Case No. 15-7067

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT E. ADAIR,

Plaintiff/Appellant,

v.

CITY OF MUSKOGEE, OKLAHOMA

Defendant/Appellee

APPELLEE'S RESPONSE BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA, HONORABLE
RONALD A. WHITE
Case No. 15-CV-53-RAW

ORAL ARGUMENT REQUESTED

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2. Did the Trial Court err in granting summary judgment on the Workers' Compensation Based Claim?
3. Did the Trial Court commit reversible error by ordering Plaintiff to make complete initial disclosures as to damages in the discovery phase, and where computation of damages had no relation to the summary judgment issues whatsoever?

II. STATEMENT OF THE CASE

Plaintiff's theory in essence is that, in a meeting in which Plaintiff's union representative was present, he was "encouraged" by the Fire Chief to retire because it was determined he had a permanent back injury with attending permanent weight lifting restrictions rendering him ineligible to be a firefighter pursuant to the well-known departmental policy.[1]

[1] Plaintiff could have opposed the department's opinion about his qualifications before the local and State Boards, as the law provides for. But he did not and chose to retire.

At the time of his retirement in 2014, Plaintiff was a 57 year old firefighter in the position of Hazmat Director firefighter for the City of Muskogee, but had been on paid leave for approximately two years. ROA, pp. 50, 52.[2] Under the written job description, the Hazmat Director "shall be required to respond to all Level II and Level III hazmat responses, and shall assume command of hazmat operations. ROA, p. 48.

Additionally, the Hazmat Director "shall be required to attend and pass all classes and schools and be confident in his ability and the team's ability in the Special Operations Officer to command the hazmat team in all situations." ROA, p. 48.

Plaintiff admitted that the Muskogee Fire Department had a policy that firefighters could not have restrictions placed on their physical activity by a doctor. ROA, p. 51. This policy applied to all firefighters, as Plaintiff himself admitted that he expected that he would be ineligible if a restricting injury was permanent. ROA, p. 51.

In 2012, Plaintiff suffered an injury to his back he claimed was on the job and he pursued a workers' compensation claim for what he

[2] All record cites are to Plaintiff/Appellant's Appendix. ROA, pp. 50, 52, means Record On Appeal, pages 50 and 52.

alleged to be a permanent injury to his back. ROA, pp. 50, 52. At issue in this Workers' Compensation matter was the nature and extent of the injury, how debilitating it was and whether it was a permanent injury. ROA, p. 52. Of course, that would not be determined until after the Workers' Compensation matter concluded.

During the pendency of the Workers' Compensation matter, Plaintiff was permitted to keep his job but on paid leave while receiving temporary benefits. ROA, p. 53. There was never any evidence or allegation that Defendant in any way threatened termination or other consequences for filing the claim, nor for seeking medical treatment or pursuing it through its proper channels. ROA, p. 52.

In the course of the Workers Compensation matter, his Workers' Compensation doctors placed a weight lifting restriction upon him; although Plaintiff was already on paid leave and the question as to his injuries had not yet been finally determined by the Workers' Compensation Court. ROA, p. 51. The doctors' reports indicated that Plaintiff could occasionally lift 105 pounds (meaning ten times a day) or frequently lift 90 pounds, but that he could not lift 130 pounds. ROA, p. 102, ¶ 13; and pp. 57-73 and 74-78. It was also advised that "going up

and down ladders with weakness in his right leg that may not totally clear, would also be problematic." ROA, pp. 74-78. These restrictions did not exclude Plaintiff from an entire class of jobs of "very heavy lifting," as Plaintiff has asserted in conclusory fashion now, citing to 20 C.F.R. 404.1567.

The Workers' Compensation matter ultimately concluded in March, 2014, and the Comp Court agreed with Plaintiff that he had a permanent impairment due to his back injury. ROA, pp. 52-53. As Plaintiff himself expected, given the Department's no-weight-restriction policy, Plaintiff's employer told Plaintiff that he could no longer work as a firefighter because of the restrictions; the Department encouraged him to retire, which he did. ROA, p. 52.

Plaintiff would then go on to affirmatively seek retirement benefits from the Firefighters Pension System, after the State Board agreed with his evidence and sworn representations that he was permanently disabled and unable to safely perform his job duties; he received the retirement benefits. ROA, pp. 79-99.

Nevertheless, he later sued Defendant, claiming that Defendant discriminated against him in violation of the ADA. Plaintiff does not

claim that he was disabled, but rather that Defendant "regarded" him as disabled under the ADA. Plaintiff claims that Defendant discriminated against him by encouraging or insisting that he retire because of his permanent weight lifting restriction that rendered him ineligible to be a firefighter under the "no restriction" policy.

Plaintiff also claims that Defendant retaliated against him for pursuing the Workers' Compensation matter. Plaintiff contended that he did not want to retire and would have kept working for a few more years before retiring. The Trial Court granted summary judgment in favor of Defendant on each of the claims, and Plaintiff has now appealed.

III. Summary of the Argument

Plaintiff's ADA discrimination claim fails as a matter of law because Plaintiff was not considered by Defendant as being "disabled" under the ADA. Rather, the sole evidence was that Defendant believed that Plaintiff was incapable of performing only as a firefighter. There was no evidence that Defendant considered Plaintiff incapable of doing anything else. The Tenth Circuit has recognized that, to show that an employer "regarded" the employee as disabled due to some inability to

work, the employee must offer much more than that the employer considered the employee unable to perform his or her particular job with the employer. *Dillon v. Mountain Coal Co.*, 569 F.3d 1215, 1220 (10th Cir. 2009). In this case, Plaintiff's evidence was insufficient for the same reasons as in *Dillon*. *Dillon* and other Tenth Circuit cases require upholding the Trial Court's decision.

Further, in this case, Plaintiff was not qualified to continue working as a firefighter which is an independent ground for judgment in favor of Defendant on the ADA claim.

Although not raised in the Complaint, Plaintiff now raises another alleged violation of the ADA, specifically in regards to a Functional Capacity Exam (FCE) that was given to Plaintiff in connection with his own Workers' Compensation Case. Because the FCE was business necessity and voluntary in nature, the FCE cannot support a cause of action under the ADA.

As to the claim that Defendant retaliated against Plaintiff for pursuing the Workers' Compensation case, the evidence was insufficient under Oklahoma law. Plaintiff has nothing but bare conclusions as to retaliatory motive and, further, he was not qualified to work as a

firefighter once it was determined that his restricting injury was a permanent one.

IV. Argument & Authorities

A. The ADA Claim Fails as a Matter of Law

To be protected under the ADA, a person must be qualified for the job and have a disability as defined by the law. A "qualified individual" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added); see also 29 C.F.R. § 1630.2(m). "Essential functions" are "fundamental job duties of the employment position ... not includ[ing] the marginal functions of the position." 29 C.F.R. § 1630.2(n)(1); *see Cripe v. City of San Jose,* 261 F.3d 877, 887 (9th Cir.2001).

1. Plaintiff Is Not Disabled Under the ADA

a. Definition of Disability

Under the ADA: "The term 'disability' means, with respect to an individual-"(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;"(B) a

record of such an impairment; or"(C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Courts have found the disability definition not satisfied where an alleged disability merely prevented the claimant from performing one specific type of job, such as firefighting.[3]

Here, Plaintiff's *sole* argument and evidence as to how he is disabled is the bare statement that Defendant considered him to be unable to work in the "very heavy lifting class" of jobs due to the weight limitation of no more than 105 pounds ten times per day. First, this allegation is insufficient as a matter of law, and second, it was not supported by evidence in any event. The evidence was that Defendant considered Plaintiff to be unable to work as a firefighter, and Plaintiff disagreed. That is insufficient as a matter of law. *Dillon v. Mountain Coal Co.*, 569 F.3d 1215, 1220 (10th Cir. 2009).

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[3] *See, e.g., Walker v. Town of Greeneville*, E.D.Tenn.2004, 347 F.Supp.2d 566 (Firefighter had not been "regarded as disabled," as defined by Americans with Disabilities Act (ADA), by municipality that believed that firefighter could not satisfy requirements of job of firefighter because he could not enter burning buildings or confined spaces, since municipality did not hold any mistaken belief about firefighter's ability to think, to concentrate, or to perform manual tasks); *Smith v. City of Des Moines*, Iowa, C.A.8 (Iowa) 1996, 99 F.3d 1466 (Evidence that city regarded fire captain as unable to perform duties as firefighter did not support finding that city regarded him as having disability for purposes of Americans with Disabilities Act (ADA), where there was no evidence that city regarded him as unable to perform other jobs).

b. The "Regarded-as-Unable-to-Work"-Claim—Plaintiff's Evidentiary Burden

To show that an employer "regarded" an employee as disabled due to some inability to work, the employee must offer much more than that the employer considered the employee unable to perform his or her particular job with the employer due to a lifting or other physical restriction. The employee must show that the employer regarded him as substantially limited in the major life activity of working by virtue of an inability to perform either a class of jobs or a broad range of jobs in various classes, such that this major life activity of working is greatly impaired. *See Dillon v. Mountain Coal Co.*, 569 F.3d 1215, 1220 (10th Cir. 2009). Thus, it was Plaintiff's burden to come forth with something more than that Defendant regarded him as incapable of performing as a firefighter due to his permanent injury with weight restrictions, but he never did.

The type of evidence that must be offered to show a substantial limitation in the major life activity of working include:

> (A) [t]he geographical area to which the individual has access;
> (B) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities,

> within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
> (C) [t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes)

29 C.F.R § 1630.2(j)(3)(ii); *Bolton v. Scrivner, Inc.,* 36 F.3d 939, 944 (10th Cir. 1994). Plaintiff must provide "evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs ("few," "many," "most") from which an individual would be excluded because of an impairment." 29 C.F.R.App., § 1630.2(j). Further, in a "regarded-as" claim, as here, the Plaintiff must offer actual evidence that the employer regarded the employee as being so substantially impaired in the major life activity of working. *See Dillon v. Mountain Coal Co.*, 569 F.3d 1215, 1220 (10th Cir. 2009).

In *Dillon*, for example, the employer, Mountain Coal, regarded an employee, Dillon, as unable to continue working at the coal mine due to its "no restriction" policy as to lifting and physical abilities, similar to the firefighter's policy in this case. The Tenth Circuit rejected the

argument that that was evidence showing that Mountain Coal regarded Dillon as unable to work in a broad category or class of jobs:

> "The policy, however, only speaks to whether Mountain Coal regarded Mr. Dillon as substantially limited in his ability to work at West Elk Mine. The policy does not reveal "the number and types of jobs utilizing similar training, knowledge, skill or abilities" in the geographic area, as the EEOC regulations require. 29 C.F.R. § 1630.2(j)(3)(ii)(B). Mr. Dillon did not put on other evidence describing the jobs available in the area that fell into the class of "mining jobs," nor did he produce evidence demonstrating that mining jobs are, in fact, a class of jobs. He therefore produced no evidence from which a reasonable jury could conclude that Mountain Coal regarded him as substantially limited in the ability to perform a class of jobs."

Id.

c. *Here, Plaintiff Failed to Create a Fact Issue on Being Regarded as Substantially Limited in a Broad Category or Class of Jobs*

Here, as in *Dillon*, there was no evidence that Defendant or anyone considered Plaintiff disqualified from doing anything *other* than the job with the employer, here, a firefighter. Further, based on the limitation given by the doctors in this case, while he could not be a firefighter, Plaintiff could still perform jobs in the "very heavy lifting" class because he could lift 105 pounds or less. He could also lift 105 pounds or more ten times a day. The "very heavy lifting" class of jobs includes jobs where the employee is required to lift 100 pounds or more.

20 C.F.R. 404.1567. So Plaintiff was not excluded even from very heavy lifting jobs.

Most importantly, Plaintiff never offered anything showing what other jobs he was considered as precluded from. The sole evidence is that Defendant believed Plaintiff was incapable of being a firefighter due to the well-known departmental policy, and that Plaintiff disagreed. Being considered as incapable of working as a firefighter is insufficient as a matter of law to create a fact issue on the disability requirement under the ADA. *E.g., Dillon v. Mountain Coal Co.*, 569 F.3d 1215, 1220. The Trial Court properly granted summary judgment on the ADA claim.

On page 26 of his Appellate brief, Plaintiff incorrectly states that the Trial Court "ignored" evidence that Defendant considered Plaintiff as disqualified from the very heavy lifting class of jobs. Plaintiff is trying to claim that there were evidentiary representations to the lower court which were never made. Nowhere in the Statement of Facts in Plaintiff's Response to the Summary Judgment Motion is there any statement, much less with evidence supporting it, that Defendant considered Plaintiff to be disqualified from jobs in the very heavy lifting

"class" or *any* other job besides that of a firefighter. ROA, pp. 100-105. Plaintiff merely alleged the insufficient, and facially incorrect, statement that the weight limitation would render him incapable of performing the class of very heavy lifting jobs under 20 C.F.R. 404.1567. ROA, p. 103, ¶22. Not only is there no evidence at all that Defendant regarded Plaintiff as incapable of doing anything other than being a firefighter, but the federal statute Plaintiff cites to demonstrates as a matter of law that the weight lifting requirement did not disqualify him from the entire class of "very heavy lifting" jobs, and also rendered him automatically qualified for very similar "heavy lifting" jobs and "medium lifting" jobs too. 20 C.F.R. 404.1567. Plaintiff thus was not regarded as disabled, and offered no evidence of anything more than that he was considered incapable of being a firefighter. ROA, pp. 100-105. Judgment in favor of Defendant was required for this reason on the ADA claim.

d. Further, as a Matter of Law, this Lifting Restriction Was Insufficient to Render Plaintiff "Disabled" under the ADA in Any Event

Plaintiff was regarded as being permanently restricted to some extent in lifting weight, but that does not mean he is regarded as

disabled when the perceived inability to lift large amounts of weight is not a disability under the law in the first place. In other words, mistakenly believing that an employee has lifting restrictions does not satisfy the "regarded as" test if the lifting restrictions are not a substantial limitation on a major life activity of working.[4]

The great weight of authority holds that lifting restrictions alone are insufficient to substantially limit the major life activity of working. *See, e.g., Burgard v. Super Valu Holdings, Inc.,* No. 96–1199, 1997 WL 278974, at *3 (10th Cir. May 27, 1997) (twenty-five pound restriction only limits a narrow range of jobs); *Aucutt v. Six Flags Over Mid–America, Inc.,* 85 F.3d 1311, 1319 (8th Cir.1996) (twenty-five pound lifting restriction); *Williams v. Channel Master Satellite Sys., Inc.,* 101 F.3d 346, 348 (4th Cir.1996) (same); *Otis v. Canadian Valley–Reeves Meat Co.,* No. 94–6308, 1995 WL 216906, at *1 (10th Cir. April 12, 1995).

[4] "To prevail on a regarded-as claim, a plaintiff must show that an employer has mistaken beliefs about the plaintiff's abilities: the employer 'must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.' *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999)." *Jones v. U.P.S., Inc.,* 502 F.3d 1176, 1190 (10th Cir. 2007).

Additionally, the majority rule is that a weight lifting restriction of 50 pounds or more (far less than 105) does not render one disabled under the ADA in the first place. *Williams v. Excel Foundry & Machine, Inc.*, 489 F.3d 309, 19 A.D. Cas. (BNA) 481 (7th Cir. 2007); *Gillette v. Lefthander Chassis*, Inc., 25 Nat'l Disability Law Rep. P 25, 2002 WL 31497363 (N.D. Ill. 2002) *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682, 14 A.D. Cas. (BNA) 1204 (8th Cir. 2003)

In fact, several circuits, including the Tenth Circuit, have found lifting restrictions of even *less* than 50 pounds to be insufficient, as a matter of law, to show disability under the ADA. *See, e.g., Thompson v. Holy Family Hosp.,* 121 F.3d 537, 539–40 (9th Cir.1997) (finding restriction from lifting more than twenty-five pounds not substantially limiting); *Williams v. Channel Master Satellite Sys., Inc.,* 101 F.3d 346, 349 (4th Cir.1996) (same), *cert. denied,* 520 U.S. 1240, 117 S.Ct. 1844, 137 L.Ed.2d 1048 (1997); *Aucutt v. Six Flags Over Mid–America, Inc.,* 85 F.3d 1311, 1319 (8th Cir.1996) (same); *Dutcher v. Ingalls Shipbuilding,* 53 F.3d 723, 726 (5th Cir.1995) (individual with impaired arm who could not do heavy lifting or repetitive rotational movements and who had difficulty picking things up from the floor and holding

things up high was not disabled); *Huckans v. United States Postal Serv.,* 201 F.3d 448, 1999 WL 1079619 (10th Cir.1999) (table) (finding thirty-five pound lifting restriction not substantially limiting); *Barnard v. ADM Milling Co.,* 987 F.Supp. 1337, 1342 (D.Kan.1997) (finding a forty-two pound restriction not substantially limiting). *Cf. Lowe v. Angelo's Italian Foods, Inc.,* 87 F.3d 1170, 1174 (10th Cir.1996) (finding plaintiff who could not lift items over fifteen pounds and only could lift items weighing less than fifteen pounds occasionally presented genuine issue of material fact concerning her lifting ability).

Furthermore, it has been held that merely alleging that one cannot work in the narrow "very heavy lifting class of jobs" is *not enough* to create a fact issue on disability. *Wicks v. Riley Cty. Bd. of Cty. Comm'rs*, 125 F. Supp. 2d 1282, 1289-94 (D. Kan. 2000). The *Wicks* Court explicitly rejected the argument that disability under the ADA can be established by an inability to work in the "very heavy lifting class." *Id*. Similarly, as the Court stated in *Matthews v. TCI of Illinois*, No. 95 C 4096, 1996 WL 332693, at *2-3 (N.D. Ill. June 14, 1996), citing to the Tenth Circuit's *Bolton* opinion:

> The existence of certain physical restrictions, particularly those relating to manual labor, dexterity, or tolerance of

> pain, do not necessarily establish that an individual is disabled or that his employment opportunities have been significantly curtailed. **Thus, the imposition of a lifting restriction, or the inability to use certain tools, or even a designation such as light or medium duty, is not sufficient to establish the existence of a disability**. . . . In such cases, a plaintiff must go further, offering evidence that these restrictions, in light of his training, skills, vocational opportunities, geographic limitations, and the like, significantly impede his ability to find a job. *Bolton,* 36 F.3d at 944; *Marschand,* 876 F.Supp. at 1539. **This requires the plaintiff to carefully and systematically establish the types of jobs which he can no longer do; the restrictions must pose a significant barrier to his employment**.
>
> *Matthews v. TCI of Illinois*, No. 95 C 4096, 1996 WL 332693, at *2-3 (N.D. Ill. June 14, 1996) (emphasis added).

Plaintiff has not satisfied the *Bolten* test. Plaintiff was simply restricted in lifting very heavy amounts of weight. He could lift 105 pounds, ten times a day. Under the case law above, Plaintiff would not have been disabled by virtue of being unable to lift more than 105 pounds ten times a day, and thus believing Plaintiff could not continue as a firefighter due to that lifting restriction could not be enough to "regard" him as disabled under the ADA.

2. Plaintiff Was Also Not Qualified To Continue His Job

Because of the well-known departmental no restriction policy, Plaintiff was not qualified to serve as a firefighter due to a permanent

injury with attending permanent lifting restrictions. The ADA does not require an employer to create a new job category to accommodate a disabled worker, or to adjust co-workers' duties to make them work longer or harder. For example, it was noted in the case of *Burch v. City of Nacogdoches* that the defendant city had no duty, under the ADA, to continue employment of the plaintiff-firefighter within the fire department, after he had sustained a back injury at work, as there was no reasonable accommodation available which would have allowed the firefighter to perform essential duties of firefighter, which included ability to lift and carry heavy objects, and to stoop and bend frequently. *Burch v. City of Nacogdoches*, 174 F.3d 615, 9 A.D. Cas. (BNA) 509, 9 A.D. Cas. (BNA) 637 (5th Cir. 1999); *see also Wolski v. City of Erie*, W.D.Pa.2012, 900 F.Supp.2d 553. Here, by his own admission, Plaintiff did not meet the requisite physical standards for being a firefighter under his employer's known policy, and if he disagreed with the policy, the matter had to be addressed with the State Board.

3. As a Matter of Law, the Workers' Comp Medical Test Did Not Violate the ADA and Does Not Create a Fact Issue

Plaintiff argues that a functional capacity exam violated the ADA. Plaintiff is cites to 42 U.S.C. § 12112(d)(4) which requires that testing

for medical conditions by an employer be job-related and consistent with business necessity.

There is no dispute that the testing Plaintiff refers to was in conjunction with his workers' compensation claim, so it was necessary by definition, and the Trial Court properly agreed. ROA, p. 51. Also, the statute provides that when the test is voluntary, it is not a violation of the act. Further, the test would have been job-related and consistent with business necessity because Plaintiff was a firefighter under a no-weight-restriction policy. Thus, Plaintiff's assertion relating to an alleged "improper medical examination" fails to create a fact issue on his ADA discrimination claim and does not support an actionable violation of the ADA. 42 U.S.C. § 12112(d)(4).

B. The Workers' Compensation Based Claim Fails as a Matter of Law

An Oklahoma Workers' Compensation statute prohibits the termination of an employee in retaliation for filing a Workers' Compensation claim or instituting a proceeding. *See* OKLA. STAT. tit. 85, § 341(A). Plaintiff sought to prove this claim by using the insufficient fact that the encouraged retirement occurred after the Workers' Compensation Matter concluded, wherein the very question of his

injury and its permanence was being determined. Plaintiff's evidence was insufficient. Temporal proximity is insufficient by itself. *Taylor v. Cache Creek Nursing Centers*, 1994 OK CIV APP 160, 891 P.2d 607, 610. Also, as shown below, if there is a non-retaliatory reason and no sufficient evidence to show it is pretext, then there is no claim. And if the employee is not qualified to continue in the employment, then there is no claim.[5] The Trial Court properly granted summary judgment on this claim for these reasons. The statute provides in pertinent part:

> A. No employer may discharge or, except for nonpayment of premium, terminate any group health insurance of any employee because the employee has in good faith:
> 1. Filed a claim;
> 2. Retained a lawyer for representation regarding a claim;
> 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; or
> 5. Elected to participate or not to participate in a certified workplace medical plan as provided in this act.
>
> B. No employer may discharge any employee during a period of temporary total disability solely on the basis of absence from work.
>
> C. After an employee's period of temporary total disability has ended, no employer shall be required to rehire or retain any employee

[5] An employee cannot establish a retaliatory discharge claim based on a provision that expressly permits termination of an employee who is unable to perform his or her job duties after suffering an on-the-job injury. *See Garza v. Henniges Automotive*, 2013 WL 6858690, *5 (W.D. Okla.).

who is determined to be physically unable to perform assigned duties. The failure of an employer to rehire or retain any such employee shall not be deemed a violation of this section.

The Oklahoma Supreme Court has adopted a burden-shifting approach to prove a retaliatory discharge, workers' compensation claim similar to the analysis applied to federal discrimination claims. *See Buckner v. General Motors Corp.*, 760 P.2d 803, 806–07 (Okla.1988). To establish a prima facie case, Plaintiff "must show employment, on the job injury, receipt of treatment under circumstances which put the employer on notice that treatment had been rendered for a work-related injury, or that the employee in good faith instituted . . . proceedings under the Act, and consequent termination of employment." *Id.* at 806 (emphasis in original). "In order to establish a consequent termination under Oklahoma law, a plaintiff must produce evidence sufficient to support a legal inference that the termination was 'significantly motivated' by retaliation for exercising her statutory rights." *Blackwell v. Shelter Mut. Ins. Co.*, 109 F.3d 1550, 1554 (10th Cir.1997) (citing *Wallace v. Halliburton Co.*, 850 P.2d 1056, 1058 (Okla.1993), and *Taylor v. Cache Creek Nursing Ctrs.*, 891 P.2d 607, 610 (Okla.Civ.App.1994); footnote omitted).

Further, merely alleging that an employer "retaliated" because the termination occurred close in time to the Workers' Compensation case is insufficient by itself to show that the termination was in retaliation. *See, e.g., Taylor*, 1994 OK CIV APP 160, 891 P.2d 607, 610. In *Taylor*, the Court explained that there must be more that such an allegation as to the temporal proximity between the termination and the comp case: "The facts show plaintiff was fired immediately after returning from a two-week, doctor-ordered disability leave. However, this in itself does not raise a legal inference that the firing was significantly motivated by retaliation." *Id*.

Defendant had a clear non-retaliatory reason for encouraging or insisting on retirement, and, as the Trial Court pointed out in its Order, Plaintiff offered nothing but the bald conclusions that the Workers' Compensation Decision was the cause of the encouraged retirement. This simply circles back to the insufficient fact that Defendant encouraged retirement shortly after the conclusion of the Workers' Compensation matter, which is insufficient as a matter of law to establish the retaliation claim. It is especially insufficient in this case, because the Comp Court was faced with the question of whether

Plaintiff had a permanent injury. ROA, p. 52. The Comp Court agreed with Plaintiff on the question ultimately. That question was the very subject of the litigation in the comp court, and Plaintiff admits he expected that he could no longer work as a firefighter if he had a restricting back injury that was permanent. The Defendant never threatened the Plaintiff with termination for filing the claim, nor for seeking medical treatment nor pursuing it through its proper channels. There is nothing on which to reasonably base a conclusion that encouraging retirement here was significantly motivated by retaliation. If this were sufficient, then an employee would have a guaranteed ticket to a discrimination jury trial simply because the Comp Court agreed with him that he suffered a permanent injury, which permanent injury also rendered him unqualified to continue working according to the employer's well-known policy. Accordingly, Defendant was entitled to summary judgment on this claim as a matter of law. The judgment of the Trial Court was proper and should be upheld.

C. Plaintiffs' Failure to Raise these Issues at the Local and State Boards Bars the Instant Claims, as a Matter of Law

Plaintiff's alleged desire to keep working should have been raised in 2014 before local and state boards. Under Oklahoma law, issues of

when a firefighter may or must retire are dealt with by the State Board pursuant to the Firefighters Pension and Retirement System. Okla. Stat. tit. 11, §49-100.2. When a firefighter may have become disabled while in the line of duty or as a consequence of his duties, such that he may not be able to serve as a firefighter, then there are essentially two options. Okla. Stat. tit. 11, §49-109. First, the firefighter himself can seek a determination that he is disabled such that he must retire, or the department can seek a determination that the firefighter is disabled such that he must retire. Okla. Stat. tit. 11, §49-109. In both instances, a determination is made by a "local board" which then serves only as a recommendation to the State Board. Okla. Stat. tit. 11, §49-105.1. The State Board then conducts its own inquiry and analysis of the matter, sometimes requiring further medical testing and testimony. Okla. Stat. tit. 11, §49-118.

If Plaintiff desired to keep working instead of receiving the retirement benefits, he could have made his arguments to his local board, and then the State Board.

1. Plaintiffs' Allegations if True Negate Causation as a Matter of Law

Plaintiff, his union agents, and presumably his or the union's attorney had the clear opportunity to raise these issues and dispute the department's opinions, but they simply chose not to even try. As shown above, firefighters can clearly dispute their employer's decision that they are too disabled to continue working.

Thus, Plaintiff's theory in this lawsuit cannot succeed. With every step toward proving his belief that a Hazmat Director should not have to be free from weight restrictions, Plaintiff is proving to an equal extent that no person other than himself, the union, and his attorney, were the but-for cause of this result due to their failure to raise these arguments when it really mattered. In fact, Plaintiff by definition swore to the State Board that he was too injured to work and now asks this Court to find the opposite and award him additional damages. If any claim in a civil court exists arising from this matter, it is a claim against Plaintiff's union agents or attorney(s) for failing to assist him in making his current allegations to the State Board when they could have actually made a difference.

Due to failure of causation as a matter of law, Plaintiff's allegations here are not legally valid. Plaintiff has attempted to avoid

the requisite state procedures for this dispute, choosing instead to file a lawsuit.

2. Equitable Estoppel and Waiver

Additional and independent grounds for dismissal are basic principles of the equitable estoppel doctrine, which "holds a person to a representation made, or a position assumed where otherwise inequitable consequences would result to another who has in good faith relied upon that representation or opinion." *Merritt v. Merritt*, 2003 OK 68, ¶ 15, 73 P.3d 878, 883. Also applicable is the doctrine of equitable waiver, which is the voluntary relinquishment of a known right. *Barringer v. Baptist Healthcare of Oklahoma*, 22 P.3d 695, 701 (Okla. 2001). An implied waiver can be established by decisive action or conduct which warrants an inference of intent to relinquish. *Id.*

In this case, Plaintiff made contrary and inconsistent representations to the State Board as contrasted with those he conveniently asserts now. Based on the most fundamental principles of equity and authority cited above, Plaintiff should be barred from changing his position now and blaming Defendant for a result that Plaintiff, his union, and potentially other agents allowed to occur.

D. The Initial Disclosures Issue

Plaintiff asserts that the Trial Court erred by requiring more complete disclosures as to the damages in the discovery phase of the case. The computation of damages had no bearing on the summary judgment issues. Because the claims fail as a matter of law, the initial disclosure issue raised by Plaintiff is moot. Further, Plaintiff cites to state cases discussing the state initial disclosure rule, but the Trial Court was applying the federal initial disclosure rule. Regardless, the order as to initial disclosures cannot be reversible error, especially where there is no showing how Plaintiff was actually harmed.

V. Conclusion

Wherefore, for the reasons stated above, Appellee urges that the Court uphold the Order of the Trial Court below.

Respectfully submitted,

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Certificate of Service

_X_ I hereby certify that on the 23rd day of November 2015, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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___ I hereby certify that on the _____ day of _____ 2015, I served the attached document by U.S. Mail, postage fully prepaid, on the following who are not registered participants of the ECF System:

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/s/ Clark W. Crapster
of Steidley & Neal, P.L.L.C.

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I, Clark Crapster, certify that this brief complies with Fed. R. App. P. 32(a)(7)(B), in that it is proportionally spaced and contains 6,689 words, including Table of Contents, Table of Authorities and Certificates of Compliance and Digital Submissions.

I relied upon my word processor, Microsoft Word, to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Clark W. Crapster
Of Steidley & Neal, P.L.L.C.

CERTIFICATE OF DIGITAL SUBMISSIONS

I further certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program and, according to the program are free of viruses.

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