FILED
United States Court of Appeals
Tenth Circuit

September 8, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SHANE WEBSTER UPCHURCH,

Plaintiff - Appellant,

v.

WASTEQUIP, LLC; TRAVELERS INDEMNITY AMERICA,

Defendants - Appellees.

No. 21-7055
(D.C. No. 6:20-CV-00066-RAW)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **HOLMES**, Circuit Judges.

Shane Webster Upchurch, pro se, appeals the district court's order granting Wastequip, LLC's motion for summary judgment on his claims for discriminatory discharge under the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA), and retaliatory discharge under Oklahoma's workers' compensation laws. He also appeals the denial of his motions

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

to amend the complaint to add new claims and a new party. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[1]

I. BACKGROUND

The district court found the following facts undisputed for summary judgment purposes. Wastequip hired Upchurch as a full-time welder on April 3, 2018. He was thirty-nine years old at the time he was hired. Two weeks later, on April 17, Upchurch sustained a work-related injury to his feet when a component he was welding fell off a table and onto his feet. He was examined for his injuries at the Family Health Clinic of Southern Oklahoma (FHCSO). Upchurch was next seen at FHCSO on July 18, when he received an injection in his elbow for an unrelated complaint.

In October 2018, Upchurch began experiencing numbness and tingling in both hands. In November, he was tested for carpal tunnel syndrome.

On February 28, 2019, Wastequip placed Upchurch on leave under the Family Medical Leave Act (FMLA) to have carpal tunnel surgery performed by his doctor at the Texoma Valley Surgery Center.[2] On March 7, his doctor performed a second surgery to address Upchurch's carpal tunnel syndrome. There are no work-injury

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[1] Travelers Indemnity America was named as a defendant but was never properly served. Nonetheless, counsel entered an appearance on behalf of the company as an appellee.

[2] The FMLA guarantees the substantive rights of up to twelve weeks of unpaid leave for eligible employees of covered employers for serious health conditions and reinstatement to the former position or an equivalent one upon return from that leave. *See* 29 U.S.C. §§ 2612(a)(1), 2614(a).

reports concerning either the February or March surgeries. On April 17, Upchurch's doctor issued written confirmation that he could return to full-work duty, without restrictions, starting May 1. He returned to work on that date.

Upchurch arrived at work on May 8, 2019, with a swollen hand and arm. He stated that he did not know what was wrong nor could he recall doing anything that would have caused an injury. He told the plant manager that his hand and arm were fine when he left work the previous evening, May 7. The plant manager advised him to visit his doctor. Upchurch went to Urgent Care Family Care of Calera (UCFCC) for treatment. He returned to UCFCC for a follow-up appointment on May 15. Upchurch's last day of work was May 7.

On May 29, 2019, Upchurch filed a notice of claim for compensation with the Oklahoma Workers' Compensation Commission in which he alleged "[c]arpal tunnel" injury to "both hands & arms" resulting from "[h]eavy repetitive mo[ti]on, [l]ifting." R. at 180.

Although Upchurch's FMLA benefits expired on May 30, 2019, he failed to inform Wastequip when he would return to work. By June 5, he had reached the maximum number of allowable unexcused absences under the company's attendance policy. On or about June 9, Wastequip's vice president of human resources called Upchurch to find out when he planned to return to work or if he had any upcoming doctor appointments. Upchurch failed to provide any updates. Wastequip terminated his employment the following day in accordance with its attendance policy.

II. DISTRICT COURT PROCEEDINGS

Upchurch filed suit in March 2020, alleging claims under the ADA, ADEA, and retaliatory discharge under Oklahoma's workers' compensation laws. Nearly six months after Wastequip filed its answer, Upchurch moved to amend his complaint to add claims under the Equal Pay Act (EPA), 29 U.S.C. § 206(d)(1); the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. § 2000ff-1(a)(1), (2); and the Fourth Amendment, U.S. Const. amend IV. Wastequip objected and moved to strike the motion. As grounds, it cited Upchurch's failure to attach a proposed amended complaint to the motion in violation of the local rules, the futility of the proposed amendment, and undue delay.

While Upchurch's motion to amend was pending, he filed a motion to "Add Party to Action." R. at 154. In this motion, he sought "to add party RAW to [this] action, [to include] ALL defendants who have infiltrated [Upchurch's] family, home, body, life, doctor visits with the[ir] 5G mind-altering reading technology hologram . . . to protect HUMAN SCUM Wastequip, Traveler's Ind. America, [and the] Worker's Comp. Commission." *Id.* "RAW" is an apparent reference to the presiding judge. Wastequip opposed the motion. Again, Upchurch failed to attach a proposed amended complaint.

Not long thereafter, Wastequip filed a motion for summary judgment. In response, Upchurch filed a two-page "Motion to Deny Summary Judg[]ment," in which he laid out an unsubstantiated summary of his claims. *Id.* at 206-07. A month later, he filed a document titled "Supplemental to Denial of Defendant's Summary

Judg[]ment Motion," which was a hand-written timeline of events accompanied by a number of unidentified and unauthenticated materials. Suppl. R. at 3. As grounds for the untimely filing, Upchurch accused Wastequip of molestation, rape, torture, and hate crimes, and further alleged that the company held him at gunpoint and then stole his cell phone and prescription medications to hinder his ability to respond to summary judgment. Wastequip moved to strike the supplement as untimely and inappropriate. In response to the motion to strike, Upchurch accused Wastequip of killing his dog and, employing obscene language, asked the court to "set a trial date . . . ASAP[.]" *Id.* at 70. The court struck the response under Fed. R. Civ. P. 12(f), which provides that "[t]he court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." In a later order, it sua sponte struck Upchurch's Supplemental Denial on the grounds that it contained "abusive [and] offensive language," R. at 215, granted Wastequip's motion for summary judgment, and denied the motions to amend the complaint.

III. LEGAL FRAMEWORK

A. *ADA*

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to . . . the . . . discharge of employees." 42 U.S.C. § 12112(a). "ADA discrimination claims are generally subject to the [three-step] *McDonnell Douglas* burden-shifting framework adapted from Title VII discrimination caselaw." *Kilcrease v. Domenico Transp. Co.*, 828 F.3d 1214, 1220 (10th Cir. 2016).

At step one, "a plaintiff carries the burden of raising a genuine issue of material fact on each element of his prima facie case." *Id.* (internal quotation marks omitted). To establish a prima facie case,

> a plaintiff must demonstrate: (1) that [he] is . . . disabled . . . within the meaning of the ADA; (2) that [he] is . . . able to perform the essential functions of the job, with or without reasonable accommodation; and (3) that the employer terminated [his] employment under circumstances which give rise to an inference that the termination was based on [his] disability.

Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997) (citations omitted). The ADA defines the term "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities of such an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1).

"If plaintiff establishes a prima facie case, the burden shifts to the defendant [at step two] to offer a legitimate nondiscriminatory reason for its employment decision." *Kilcrease*, 828 F.3d at 1220 (internal quotation marks omitted). And at step three, "[i]f defendant articulates a nondiscriminatory reason [for its actions], the burden shifts back to plaintiff to show a genuine issue of material fact as to whether the defendant's reason for the adverse employment action is pretextual." *Id.* (internal quotation marks omitted).

B. *ADEA*

Under the ADEA, it is "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). "To establish a disparate-treatment claim under the plain language of the ADEA . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). In the absence of direct evidence of age discrimination, we apply the three-step burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Jones v. Okla. City Pub. Schs.*, 617 F.3d 1273, 1278 (10th Cir. 2010).

To prove a prima facie case at step one, a plaintiff must show: "1) []he is a member of the class protected by the ADEA; 2) []he suffered an adverse employment action; 3) []he was qualified for the position at issue; and 4) []he was treated less favorably than others not in the protected class." *Id.* at 1279 (brackets and internal quotation marks omitted). If the plaintiff succeeds, "the burden of production then shifts to the employer to identify a legitimate, nondiscriminatory reason for the adverse employment action. Once the employer advances such a reason, the burden shifts back to the plaintiff to prove the employer's proffered reason was pretextual." *Id.* at 1278 (citation omitted).

C. Retaliation

Oklahoma law provides that "[a]n employer may not retaliate against an employee when the employee has in good faith[] [f]iled a claim [under the Workers' Compensation laws]." Okla. Stat. tit. 85A, § 7 (2019). The Workers' Compensation Commission has exclusive jurisdiction to hear and decide such claims. *See Southon*

v. Okla. Tire Recyclers, LLC, 443 P.3d 566, 573 (Okla. 2019) (holding "[t]he Legislature explicitly gave the Workers' Compensation Commission sole jurisdiction to oversee wrongful termination claims that arise from an underlying Workers' Compensation Claim, . . . and . . . the . . . Commission is fit to adequately protect Oklahoma public policy in this area").

IV. STANDARD OF REVIEW

A. *Summary Judgment*

We review the district court's grant of summary judgment de novo, "applying the same legal standard as the district court." *Williams v. FedEx Corp. Servs.*, 849 F.3d 889, 895 (10th Cir. 2017). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Although "[w]e view the evidence and draw reasonable inferences in the light most favorable . . . to the nonmoving party," *Williams*, 849 F.3d at 896, "[f]or dispositive issues on which the plaintiff will bear the burden of proof at trial, he must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to his case in order to survive summary judgment," *Cardoso v. Calbone*, 490 F.3d 1194, 1197 (10th Cir. 2007) (brackets and internal quotation marks omitted). "Unsubstantiated allegations carry no probative weight in summary judgment proceedings." *Id.* (internal quotation marks omitted).

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to [summary judgment].

Fed. R. Civ. P. 56(e)(3). However, "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." *Id.* at 56(d).

B. *Motions to Amend*

A motion to amend a complaint is governed by Fed. R. Civ. P. 15(a), which sets out the methods available for amending pleadings before trial. Because more than twenty-one days had elapsed between the time Wastequip filed its answer and Upchurch filed the motions to amend, he could add new claims or parties only by leave of court or with Wastequip's written consent. *See id.* at 15(a)(2). Relevant here, Local Civil Rule 7.1(k) for the United States District Court for the Eastern District of Oklahoma provides that "[a]ll motions to amend shall be accompanied by a proposed order submitted pursuant to the ECF Policy Manual which specifically sets forth what is being amended. The movant also shall attach to the motion a copy of the signed, proposed amended pleading."

"Where the party seeking amendment knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint, the motion to amend is subject to denial." *Las Vegas Ice & Cold Storage*

Co. v. Far W. Bank, 893 F.2d 1182, 1185 (10th Cir. 1990) (internal quotation marks omitted). Moreover, "[a] proposed amendment is futile if the complaint, as amended, would be subject to dismissal." *Bradley v. Val-Mejias*, 379 F.3d 892, 901 (10th Cir. 2004) (internal quotation marks omitted).

"We review for abuse of discretion the district court's denial of [a] motion to file an amended complaint." *Cohen v. Longshore*, 621 F.3d 1311, 1313 (10th Cir. 2010). "Under the abuse of discretion standard, a trial court's decision will not be disturbed unless we have a definite and firm conviction that the lower court has made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998) (brackets and internal quotation marks omitted).

> Although we generally review for abuse of discretion a district court's denial of leave to amend a complaint, when this denial is based on a determination that amendment would be futile, our review for abuse of discretion includes de novo review of the legal basis for the finding of futility.

Cohen, 621 F.3d at 1314 (internal quotation marks omitted).

V. DISCUSSION

A. *Summary Judgment*

The district court found that Wastequip was entitled to summary judgment. As to the ADA claim, the court found that Upchurch "has not provided proof of any impairment, whether occurring prior to or during his employment with Wastequip[,] which meets the standard of substantially limiting a major life activity." R. at 213. Rather, "[t]he only restriction presented limiting [his] work were those related to his

carpal tunnel surgeries[,] which were lifted as of May 1[], 2019 without restriction." *Id.* With regard to the ADEA claim, the court found that Upchurch failed to come forward with any evidence that he was treated less favorably than others who were not in the protected class or that age was a factor in Wastequip's decision to terminate his employment. The court further determined that the Workers' Compensation Commission had exclusive jurisdiction to decide the retaliation claim.

Upchurch does not raise any substantive argument that the district court erred by granting summary judgment based on the evidence it had before it. Instead, he argues that "it was error [for the district court] to grant summary judgment to [Wastequip] where [he,] the pro se plaintiff[,] was not given any opportunity to engage in discovery." Aplt. Opening Br. at 2. To be sure, Fed. R. Civ. P. 56(d) provides that a nonmovant can ask the district court for the opportunity to conduct discovery to adequately respond to summary judgment; however, Upchurch never made any such request, and having failed to do so, the court did not abuse its discretion in granting summary judgment. "[W]here a party opposing summary judgment fails to take advantage of the shelter provided by Rule 56[(d)] . . . there is no abuse of discretion in granting summary judgment if it is otherwise appropriate." *Campfield v. State Farm Mut. Auto Ins. Co.*, 532 F.3d 1111, 1125, (10th Cir. 2008) (ellipsis and internal quotation marks omitted). Summary judgment was appropriate here.

Nor does Upchurch's pro se status excuse his failure to ask for discovery. "Although a pro se litigant's pleadings are to be construed liberally and held to a less

stringent standard than formal pleadings drafted by lawyers, this court has repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (brackets, citation, and internal quotation marks omitted). Here, Upchurch never alerted the court to the need for any discovery.

We also reject Upchurch's further argument that the "mass of documentation [he tendered to the district court] in what he believed was the mandatory disclosure requirements of [Fed. R. Civ. P. 26] . . . should have been considered in opposition to summary judgment." Aplt. Opening Br. at 10-11. Although he fails to specify the nature of these documents, they appear to be a box of documents that he submitted in conjunction with his "Motion for Violation of Conscience," which the court found were "incomprehensible with respect to any claim brought herein," and ordered them returned to Upchurch. R. at 4.

B. *Motions to Amend*

We find no abuse of discretion in the district court's denial of Upchurch's motions to amend, which were facially deficient. First, Upchurch maintains that "[t]he proposed amended complaint contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Aplt. Opening Br. at 13 (brackets and internal quotation marks omitted). But the motions did not include proposed amended complaints as required by the local rule, which makes it impossible to evaluate the viability of the proposed amendments. Second, setting aside Upchurch's failure to comply with the local rule, he fails to explain how the

proposed new claims were based on facts that were unavailable to him at the time he filed the original complaint or how they set forth viable claims for relief under the EPA, GINA, or Fourth Amendment. Last, he fails to explain how his proposed new defendant was involved in the decision to terminate his employment. Although a pro se plaintiff's pleadings are entitled to some allowances, "the court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett*, 425 F.3d at 840.

VI. CONCLUSION

The judgment of the district court is affirmed.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

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September 30, 2022

Bonnie Hackler
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P.O. Box 607
Muskogee, OK 74401

RE: 21-7055, Upchurch v. Wastequip, et al
Dist/Ag docket: 6:20-CV-00066-RAW

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's September 8, 2022 judgment takes effect this date. With the issuance of this letter, jurisdiction is transferred back to the lower court.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Michael C. Felty
Montrel D. Preston
Shane Webster Upchurch

CMW/sls

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

SHANE WEBSTER UPCHURCH, *Plaintiff,* v. WASTEQUIP, LLC and TRAVELERS INDEMNITY AMERICA, *Defendants,*	Case No. CIV-20-066-RAW

ORDER

Before the court is Defendant Wastequip's Motion for Summary Judgment [Doc. 66]. Plaintiff (proceeding *pro se*) alleges he was employed by defendant Wastequip until terminated on June 10, 2019. He brings three claims arising out of an injury, workers' compensation claim and subsequent discharge.

The court will grant summary judgment "if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In applying the summary judgment standard, the court views the evidence and draws reasonable inferences therefrom in the light most favorable to the non-moving party. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1116 (10th Cir. 2013). *See also Burke v. Utah Transit Auth. & Local 382*, 462 F.3d 1253, 1258 (10th Cir. 2006).

The movant bears the burden of making an initial showing of the absence of a genuine issue of material fact. *Ade v, Conklin Cars Salina, LLC*, 800 Fed.Appx. 646, 650 (10th Cir. 2020). The court finds the Defendant Wastequip has done so. If the movant meets this burden, the nonmovant must then set forth specific facts showing that there is a genuine issue for trial to avoid entry of summary judgment. *Id.* At this stage, however, Plaintiff may not rely on mere allegations, but must have set forth, by affidavit or other evidence, specific facts in support of his Complaint. *Id.*

"Conclusory allegations that are unsubstantiated do not create an issue of fact and are insufficient to oppose summary judgment." *Harvey Barnett, Inc. v. Shidler*, 338 F.3d 1125, 1136 (10th Cir. 2003) (citation omitted).

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

While the court may afford a *pro se* litigant's filing some leniency, even *pro se* litigants are expected to follow the same rules of procedure that govern other litigants. *See Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007); *Franke v. ARUP Labs.*, 390 Fed.Appx. 822, 826 (10th Cir. 2010).

Plaintiff Upchurch began his employment with Wastequip as a welder on April 3, 2018 and on April 17, 2018 sustained a work-related injury to his feet when a component he was welding fell off of a worktable onto his feet. On April 19, 2019, Plaintiff went to Family Health

Clinic of Southern Oklahoma (FHCSO) for an examination. On July 12, 2018 Plaintiff went to FHCSO complaining of an elbow ailment and was given an injection. Thereafter, in October 2018 Plaintiff began experiencing numbness and tingling in both hands and was tested for carpel tunnel in both hands. On February 28, 2019, Plaintiff was placed on FMLA leave to have carpel tunnel surgery performed by his doctor at Texoma Valley Surgery Center. There is no work injury report concerning the surgery or a subsequent surgery in March, 2019. On April 17, 2019 Plaintiff's treating physician, Dr. Papalia, issued a confirmation of defendant's ability to "Return to Full Duty" without restrictions as of May 1, 2019. On May 8, 2019 Plaintiff arrived at work with a swollen hand and arm stating he didn't know what had happened. The plant manager suggested he see his doctor. Plaintiff saw the doctor on May 8 and on May 15. Subsequently, on May 29, 2019 Mr. Upchurch filed a Workers' Compensation Form 3 alleging a work related injury and that the nature of the injury was carpal tunnel resulting from "heavy repetitive motion, lifting." On May 30, 2019 Plaintiff's FMLA benefits expired and no return to work date was provided. Wastequip's Human Relations department had a telephone conversation with Plaintiff to see when he would be returning to work or whether he had other doctor appointments. Plaintiff failed to provide a return to work date or other updates and, on June 10, 2019, was terminated in accordance with Wastequip's Attendance Policy.

Plaintiff filed this action on March 3, 2020 citing a multitude of potential grievances, which the court has deciphered as claims alleging disability discrimination under the Americans with Disabilities Act, age discrimination pursuant to the Age Discrimination in Employment Act, and retaliatory discharge under Oklahoma law. Although Plaintiff has continued to file manifesto-like papers routinely attacking defense counsel and the judiciary, along with his workers' compensation judge and counsel, he has presented no evidence to support his claims.

Plaintiff's claim of discrimination pursuant to the Americans with Disabilities Act 42 U.S.C § 12101, *et.seq.* ("ADA") requires that he establish a prima facie case of disability discrimination. Liability in a discrimination case is based upon whether the protected trait actually motivated the employer's decision. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). Plaintiff must prove that he was a victim of intentional discrimination. *EEOC v. Flasher Co., Inc.*, 986 F.2d 1312, 1314 (10th Cir. 1992).

This burden may be satisfied either through direct proof of discriminatory intent, or through the burden shifting framework laid out in *McDonnel Douglas Corp. v. Green*, 411 U.S. 729, 802-04 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981). *See also Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1216 (10th Cir. 2002). Under the *McDonnell Douglas* and *Burdine* scheme, a plaintiff must first establish a prima facie case of discrimination by a preponderance of the evidence. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Establishment of a prima facie case, in effect, creates a presumption that the employer unlawfully discriminated against the employee. However, the presumption merely places upon the employer the burden of "producing evidence" that the employment action was taken for a legitimate, non-discriminatory reason. Although the *McDonnel Douglas* presumption shifts the burden of production to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* (citing *Burdine*, 450 U.S. at 253

In order to establish a prima facie case of disability discrimination, Plaintiff must prove (1) that he is a disabled person within the meaning of the ADA, (2) he is qualified with or

without a reasonable accommodation, (3) he is able to perform the essential function of the job, and (4) he suffered an adverse employment action because of his disability. *See Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1123 (10th Cir. 1995); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997).

Under the ADA Plaintiff must establish that he is "an individual with a disability." A disability is defined as a physical or mental impairment that substantially limits one or more of an employee's major life activities. 42 U.S.C. § 12102(C). Not every physical impairment qualifies as a disability, because not every impairment substantially limits a major life activity. *Cline v. Fort Howard Corp,*, 963 F.Supp. 1075 (E.D. Okla. 1997).

Plaintiff has not provided proof of any impairment, whether occurring prior to or during his employment with Wastequip which meets the standard of substantially limiting a major life activity. The only restrictions presented limiting Plaintiff's work were those related to his carpal tunnel surgeries which were lifted as of May 10, 2019 without restriction. Once the restrictions were lifted, Plaintiff failed to return to work or to provide a return to work date. Plaintiff was terminated after reaching Wastequip's employment policy point limit for absences once his FMLA expired. The Tenth Circuit has held that the Court will not second guess business decisions made by employers absent some evidence of impermissible motive. *See Faulkner v. Super Value Stores, Inc.*, 3 F.3d 1419, 1427 (10th Cir. 1993); *Branson v. Price River Coal Co.*, 853 F.2d 768, 770 (10th Cir. 1988).

Plaintiff has presented no evidence of pre-text for intentional discrimination and thus, his claims of discrimination under the ADA are subject to summary judgment. *See Cone v. Longmont United Hospital Association*, 14 F.3d 526, 529 (10th Cir. 1994) (failure to come

forward with evidence of pre-text will entitle defendant to judgment); *Tidwell v. Fort Howard Corporation*, 989 F.2d 406, 409 (10th Cir. 1993) (plaintiff's evidence failed to show intentional discrimination by defendant directly or indirectly).

Plaintiff's claim for age discrimination comes under the Age Discrimination in Employment Act ("ADEA") which provides a remedy for discrimination in private employment on the basis of age. 29 U.S.C. §623(a)(1); *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir. 1998). The protective provisions of §623 are limited to individuals who are 40 or older. Plaintiff was 39 years old when hired at Wastequip and 40 years old when terminated. The aim of the Act is to require employers "to evaluate [older] employees . . . on their merits and not their age." *Id.* Employers are free to exercise their sound business judgment in personnel matters and may discipline and terminate at-will employees for any reason so long as it is not unlawful. *Adamson v. Multi Community Diversified Servs., Inc.*, 514 F.3d 1136, 1153 (10th Cir. 2008). To succeed on a claim of age discrimination, a plaintiff must prove by a preponderance of the evidence that [his] employer would not have taken the challenged action but for the plaintiff's age." *Jones v. Oklahoma City Public Schools*, 617 F.3d at 1273, 1277 (10th Cir. 2010). The *McDonnell Douglass* burden shifting framework again governs consideration of the evidence presented on summary judgment. *Green v. Safeway Stores, Inc.*, 98 F.3d 554, 557-58 (10th Cir.1996). The Plaintiff bears the burden initially of establishing a prima facie case of discrimination: "(1) [he] is a member of a protected class by the [ADEA]; (2) [he] suffered an adverse employment action; (3) [he] was qualified for the position at issue; and (4) [he] was treated less favorably than others not in the protected class." *Jones*, 617 F.3d at 1277. Plaintiff Upchurch has presented no evidence to support any of these factors or to show that age was a factor at all in any decisions made by Wastequip. In the context of summary judgment, the

McDonnell Douglas framework requires a plaintiff to raise a genuine issue of material fact on each element of the prima facie case. *Garrison v. Gambro, Inc.*, 428 F.3d 9331, 937-38. (10th Cir. 2005).

Though Plaintiff has responded to Wastequip's Motion for Summary Judgment, he has neither presented new facts nor pointed to any evidentiary materials sufficient under the governing rules to overcome summary judgment. *See* Rule 56(c)(1)(A) and Rule 56(e)(3) F.R.Cv.P.; Rule 56.1 (d) of the Local Civil Rules. Further, his untimely "Supplement" [Doc. No.68] can only be construed as a continued litany of allegations and attacks (calling Wastequip "human toxic scum) with no basis in fact. As with most of Plaintiff's filings the Supplement is littered with attacks on the defense counsel and the judiciary, pronouncing "Plaintiff under full immunity it's time to commit CAPITAL INFAMOUS crimes to protect life and limb and constitutional rights..." [Doc. No. 68, p. 8]. Although a *pro se* litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers, *pro se* parties must follow the same rules of procedure that govern other litigants. *Garrett v. Welby Connor Maddux & Janer*, 425 F.3d 836 (10th Cir. 2005). "[I]f the complaint or other pleadings are abusive or contain offensive language, they may be stricken *sua sponte* under the inherent powers of the court." *Id.* at 838,, (citing *Phillips v. Carey*, 638 F.2d 207, 208 (10th Cir. 1981). Accordingly, Plaintiff's Supplemental to Denial of Defendant's Summary Judgment Motion [Doc. 68] is hereby stricken and the court grants summary judgment as to Plaintiff's ADEA claim.

The Oklahoma Workers' Compensation Commission has jurisdiction to hear and decide any retaliatory discharge claim of Plaintiff. Title 85A O.S. § 7 was enacted in 2013, becoming effective February 1, 2014, and provides:

A. An employer may not discriminate or 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; or

4. Testified or is about to testify in any proceeding under the provisions of this act.

B. The Commission shall have exclusive jurisdiction to hear and decide claims based on subsection A of this section...

85A O.S. Supp.2013 § 7; 28 U.S.C. 1445.

Plaintiff's claim with regard to retaliatory discharge under the Workers' Compensation laws of the State of Oklahoma must fail, as this claim is under the exclusive jurisdiction of the Oklahoma Workers' Compensation Commission

It is the order of the court that Defendant Wastequip's Motion for Summary Judgment [Doc. 66] is granted. Plaintiff's Motion to Issue New Form USM-285 [Doc. 46] is deemed moot and Plaintiff's Motion to Amend [Doc. 50], Motion for Trial Date [Doc. 56] and Motion to Add Party [Doc. 63] are denied.

IT IS SO ORDERED this 18th day of October, 2021.

Ronald A. White

THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA