No. 22-6351

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Shane Upchurch — PETITIONER
(Your Name)

vs.

Wastequip, LLC et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For The Tenth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Shane Upchurch
(Your Name)

199 E. Crestview Circle
(Address)

Kenefic, OK 74748
(City, State, Zip Code)

580-760-9764
(Phone Number)

QUESTIONS PRESENTED

1. Whether it was error to grant summary judgment to the defendant where the pro se plaintiff was not given any opportunity to engage in discovery.

2. Whether it was error to disregard the exhibits submitted to the Court without reviewing them.

3. Whether it was error to effectively deny the motion to amend.

4. Whether it was error holding Sole jurisdiction to the Workers' Compensation Commission to oversee Retaliatory Discharge claims.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: Travelers Indemnity America

RELATED CASES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is United States Court of Appeals For The Tenth Circuit

[✓] reported at 21-7055 Upchurch v. Wastequip, et al ; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is United States District Court Eastern District of Oklahoma

[✓] reported at 6:20-CV-00066-RAW Upchurch V. Wastequip et al ; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is Workers Compensation Commission Oklahoma City

[ ] reported at 2019-03373R, CM3C-067601P ; or,

[ ] has been designated for publication but is not yet reported; or,

[✓] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was Sept. 8, 2022.

[✓] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUES

STATE STATUES

"RESERVED ALL RIGHTS"

PRELIMINARY STATEMENT AND STATEMENT OF JURISDICTION

SHANE WEBSTER UPCHURCH appeals from a judgment of the United States District Court for the Eastern District of Oklahoma (Ronald A. White, J.), entered on October 18, 2021. DE 78. Notice of appeal was filed on October 28, 2021, DE 82, and was timely.

Jurisdiction in the district court was predicated on federal question, 28 U.S.C. § 1331.

The United States Court of Appeals For the Tenth Circuit had jurisdiction over an appeal from the final judgment pursuant to 28 U.S.C. § 1291.

Thus, The Supreme Court of The United States has jurisdiction over an appeal from final judgment[s] pursuant to 28 U.S.C. $ 1254(1).

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STATEMENT OF THE CASE

The Pro Se plaintiff alleges he was employed full time by defendant Wastequip on April 4, 2018. The plaintiff turned 40 years old on June 21, 2018 and later was terminated on June 10, 2019. In his complaint filed March 03, 2019 he brought a number of claims (and gave notice of EEOC Notice of Rights to Suit claims issued February 13, 2020) all that were timely, arising out of a burk tort disability injury, a workers' compensation retaliation claim and subsequent reprisal discharge. Thus predicated upon his pre-existing back & neck disability, age, Medical Marijuana, an Convicted Felon status, disability discrimination, DE 1, DE 2.

On April 3, 2020 a Minute Order directing the clerk of the court to issue Civil Summons April 26, 2020 was forwarded to the US Marshal for the named defendant[s]. On August 24, 2020 plaintiff filed a motion for entry of default judgment DE 16, as no entry of appearance (Fed. R. Civ. P. Local rules) had yet been entered on behalf of defendant'[s], yet denied, DE 19. Defendant filed an entry of appearance (after Wastequip fled Oklahoma intending to destroy all employment and material evidence) September 29, 2020 and answer, DE 24.

Plaintiff submitted exhibits to the court in support of his claims, a motion to Compel a discovery response was filed DE 15, and those which contained

fraudulent use of plaintiff's social security number, (by Wastequip & Mia C. Rops representing defendant'[s] filed with OKWC Fraud Unit, Andy in Dec. 2019, then his replacement Mr. Mata) non handwritten documents were sealed under warrant DE 25. Also were submitted medical and employment records, but the Court summarily rejected them and directed the Clerk to return them, yet re-filed plaintiffs 6:20-cv-00136 Violation of Conscience, was prior Sua Sponte dismissed, (then after summary judgment re-Stricken) DE 35. Plaintiffs Federal Questions also Stricken DE 30. Plaintiff sought Declaratory and Compensatory relief denied or moot DE, 38, 39.

Plaintiff sought to amend, (and raise the statutory caps DE 50) the court directed an "EXPEDITED" response, DE 51. Which defendants did, DE 52, 53. Prior to the decision, the defendant made a motion for summary judgment DE 66. Plaintiff submitted a declaration in opposition, and supplement DE 67, 68 in which he alleged, among other things, that he had been terminated for UA results, March 26, 2018 that were his prescribed (Adderall, & Marinol) medication, (thus unlawful to make any employment decision pending lab confirmation) and was asked to bring medication in to verify disability, see also www.eeoc. gov/laws/guidance/ questions-and-answers-enforments-guidance-disability-related-inquiries-and-medic al (prohibiting employers from asking employees what prescription drugs they are

taking, except "[i]n limited circumstances… employers may be able to ask employees in positions affecting public safety about their ability to perform essential functions and thereby result in a direct threat"). The employer Wastequip then had actual notice of pre-existing disabilities, that limit major life functions, then subsequently rehired.

Plaintiff sustained a work-related injury April 17, 2018 which employer had absolute certain knowledge would occur, (see text messages, "lead man & Rodger after two years knowledge would occur and still had yet come up with a way to prevent walls from falling off wall table) and subject plaintiff to hazardous employment conditions, which further harmed the disabled employee DE 1, 68). Plaintiff was seen at FHCSO, (plaintiffs primary care physician, since 1/01/2017 for pre-existing conditions) for injury to foot on April 19, 2018. He was also seen on July 12, 2018 (not July 18, 2018 and was work related ..not unrelated as the Court misconstrued to undermine the pro se plaintiff) for an injection in elbows due "bilateral lateral epicondilitis from repetaible lifting at his job" stated Dr. Litwack, (see FHCSO records). On September 12, 2018 plaintiff was seen by Dr. Litwack (FHCSO) who stated "he has b/I lateral epicondylitis secondary to his job" and Dr. Litwack also increased plaintiffs Marinol to 10mg due increased pain and or aggravation to pre-existing back and neck disability (see FHCSO records).

Plaintiff was building 8 to 10 sets of walls (16-20 individual walls) daily by himself since November of 2017, when plaintiff started a two man position at Wastequip.

Then on October 10, 2018 was seen at (FHCSO) by Dr. Faulkner after experiencing numbness and tingling in both hands, and was referred out for testing. Plaintiff was also recommended for Medical Marijuana by Dr. Adloan on October 18, 2018 and approved on October 28, 2018 by the Oklahoma Medical Marijuana Authority (see records). On Friday November 2, 2018 plaintiff tested positive for severe Carpal Tunnel in right hand and moderate in left, then referred out to Plastic Surgery by Dr. Matus for Carpal Tunnel Release, (see records). On Monday October 5, 2018 plaintiff notified employer (Plant Manager Keith Muller) of severe Carpal Tunnel and recommendations for surgical intervention. Employer then instructed the plaintiff to come back when he knew dates of surgery, and would put on Short Term Disability (STD), and would offer injured plaintiff overtime (see pay stub records) to pay for surgical relief. Wastequip was less than 60 days from becoming number one plant of the year DE, 32; (...ie no loss of time accidents). In December 2018 two weeks prior to (January) becoming number one plant of the year, Keith placed the maintenance man "Joe" (40 year or older protected class employee) on workers' compensation. The Durant Wastequip plant lost the number one plant of the year award and employee safety bonuses. Yet forced the plaintiff

(with pre-existing disabilities,) on FMLA, (after four months of overtime) in an attempt to create a constructive discharge or the plaintiff would quit due further tortious intent by Wastequip.

On February 28, 2019 plaintiff went on FMLA, (...which subject plaintiff to discriminatory employment actions, (...ie GINA, Equal Pay Act, FMLA, and subsequent reprisel Title VII violations) and employer policy's that undermind EEOC policy concerning 100% healed return to work polices, (..ie Return Without Restrictions, see records) verse mandatory public policy, Regardless of Fault Workers' Compensation coverage. Wastequip's STD insurance UNUM pre-screened plaintiff for pre-existing conditions of carpal tunnel, April 2018 thru June 2018 and nothing pre-existing was identified (proof work injuries). Plaintiff had left hand CTR surgery and both elbows injected on February 28, 2019. Then on March 7, 2019 plaintiff had left hand stitches removed and right hand CTR surgery, and both elbows with additional injections. One week later right hand stitches were removed, and Dr. Papiala referred the plaintiff to Durant Physical Therapy 3X week for month, the plaintiff attended all appointments. Dr. Papaila on April 17, 2019 scheduled for more Physical Therapy and plaintiff got additional injections on April 22, 2019 to both thumb joints, and was released May 1, 2019

back to work, (see Dr. Papaila reports) and plaintiff used Blue Cross/Blue Shield NC insurance offered through employer Wastequip to pay for all work injuries (which request reimbursements, see records).

The plaintiff did return to work May 1, 2019 and on Thursday May 2, 2019 notified the employer of Dr. Papaila warnings, (about not continuing the same repetitive motions, heavy lifting) and asked for accommodation, James Barnes ("Burt") the shop supervisor agreed to move the plaintiff to weld out, yet was never put into action. Plaintiff notified employer "Burt" on May 8, 2019 "could no longer do my job safely without causing further permanent injury" and "Burt" stated "plaintiff would have to speak to Keith Muller, the plant manager". Plaintiff spoke to Keith who stated "maybe the plaintiff had an infection from recent surgery". Plaintiff disagreed, and Keith stated "well I'm not a doctor", and referred plaintiff to Celera (UCFCC) and gave plaintiff his business card, to keep him (Keith) updated.

Plaintiff was seen at Urgent Care Family Care of Calera (UCFCC) May 8, 2019, Dr. Love did X-rays and plaintiff was removed from work one week, to follow up May 15, 2019. Plaintiff notified Keith as instructed, sent doctor records through text and remained off work. On May 9, 2019 plaintiff was contacted by Edina Cesko HR who left a message, which stated "she would like to discuss the recent

doctor note, to return her call". Plaintiff contacted Edina back the same day and left a message. Edina contacted plaintiff on May 10, 2019, she (Edina) stated "would place plaintiff on Leave of Absence for one week, no longer (although plaintiff still had four weeks FMLA leave left...see FMLA violations) and would mail forms to address on file", and that even if "employer accommodated the plaintiff, it would be unfair to other employees if plaintiff never returned to former position" and concluded expressing herself as plaintiffs need... ("a request by plaintiff to repeat that ")...it was time to find a different occupation".

Plaintiff followed up on May 15, 2019 at (UCFCC) and was removed from duty until evaluation by a specialist, DR. Ngwa referred the plaintiff out to Dr. Papaila (see UCFCC records). Plaintiff was seen by Dr. Papaila later that afternoon on May 15, 2019 and received more injections to both thumb joints and right elbow, (see records) and notified Keith as instructed.

Then on May 21, 2019 Keith Muller contacted plaintiff, Keith advised plaintiff to go to Urgent Care of Durant, (same facility that did UA & Physical prior to being terminated on April 26, 2018, then subsequently rehired April 4, 2018) employers doctor for an evaluation. Dr. Hutchings ordered an MRI and wrote a prescription for a high dose of steroids, (to be taken prior to the MRI), and follow up on May 28, 2019 with the MRI results, not before. Open MRI of Durant called on Friday

May 24, 2019 and stated "the WC insurance (Travelers Indemnity America) denied payment of the MRI, as no work injury had been reported, to call the employer to find out what happened". Plaintiff called Keith Monday May 27, 2019, Keith advised "he would find out what happened and get back". Plaintiff retained Work Comp. counsel, who filed a claim CC-Form 3 on May 29, 2019. Open MRI called to confirm appointment on May 30, 2019, plaintiff attended MRI, and was diagnosied with mild Tendinosis (Not Tendinitis as DR. Hutchings put on his report, and stated the plaintiff went back to work, after being removed by Dr. Love, ..false see pay stub 05/17/2019) …which is directly proportional to an overuse injury. The plaintiff followed up on June 3, 2019 with Dr. Hutchings plaintiff was removed from duty, and referred to TMC orthopedic surgery, reason work comp. (see Durant Urgent Care Wellness Works record).

Plaintiff contacted Sona Steid (who had started a work comp. claim with Travelers Indemnity America) on June 3, 2019 with Dr. Hutchings report and WC attorney information, all information sent through email (see email record). To which Travelers Indemnity America (acted in bad faith) also "Retaliated" and denied plaintiffs WC claim DE 2. Keith next texted the plaintiff on Friday June 7, 2019 after 4pm, requesting the plaintiff come to the shop, which plaintiff stated "had already taken medication (..ie medical marijuana, and other prescription

meds) and asked if could come in Monday morning June 10, 2019", Keith agreed. Wastequip HR Edina Cesko on Monday June 10, 2019 terminated (see termination letter) plaintiff "in retaliation" without due care, with malice, and intending to harm, letter stating excessive Absence/ Tardiness. While under employers doctors care, and terminated for reasons that undermine (OK HB 2367) public policy, see also *Shirazi v. Chil Time Learning Center*, 2009 OK 13, ¶ 12, 204 P. 3d 75 applied to victims of unlawful discrimination...must receive evenhanded treatment under art. 5, $ 46 of OK constitution. Also see BURK v. *K-MART CORP.*, 1989 OK 22, 770 P.2d 24, right to a jury trial where termination is contrary to a clear mandate of public policy as articulated by constitutional, statuary or decisional law. Also Title VII see Note, Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception, 96 HARV. L. Rev. 1931, 1936, (1983); (The basis of the exception is the duty of the employer to refrain from firing an employee for reasons that contravene fundamental principles of public policy). Employer states plaintiff never gave return to work date (the plaintiff was referred out by employer's doctor on June 3, 2019 to TMC ortho surgery). Employer provided wrong SSN (WC fraud) to Urgent Care Durant, date of injury was plaintiffs date of birth ... intentional discriminatory acts and suppression of evidence by Wastequip/Travelers... (independent tort ..ie disabled plaintiffs financial institution

bought out to remove financial records, phone carrier bought out to remove cell phone communcation records, attorneys frivolous joined the other party, dogs were shot, defendant's weaponized the law community against plaintiff, was arrested, suffered medication and opioid whithdrawls, antaginized, home and neighborhood influtrated, disabled plaintiff was molested, and raped of natural born employment, civil, and human rights, the "white thing to do" Wastequip's opinion).

In fact on June 13, 2019 Wastequip pay stub reflects plaintiff was given a .31¢ raise from $20.22 to $20.53, 3.4 hours of PTO added, and a deduction of $45.70 from medical buy-up, and $24.12 from dental, totaling $69.82 (HB 2367 $85A-9 Employee Pay Premium ..public policy violation). Plaintiff was then seen by Dr. Rosson (a certified work comp. doctor) also on June 13, 2019 for a Work comp. Temporary Total Disability (TTD) evaluation. Plaintiff also notified Dr. Rosson on intake forms of pre-existing back and neck injuries from May of 2000, to which doctor Rosson requested plaintiff speak to Mr. Burton regarding pre-existing conditions, as was only scheduled for evaluation to hands and arms. Plaintiff then met with Mr. Burton also June 13, 2019 following the TTD evaluation and notified him of doctor Rosson request and showed Mr. Burton (see email record) paystub records of the deductions indicating such violations, and Mr. Burton requested the plaintiff send all paystub records (and give him a copy of termination letter) ASAP.

Plaintiff did.

All Work comp. retaliation and discriminatory actions (The Unity Bill, convinced felon status, EEOC rights to suit) after the plaintiff filed a claim, retained counsel..etc, (HB 2367 $85A-7 (A. 1. 2. 3. 4.), (B.), (C.), (D.), (E.), (G.), (H.), (HB 2367 $85A-6 Fraud), (HB 2367 $85A-5 states (B. 1.) Exclusive Remedy shall not apply if: 1. An employer fails to secure payment of compensation due to an employee as required by this act. (A.); (B. 1. 2.); (C.); (D.); (G.); (I.); ($85A-9) Amend by laws 2019, c. 476, $ 3, emerg. eff. May 28, 2019.)

Judge White struck supplement to summary judgment DE 67, 68. Then granted summary judgment DE, 77. Plaintiff appealed DE, 82.

Upon such appeal, The United States Court of Appeals for the Tenth Circuit opinion noted Travelers Indemnity America was party to the Action, yet was never properly served. Although plaintiff requested a new form 285 to be served after ten months (January 27, 2021) returned unexecuted by US Marshals DE 33, (the record of service was sealed under warrent). Oral argument was also rejected. Further opinion went on to state a thwarted timeline of events that were unsubstantiated to further penalize and undermine the Pro Se status of the Appellant.

Then concluded opinion by stating the appeals courts can not act as the

appellant's counsel in construing arguments nor search the record. Further intending to degrade the disabled plaintiff and the In Forma Pauperis, pro se litigant status.

Either however, PRAYER OF RELIEF ifandor upon the grant of Writ of Certiorari by The Supreme Court of the United States, the disabled appellant would request appointment of counsel under Criminal Justice Act of 1964, 18 U.S.C. $ 3006A(d)(7) to not be further penalized, degraded or be undermined with unsubstantiated merits.

"**RESERVE RIGHTS**" TO ANY OR ALL FURTHER ARGUMENTS, MERITS, FEDERAL & STATE STATUTES, LAWS, TREATIES, etc.

STANDARD OF REVIEW

The Tenth Circuit Court's summary judgment standard of review is settled established:

> We review the grant of summary judgment de novo. We view the facts in the light most favorable to the nonmovant and draw all reasonable inferences in the non movant's favor. Summary judgment is appropriate only if there is no genuine dispute as to any material fact. A fact is material if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented.

Jones v. Norton, 809 F.3d 564, 573 (10th Cir. 2015); see also *Adams v. C3 Pipeline Constr. Inc.*, 17 F.4th 40, 57 (10th Cir. 2021); *Peterson v. Nelnet Diversified Sols., LLC*, 15 F.4th 1033, 1037 (10th Cir. 2021); Thus appellate courts consider summary judgments to be drastic. "This drastic remedy should not be granted where there is any doubt as to the existence of [triable] issues. see "*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957].

In resolving the legal issue whether a court has given the non-moving party a sufficient opportunity under Rule 56 to rebut a motion for summary judgment, the Court conducts a de novo review. See, e.g. *Adams v. Campbell County Sch. Dist.*, 483 F.2d 1351, 1353-54 (10th Cir.1973) (reversing summary judgment because court "deprived [non-moving party] of an adequate opportunity to be

heard and denied them the right to present controverting material" and noting, in concurring opinion, that a non-moving party has the right on summary judgment to explain the record asserted by moving party or to deny its effect by counter-affidavit); *United States v. Mills*, 372 F.2d 693, 697 (10th Cir.1966) (independently reviewing affidavit submitted by nonmoving party and determining that court erred in refusing to consider it). see also Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). It is important to remember lawyers cannot testify and what the lawyer says during the summary judgment argument is not evidence on which the judge can render a decision.

A denial of leave to amend a complaint is reviewed for abuse of discretion, but where the reason for denial of leave to amend is futility, the Tenth Circuit Court reviews de novo the legal basis for the finding of futility. *Jones v. Norton*, 809 F.3d 564, 579 (10th Cir. 2015); *Hawg Tools, LLC v. Newsco Int'l Energy Servs., Inc.*, 758 F. App'x 632, 636 (10th Cir. 2018).

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ARGUMENT

POINT I

THE MOTION FOR SUMMARY JUDGMENT WAS PREMATURE

It seems rather clear, that the defendant and the district court took advantage of plaintiff's pro se status. Since he was granted *in forma pauperis* status, his initial complaint must have been found to state a cause of action because it survived the initial screening process.

After all, When a plaintiff proceeds in forma pauperis, the court must screen the complaint under 28 U.S.C. § 1915(e)(2)(B). That statute authorizes the court to dismiss a case if it determines the action "(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune (see 6:20-CV-00136 VOC) from such relief." *Salgado-Toribio v. Holder*, 713 F.3d 1267, 1270 (10th Cir. 2013) (screening applies to all litigants proceeding in forma pauperis). The screening process "is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11." *Neitzke v. Williams*, 490 U.S. 319, 327

(1989).

Consequently, the case should have been permitted to proceed in the normal course, i.e., exchange of mandated discovery and the setting of a discovery schedule. Fed.R.Civ.P. 16(b)(1) ("Scheduling Order. Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order. . . ."). This was never done.

"As a general rule, summary judgment is proper 'only after the nonmovant has had adequate time for discovery.'" *Iverson v. Johnson Gas Appliance Co.*, 172 F.3d 524, 530 (8th Cir.1999) (quoting *In re TMJ Litig.*, 113 F.3d 1484, 1490 (8th

Cir.1997)).[1] "When, as here, there has been no adequate initial opportunity for discovery, a strict showing of necessity and diligence that is otherwise required for a Rule 56(f) request for additional discovery . . . does not apply." *Metropolitan Life*

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[1]. This Court has not spoken to the issue directly, but the district courts in this Circuit have. "Although a party may move for summary judgment prior to the conclusion of discovery, courts often deny motions for summary judgment or motions for judgment on the pleadings as premature when no discovery has been conducted. See, e.g., *Johnson v. Phila. Hous. Auth.*, CIVIL ACTION NO. 16-1817, 2016 U.S. Dist. LEXIS 134203, 2016 WL 5468167, at *4 (E.D. Pa. Sept. 29, 2016) (denying plaintiff's motion for summary judgment as premature, in part because no factual record had been developed in the case), appeal dismissed, 2016 U.S. App. LEXIS 24077, 2016 WL 10077318 (3d Cir. Dec. 21, 2016); *El'Ahmad Baba Hashin Barak v. HSBC Bank, NA*, C.A. No. 12-835-SLR-MPT, 2013 U.S. Dist. LEXIS 84012, 2013 WL 2949132, at *4 (D. Del. June 14, 2013) (denying plaintiff's motion for summary judgment where no discovery had occurred, the parties had not conferred, no Rule 16 scheduling conference had been ordered or conducted, and defendant had had "no opportunity to explore the issues and develop its defenses through the discovery process"), report and recommendation adopted, 2013 U.S. Dist. LEXIS 101240, 2013 WL 3815971 (D. Del. July 19, 2013); *Colo. Cas. Ins. Co. v. Perpetual Storage, Inc.*, Case No. 2:10CV316 DAK, 2011 U.S. Dist. LEXIS 159154, 2011 WL 13078586, at *1 (D. Utah Aug. 4, 2011) ("The court agrees . . . that it would be premature to grant judgment as a matter of law at this point in the litigation, when there has not yet been any discovery."); *Fortney v. Pollard*, No. 09-cv-527-slc, 2009 U.S. Dist. LEXIS 105814, 2009 WL 3816852, at *1 (W.D. Wis. Nov. 12, 2009) (motion for summary judgment was premature where no discovery had been conducted to obtain relevant facts, defendants had not filed an answer, and no pretrial conference had been conducted)." *Fleming v. Sims*, 2017 U.S. Dist. LEXIS 222013, *7-8 (D. Colo. December 5, 2017)

Ins. Co. v. Bancorp Services, L.L.C., 527 F.3d 1330, 1337 (Fed. Cir. 2008).

This rule has been fully applied in the Tenth Circuit in cases involving discrimination. See, e.g. *Williams v. Sprint/ United Mgmt. Co.*, 222 F.R.D. 483, 487 (D. Kan. 2004). see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). See also Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970).

That is precisely the circumstance here and these authorities are dispositive. The case must be remanded to the district court so that normal procedures may be followed.

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POINT II

THE WHOLESALE REJECTION OF PLAINTIFF'S DOCUMENTS WAS ERROR

Plaintiff tendered a mass of documentation in what he believed was the mandatory disclosure requirements of Rule 26. The purpose of Rule 26 is to "accelerate the exchange of basic information" that is "needed in most cases to prepare for trial or make an informed decision about settlement." The purpose of Rule 26 is to "accelerate the exchange of basic information" that is "needed in most cases to prepare for trial or make an informed decision about settlement." Sender v. Mann, 225 F.R.D. 645, 650 (D.Colo.2004). Early disclosure also assists the parties "in focusing and prioritizing their organization of discovery." *City and County of San Francisco, et al. v. Tutor-Saliba Corporation*, 218 F.R.D. 219, 221 (N.D.Cal.2003); see also *Hudgins v. Vermeer Mfg. Co.*, 240 F.R.D. 682, 686 (E.D. Okla. 2007), 225 F.R.D. 645, 650 (D.Colo.2004).

In essence, the district court penalized plaintiff for complying with his disclosure requirements. Notably, the defendant never made the requisite disclosures, instead fled Oklahoma DE, 50 and changed corporate name (5X removed to Patriot Container Intermediate, HPCC parent company) during this action so requisite disclosure would never be made, no longer exist, or both.

In *Adams v. Campbell County Sch. Dist.*, 483 F.2d 1351, 1353-54 (10th Cir.1973) the Tenth Circuit Court reversed summary judgment because court "deprived [non-moving party] of an adequate opportunity to be heard and denied them the right to present controverting material" and noting, in concurring opinion, that a non-moving party has the right on summary judgment to explain the record asserted by moving party or to deny its effect by counter-affidavit.

That, once again, is the basic error that occurred here. The submitted documents should have been considered in opposition to summary judgment.

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POINT III

IT WAS ERROR TO DENY LEAVE TO AMEND THE COMPLAINT

Under Fed. R. Civ. P. 15(a)(2), "[t]he court should freely give leave" to amend pleadings "when justice so requires." *Id.*; see also Foman v. Davis, 371 U.S. 178, 182 (1962) "Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Bylin v. Billings*, 568 F.3d 1224, 1229 (10th Cir. 2009) (quotations and citation omitted), ..here appellant gave notification to the the district court upon filed intake forms of EEOC notice of rights to suit (..ie GINA, Equal Pay Act, Title VII, yet denied, upon motion to add the EEOC rights to suit claims) ..upon which some venue entry requirements to district court jurisdiction, certain notice of rights and time required EEOC filings must exist. The court deprived, nor did the court freely grant leave.

The interests of justice require giving Plaintiff leave to amend its complaint. The concept of "justice" is "a term broad enough to cover the variant circumstances of each individual case, which in sum reflect that the administration of justice will be advanced" by the amendment. *Oil & Gas Ventures-First 1958 Fund, Ltd. v. Kung*, 250 F. Supp. 744, 754 (S.D.N.Y. 1966). During litigation here,

Plaintiff has discovered information that forms the basis for adding new claims and parties. Plaintiff should be permitted to pursue those claims and parties, particularly where, as here, the time for amending pleadings and adding new parties under a scheduling order has not passed. Therefore, the interests of justice require amendment.

The district court gave no reason for the denial of leave to amend. There is no finding of futility. It is submitted that there is no basis for doing so. The proposed amended complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The Tenth Circuit Court has clarified that "[t]his is not to say that the factual allegations must themselves be plausible; after all, they are assumed to be true. It is just to say that relief must follow from the facts alleged." *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

So viewed, the motion to amend should have been granted.

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POINT IV

WHETHER IT WAS ERROR TO GIVE WORKER'S COMPENSATION COMMISSION JURISDICTION FOR RETALIATION.

Following the Oklahoma Supreme Court opinion May 21, 2019 upholding the *Southon* v. *Oklahoma Tire Recyclers*, LLC decision, the Oklahoma Legislator then solidified the venue under HB 2367 which nullified the *Southon decision* and took effect immediately upon the signing on May 28, 2019 at 2:50pm. Under HB 2367 §85A-7 Discrimination or Retaliation. (A.), (B.), (C.), (E.), (H.), under such…

(A.) An employer may not Retaliate against an employee when the employee has in good faith: 1. Filed a claim under this act; 2. Retained a lawyer for representation regarding a claim under this act; 3. Instituted or caused to be instituted any proceeding under the provisions of this act; 4. Testified or is about to testify in any proceeding under the provisions of this act.

(B.) The District Court shall have exclusive jurisdiction to hear and decide claims based on this section.

(C.) An employer which violates any provision of this section shall be liable in a district court action for reasonable damages, actual and punitive if applicable, suffered by the employee as a result of the violation. Exemplary or punitive damage awards made pursuant to this section shall not exceed One Hundred

Thousand Dollars ($100,000.00). (E.) No employer may discharge an employee during a period of temporary total disability for the sole reason of being absent from work or for the purpose of avoiding payment of temporary total disability benefits to the injured employee.

(H.) The remedies provided for this section shall be exclusive with respect to any claims arising out of conduct described in subsection A of this section. Added by laws 2013, c. 208, $ 7, eff. Feb. 1, 2014. Amended by Laws 2019, c. 476, $ 5, emerg. eff. May 28, 2019.

Appellant's counsel filed an executed CC-Form 3 on May 29, 2019. Appellant amended CC-Form 3, and filed CC-Form 3C, following the Tenth Circuit opinion September 8, 2022. The Workers' Compensation Commission does not have jurisdiction for Retaliation (CM3C-2022-06761P) that occurs after the signing date of HB 2367.

Additionally, should the disabled employee be denied their Delgado rights, See Delgado v. Phelps Dodge Chino, Inc., NMCA 20,972, slip. op. (May 3, 2000) "Unequipped with legislative guidance on the matter, we apply NMSA 1978, § 52-5-1 (1990) and conclude that worker and employer rights under the Act must be subject to the same standard of conduct and equivalent consequences for misconduct. Accordingly, we reject the "actual intent test" and hold that when an

employer willfully or intentionally injures a worker, that employer, like a worker who commits the same misconduct, loses the rights afforded by the Act. See NMSA 1978, § 52-1-11 (1989). For purposes of the Act, willfulness occurs when: (1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2) the worker or employer expects the injury to occur, or has utterly disregarded the consequences of the intentional act or omission; and (3) the intentional act or omission proximately causes the worker's injury. We reverse the Court of Appeals and remand to the trial court to apply the test we adopt today".

Delgado rights defendant states are related to an injured employee's ability to concurrently bring a tort action as well as a workers' compensation claim for injuries, DE 29.

Thus would not further suffer the economic loss imposed by his injuries while pursuing district court actions while the Appellants workers' compensation claim was held at Abeyance, August 27, 2020 O.K.C. WCC 2019-03373R, WC opinion states "bar economic recovery during Abeyance". The Appellant raised this issue with the district court DE 28, defendant responded DE 29, but rights continue to be degraded.

"RESERVED ALL RIGHTS"

REASON TO GRANT WRIT OF CERTIORARI &

CONCLUSION

Reason to grant Certiorari as to UPHOLD ALL FREEDOMS, PROTECTIONS & RIGHTS AFFORDED TO ANY AND ALL PRO SE LITIGANTS approved under entry of In Forma Pauperis, thus to not FURTHER DEGRADE SUCH PRIVILEGED RIGHT UNDER LAW.

In Conclusion,

The judgment'[s] should be reversed and the matter remanded to the district court for further proceedings.

Dated: December 05, 2022

/s/ Shane Webster Upchurch