makere, swears or affirms as follows:

**Background**

1. I am over the age of eighteen (18).
2. I am a plaintiff in the above-captioned case.
3. This affidavit is made in good faith.

**Familiarity**

4. I have read the Local Rules of Court, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the Middle District's Discovery Handbook.
5. The information in this affidavit is based on my own personal knowledge.

**Facts**

6. I worked for Allstate for roughly 33 months. For about 21 of those months, Allstate had an employee named Janice Bradley.

7. Ms. Bradley was my co-worker. She was black; she was female.

8. Allstate subjected me to inferior treatment compared to her. The most concrete examples include (but are not limited to):

a. Requiring me to have actuarial exam success prior to employment, but never placing that requirement on Ms. Bradley.

b. Denying all of my requests to work-from-home, but always allowing Ms. Bradley to do so.

c. Forcing me to pay \$1,025 for an exam fee, but never requiring anyone else - including Ms. Bradley - to do the same.

d. Firing me "solely" for failing the 9<sup>th</sup> actuarial exam, but never conditioning anyone else's employment - including Ms. Bradley's - on unblemished exam success.

9. Moreover, I believe that Allstate has a practice of paying its black employees less than its non-black employees. This belief is based on:

a. The fact that Allstate paid me less than it paid a different non-black coworker. The same coworker who put a racist doll on my desk.

b. Management's discriminatory actions towards me (racist characterizations, unwanted date requests, discriminatory proclamations/statements, etc.).

10. These factors - among others - prove to me that Allstate views the entire black race as being inferior. Yet, it views the female status of that race as a saving grace.

11.To be clear:

- a. Ms. Bradley never passed an actuarial exam before Allstate hired her. Allstate lent her grace due to her demographics.
- b. Ms. Bradley has never passed an actuarial exam during her employment with Allstate. Ditto.
- c. Ms. Bradley was allowed to work-from-home. Ditto.
- d. I believe that Allstate paid Ms. Bradley less than it paid her non-black counterparts. And when coupled with the known fact that Allstate paid me less than it paid my non-black counterpart(s) I think a strong statistical inference of racial animus arises.

12.Altogether, Ms. Bradley's Allstate wages, exam progress, and granted work-from-home privileges are crucial to my lawsuit against Allstate Insurance Company.

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### Verification Under Oath Pursuant to 28 USC §1746

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 30th day of December 2020.

UNITED STATES OF AMERICA



12/30/2020

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Elias Makere, Plaintiff/Affiant

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